



# FTC non-compete ban: Implications and next steps for employers

May 1, 2024

# Agenda

**1** Current  
Non-Compete  
Landscape

**2** FTC Final Rule  
Specifics

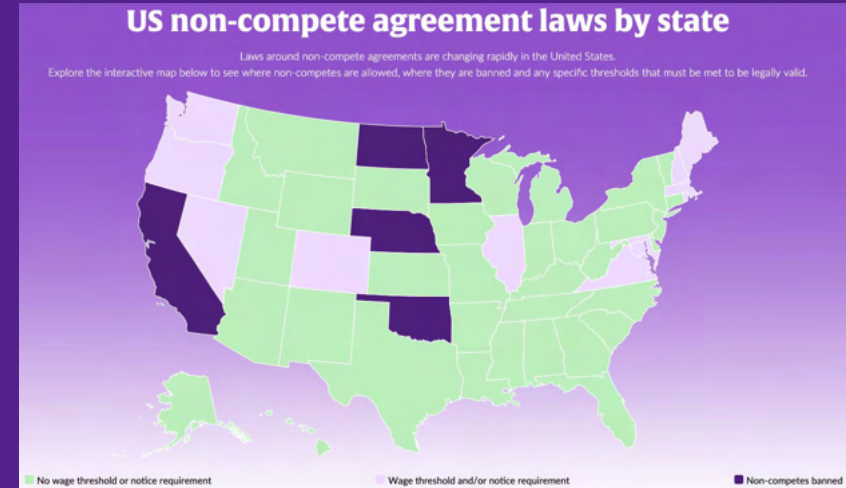
**3** Challenges,  
Implications, and  
To-dos

## Non-competes: What are they?

A non-compete agreement, also known as a covenant not to compete (CNC), is a contractual agreement between an employer and an employee (or sometimes between a business and an independent contractor) in which **the employee agrees not to engage in certain competitive activities** that may harm the employer's business interests.

# Bans

- California
- Oklahoma
- North Dakota
- Minnesota
- Nebraska
  - Traditional non-competes unenforceable; non-competes allowed only to the extent they restrict the former employee from doing business with customers the former employee actually did business with (generally referred to as non-solicitation provisions)



Visit our free  
[non-compete map](#):



# More restrictive than a complete ban?

Last year, California took two large steps to further restrict non-compete use in and out of the state.

## S.B. 699 Out-of-State Void

- “An employer or former employer shall not attempt to enforce a contract that is void under this chapter regardless of whether the contract was signed and the employment was maintained outside of California.”
- Creates private right of action for injunctive relief, damages, or both
- Effective January 1, 2024

## A.B. 1076 Notice and Penalties

- Likely applicable to more agreements than just traditional non-competes
- Notice required for current and ex-employees by February 14, 2024
- Creates fines up to \$2,500 per violation
- Effective January 1, 2024

# Notice Requirements

- Colorado
- Washington D.C.
- Illinois
- Maine
- Massachusetts
- New Hampshire
- Oregon
- Virginia
- Washington



# Income thresholds

Based on Consumer Price Index (CPI)

- Oregon (\$113,241)
- Washington D.C. (\$154,200)

Based on federal poverty level

- Maine (\$60,240)
- Rhode Island (\$37,650)\*

Based on State figures

- Maryland (\$46,800)\*\*
- Virginia (\$73,320)\*

Based on other

- Colorado (\$123,750)
- Washington (\$120,559.99)

\* Income threshold based on state's average income

\*\* Income threshold based on state's minimum wage

# What is “reasonable”?

Factors courts often consider when determining reasonability:

**Duration**

**Geographic  
Scope**

**Scope of  
Activity**

**Protectable  
Interests**

**Public  
Interest**



# What does it all mean?



## Maine, LD1496

### “An Act to Prohibit Noncompete Clauses

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 26 MRSA §599-A, as enacted by PL 2019, c. 513, §1, is amended to read:

§599-A. Noncompete agreements

1. Definitions. As used in this section, unless the context otherwise indicates, the following terms have the following meanings...”

## Maryland, HB1388

### “AN ACT concerning Labor and Employment – Noncompete and Conflict of Interest – Clauses for Veterinary and Health Care Professionals and Study of the Healthcare Market

FOR the purpose of applying to certain veterinary and health care professionals certain provisions of law stating that certain noncompete and conflict of interest provisions in certain employment contracts are null and void as being against the...”

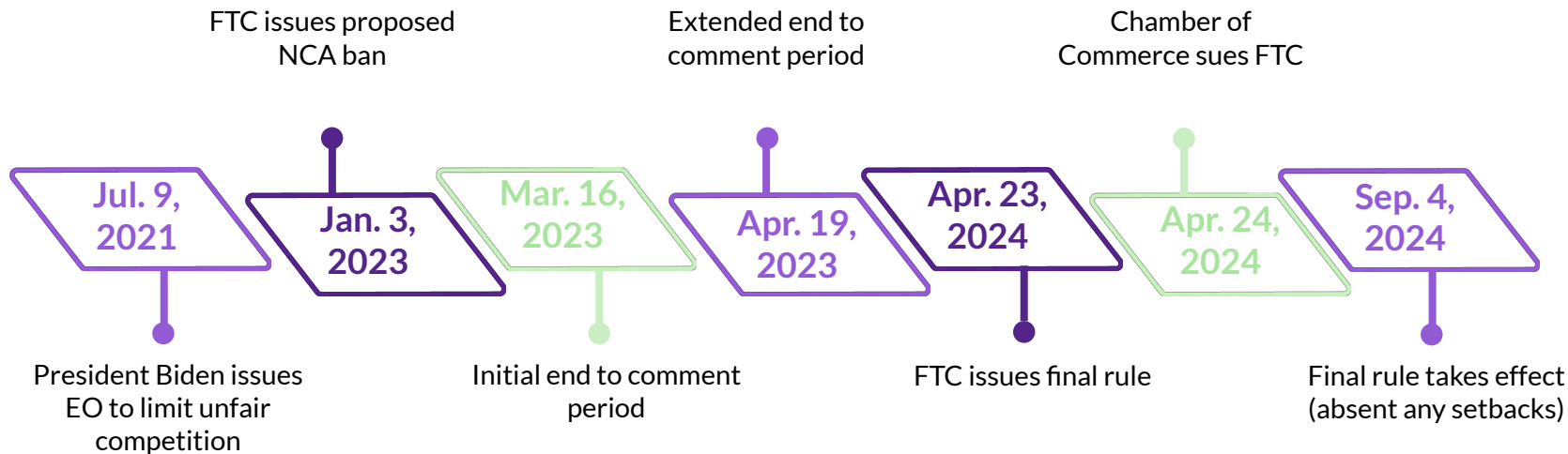


## Floor vs. Ceiling

“Accordingly, § 910.4(a) states that the final rule will not be construed to annul, or exempt any person from complying with, any State statute, regulation, order, or interpretation applicable to a non-compete, including, but not limited to, State antitrust and consumer protection laws and State common law. Rather, the final rule supersedes such laws to the extent, and only to the extent, that such laws would otherwise permit or authorize a person to engage in conduct that is an unfair method of competition under § 910.2(a) or conflict with the notice requirement in § 910.2(b).<sup>970</sup> These revisions provide that when States have restricted non-competes and their laws do not conflict with the final rule, employers must adhere to both provisions, and workers are protected by both provisions (including State restrictions and penalties that exceed those in Federal law).

# Timeline

## The Ban Through the Years



# What's affected?

Non-competes are pervasive:

## Patent innovation

- Estimated increase of 17,000-29,000 per year

## Average wages

- Estimated to rise by \$524 per year

## Startup opportunity

- Estimated 8,500 new startups per year

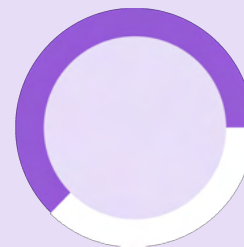
## Healthcare costs

- Estimated reduction of \$194 billion over 10 years



20%

100+ Million  
Workers



**\$53+ billion**

Estimated increase in total annual  
worker earnings

# The FTC's final rule

- Institutes a categorical ban on post-employment non-competes, with very limited exceptions
- Covers virtually all workers, including independent contractors, interns, volunteers, and more
- Applies retroactively to non-competes already signed
  - Existing agreements with senior executives are exempt
- Imposes strict notice requirements
- Faces immediate legal challenges and uncertain future

# Prohibition

What is a non-compete?

- Any term or condition of employment that prohibits, penalizes, or functions to prevent a worker from:
  - Seeking or accepting other post-employment work in the U.S., or
  - Operating a business in the U.S., after conclusion of employment.
- This could function to prohibit non-solicitation agreements, NDAs, etc.
- This rule preempts state laws unless they provide greater protections.

# Who does this apply to?

- Applies prospectively and retroactively
- All workers are treated equally, with a minor exception for senior executives
- A “worker” is a person who works or previously worked for someone else, including:
  - employees
  - independent contractors
  - externs
  - interns
  - volunteers
  - apprentices
  - sole proprietors



# Senior executives

## Policy-making position

President, CEO or equivalent, any other officer, or any other natural person with policy-making authority for the business.

## High salary

Must have earned at least \$151,164 in the preceding year. If they didn't work the whole year, they must have earned at least that much when annualized.

## Existing agreements

Senior executives are treated differently only in that their **existing** agreements may run their course.

No **new** non-competes may be executed after the effective date.



# Exceptions

## Sale of business

- Bona fide sale of business
- Sale of interest in a business
- Sale of all or most of a business' operating assets

## Existing cause of action

- Non-compete in question was otherwise valid
- Cause of action accrued before the final rule's effective date

## Good faith

- Invalid agreement, under new rule
- Person attempts to enforce the agreement, honestly believing this rule doesn't apply
- Must have good faith basis for belief

# Notice

Employers must provide notice to workers that their **non-competes won't and can't be enforced**.

- Must be provided to all affected current employees and ex-employees
- May be provided:
  - on paper, if hand-delivered or sent by mail;
  - by email at current work address or last known personal address; or
  - by text message.
- Must be provided by effective date of the rule
  - 120 days from publication in the Federal Register
  - Currently scheduled for publication on May 7, making it effective September 4

# Will the rule survive?

- Three lawsuits already filed challenging the rule.
- Legal challenges:
  - FTC doesn't have legal authority to regulate non-competes
  - Rule is overbroad and arbitrary
  - Retroactive application is unlawful
- Possible results
  - Temporary injunction
  - Permanent injunction
  - Rule survives



# Now what?

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## Prepare to comply with the rule

- Identify current and former employees under non-competes
- Prepare notices for those employees—**but don't send them quite yet!**
- Prepare to remove non-competes from your employment agreements—**but don't do it quite yet!**

# Alternatives to non-competes

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The rule does not categorically prohibit any of the following:

- Non-Disclosure Agreements
- Non-Solicitation Agreements
- Training Repayment Agreements (TRAPs)
- Garden Leave
- Bonus Repayment

But any of these agreements may be so overbroad that they have the same functional effect as a contract term prohibiting or penalizing a worker for seeking other work or starting a business—meaning they could be viewed as a non-compete.

# We're here to help

Get up-to-date info on non-compete law—pushed directly into your docs, policies, and agreements.

Book a personalized  
consultation

