

**BRIEFLY SPEAKING**

A new legal column by  
DASMA Legal Counsel Christina Pannos

# THE FTC'S BAN ON NONCOMPETE AGREEMENTS

**Editor's note:**

DASMA recently hired Christina Pannos of Pannos Law as its new Legal Counsel. Pannos' legal background working with nonprofit organizations and industry trade associations makes her uniquely qualified to write about topics affecting door, gate, and access control companies. Read Pannos' new "Briefly speaking" legal column to stay informed.

**N**oncompete agreements have been around since the Middle Ages, but is it time for them to go away completely? Traditionally, noncompete agreements in the United States have been regulated by the states. Under that framework, only three states banned employee noncompete agreements outright. The other forty seven states varied greatly in interpreting the enforceability of noncompete agreements based on factors such as scope (time and geography), applicability to certain types of workers, and their effect on competition.

The landscape has changed — dramatically, perhaps. On April 23, 2024, the Federal Trade Commission (FTC) issued a final rule that significantly limits the use of noncompete clauses in employment contracts in every state. The ban, which the FTC says is to prevent both "unfair and deceptive trade acts or practices" and "unfair methods of competition" was intended to go into effect on Sept. 4, 2024.

**Key points of the rule:**

- **Ban on new noncompetes:** The rule prohibits employers from entering into new noncompete agreements with most workers. That includes employees, independent contractors, and interns.
- **Invalidation of existing noncompetes:** Many

existing noncompete clauses will become unenforceable if the rule takes effect. That applies to most workers, except for senior executives.

- **Limited exceptions:** There are a few exceptions to the rule, which are primarily for senior executives and the sale of a business. The rule provides that existing noncompetes for senior executives can remain in effect, but employers are barred from entering into or attempting to enforce new noncompetes at the senior executive level. The FTC defines a senior executive as a worker who earns more than \$154,164 annually and holds a policy-making position.
- **Definition of noncompete:** A noncompete clause is broadly defined as any term or condition of employment that restricts a worker's ability to seek or accept new employment or operate a business after leaving their current job.

**FTC rationale for the rule:**

- **Increased worker mobility:** Noncompete clauses can limit a worker's ability to change jobs and pursue new opportunities, which hinder their career advancement and economic mobility.
- **Suppressed innovation:** By restricting competition, noncompetes can stifle

innovation and entrepreneurship, which harms the overall economy.

- **Lower wages:** Noncompete clauses can contribute to lower wages by reducing workers' bargaining power.

**Legal challenges**

Some employers and industry groups, including the U.S. Chamber of Commerce, have raised concerns about potential negative consequences, such as job losses, reduced investment, and decreased innovation.

Since April, numerous lawsuits challenging the ban of noncompetes have been filed in courts around the United States. These challenges primarily center around the FTC's authority to implement such a sweeping policy and the potential negative economic consequences of the rule. Other challengers assert that the rule is arbitrary and capricious as it fails to adequately consider the economic impact on businesses and workers. They argue that the FTC did not provide sufficient justification for the ban or explore alternative approaches.

Now, as of Aug. 20, 2024, a federal court in the fifth circuit has held that the FTC may not enforce the rule across the country for the aforementioned reasons. Thus, the

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original date for compliance (Sept. 4, 2024) will come and go without the need to update contracts and practices until the FTC appeals the decision.

### What employers should do

First and foremost, employers should contact legal counsel as state restrictions regarding noncompete provisions will still apply. Also, be sure to have legal counsel check the status regularly. It may change as the appeals process progresses or with the outcome of the November U.S. election.

Employers can also consider alternatives to noncompete agreements that still enable protection of their investments, such as trade secrets laws and nondisclosure agreements (NDAs). Both give employers the ability to protect proprietary and other sensitive information.

*In short, it is extremely important to continue monitoring the noncompete situation as cases around the United States continue. Consequences of not complying with the FTC's noncompete ban include civil penalties of up to \$10,000 per violation – if it gets reinstated. Consult your legal counsel to determine the best next steps for your company. ■*

## Meet DASMA's new legal counsel – Christina Pannos

Christina Pannos is the owner and founder of Pannos Law, LLC; a law firm that specializes in representing and advocating for nonprofit organizations. The client base of the firm consists of trade associations, professional societies, charitable foundations, event planners, and other related entities.

Prior to opening her own law firm, Pannos worked with former DASMA Legal Counsel Naomi Angel and Nathan Breen at Howe and Hutton for eight years, and she has served as Legal Counsel for the American Fence Association for five years.

Pannos' legal experience includes advising and representing clients in the areas of contract negotiation, corporate and not-for-profit structure, intellectual property protection and registration, commercial real estate leasing, employment, antitrust, and data privacy. She has also presented on various issues including effective contract negotiation, licensing intellectual property, risk management, data privacy, social media, and security.

Pannos is also an adjunct professor at DePaul University College of Law, where she teaches three legal drafting courses: Art Market Transactions, Intellectual Property Licensing, and Legal Drafting: Transactions.



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