BREAKING NEWS: FTC APPROVES NATIONWIDE BAN ON NONCOMPETE CLAUSES – WHAT IT MEANS FOR YOUR BUSINESS

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Earlier today, and in a significant move with far-reaching implications for the U.S. labor market, the Federal Trade Commission (FTC) has taken a decisive step by voting to ban non-compete agreements. This decision marks a pivotal moment in the ongoing debate surrounding the use and enforcement of such agreements. The FTC's action reflects growing concerns about the potential negative impact of non-compete agreements on workers' mobility and overall competition within the job market. As businesses digest the implications of this ruling, it signals a shift in the regulatory landscape that could have profound consequences for employers and employees alike.

Key points to consider:

Businesses and Workers

Following receipt of over 26,000 public comments, the Federal Trade Commission voted today to adopt the final version of a rule (the "Rule") banning all non-competes restricting workers, except existing non-competes with Senior Executives. A Senior Executive is an employee earning more than $151,164 annually who is in a "policy-making" position. Businesses should note that the Rule's definition of "worker" is not limited to employees—it includes independent contractors, interns, and sole proprietors, among other categories.

Non-Competes were historically used to preclude high level employees with highly proprietary and trade secret information from working for a competitor. In recent years, non-competes have been more broadly used to restrict lower wage earners from working for a competitor. The FTC claims that non-competes would cost workers 400 billion over the next ten years. Many business groups claim that non-competes are necessary to protect investments made in employees and research and development. The United States Chamber of Commerce, along with other groups, are expected to immediately file suit to enjoin enforcement of the ban.

All businesses and employers who use non-competes must be aware of this Rule.

Confidential Information and Trade Secrets

Agreements to prevent the disclosure of trade secrets and confidential information, as well as agreements to prevent the solicitation of accounts, can still be enforced. Statutes protecting trade secrets, such as the Defend Trade Secrets Act, are still enforceable. However, if a non-solicitation or non-disclosure agreement is deemed a disguised non-compete, it cannot be enforced. The title of any given clause or agreement is not outcome determinative. Agreements or provisions with different titles may be subject to the FTC ban if they are deemed the functional equivalent of a non-compete clause.

Retroactivity

Existing non-competes with Senior Executives remain in force. All other non-competes will become unenforceable as of the effective date of the Rule. Non-competes with all employees, including Senior

Executives, executed after the effective date of the Rule are unenforceable. Before the effective date of the Rule, covered employers must notify employees (including former employees) who are not Senior Executives that their existing non-competes are unenforceable. The Rule includes a template for providing this required notice. The Rule will not apply to a cause of action under an existing non-compete agreement which has accrued prior to the effective date of the Rule (e.g., if a worker has breached an otherwise valid non-compete agreement prior to the Rule going into effect).

The Sale of a Business

The Rule does not prohibit non-compete clauses in connection with the bona fide sale of a business entity, of a person's ownership interest in a business entity, or of all or substantially all of a business entity's operating assets.

Certain Businesses are Exempt from the Rule Exceptions

The FTC does not have jurisdiction over all businesses. The Rule will not apply to non-profits, for instance.

Effective Date

The Rule will take effect 120 days after it is published in the Federal Register. If you have a Senior Executive who should be bound by a non-compete but is not, you have a short period of time to have the Senior Executive execute a valid non-compete.

Berger Singerman's Labor and Employment Practice remains committed to keeping you informed about significant developments that may affect your business operations. The FTC's decision to ban certain non-compete agreements underscores the importance of staying vigilant and proactive in navigating evolving regulatory frameworks.

Should you have any questions or require further guidance on how this decision may impact your company, please contact Leonard K. Samuels, Ruth Vafek or any other attorney of Berger Singerman's Labor & Employment Practice.

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