The Patent Lawyer

GLOBAL REACH, LOCAL KNOWLEDGE

www.patentlawyermagazine.com

July / August 2024

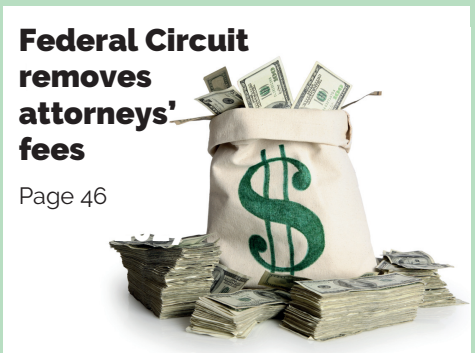
The specific effects of introducing manifest inventiveness examination into utility patent examination in China

SOUTH AMERICA Law firm RANKINGS

Dr. Yongqiang Qi, Partner & Patent Attorney at Corner Stone & Partners, outlines the amended patent examination guidelines, criteria for inventiveness identification, and examination procedures to highlight the impact on the examination of utility patents in China.

Stunted plant innovation in Europe?

Page 12



Federal Circuit removes attorneys' fees

Page 46

UKIPO: 3-year strategy 2024 -2027

Page 63

CTC Legal Media

Jurisdictional Briefing, US: FTC bans most employee non-compete agreements

Steven M. Coyle and Michael J. Rye of Cantor Colburn introduce the new Non-Compete Clause Rule, outlining its ramifications alongside the specific notice requirements for existing non-compete clauses in workers' employment agreements.

The Federal Trade Commission recently published a Final Rule on the Federal Register, which, barring successful legal challenges to the Rule, is projected to be effective on September 4, 2024. Subject to exceptions, the Rule generally states that entering into an agreement containing a non-compete clause (defined in 16. C.F.R. §910.1 (1)) with a worker – including a senior executive - after the Rule's Effective Date, is an unfair method of competition.

In January 2023, pursuant to its authority under Section 5 and Section 6(g) of the FTC Act, the Commission published a notice of proposed rulemaking about non-compete clauses. Over a year later, the Commission issued and ultimately voted to adopt the Rule. The requirements in the Rule are largely reflected in 16. C.F.R. §910.

The Commission cited the preservation and protection of fair competition as the primary reason for the Rule. Further, the Commission pointed to empirical research over the years that demonstrated the negative effects of non-compete clauses on labor markets as well as constraints on product and service markets, which limits the blossoming of new businesses and innovation more generally.

While the Rule institutes "a comprehensive ban" on employers entering non-compete agreements with all workers, including senior executives, after the Rule's Effective Date, the Rule treats existing workers and senior executives differently.

Steven M. Coyle

Michael J. Rye

The treatment of workers

The Commission gave a lot of consideration to who should be included in the definition of a "worker" between the Commission publishing the notice of proposed rulemaking about non-compete clauses and the Commission's issuing of the Rule over a year later. The FTC ultimately declined a narrow definition of a "worker." A worker, according to 16. C.F.R. §910.1, includes, "an employee, independent contractor, extern, intern, volunteer, apprentice, or sole proprietor who provides a service to a person." The Rule bans and renders unenforceable existing non-compete agreements between workers other than senior executives and employers as well as non-competes entered into after the Rule's Effective Date.

The treatment of senior executives

The Commission also addressed the classification of "senior executives" (in contrast to workers) as defined in 16. C.F.R. §910.1. The Rule holds that non-compete agreements involving senior executives are also unfair methods of competition. Thus, any non-compete agreements entered into with a senior executive after the Rule's Effective Date are ineffective. However, any non-compete agreements entered into with a senior executive before the Rule's Effective Date may remain in force.

More generally, the Rule includes a notice requirement for existing non-compete clauses included in worker's employment agreements,

who are not senior executives, requiring employers to give those workers "clear and conspicuous notice" of the date the non-compete clause will no longer be effective against the worker. The Commission also outlined what must be included in that notice.

There are three exceptions to the Rule. First, the requirements listed in 16. C.F.R. §910 do not apply to "a noncompete agreement that is entered into by a person pursuant to a bona fide sale of a business entity, of the person's ownership interest in a business entity, or of all or substantially all of a business entity's operating assets." In addition, 16. C.F.R. §910 does not apply to a cause of action arising from a non-compete agreement entered into prior to the Effective Date of the Rule. Lastly, it is not a violation of Section 5 of the FTC Act to attempt to enforce a non-compete agreement or "make representations" related to a non-compete agreement when the individual is doing so under a good faith belief that 16 C.F.R. §910 does not apply to the present situation.

There have already been lawsuits instituted against the FTC related to the Rule, one of the first of which, was by Ryan LLC, a global tax services and software provider. *Ryan LLC v. FTC, 3:24-cv-00986-E* (N.D. Texas) (Apr 23, 2024). While it is unclear at this time how this and other legal challenges will impact the Rule, employers should consider taking steps to be in compliance with the Rule, including with respect to any notice requirements.

Résumés

Steven M. Coyle, Partner Litigation Practice Co-Chair

Steve litigates and tries complex disputed matters, and specializes in patent and all varieties of intellectual property litigation. Steve's areas of focus include ANDA and Hatch-Waxman litigation, where he has represented the rights of generic drug manufacturers and helped them to bring products to market. In addition to patent litigation, Steve has litigated trademark and trade dress cases, trade secret cases, copyright cases, non-compete disputes, licensing matters, and complex commercial disputes. He has handled cases in numerous courts throughout the country and has argued before the First and Federal Circuit Courts of Appeals.

Michael J. Rye, Partner Litigation Practice Co-Chair

Mike's varied experience with intellectual property litigation over the past 25 years runs the gamut of litigation from injunction hearings through appeal for domestic and international clients in a wide variety of industries, often involving complex technologies. Mike's practice emphasizes patent litigation, but often involves trademark, trade dress, copyright, trade secrets, unfair competition, false advertising, licensing, and other related commercial and business litigation. Mike has acted as lead litigation counsel in courts throughout the United States, including multi-district litigation and numerous Federal District courts.

Contact

Cantor Colburn LLP
20 Church Street, 22nd Floor, Hartford, CT 06103-3207 USA
Tel: +1 860 286 2929
www.cantorcolburn.com