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FEDERAL COURT DELAYS BAN ON NONCOMPETE AGREEMENTS

INSIGHT

As expected, a legal battle is playing out over the U.S. Federal Trade Commission's near-total ban on noncompete agreements, and a federal judge has granted a preliminary injunction delaying implementation of the ban while the court reviews the merits of the case.

The United States District Court for the Northern District Court of Texas Dallas Division granted a preliminary injunction blocking the ban from taking effect, with Judge Ada Brown saying the plaintiffs, the U.S. Chamber of Commerce and a Texas tax firm, "have met their burden of showing irreparable harm in the absence of injunctive relief."

Furthermore, she ruled, "...it is evident that if the requested injunctive relief is not granted, the injury to both Plaintiffs and the public interest would be great. Granting the preliminary injunction serves the public interest by maintaining the status quo and preventing the substantial economic impact of the Rule, while simultaneously inflicting no harm on the FTC."

The court declined to issue a nationwide injunction and limited the scope of the injunction to the parties involved in the case. The court's final decision, however, may broaden the scope of relief and vacate the rule entirely. The court is expected to issue a decision on the merits by August 30.

The FTC maintains that noncompete agreements should be banned because they unfairly block employees from switching jobs. Business groups, however, state the agreements are critical to protecting their proprietary information and intellectual property. The FTC's rule was initially scheduled to take effect on September 4, 2024, but that could change depending on the outcome of this litigation.

As defined in the final rule, a "non-compete clause" is any term or condition that prohibits a worker from seeking or accepting work with a different employer after they leave their current employer. That definition will capture virtually all traditional non-compete agreements between employers and employees, affecting nearly 30 million employment contracts.

The FTC's final rule made an exception for existing non-compete agreements with senior executives, defined as leadership-level employees earning more than $151,164 annually, and, in policy-making positions. Harris Beach previously took an in-depth look at what the FTC final rule on noncompete agreements entails.

WHAT BUSINESSES SHOULD DO WITH THEIR NONCOMPETE AGREEMENTS

While the courts sort through the federal ban, numerous states, including New York, are still actively considering their own prohibitions on non-compete agreements. Here's what Harris Beach recommends employers do as the litigation plays out in court:

First: looking strictly at the Final Rule, businesses with any interest in securing a non-compete agreement with key leaders should act fast, and, consider any compensation adjustments needed to come within the Rule's exception for "senior executives."

Second: businesses may consider modifying their existing employment agreements to bring them into best-as-possible compliance with regard to non-solicitation, confidentiality, and trade secret matters.

Third: businesses should review all of their restrictive covenant agreements and prepare for a potential "sea-change" in the world of non-competes, irrespective of whatever happens with the FTC's Rule. State and local governments, including New York State, continue to draft their own non-compete prohibitions. Regardless of the final disposition of the FTC's Rule, the regulatory and legislative oversight of non-compete agreements may have finally reached a tipping point. Consulting with employment counsel is critical to protect core interests.

Harris Beach's Labor & Employment team will continue to monitor these developments. For more information, please contact Daniel J. Moore at (585) 419-8626 and dmoore@harrisbeach.com; attorney Scott D. Piper at (585) 419-8621 and spiper@harrisbeach.com; attorney Daniel J. Palermo at (585) 419-8946 and dpalermo@harrisbeach.com; or the Harris Beach attorney with whom you most frequently work.

This alert does not purport to be a substitute for advice of counsel on specific matters.

Harris Beach has offices throughout New York state, including Albany, Buffalo, Ithaca, Long Island, New York City, Rochester, Saratoga Springs, Syracuse and White Plains, as well as Washington D.C., New Haven, Connecticut and Newark, New Jersey

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WHAT NEW YORK EMPLOYERS SHOULD KNOW ABOUT THE FREELANCE ISN'T FREE ACT

INSIGHT

New Yorkers utilizing freelance workers or independent contractors for work totaling $800 or more will soon need to comply with New York's Freelance Isn't Free Act ("FIFA"). The Act, which was signed into law by Governor Hochul in November 2023, is set to take effect on August 28, 2024.

The statute provides new protections and remedies for "freelance workers" (i.e., "independent contractors," or those whose compensation is typically reported on an IRS Form 1099). FIFA applies to any service arrangement worth $800 or more, whether under a single contract or multiple contracts over a 120-day period. The law expands and builds upon a similar local law New York City enacted in 2016.

The statute provides specific requirements regarding contracts, payment, record-keeping and anti-discrimination. Given the breadth of the law and the increasing frequency with which businesses are utilizing freelancers, the implications for compliance are significant.

WHAT DOES FIFA REQUIRE?

- **Written Contracts:** Hiring parties are required to provide written contracts, on paper or electronically, to freelance workers that contain the following:
  - names and mailing addresses of both parties
  - an itemized list of services to be provided and the value of those services
  - the rate and method of compensation
  - the date by which the freelancer must bill for the services and the date of payment (no later than 30 days after completion of services)

- **Recordkeeping:** Hiring parties must maintain all written contracts for a minimum of six years.
- **Anti-Discrimination:** Hiring parties are prohibited from threatening or intimidating freelancers who attempt to exercise rights under FIFA.

WHO IS A FREELANCE WORKER?

FIFA defines a "freelance worker" as "any natural person or organization composed of no more than one natural person, whether or not incorporated or employing a trade name, that is hired or retained as an independent contractor by a hiring party to provide services" in exchange for compensation.

The law does provide exceptions for attorneys, licensed medical professionals, sales representatives, and construction contractors.

WHAT BUSINESSES ARE SUBJECT TO THE REQUIREMENTS OF FIFA?

Any person or company hiring freelance workers to provide any service. It does not, however, apply to federal, state and local governments.

WHAT ARE THE PENALTIES FOR NON-COMPLIANCE WITH FIFA?

Freelancers can sue for damages for non-payment or retaliation within six years of the act in question. If successful on a non-payment claim, the freelancer can be entitled to the amount owed, double damages, injunctive relief, and attorneys' fees. For a successful retaliation claim, a freelancer can receive damages equal to the value of the contract for each violation.

Freelance workers can also file a complaint with the New York Department of Labor ("NYSDOL"). The NYSDOL will investigate such complaints and, if appropriate, award relief, including civil and criminal penalties. Notably, the NYSDOL can join any number of additional wage claims against the same hiring party.

Last, if a hiring party is determined to have engaged in a pattern of violating FIFA, the New York State Attorney General may commence an action on behalf of the state and seek fines of up to $25,000.

KEY TAKEAWAYS

At some point, nearly all businesses utilize freelance workers, which means that most businesses will need to ensure compliance with FIFA. Prior to FIFA taking effect, businesses should assess their utilizations of freelance workers and consult legal counsel to discuss the legal implications to their particular business.

Harris Beach's New York Labor and Employment attorneys will continue monitoring this law and related matters. If you need help with interpreting and complying with the Act, please reach out to attorney Daniel J. Moore at (585) 419-8626 and dmoore@harrisbeach.com; attorney Daniel J. Palermo at (585) 419-8946 and dpalermo@harrisbeach.com; or the Harris Beach attorney with whom you most frequently work.

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