



## Employers Beware: FTC Announces Final Rule Banning Worker Non-Competes

# 美国劳动法动向：美国联邦贸易委员会发布《最终规则》，禁止竞业禁止协议

The Final Rule, if it survives significant legal challenges and the challenges yet to come, will ban all existing and future non-compete agreements with workers, with only narrow exceptions.

如果《最终规则》能够经受住重大法律挑战和未来的其他挑战，其将最终禁止和劳动者的所有现存的和未来的竞业禁止协议，只允许极少数例外情况。

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## TAKEAWAYS

### 影响

- **The FTC Final Rule imposes a near-total nationwide ban on non-compete agreements for any company under the FTCs jurisdiction.**  
《最终规则》几乎在美国全国范围内禁止了美国联邦贸易委员会（FTC）管辖范围内的任何公司采用竞业禁止协议。

- The Rule is scheduled to go into effect 120 days after publication in the *Federal Register* for all future non-compete agreements and will prohibit enforcement of existing non-competes unrelated to the sale of a business, except for those with senior executives.  
该规则计划在《联邦公报》上公布120天后生效，禁止未来全部的竞业禁止协议，以及禁止执行与业务出售交易无关的现有竞业禁止协议，但与高级管理人员签署的竞业禁止协议除外。
  - Lawsuits seeking to block the regulation have already been filed.  
试图阻止该规则的诉讼已经被提起。
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04.25.24  
2024年4月25日

**O**n April 23, 2024, the Federal Trade Commission (FTC) voted along party lines to issue its Final Rule prohibiting almost all non-competes with workers—both those entered into in the past and in the future. The Final Rule is set to become effective 120 days after it is published in the *Federal Register* (the Effective Date). The Rule rests on the FTC’s authority to interpret and enforce sections 5 and 6(g) of the Federal Trade Commission Act (FTC Act), which prohibits unfair methods of competition.

2024年4月23日，美国联邦贸易委员会（FTC）投票通过了《最终规则》，禁止几乎所有与劳动者的现有的和未来的竞业禁止协议。《最终规则》计划在《联邦公报》上公布120天后生效（生效日期）。该规则的颁布基于FTC具有解释和实施禁止不公平竞争方式的《联邦贸易委员会法》第5条和第6(g)条的权限。

The purpose of this alert is to provide preliminary high-level guidance on the Final Rule. Further guidance will follow in the coming days as Pillsbury continues to review and analyze this Final Rule.

本文旨在就《最终规则》提供高度概括的初步指引。美国普盈律师事务所将进一步审阅和分析该规则，并将在未来发布更多的指引。

## Gaining Definition

### 定义

The FTC has revised several definitions to cement the broad scope of the Final Rule. FTC修改了若干定义，以确保《最终规则》的广泛适用范围。

### Non-Compete Clause

#### 竞业禁止条款

The FTC revised the definition of a non-compete clause that it had initially proposed when it published a Notice of Proposed Rulemaking on January 23, 2023. The Final Rule now defines a non-compete clause as a term or condition of employment that either “prohibits” a worker from, “penalizes” a worker for, or “functions to prevent” a worker from “(i) 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 (ii) operating a business in the United States after the conclusion of the employment that includes the term or condition.”

与2023年1月23日发布的《拟议规则制定通知》中不同，FTC对其最初提出的竞业禁止条款的定义进行了修订。现在，《最终规则》将竞业禁止条款定义为“禁止”、“惩罚”或者“用于阻止”劳动者（1）在包含该等竞业禁止条款或条件的雇佣关系结束后，在美国寻求或接受其他主体的雇佣；或者（2）在包含该等条款或条件的雇佣关系结束后，在美国开展一项业务。

The Final Rule makes clear that the non-compete ban will apply to any terms or conditions that require a worker to pay a penalty for engaging in competition, including liquidated damages, forfeiture-for-competition clauses, and severance agreements that condition payment of severance on compliance with a non-compete.

《最终规则》明确规定，竞业禁止禁令将适用于任何要求劳动者为参与竞争而需支付罚款的条款或条件，包括违约赔偿金、因参与竞争而没收收益，以及以遵守竞业禁止为支付劳动关系解除补偿金的条件的解除协议。

Notably, however, the Final Rule also explains that non-competes during a period of garden leave, in which the worker is still employed and receiving the same total annual compensation and benefits on a pro rata basis, are **not** prohibited because such an agreement is not a post-employment restriction.

但值得注意的是，《最终规则》还明确，在劳动者离职前的停职留薪假期期间，因其劳动关系仍处于存续状态并按比例享有年薪和福利（总的计算基数不变），则该等协议不被禁止，因为其不属于对劳动者离职后的限制。

### Workers

#### 劳动者

After considering the extensive comments, the FTC revised the definition of “worker” to clarify that all current and former workers are covered, regardless of which entity hired or contracted with them to work, and regardless of a worker’s title or status under any other applicable law.

在听取了广泛的意见后，FTC修改了对于“劳动者”的定义，明确保护所有现在的和先前的劳动者，无论哪个实体雇佣了他们或者与之签订合同，也无论劳动者在任何其他适用法律下的职位或身份如何。

The Final Rule defines “worker” as “a natural person who works or who previously worked, whether paid or unpaid, without regard to the worker’s title or the worker’s status under any other State or Federal laws, including, but not limited to, whether the worker is an employee, independent contractor, extern, intern, volunteer, apprentice, or a sole proprietor who provides a service to a person. The term worker includes a natural person who works for a franchisee or franchisor, but does not include a franchisee in the context of a franchisee-franchisor relationship.”

《最终规则》将“劳动者”定义为“工作或者曾经工作过的自然人，无论是否有偿，也无论其在任何其他州法律或联邦法律下的职位或身份如何，包括但不限于员工、独立承包商、见习生、实习生、志愿者、学徒或个人服务提供者。劳动者一词包括为特许经营商或特许经营授权商工作的自然人，但不包括特许经营关系中的特许经营商。”

The FTC specifically declined to specify in the Final Rule whether a “‘worker’ includes an ‘owner who provides services to or for the benefit of their business’ because ‘the definition already encompasses the same.’” **Employers, particularly startup companies who rely upon their owners and a host of outside advisors for assistance, must therefore understand that, if the Final Rule takes effect, they will no longer be permitted to enter into non-competes with any individual rendering any services to the company, whether with or without compensation (equity or otherwise).**

FTC明确拒绝在《最终规则》中说明“劳动者”是否包括“为其自身业务提供服务或为其自身业务利益而提供服务的所有权人”，因为“该定义已不言自明”。雇主（尤其是依赖其所有人和大量外部顾问提供帮助的初创公司）必须明白，如果《最终规则》生效，其将不再被允许与为公司提供任何服务的个人签订竞业禁止协议，无论该等个人是否获得报酬（以股权形式或其他形式）。

## Limits to the Ban

### 对竞业禁止禁令的限制

The ban does not apply to other restrictive covenants so long as they do not function as non-competes. 该禁令不适用于没有竞业禁止作用的其他约束性约定。

In the Final Rule, the FTC clarifies that the Final Rule does not cover agreements other than non-competes, such as nondisclosure agreements (NDAs) and non-solicitation agreements, that do not by their terms or necessarily in their effect prevent a worker from seeking or accepting work with a person or operating a business after the worker leaves their job. The FTC explains that, for example, a garden-variety NDA, in which the worker agrees not to disclose certain confidential information to a competitor, would not prevent a worker from seeking work with a competitor or from accepting such work after the worker leaves their job, and, therefore, is still lawful.

在《最终规则》中，FTC 明确指出，该规则不适用于除竞业禁止协议以外的其他协议，例如保密协议（NDA）和禁止招揽协议，因为该等协议的条款或实际效果并不必然会阻止员工在离职后寻求或接受他人提供的工作机会或经营业务。FTC 解释说，例如，在一份常见的NDA中，劳动者承诺不向竞争对手透露保密信息，并不必然阻止劳动者在离职后寻求或接受为竞争对手工作的机会，因此该等协议合法。

However, NDAs will be viewed as unlawful non-competes if they cover such a large scope of information that they function to prevent workers from seeking or accepting other work or starting a business after they leave their job. For example, an NDA that bars a worker from disclosing, in a future job, any information that is “usable in” or “relates to” the industry in which they work would not be permissible.

然而，如果NDA涵盖的信息范围过于宽泛，以至于它们事实上起到阻止员工在离职后寻找或接受其他工作或创业的作用，那么该等保密协议将被视为非法的竞业禁止协议。例如，禁止员工在未来的工作中透露与其所处行业“有用”或“有关”的任何信息的保密协议，将是不被允许的。

The Final Rule discusses training repayment provisions, described with the acronym “TRAPs.” These provisions require workers to repay the value of training before or after departing a job. The Final Rule does not categorically ban their use but requires that they do not functionally prevent a worker from seeking or accepting work or starting a business after departing the job, such as when they impose penalties that are disproportionate to the value of training workers received.

《最终规则》讨论了培训费偿还条款，简称“TRAPs”。该等条款要求劳动者在离职前或离职后赔付培训费。《最终规则》并没有绝对禁止该类条款的使用，但要求其在实质上不得阻止劳动者在离职后寻找或接受新工作或创业，例如当其施加的罚款与劳动者接受培训的价值不成比例时。

Similarly, non-solicitation agreements will be impermissible non-competes where they function to prevent a worker from seeking or accepting other work or starting a business after their employment ends.

同样地，具有阻止劳动者在离职后寻找或接受其他工作或创业作用的禁止招揽协议，也被视为被禁止的竞业禁止协议。

## Exceptions

### 例外

The Final Rule contains four express exceptions.

《最终规则》中包含四种明确的例外情况。

#### **Existing Non-Competes with Senior Executives (But Senior Executives Cannot be Required to Enter into New Non-Competes)**与高级管理人员之间的现存的竞业禁止协议（但高级管理人员不得被要求签订新的竞业禁止协议）

The Final Rule specifically creates an exemption for senior executives with *existing* non-competes. The FTC explains it created this exception based on “the practical impacts of extinguishing existing non-competes for senior executives.” In addition, the FTC considered the fact that valuations of senior executive non-competes are routinely conducted during many M&A transactions, with acquisition prices reflecting the value of those non-competes to ensure the buyer retains certain talent.

《最终规则》明确豁免了与高级管理人员之间现存的竞业禁止协议。FTC解释说，因考虑到“消除现存的高级管理人员的竞业禁止协议将产生的实际影响”而设置这一例外。此外，FTC考虑到，在许多并购交易中常常对高级管理人员的竞业禁止协议进行估值，收购价格亦会反映可以使买方留住某些人才的该等竞业禁止协议的价值。

**The definition of a “senior executive” includes both an earnings test and a job duties test: The executive must have received total annual compensation in the preceding year of at least \$151,164 and be in a “policy-making position.”** Total annual compensation may include salary, commissions, nondiscretionary bonuses and other nondiscretionary compensation earned during that preceding 52-week period.

“高级管理人员”的确定必须同时满足两个条件—收入和工作职责：管理人员在上一年度的总年薪不得少于 151,164 美元，并且担任“决策职位”。总年薪包括之前 52 周期间的薪水、佣金、非酌情给予的奖金，以及其他非酌情给予的报酬。

The Final Rule defines “policy-making position” as “a business entity’s president, chief executive officer or the equivalent, any other officer of a business entity who has policy-making authority, or any other natural person who has policy-making authority for the business entity similar to an officer with policy-making authority.” The definition of “policy-making authority,” in turn, means “final authority to make policy decisions that control significant aspects of a business entity or a common enterprise.” The definition further states that policy-making authority “does not include authority limited to advising or exerting influence over such policy decisions or having final authority to make policy decisions for only a subsidiary of or affiliate of a common enterprise.”

《最终规则》将“决策职位”定义为“商业实体的总裁、首席执行官或类似职位、拥有决策权的其他高级管理人员，以及与有决策权的高管类似的有决策权的其他自然人”。“决策权”被定义为“控制了商业实体或企业重要方面的决策的最终权限。”该定义进一步指出，决策权“不包括仅对该等决策提供建议或施加影响的权力，也不包括仅对企业下属子公司或关联公司拥有决策的最终权限”。

To be clear, the exception covers only existing non-competes. If the Final Rule takes effect, employers may not enter into new non-competes with senior executives after the Effective Date. 需要明确的是，上述例外规定仅适用于现存的竞业禁止协议。如果《最终规则》生效，在其生效日期后，雇主禁止与高级管理人员签订新的竞业禁止协议。

### **Non-Competes Entered Into in the Sale of Business Context** 在业务出售背景下签订的竞业禁止协议

In the Notice of Proposed Rulemaking, the FTC proposed an exception for certain non-competes between the seller and the buyer of a business that would have applied only to a substantial owner, member or partner, defined as an owner, member or partner with at least 25% ownership interest in the business entity being sold.

在之前的《拟议规则制定通知》中，FTC拟对业务出售方和收购方之间的某些竞业禁止协议做出例外规定，该例外仅适用于在待售企业实体中拥有至少25%所有权的重要所有者、股东或合伙人。

In a bit of good news for those in the M&A world, the FTC has revised this exception and adopted an exception for the bona fide sale of a business without requiring any specific level of ownership interest. The Final Rule does require that such sales are “bona fide” and conducted at arms’ length with the opportunity for the seller to negotiate the terms of the sale, a qualification described as addressing the possibility of repurchase rights for equity granted to employees, or other examples of possible “sham” transactions that could circumvent the Final Rule.

对于并购领域，好消息是FTC现已修改了上述例外规定，在真实出售业务时，不再设定任何具体的所有权比例要求。《最终规则》要求此类交易是“真实的”并在正常公平交易的基础上进行，且卖方有机会就交易条款进行谈判。这一限定条件被视为解决了授予劳动者股权的回购权或其他可能规避《最终规则》的“虚假”交易的可能性。

### **Causes of Action Accruing Before the Effective Date** 生效日期之前产生的诉讼事由

The Final Rule does not render existing non-competes unenforceable or invalid. Instead, the Final Rule makes it an unfair method of competition to enforce certain non-competes beginning on the Effective Date. Accordingly, actions taken before the Effective Date—for example, enforcing an existing non-

compete or making representations related to an existing non-compete—are not unfair methods of competition under the Final Rule.

《最终规则》并没有使现有的竞业禁止协议不可执行或无效。相反，《最终规则》规定，自生效日期起，执行某些竞业禁止协议属于不公平竞争行为。因此，在生效日期之前采取的行动，例如执行现有的竞业禁止协议或就现有竞业禁止条款做出陈述，不属于《最终规则》下的不公平竞争行为。

## Good Faith

### 善意

The Final Rule’s “good faith” exception states: “It is not an unfair method of competition to enforce or attempt to enforce a non-compete clause or to make representations about a noncompete clause where a person has a good-faith basis to believe that this part 910 is inapplicable.”

《最终规则》的“善意”例外条款规定，“如果基于善意基础认为《最终规则》第910部分（即有关禁止适用竞业禁止协议的规定）不适用，那么执行或试图执行竞业禁止条款或就非竞争条款做出陈述并非不公平的竞争方法。”

## Application to Nonprofit Organizations

### 对非营利组织的适用

The FTC has stated that the Rule “applies to the full scope of the Commission’s jurisdiction” and will apply to nonprofit, tax-exempt organizations, if they are “organized to carry on business for their own profit or the profit of their members.” Citing both FTC precedent and court decisions, the FTC has stated that it will look to both “the source of the income, i.e., to whether the corporation is organized for and actually engaged in business for only charitable purposes, and to the destination of the income, i.e., to whether either the corporation or its members derive a profit.” Unfortunately for most nonprofit associations, there are not clear bright-line checklists on which they can rely. The preamble to the Final Rule notes that “The Commission cannot predict precisely how many entities claiming nonprofit tax-exempt status may be subject to the Final Rule. The Commission finds that the benefits of the Final Rule justify implementing it no matter how many nonprofit entities claiming tax-exempt status it ultimately reaches—including under the unlikely assumption that it does not reach any of them.” Nonprofit organizations wishing to incorporate noncompete provisions in future employment contracts would be prudent to consult counsel for advice on the application of the Final Rule to them.

FTC表示，该规则“适用于联邦贸易委员会的全部管辖范围”，并将适用于“组织并开展业务是为其自身或股东营利”的非营利组织和免税组织。FTC援引其先例和法院判决，说明它将同时考虑“收入的来源，即该组织是否仅为慈善目的而组织并实际开展业务，以及收入的去向，即该组织或其股东是否获得了利润。”遗憾的是，对于大多数非营利组织来说，并没有明确的清单指南可供参考。《最终规则》的序言指出，“FTC无法准确预测有多少申请非营利免税地位的实体可能会受到《最终规则》的约束。FTC认为，无论最终有多少申请免税地位的非营利实体受益于《最终规则》—即使是在没有任何非营利实体受益于《最终规则》的不可能的假设下—《最终规则》的益处都足以支持其实施的合理性。”希望今后在劳动合同中纳入竞业禁止条款的非营利组织应当谨慎地咨询其法律顾问，以确定《最终规则》对其是否适用。

## Interaction with State Law

### 与州法律的互动

State laws that restrict non-competes and do not conflict with the Final Rule are not preempted. The Final Rule makes clear that states may continue to enforce in parallel laws that restrict non-competes and do not conflict with the Final Rule, even if the scope of the state restrictions is narrower than that of the Final Rule. Similarly, states that have broader scope restrictions—such as California’s prohibition on non-solicitation clauses—may continue to enforce those restrictions. State laws, however, cannot authorize non-competes that are prohibited under the Final Rule.

限制竞业禁止条款、但不与《最终规则》相冲突的美国各州的法律不会被取代。《最终规则》明确规定，各州可以继续同时实施限制竞业禁止条款并且不与《最终规则》相冲突的法律，即使各州的限制范围比《最终规则》更窄。同样，限制范围更广的州法律也可以继续执行其限制，例如加州对非招揽条款的禁止。但是，州法律不能授权实施《最终规则》所禁止的竞业禁止条款。

### **No Rescission, But Required Notice**

#### **无须撤销，但需要通知**

The Final Rule does not require rescission of existing non-competes, but it does prohibit enforcement of existing non-competes after the Effective Date, other than with respect to senior executives or as subject to other exceptions in the Final Rule. The Final Rule requires the employer or person who entered into the non-compete with the worker to provide clear and conspicuous notice to the worker, by the Effective Date, that the worker’s non-compete will not be, and cannot legally be, enforced against the worker.

《最终规则》不要求撤销现有的竞业禁止协议，但它禁止在生效日期之后强制执行现有的竞业禁止协议，除非该协议针对高级管理人员或符合《最终规则》中的其他例外情况。根据《最终规则》，已与劳动者签订竞业禁止协议的雇主或人士必须在生效日期之前向员工发出清楚明确的通知，告知劳动者其竞业禁止条款依法将不会且不能被执行。

This notice must identify the employer or person who entered into the non-compete with the worker and must be delivered by hand to the worker, or by mail at the worker’s last known personal street address, or by email at an email address belonging to the worker, including the worker’s current work email address or last known personal email address, or by text message at a mobile telephone number belonging to the worker. There is an exception if the employer does not have any contact information for the worker.

该通知必须说明与劳动者签订竞业禁止协议的雇主或人士，并且必须通过以下方式之一交付给劳动者：亲手递交，邮寄至劳动者最近已知的个人地址，发送至劳动者的电子邮箱（包括劳动者当前的工作电子邮箱或最近已知的个人电子邮箱），或通过短信发送至劳动者的移动电话号码。如果雇主没有劳动者的任何联系信息，可作为例外情况处理。

The Final Rule includes a model notice that may be used by employers.

《最终规则》提供了可供雇主使用的通知模板。

### **The Final Rule’s Fate Is Far from Certain**

#### **《最终规则》的命运远未确定**

It is not at all certain when, or even if, the Final Rule will take effect, as this Final Rule will trigger numerous legal challenges. Indeed, two lawsuits have already been filed in Texas—one by Ryan LLC, in the U.S. District Court for the Northern District of Texas, and the other by the U.S. Chamber of Commerce in the U.S. District Court for the Eastern District of Texas.

毋庸置疑，《最终规则》将引发大量法律挑战，因此，目前尚不能确定其何时生效，甚至能否生效。事实上，德克萨斯州已经有了两起诉讼——一起由Ryan LLC在德克萨斯州北区美国地区法院提

起，另一起由美国商会在德克萨斯州东区美国地区法院提起。

**As noted, Pillsbury is continuing its review and analysis of the Final Rule and will be issuing additional guidance regarding this important legal development.**

如前所述，美国普盈将继续审阅和分析《最终规则》，并将就这一重要的法律进展发布更多指引。

These and any accompanying materials are not legal advice, are not a complete summary of the subject matter, and are subject to the terms of use found at: <https://www.pillsburylaw.com/en/terms-of-use.html>. We recommend that you obtain separate legal advice.

本文和任何附带资料均不构成法律意见，也不构成对主题事项的完整阐述，并且受通过以下网址公布的使用条款的约束：<https://www.pillsburylaw.com/en/terms-of-use.html>。如需法律意见，请单独咨询。