HR AFFILIATES **HR UPDATES**

We're sure that by now you have heard or read some of the "maybes" or "could bes" about non-competes and whether they will continue to be legally enforced. For a long time now, they've been litigious and more difficult to enforce and have required a narrower scope so as not to completely prohibit a former employee from making a living.

However, earlier this year, legislation passed to completely prohibit non-compete clauses (well, most of them). There's been a lot of dialogue and controversy around this, as businesses across the country have been concerned about protecting their assets and client base. As of right now, though, there does not appear to be a block on the ruling, so it's time to prepare for the action you need to take in early September.

**WHAT YOU NEED TO KNOW**

On April 23, 2024, the Federal Trade Commission ("FTC"), prompted by a 2021 Executive Order, concluded that non-compete agreements unlawfully stifle competition and depress wages, and that banning them would encourage competition, innovation, and increased wages. The Final Rule, *effective September 4, 2024*, has been a long time in the making and has already created legal controversy with separate federal courts ruling differently as to whether the Final Rule is enforceable, and months of appeals are still expected to follow.

**The Final Rule prohibits a private employer from entering into or enforcing a non-compete clause with a "worker" (including independent contractors).**

> Note: Employers can maintain existing non-compete agreements with "senior executives," (those with over $151,164 annual compensation and in a policy making position for the business) but states that no new non-compete clauses may be entered into with a senior executive after September 4, 2024.
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> Also Note: Non-profits, banks, credit unions, common carriers, and non-compete clauses associated with the sale of a business are not subject to the Final Rule.

In addition to the ongoing legal challenges, a recent U.S. Supreme Court decision ("Loper Bright") may question whether the FTC overreached its authority by issuing the Final Rule. These factors set up the potential for a showdown at the U.S. Supreme Court as to whether the Final Rule will be upheld or overturned, but that is likely more than a year away. This means that businesses still need to act now. What will happen if businesses cancel their non-competes, an employee leaves for a competitor, and then the legislation is overturned in a year? That's definitely unclear; but what is clear is that you will need HR to help navigate that.

**WHAT YOU NEED TO DO NOW**

The Final Rule requires an employer to provide clear and conspicuous notice to workers who are currently subject to a non-compete agreement or clause, in an individualized communication, that the

worker's non-compete will not be, and cannot legally be, enforced against the worker. ***The employer must provide notice by September 4, 2024 by hand-delivery, by mail at the worker's last known street address, by email, or by text message.*** We recommend that you deliver in such a way that you can verify delivery and document to each employee's personal file.

HR Affiliates recommends NOT sending the notices prior to Monday, September 2, 2024. This is because the Texas case was filed against the FTC by the U.S. Chamber of Commerce, and the USCC is seeking a nationwide ban of the Final Rule. The judge has committed to issuing a decision no later than August 30, 2024. Until we know if the judge rules the ban is nationwide, or just in the 5th Judicial Circuit (Texas, Mississippi, and Louisiana), it is prudent to delay sending notices until her ruling is published.

**WHAT TO DO IN THE FUTURE**

Moving forward, HR Affiliates will continue to monitor the various legal challenges to the Final Rule as they work their way through the judicial process and will provide periodic updates of any notable decisions. We encourage clients to take a conservative approach when hiring new employees, presume the FTC's Final Rule will be upheld, and remove any non-compete language from offer letters or employment agreements.

Many employers feel the Final Rule will have an adverse impact on their ability to protect their business interests. For this reason, we strongly recommend clients review and update their confidentiality provisions or agreements to ensure they are sufficiently specific to protect trade secrets, proprietary business information, or other information that could be harmful if it fell into the hands of a competitor. Non-disclosure agreements and non-solicitation agreements are not explicitly barred by the Final Rule, but employers will want to ensure they are not so broad to prevent workers from seeking or accepting other work or starting a business after they leave their job.

**IT IS IMPORTANT TO NOTE THAT STATES IN WHICH THE FINAL RULE MAY BE UNENFORCEABLE DUE TO LEGAL CHALLENGES:**

Texas, Mississippi, Louisiana, Florida, Georgia, and Alabama

**WE CAN HELP**

If you need assistance in drafting your communication, updating your policies, or updating your onboarding documents or offer letters to reflect these changes, we are here to help.