

Federal Trade Commission Excludes Franchise Relationship From New Rule Prohibiting Non-compete Agreements

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A big sigh of relief for franchisors: the FTC's new rule prohibiting non-compete covenants will not apply to the franchisor-franchisee relationship.

As expected by many, yesterday the FTC adopted sweeping new prohibitions against noncompete restrictions between a "worker" and an "employer." The new rule has nationwide implications and forces employers to rescind existing non-compete agreements with its employees who are not "Senior Executives," as defined in the new rule, who may be bound by an existing non-compete agreement. However, after reviewing over 26,000 comments on the new proposed rule, **the FTC specifically excluded the franchise relationship from the new rule**, stating: "The term "worker" includes a natural person who works for the franchisee or franchisor, but does not include a franchisee in the context of a franchisee-franchisor relationship." Non-compete clauses between franchisors and franchisees remain subject to federal antitrust law as well as all other applicable state laws.

Thus, although the new rule allows non-executive employees of franchisors and franchisees to rid themselves of employment noncompete agreements, it leaves intact the substantial body of state-by-state law pertaining to noncompete provisions in franchise agreements between franchisors and franchisees. This is good news for franchisors who rely on franchise noncompete agreements to protect their substantial business interests, including trademarks, customer goodwill, trade secrets, specialized training and trade dress.

Employers are required to comply within 120 days after publication of the final rule. There is little doubt that the new rule will be challenged in court and many legal scholars, including dissenting FTC Commissioner Christine Wilson, believe the new rule is vulnerable to challenge based on the Commission's lack of clear Congressional authorization, among other reasons.

If you have any questions about the application of the new rule, please contact any of the authors listed above or your regular Lathrop GPM attorney. Lathrop GPM's labor and employment practice group also authored this alert providing an analysis on the full effect of this new Rule on all aspects of employment law