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TRADE SECRETS

NEW RULE TO FOLLOW

FTC bans noncompete agreements

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With over 100 million noncompete agreements active in the United States, it is clear companies have heavily relied on them to protect trade secrets.

But on April 23, noncompetes were eliminated (at least temporarily) when the Federal Trade Commission adopted "a comprehensive ban on new noncompetes with all workers." The ban prohibits enforcement of *any* noncompete agreements going forward (starting approximately August 2024). It also retroactively applies to all noncompete agreements signed by "workers other than senior executives" (i.e., "senior executives" who signed noncompetes before the rule is enacted can still be bound by their terms).

The ban also prohibits any employment agreement that "penalizes" or "functions to prevent" employee mobility. The guidepost for whether employment clauses function as "noncompetes" under the ban is whether they "restrain such a large scope of activity that they function to prevent a worker from seeking or accepting other work."

Considering the ban, it is critical for companies to focus on other methods to protect trade secret information. The time is now to sharpen those tools.

CONFIDENTIALITY/NONDISCLOSURE AGREEMENTS (NDAS):

Companies should focus on NDAs but be cognizant of the blurry line between permissible NDA language and impermissible noncompete terms. Overly broad NDAs "raise the same policy concerns about restraining competition as noncompete clauses" when "they have the effect of preventing the defendant from competing with the plaintiff." *TLS Mgmt. & Mktg. Servs., LLC v. Rodriguez-Toledo*, 966 F.3d 46, 57 (1st Cir. 2020).

NDA language that prohibits the post-employment use of specifically identified confidential information would normally be enforceable. However, if the agreement precludes disclosure of information that (1) arises from the employees' general training, knowledge, skill or expertise or (2) is readily ascertainable, it is impermissible under the new rule. Accordingly, an impermissible noncompete (in NDA form) would, for example, bar a worker from disclosing information that is "usable in" or "relates to" the industry in which they work and, as such, would likely be viewed as preventing an employee from seeking work.

Thus, while the ban explicitly reaffirms that NDAs "provide employers with well-established, viable means of protecting valuable investments," it will unquestionably curtail the reach of NDAs. There exists plenty of grey area between permissible and impermissible NDAs, and the assortment of state jurisprudence regarding NDAs will only intensify some of this ambiguity. *Bodemer v. Swanel Beverage, Inc.*, 884 F. Supp. 2d 717, 733–34 (N.D. Ind. 2012). Accordingly, employers should be specific in identifying the trade secret information to be protected in the agreement itself.

BOLSTER TRADE SECRET PROTECTION PROGRAMS

The FTC explicitly notes trade secret protections are still available to companies. However, it is notable that courts have frequently asked if employers utilized noncompetes in determining whether "reasonable efforts" were taken to maintain the information's secrecy (a necessary element to any trade secret claim). *Prairie Field Servs., LLC v. Welsh,* 497 F. Supp. 3d 381, 397 (D. Minn. 2020). Thus, if the ban survives judicial scrutiny, it is imperative companies ensure they do more to protect their trade secrets.

Some of the moves companies can currently take to bolster their trade secret protections include robust employee restrictions and training, security policies, policies for returning information upon termination and controlling access to the physical environment where secrets are kept. These measures serve to prevent an unauthorized disclosure, but also are evidence of "reasonable efforts" to protect trade secrets.

Finally, other legal methods for protecting information may still be applicable (and, presently, aren't overly affected by the new rule). These protections include patent law, non-solicitation agreements (subject to Rule § 910.1(1)) and assignment of invention rights.

Given the FTC ban on noncompetes, companies should immediately implement a robust trade secret protection program. Failure to act will leave their most competitive sensitive information vulnerable, as employees feel emboldened by the ban to leave for competitors. CL

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