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# Noncompetition Agreements

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# Presentation Overview:



- Summary of FTC final rule
  - Restrictions under final rule
  - Scope of application
  - Definition of noncompetition agreement (NCA)
  - Enforceability - existing vs. new, senior executives
  - Compliance
- Summary of state law
  - Definition of noncompetition agreement
  - Criteria for valid NCA
  - Exclusions
  - Final Rule interaction with state law



# FTC Final Rule: Summary



- Effective September 4, 2024, unlawful to enter into or attempt to enter into new noncompete
- Scope of application:
  - Employers subject to FTC jurisdiction, regardless of size
  - Workers of subject employers, including
    - Senior executives
    - Part-time and full-time
    - Paid and unpaid – interns, externs, volunteers, apprentices
    - Independent contractors



# FTC Final Rule: Summary



- Existing noncompete agreements, enforceability
  - Senior executives
  - Non-senior executives
- Exclusions – applies to employer/employee agreements
  - Franchise agreements
  - Sale of business
- Pending legal challenges

# Noncompetition Agreements: FTC Final Rule Definition



Under the final rule a “non-compete clause” is “a term or condition of employment that prohibits a worker from, penalizes a worker for, or functions to prevent a worker from:

1. seeking or accepting work in the United States with a different person where such work would begin after the conclusion of the employment that includes the term or condition; or
2. operating a business in the United States after the conclusion of the employment that includes the term or condition.”

# Senior Executive: FTC Final Rule Definition



- Senior executives may be subject to *existing* noncompete agreements
- Two-part test:
  - Compensation - must earn more than \$151,164 annual compensation in the preceding year; AND
  - Job duties – must hold a policy-making position for entire business

# FTC Final Rule: Employer Compliance



- Notice requirements:
  - For active, preexisting noncompete agreements for current and former workers who are not senior executives
  - Clear and conspicuous
  - By effective date
  - Model language is available
- Do not:
  - Enter into or attempt to enter into noncompete
  - Attempt to enforce active/preexisting noncompetes against workers other than senior executives
  - Represent to workers (other than relevant senior executives) that worker is subject to noncompete



# Oregon Law – ORS 653.295

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- Provides that noncompetition agreements are void and unenforceable unless the agreement meets certain criteria.
- Void and unenforceable requires no affirmative steps to invalidate
- Limited term - 12 months post-employment



# Noncompetition agreement: Definition



“Noncompetition agreement” means a written agreement between an employer and employee under which the employee agrees that the employee, either alone or as an employee of another person, will not compete with the employer in providing products, processes or services that are similar to the employer’s products, processes or services for a period of time or within a specified geographic area after termination of employment.

“Employer” and “employee” are defined terms – excludes independent contractors

# Valid Noncompetition Agreement: Criteria



- Two weeks advance notice of initial employment or upon subsequent bona fide advancement
- Salaried exempt employee
- Annual income exceeds salary threshold adjusted annually for inflation at time of termination (2024 - \$113,241)
- Protectable interest
- Post-employment notice – signed, written copy within 30 days after date of termination

# Noncompetition agreement: Protectable interest



An employer has a protectable interest when the employee:

(a) Has access to trade secrets, as defined in ORS 646.461;

(b) Has access to competitively sensitive confidential business or professional information that otherwise would not qualify as a trade secret, including product development plans, product launch plans, marketing strategy or sales plans; or

(c) Is employed as an on-air talent by an employer in the business of broadcasting and the employer:

(A) In the year preceding the termination of the employee's employment, expended resources equal to or exceeding 10 percent of the employee's annual salary to develop, improve, train or publicly promote the employee, provided that the resources expended by the employer were expended on media that the employer does not own or control; and

(B) Provides the employee, for the time the employee is restricted from working, the greater of compensation equal to at least:

(i) Fifty percent of the employee's annual gross base salary and commissions at the time of the employee's termination; or

(ii) Fifty percent of \$100,533, adjusted annually for inflation pursuant to the Consumer Price Index for All Urban Consumers, West Region (All Items), as published by the Bureau of Labor Statistics of the United States Department of Labor immediately preceding the calendar year of the employee's termination.

# Noncompetition agreement: Exclusions



- Bonus restriction agreements\*
- Nonsolicitation agreements\*\*
- Nondisclosure agreements\*\*
- Employer protection of trade secrets
- Nonexempt employees paid less than the salary threshold – if the employer agrees to pay, for the time the employee is restricted from working, the greater of:
  - 50% of employee’s annual base salary plus commission; or
  - 50% of the minimum salary threshold

\* Likely constitutes NCA under FTC final rule.

\*\* Depends on terms – garden variety may be enforceable



# Summary



- Effective date September 4, 2024
- Pending legal challenges
  - Upheld – preempts less restrictive, conflicting state laws; invalidates most NCA's;
  - Final rule invalidated or changed – state law restrictions enforceable or to the extent consistent with the final rule
- Prudent to comply with notice requirements for active NCA's by effective date
- Do not:
  - Enter into or attempt to enter into new noncompetes
  - Attempt to enforce active/preexisting noncompetes against workers other than senior executives
  - Represent to workers (other than relevant senior executives) that worker subject to noncompete



# Questions



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