

Preparing for the Potential FTC Noncompete Ban

On April 23, 2024, the Federal Trade Commission ("FTC") voted to approve the final "Non-Compete Clause Rule" ("Final Rule"), effectively banning most forms of noncompete agreements. The Final Rule is scheduled to take effect on September 4, 2024. However, employers should not abandon their noncompete agreements just yet. The Final Rule is already being challenged in several courts which may delay, limit, or prohibit its implementation. In the event the FTC's Final Rule does become effective or if states enact other legislation that may restrict the enforceability of noncompete provisions, employers should be prepared with alternatives to noncompete agreements to protect their investments and interests.

Most employers use noncompete agreements to protect one or more of the following:

- Intellectual property and trade secrets
- Confidential and Proprietary Information
- Workforce/employees and associated training expenses
- Customer/client relationships
- Vendor relationships

Even without noncompete agreements, employers have myriad ways to protect their investments and interests:

Federal and State Laws That Protect Trade Secrets and Confidential Information

- In states that have adopted the Uniform Trade Secrets Act ("UTSA"), employers may bring an action against former employees for trade secret misappropriation, i.e., disclosure or use of a trade secret without express or implied consent. The UTSA permits employers to seek injunctive and monetary relief, including compensatory damages, punitive damages, and attorneys' fees.
- Trade secret owners, including employers, may bring causes of action under federal law for trade secret misappropriation under the Defend Trade Secrets Act ("DTSA"). Like the UTSA, the DTSA provides for injunctive relief, damages (including punitive damages), and attorneys' fees. The DTSA also authorizes a court, in "extraordinary circumstances," to issue orders for the "seizure of property necessary to prevent the propagation or dissemination of the trade secret that is the subject of the action."
- If an individual has stolen trade secrets for his or her own economic benefit or for the economic benefit of someone else who is not the owner of the trade secret, then the individual may be subject to criminal and civil liability under the Economic Espionage Act.
- In certain circumstances, particularly where there has been intentional misappropriation, the former employer may be able to prevent the worker from competing pursuant to the inevitable disclosure doctrine, depending on applicable state law.

Non-Disclosure Agreements (NDAs)

NDAs can be used to protect confidential and proprietary information, including trade secrets. In these agreements, the worker agrees to not disclose or use information designated as confidential or proprietary during the term of their employment and post-employment unless they receive prior authorization or consent. If the NDA is violated, then the worker may be liable for breach of contract. However, if the FTC's Final Rule becomes effective, the NDA must be appropriately tailored to not prevent a worker from seeking or accepting employment elsewhere or operating a competitive business.

Non-Solicit Agreements/Clauses

Even under the Final Rule, employers may continue to include non-solicit provisions in their employment agreements or in standalone agreements to prevent former workers from contacting and poaching clients or employees for a specific period of time after their employment ends. Yet, under the Final Rule, employers would be limited if they prevented the worker from seeking or accepting other work or starting a new business after their employment ends.

Invention Assignment Agreements

Invention assignment agreements protect an employer's business and intellectual property by giving the employer certain rights to inventions created by the worker during their employment. Under these agreements, workers assign to the employer any rights they may have to any inventions or work product developed by the worker during their employment while using employer resources.

Employment Agreements With a Fixed Duration

Employers who wish to protect their workforce and the time, training, and other resources invested in their workers, may enter into employment agreements with their workers for a fixed amount of time to prevent them from leaving shortly after the employer has invested in them.

Repayment of Training Expenses

Employers may require that workers repay certain training expenses when they leave so long as such payment is reasonably related to the expenses the employer incurred and not a penalty.

Garden Leave Requirements/Severance Pay

Employers may institute a mandatory notice period during which the worker would still remain employed and be paid accordingly. During this period, the worker would likely be prevented from immediately joining a competitor.

Better Working Conditions

Employers may also increase the retention of their workers by improving their conditions of employment, such as an increase in salary or other forms of compensation, offering better hours, remote work options, or other working conditions and benefits.

We will continue to monitor the status of this Final Rule and will keep you apprised of any subsequent developments.

Should you have any questions, please contact an HNRK attorney. HNRK attorneys stand ready and available to review alternative options to noncompete agreements and discuss the benefits and considerations of each with any employer.



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Damian represents clients in all capacities, with expertise in business and employment litigation. He advises both employers and employees on employment agreements, employment separation agreements, internal employment issues, and non-competition restrictions and covenants.



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¹ The Final Rule, if enacted as written, deems all existing noncompete agreements unenforceable for all workers except senior executives, and prohibits employers from entering into new noncompete agreements after the effective date for all workers including senior executives. Senior executives are defined as workers who are in a "policy-making position" and earn a total annual compensation of at least \$151,164 per year.

² <https://www.federalregister.gov/documents/2024/05/07/2024-09171/non-compete-clause-rule>

³ Ryan, LLC v. Fed. Trade Comm'n, No. 3:24-cv-986 (N.D. Tex. April 23, 2024); Chamber of Com. of United States, et al. v. Fed. Trade Comm'n, et al., No. 6:24-cv-00148 (E.D. Tex. April 24, 2024); ATS Tree Servs., LLC v. Fed. Trade Comm'n, et al., No. 2:24-cv-1743 (E.D. Pa. April 25, 2024).

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