

Time to Build Your Team?

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Optimism in the face of uncertainty is one of the key distinguishing traits that separates those willing to risk it all and found a new venture from the rest of the pack. Uncertainty looms in the macro economy, and yet, now could be an excellent opportunity for optimistic founders to acquire top talent, especially in tech, which has been shedding workers. Indeed, recent data suggests that emerging businesses already benefit from the forced talent migration from Big Tech.

Perhaps, the Federal Trade Commission's (FTC) proposed rule on noncompetes also could help further spur a talent migration from established companies to incumbents. The FTC's proposed rule barring employers from entering noncompete agreements with their workers, if finalized, could make it easier for founders to convince their former colleagues to join their startup because their fear of reprisal from their former employers for violating a noncompete agreement will be greatly reduced, if not eliminated.

Still, attracting top talent is never easy. Despite recent layoffs in tech and other industries, the U.S. labor market remains very strong by historical measures. Successful employers will need to bring the right combination of salary, benefits, work-life balance, and opportunity for growth, as appropriate for their respective industry.

Once hired how do you keep your talent, especially considering the FTC's proposed ban on noncompetes? If the FTC's proposed rule becomes effective in its current format, it would invalidate existing noncompete agreements, as well as those put in place following the effective date of the new rule. As a result, employers would be well served to focus now on employee retention benefits rather than relying on contractual restriction on competitive activity following termination. As for worker retention, emerging companies may want to explore both financial retention mechanisms, such as equity incentives with vesting schedules, and "softer" mechanisms, such as loftier titles for certain employees, higher base compensation, and continued investment in their corporate culture and employee perks.

Employers should also expand their usage of nondisclosure and nonsolicitation agreements as a means to reduce employee competition, while simultaneously confirming that such agreements and noncompete agreements could not be treated as de facto noncompetes. As for protecting confidential information and trade secrets, our colleagues provide guidance on that issue in the alert below, including suggesting that companies audit their noncompete agreements and practices.

If you are interested in learning more about the FTC's proposed rule, please consider reading our colleagues' [article](#). As our colleagues note, the FTC's proposed rule is not a sure thing and will likely face legal challenges. If enacted, the rule will affect how emerging companies hire and retain workers, and how startup founders staff their fledgling companies.

While we wait for the rulemaking process to play out, emerging companies may want to start minimizing their reliance on noncompete agreements, so if the FTC's rule becomes law, losing the use of these agreements will not pose a significant challenge to their operations or growth or to their returns on investment, respectively.

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