

# FTC Ban on Covenants Not to Compete and Steps to Compliance





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## FTC Non-Compete Rule (16 C.F.R. §§ 910.1-910.6)

- Bans covenants not to compete in the employment context (with limited exceptions).
- Published: May 7, 2024
- Effective Date: September 4, 2024 (16 C.F.R. §§ 910.6)
- Current Status: Set aside on a nationwide basis.  
*Ryan, LLC v. FTC*, 2024 WL 3879954 (N.D. Tex. Aug. 20, 2024).

## What is a non-compete clause? (16 C.F.R. §§ 910.1)

- A term or condition of employment
- That
  - prohibits a worker from
  - penalizes a worker for
  - functions to prevent a worker from
- Either
  - seeking or accepting work with a different person post-employment, or
  - operating a business post-employment.

- “Worker”: Employee, independent contractor, extern, intern, volunteer, apprentice, or sole proprietor. (16 C.F.R. §§ 910.1)
- “Penalizes a worker”
  - Example: Liquidated damages provision. (Comment, 89 FR 38342 (May 7, 2024) at 38364.)

## “Functions to prevent”

- “[A] term or condition that is so broad or onerous that it has the same functional effect as a term or condition prohibiting or penalizing a worker from seeking or accepting other work or starting a business.” (Comment at 38364.)
  - Example: Non-solicitation provision that functions to prevent a worker from seeking or accepting other work or starting a business. (Comment at 38365.)
  - Example: Nondisclosure agreement (NDA) that bars a worker from disclosing any information that is “usable in” or “relates to” the industry in which they work. (Comment at 38365.)

## “Functions to prevent”

- Example: NDA that bars a worker from disclosing any information or knowledge the worker may obtain during their employment whatsoever, including publicly available information. (Comment at 38365.)
- Example: Training-repayment agreement (TRAP). (Comment at 38365.)

## What non-competes are banned under the Rule? (16 C.F.R. §§ 910.2)

- Any non-compete entered into after the effective date.
- Any non-compete entered into before the effective date, unless it was with a Senior Executive.

## What non-competes are enforceable under the Rule?

- Existing non-compete with Senior Executive. (16 C.F.R. §§ 910.2)
  - Was in a policy-making position (generally, president, chief executive officer or the equivalent).
  - Total annual compensation of at least \$151,164 (actual or annualized) in the preceding year.

## What non-competes are enforceable under the Rule?

- Non-compete with franchisee. (16 C.F.R. §§ 910.1)
- Non-compete connected to bona fide sale of business. (16 C.F.R. §§ 910.3(a))
- Existing causes of action (accrued prior to effective date). (16 C.F.R. §§ 910.3(b))
- Good faith basis to believe that Rule is inapplicable. (16 C.F.R. §§ 910.3(c))

## To whom does the Rule NOT apply? (16 C.F.R. §§ 910.1; Comment at 38356)

- Employers who are exempted from coverage under the FTC Act.
  - Possible examples:
    - Certain banks, savings and loan institutions, and federal credit unions.
    - Common carriers, air carriers and foreign air carriers.
    - Persons subject to the Packers and Stockyards Act of 1921.
    - Certain non-profits.
    - Certain state or local government agencies.

## What will employers have to do in order to comply with the Rule? (16 C.F.R. §§ 910.2)

- Not enforce or attempt to enforce a non-compete clause.
- Not represent that the worker is subject to a non-compete clause.
- Notify workers that existing non-competes will not be, and cannot legally be, enforced.
  - Model language.
  - Safe harbor.

## Why was the Rule set aside?

- The FTC lacks the authority to create substantive rules with respect to unfair methods of competition. *Ryan, LLC v. FTC*, 2024 WL 3879954 at \*12.
- The Rule is arbitrary and capricious. *Ryan* at \*13.
  - The FTC relied upon inconsistent and flawed empirical evidence.
  - The FTC failed to consider the positive benefits of non-compete agreements.
  - The FTC disregarded the substantial body of evidence supporting non-competes.
  - The FTC failed to sufficiently address alternatives to issuing the Rule.

## What is the current law in Montana regarding the enforceability of non-competes?

- Mont. Code Ann. § 28-2-703
  - “Any contract by which anyone is restrained from exercising a lawful profession, trade, or business of any kind . . . is to that extent void.”
- Exceptions to § 28-2-703:
  - Sale of goodwill of business. Mont. Code Ann. § 28-2-704.
  - Dissolution of partnership. Mont. Code Ann. § 28-2-705.
  - “Reasonable” restraint. *Dobbins, DeGuire and Tucker v. Rutherford*, 218 Mont. 392, 708 P.2d 577 (1985); accord *Junkermier, Clark, Campanella, Stevens, PC v. Alborn, Uithoven, Riekenberg, P.C.*, 2016 MT 218, ¶ 40, 384 Mont. 464, 380 P.3d 747.

## Unenforceable Non-Competes

- Employee would have to move. *Montana Mountain Prods. v. Curl*, 2005 MT 102, ¶ 11, 327 Mont. 7, 112 P.3d 979.
- Employer terminates employment. *Wrigg v. Junkermier, Clark, Campanella, Stevens, P.C.*, 2011 MT 290, 362 Mont. 496, 265 P.3d 646.
- No new consideration. *Access Organics, Inc. v. Hernandez*, 175 P.3d 899, 904 (Mont.2008).

## (Arguably) Enforceable Non-Competes

- Liquidated damages provision. *Junkermier, Clark, Campanella, Stevens, PC v. Alborn, Uithoven, Riekenberg, P.C.*, 2016 MT 218, ¶ 40, 384 Mont. 464, 380 P.3d 747; *Dobbins, DeGuire and Tucker v. Rutherford*, 218 Mont. 392, 708 P.2d 577 (1985).
- Non-solicitation provision. *American National Property and Casualty Company v. Camp*, 2011 WL 3348067 (D. Mont. Aug. 3, 2011).
- Non-compete with franchisee. *H & R Block Tax Services v. Kutzman*, 681 F. Supp. 2d 1248 (D. Mont. 2010).

## Alternatives to Non-Competes

- Nondisclosure Agreements (NDAs)
- Non-Solicitation Provisions
- Liquidated Damages Provisions

## Alternatives to Non-Competes

- Trade Secret Enforcement
  - Montana Uniform Trade Secrets Act (MUTSA)  
(Mont. Code Ann. §§ 30-14-401 – 30-14-409)
    - (1) information (2) that has independent economic value (3) from not being generally known or readily ascertainable by proper means, and (4) that is the subject of reasonable efforts to maintain secrecy.
  - Defend Trade Secrets Act (DTSA)  
(18 U.S.C. §§ 1832, 1833, 1835, 1836, 1838, 1839)
    - Use in commerce requirement.

# FTC Ban on Covenants Not to Compete and Steps to Compliance Thank You!

