

LEGAL UPDATE

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NON-COMPETE AGREEMENTS: UPDATED REGULATIONS IN THE UNITED STATES AND THEIR LEGAL STATUS IN VIETNAM**KEY TAKEAWAYS**

- On 23 April 2024 the FTC issued its final rule banning noncompetes. With an exception for senior executives, all noncompetes will not be valid and enforceable nationwide. This ban fundamentally changes the long-standing practice in the U.S. labor market regarding noncompetes.
- Vietnamese law does not provide a clear answer regarding the legality and enforceability of a noncompete. In practice, Vietnamese courts often invalidate noncompetes based on the potential violation of an employee's right to work.
- However, an arbitration ruling validated a noncompete which was produced independently from a labor contract. This ruling is later upheld by the Court of Ho Chi Minh City when the losing party sought to set aside the arbitration ruling. Finally, the Supreme People's Court established a court precedent that such a confidentiality and non-competition agreement "is an independent agreement from the labor contract and falls under the jurisdiction of the commercial arbitration."

INTRODUCTION

On 23 April 2024, the US Federal Trade Commission ("**FTC**") issued its final rule, the Non-Compete Clause Rule ("**Rule**"), banning non-compete agreements (or noncompetes) nationwide. This ban will fundamentally change the long-standing practice in the U.S. labor market regarding noncompetes after employees quit their jobs.

WHAT IS A NON-COMPETE AGREEMENT?

The Rule is introduced in the form of Part 910 of the new subchapter J of chapter I, title 16 of the Code of Federal Regulations. Under the Rule, a non-compete clause is defined as: "A term or condition of employment that 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."¹

To put it more simply, the Rule will prohibit agreements between employers and employees that the employee will not work for the employer's competitors or start their own business after their employment with the employer terminates.

Section 910.1 also provides that "a term or condition of employment" referred to in the above definition includes, but is not limited to, "a contractual term or workplace policy, whether written

¹ Section 910.1 of the Rule.

or oral.”

WHY THE FTC BANS NON-COMPETES?

Previously, noncompetes were governed by state laws, with some allowing and others prohibiting them. The main rationale for the legality of the agreement is that it helps employers protect their business secrets (e.g., know-how, technology, customer list, etc.) and the employers’ costs. It is unfair if employers bear huge investment costs for the employees (via vocational training, etc.) but employees have the right to quit their jobs at their wish. A noncompete helps to limit employees leaving their jobs early to work for the employers’ competitors or directly compete with the employers by the employees’ own business. A noncompete should therefore be considered lawful and enforceable.

However, the FTC has a different view. It believes that a noncompete will: (i) limit workers’ ability to find jobs with higher salaries or better working conditions; (ii) stifle competition because other businesses or workers themselves cannot take advantage of their new ideas and skills; and (iii) employers can protect their business secrets through trade secret protection laws and non-disclosure agreements (NDAs). Employers can also retain employees through more competitive salaries and improving the working environment.

Overall, the FTC is of the view that the Rule protects a fundamental right of workers, which is the freedom to change jobs, increases creativity and encourages new businesses. Meanwhile, a noncompete is an unfair method of competition and therefore violates Section 5 of the Federal Trade Commission Act.

WHAT WILL HAPPEN NEXT?

The Rule will take effect 120 days after its publication in the Federal Register. From the effective date: (i) Employers will not be allowed to enter into noncompetes with all employees; (ii) previously signed noncompetes will not be enforceable (i.e., employers cannot enforce them) except for employees who are senior executives; (iii) employers are obliged to notify employees that the previously signed noncompetes are no longer effective (except for those signed with senior executives); and (iv) the noncompetes signed with senior executives continue to be effective until their expiration. However, employers are not allowed to sign a new noncompete with senior executives after the effective date of the Rule.²

Senior executives are defined in the Rule to include workers who earn more than USD 151,164 per annum and who are in policy-making positions.

The Rule is expected to make many businesses feel uncomfortable. Immediately after the issuance of the Rule, the US Chamber of Commerce initiated a lawsuit against the FTC before the Federal Court in Tyler, Texas, demanding a revocation of the Rule on the basis that the FTC lacks the power to issue the Rule.

VIETNAMESE VIEWS ON NONCOMPETES

Vietnamese law does not have a clear answer as to whether a noncompete is legally valid and enforceable or not. In practice, Vietnamese courts often invalidated noncompetes on the grounds of

² Section 910.2 of the Rule.

violation of a constitutional right of workers and a prohibition of the Law on Employment of 2013.³

However, there is a noteworthy arbitration ruling from 2018. An employer sued an employee to demand compensation for the latter's breach of a noncompete agreement that was made separately from the labor contract and contained the arbitration clause allowing an arbitration tribunal to resolve the parties' disputes arising from the noncompete. In its award, the arbitration tribunal held that the noncompete was valid and enforceable, with the main reasonings behind the ruling being: (i) the parties' autonomy to enter into a noncompete which is allowable under civil law; and (ii) the employee's loss of the right to protest/challenge pursuant to Article 13 of the Law on Commercial Arbitration of 2010.⁴ On this basis, the tribunal issued its ruling in favor of the employer, requiring the employee to compensate for damages to the employer.

The employee then challenged the tribunal's award before the Court of Ho Chi Minh City, requesting the court to set aside the arbitration award, arguing, among other things, that: (i) the dispute did not fall under the jurisdiction of the arbitration tribunal; (ii) the arbitration agreement is invalid due to violation of legal prohibitions; and (iii) the proceedings violate the Law on Commercial Arbitration.

The Court of Ho Chi Minh City later that year dismissed the employee/defendant's request to set aside the award of the tribunal. Finally, the judgment of the Court of Ho Chi Minh City has been accepted to become a court precedent with binding content for courts in Vietnam that such a confidentiality and non-competition agreement "is an independent agreement from the labor contract and falls under the jurisdiction of the commercial arbitration."⁵

We hope our article has been helpful to you. Please feel free to contact us if you have any further inquiries.

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³ Article 35 of the Constitution of 2013 states: "Citizens have the right to work, choose a career, job and place of work"; Article 9.6 of the Law on Employment prohibits employers from "[o]bstructing, causing difficulties or damaging the legitimate rights and interests of employees..."

⁴ Article 13 of the Law on Commercial Arbitration states: "In case a party discovers a violation of the provisions of this Law or the arbitration agreement but still continues to carry out arbitration proceedings and does not protest the violations within the time limit, prescribed by this Law, such party shall lose the right to protest at Arbitration or Court."

⁵ Court Precedent No. 69/2023/AL which was approved by the Council of Judges of the Supreme People's Court on 18 August 2023.