Employers Should Examine Employment Agreements and Guard Trade Secrets While Waiting to See if Noncompete Ban Will Stand

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As briefing is wrapping up in two federal district court cases challenging[i] the FTC's new rule banning noncompetes, which is set to take effect on September 4, 2024, employers and counsel await the courts' anticipated decisions forecasted for July, which will either uphold the rule or stay its effective date and enjoin the FTC from enforcing it.

During the pendency of the litigation, and in light of the rule's fast-approaching effective date, employers should get prepared by doing the following:

- Plan ahead to be ready to provide notice[ii] before September 4, 2024 to workers who entered into noncompetes before that date and who are not excepted from the rule.[iii] Start by listing all *current and former* employees who don't qualify for the "senior executive" or the sale-of-business exceptions. Then, prepare notices, using the model language provided by the FTC, to be delivered to these workers by email, text, mail, or by hand.
- Examine nondisclosure agreements (NDAs),[iv] non-solicitation agreements, other confidentiality agreements, anti-moonlighting provisions, no-recruit agreements, and training repayment provisions, to determine whether they could be deemed so broad as to functionally operate as "non-compete clauses" as defined in the rule.[v]
- Consider whether to enter into new noncompetes with "senior executives"[vi] before September 4, 2024.

If the courts uphold the rule, employers seeking to comply should consider the following:

- Provide the required notice before September 4, 2024.
- Do not enter into any new noncompete agreements on or after September 4, 2024 unless they qualify for the sale-of-business exception.[vii]
- Do not try to enforce existing noncompetes entered into before September 4, 2024 unless they were executed by "senior executives."[viii]
- Modify NDAs, non-solicitation agreements, other confidentiality agreements, anti-moonlighting provisions, no-recruit agreements, and training repayment provisions as needed to avoid violation of the rule.

- Consider the merits and viability under relevant state laws of entering into true "garden leave" agreements with certain employees, under which their employment is continued at full salary but without assigned work and without access to the company's information, technology, and workplace.

If one of the courts enjoins enforcement of the rule nationwide, employers should consider doing the following:

- Expect ongoing litigation of the rule, whose ultimate fate will likely be decided by the United States Supreme Court.
- Evaluate whether existing noncompetes are enforceable under all potentially applicable state laws. For each noncompete, consider the noncompete laws, as well as conflict-of-laws and choice-of-law rules, of the states where the noncompete was executed and the states where the employee worked.

Regardless whether the rule survives, employers should consider protecting confidential information and legitimate business interests in the following ways:

- Improve electronic, technical, and physical security to limit data access, use, and sharing.
- Develop policies and procedures for preserving confidentiality and protecting trade secrets and proprietary information that define protected information and set clear expectations for employees.
- Ensure that policies and procedures exist for all stages of the employment life cycle, from onboarding to exit interviews to post-employment access to information and recovery of company equipment.
- Examine and modify remote work policies to ensure consistency with security measures.
- Educate and train employees on policies and procedures for data security, confidentiality, and protection of trade secrets and proprietary information.
- Monitor employee compliance with data security measures and discipline noncompliance.
- Examine and modify agreements with third parties to establish clear obligations regarding use of confidential company and customer information.
- Examine statutory and common-law trade secret misappropriation laws and modify policies and procedures as needed to ensure protection of trade secrets through litigation.

[i] See *Ryan LLC, Chamber of Commerce of the United States of America, et al. v. Federal Trade Commission*, United States District Court for the Northern District of Texas (Dallas), Case No. 3:24-CV-00986-E (court forecasts issuing a decision on plaintiffs' motion for stay and preliminary injunction on July 3, 2024), and *ATS Tree Services, LLC v. Federal Trade Commission et al.,* United States District Court for the Eastern District of Pennsylvania (Philadelphia), Case No. 2:24-CV-01743-KBH (court forecasts issuing a decision on plaintiffs' motion for stay and preliminary injunction July 23, 2024).

[ii] The rule's notice requirement is in Section 910.2.

[iii] See the rule's exceptions for noncompetes with "senior executives" entered into *before the effective date* (see Section 910.1) and the "sale of business" exception for noncompetes entered into at any time (see Section 910.3).

[iv] See discussion of NDAs in Part III.D., at pp 80-81. The rule explains that a garden-variety NDA in which the worker agrees not to disclose certain confidential information to a competitor would not constitute a "non-compete clause," because it would not prevent a worker from seeking work with a competitor or from accepting such work after the worker leaves the job. An NDA isn't a "non-compete clause" if it doesn't prohibit disclosure of information that is readily ascertainable to other employers or the general public, or if it arises from the worker's general training, knowledge, skill or experience. NDAs may be "non-complete clauses" if they span 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. NDAs that bar workers from disclosing any information in a future job that relates to the industry in which they work would constitute "non-compete clauses" because they effectively prevent working for another employer in that industry. NDAs that bar workers from disclosing any information or knowledge workers may obtain during their employment, including publicly available information, would constitute "non-compete clauses."

[v] The rule's definition of "non-compete clause" is in Section 910.1. See discussion throughout Part III.D., starting at p. 65, of how other agreements might constitute "non-compete clauses" banned by the rule.

[vi] "Senior executives" are defined in Section 910.1 and discussed in Part IV.C.4 of the rule.

[vii] The "sale of business" exception is in Section 910.3.

[viii] "Senior executives" are defined in Section 910.1 and discussed in Part IV.C.4 of the rule.

The information contained in this article is of a general nature and is not intended as, nor should it be relied upon for, legal advice. No action should be taken in reliance upon the information contained in this article without obtaining the advice of an attorney.

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