

## Navigating the FTC's Final Rule Banning Non-Competes: Why Direct Sellers Shouldn't Panic

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In the world of direct selling, the recent FTC approval of a final rule banning non-compete agreements (the Rule) has sparked concern and uncertainty among direct sellers. Understandably, many are wondering how this ruling will impact their businesses and what steps they can take to protect themselves against unfair competition and misuse of their intellectual property. However, amid the apprehension, it's essential to remember that there are avenues for safeguarding your interests, and the FTC's Rule may not be as set in stone as it initially appears.

### UNDERSTANDING THE FTC'S FINAL RULE

The Federal Trade Commission's (FTC) final rule banning non-compete agreements aims to promote competition in the labor market by prohibiting certain practices that restrict job mobility. Additional information about the Rule itself can be found [here](#), but here are the basics that you need to know:

- The Rule is not yet in effect and will not be effective until 120 days after its publication in the Federal Register.
- The Rule bans all new non-competes with workers of any kind, with very limited exceptions for non-compete agreements between the seller of a business and the purchaser.
- The Rule invalidates all existing non-competes with workers, other than senior executives who have final authority to make policy decisions that control significant aspects of a business entity or common enterprise (such as the CEO or other C-suite executives).
- "Workers" are broadly defined and include employees, independent contractors, and others who provide a service. However, franchisees in the context of a franchisee–franchisor relationship are not included.
- The Rule only affects postemployment restraints, not concurrent-employment restraints.
- Nondisclosure agreements (NDAs) and non-solicitation agreements are generally not prohibited, unless "they function to prevent a worker from seeking or accepting other work or starting a business after their employment ends."

While this new Rule may seem worrisome at first glance, it's crucial to recognize that its implementation faces significant legal challenges. The legality and enforceability of the rule will undoubtedly be contested in court,

potentially leading to revisions or even its overturning. Given the delay in the Rule taking effect and the significant legal challenges it faces, it may be quite some time before the Rule takes effect, if at all.

## WHY DIRECT SELLERS SHOULDN'T PANIC

For direct sellers, the prospect of navigating this regulatory landscape may seem daunting. However, there are several reasons why panic is premature:

Legal Challenges: Legal experts anticipate that the FTC's rule will face significant pushback from various sectors, including businesses and industry groups and even other governmental entities. Indeed, the first of many challenges to the Rule was filed in the U.S. District Court for the Northern District of Texas in recent weeks. We believe that the legal challenges to the FTC's authority to promulgate such a Rule are well founded, and that the FTC's overreach here is inherently bad for business. We wrote about the dubious nature of the FTC's authority to enact such a Rule over a year ago [here](#). We will continue to monitor the legal challenges to the Rule, and if and when this Rule poses a threat to you or your business, we stand ready to address any needs that you have.

Alternative Protections: While non-compete agreements are one way to protect intellectual property and prevent unfair competition, they are not the only option available to direct sellers. The Rule does not generally prohibit NDAs and non-solicitation agreements unless "they function to prevent a worker from seeking or accepting other work or starting a business after their employment ends." These types of agreements, if properly drafted, can still offer valuable protection to direct sellers by preventing former associates from poaching clients or employees or misusing trade secrets. Direct sellers should review their existing contracts to assess the strength of their protections and their compliance with evolving regulations. Winston can help identify potential areas of concern and develop strategies for mitigating risks.

Focus on Compliance: Regardless of the new Rule, prioritizing compliance with existing laws and regulations remains paramount for direct sellers. By ensuring compliance, direct-sales clients can minimize exposure from claims by governmental authorities and private plaintiffs. Winston has extensive experience advising companies in all these areas. We are able to immediately assist if the FTC or a plaintiff's attorney comes calling—but we strongly prefer advising our clients on reforms that, if taken now, will greatly reduce the risk of expensive and burdensome litigation later.

While the FTC's final rule on non-compete agreements may raise questions and concerns for direct sellers, there is no need for panic. By staying informed, prioritizing compliance, and embracing alternative strategies, direct sellers can safeguard their businesses and continue to thrive in the competitive marketplace. We specialize in legal and regulatory issues affecting direct sellers and, as always, are available if you would like to discuss.

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