

A Significant Shift

Preparing for the FTC's prohibition of noncompetes

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Noncompete agreements have been a staple in the business world, providing a measure of security for companies looking to protect their proprietary information and competitive edge. However, the Federal Trade Commission (FTC) is moving toward prohibiting these agreements, claiming it will enhance employee mobility and promote fair competition. For office technology dealerships, understanding and preparing for this significant regulatory shift is essential. This article outlines the steps companies should take to navigate and adapt to this impending change.



a desire to protect company secrets, customer data and the investment made in employees. No one wants to hire an employee, invest in his (or her) training, and share company and customer data only to have the employee leave and use this data to compete. Protecting your investment and company data going forward will require planning and adjustment. The remainder of this article outlines recommended strategies for achieving these important goals.

Understanding the FTC's Prohibition

The FTC's ban on most noncompete agreements is set to take effect this fall. It is being challenged by the U.S. Chamber of Commerce and the National Federation of Independent Business, among others. Unless these challenges succeed, the new rules will go into effect on Sept. 4, 2024. The ruling calls for a ban on enforcing noncompete agreements with employees and does not allow for new noncompete agreements to be put in place. There is an exemption for senior executives, defined as those earning more than \$151,164 and being in policy-making roles. For these employees, noncompete agreements may still be enforceable. However, no new noncompete agreements may be put into place for these exempt employees after the ruling takes effect. There are also exemptions for noncompete agreements with the owners of a business when it is sold.

In short, the rule prohibits putting new noncompete agreements in place, enforcing existing noncompete agreements and prohibits companies from representing that a worker is subject to a noncompete agreement. It further states that employers must notify employees who were subject to noncompete agreements they will not be enforced after Sept. 4. The rule states this notice may be delivered to employees by hand, by mail, emailed to the employee's work or personal email address, or via text message.

The driving force behind most noncompete agreements is

Steps to Prepare for the Prohibition

(1) Review Existing Agreements — The first step is to audit current employee agreements. You will want to identify all agreements you currently have in place that contain noncompete clauses. Determine if any are with exempt employees. When reviewing the agreements, pay close attention to the distinct roles employees play, what information they have access to and what you have invested in their training and development. Understanding these will give insight into what is needed to provide protection going forward.

(2) Seek Legal Guidance — Given the complexity of the legal landscape, it is critical to consult with legal experts who specialize in employment law. They can provide updates on the regulations and how they apply to your specific situation, can help assess risks, and advise on strategy and direction. Any time you are dealing with employment law, it is important to have good advice from someone who knows the law and, in particular, the laws governed by the state and local jurisdiction in which your business is located.

(3) Revise Existing Employment Contracts and Policies — With legal advice in hand, the next step is to revise employment contracts and internal policies to comply with the FTC's new rules. This includes:

- Removing noncompete clauses: Eliminate any noncompete provisions from existing and future contracts. Often, this will require the creation of new agreements that should be fully executed by the employees and company.
- Creating nondisclosure agreements (NDAs): Creating or

strengthening NDAs will protect sensitive information and trade secrets without restricting employee mobility. NDAs should clearly cover all business and trade secrets, employee information, customer information, sales strategies, pricing strategies, etc. While you will not be able to prevent an employee from taking a job with a competitor, you can legally limit what information he can disclose after leaving your employment.

■ **Implementing nonsolicitation agreements:** Your customers and employees are your most valuable assets. One way to protect these assets is with nonsolicitation agreements. These ensure that employees cannot solicit customers or co-workers for a certain period after leaving the company. You will want to be sure the scope of the agreements meets legal standards for your area.

(4) Enhance Internal Protections — In the absence of noncompete agreements, you should bolster internal protections to safeguard your business interests. This starts as listed above, with reviewing and strengthening your confidentiality policies and agreements. You will want to clearly define what information is protected and not to be disclosed to others.

Next, I recommend reviewing and, if needed, improving data security. Does your system allow you to restrict access to only data employees need to fulfill their roles? Can your system be locked down so employees cannot export sensitive data? Are you able to lock employees out of the system when they leave? Identifying what data should be confidential and enhancing the protection of this data is one of the best ways to prevent it from being shared with or used by a competitor.

(5) Develop a Strong Company Culture — A positive and supportive company culture will reduce the risk of employees leaving for competitors. Employees who are happy with the company and how they are treated are less likely to look for employment elsewhere. They are also more likely to be loyal and protective of the company. While compensation is a big part of this, an environment of mutual respect tends to foster loyalty in employees. Investing in training and development, building strong employee relationships, providing strong compensation and benefits, supporting causes your employees feel strongly about and generally being a caring employer all lead to employee satisfaction and keep employees with you. These programs have always been pillars for strong companies. Now they are even more important than ever.

(6) Train Managers and HR Personnel — Effective implementation of new policies requires thorough training of those responsible for enforcing them. Be sure your management team members know the new rules and fully understand them. Anyone dealing in human resources needs to be trained

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on how to draft agreements properly and within the law. Properly drafted agreements will allow for future enforcement. Improper agreements may be unenforceable, leaving you vulnerable to challenges and with an unprotected business.

(7) Communicate Changes Clearly to Employees — Communication with employees about the changes can help build trust and is a requirement of the new FTC rules. Per the ruling, employees

must be informed that the noncompete agreement they signed cannot and will not be enforced after Sept. 4. As listed above, I suggest combining the communication of the FTC rule with implementing new NDAs, confidentiality agreements and nonsolicitation agreements. The required notice gives you an opportunity to educate your employees on the changes and outline what their obligations are going forward. In this meeting, you can explain the rationale behind the change and remind employees of the things you are doing to enhance their employment and lives. Maintaining open and honest communication with your employees leads to trust and loyalty.

Conclusion

The prohibition of noncompete agreements represents a significant shift in employment law, with profound implications for most businesses. By understanding these changes and taking proactive steps to adapt, companies can ensure compliance while continuing to protect their business interests.

Conducting a comprehensive audit, seeking legal guidance, revising contracts and policies, enhancing internal protections and fostering a strong company culture are all critical steps in this process. Additionally, staying informed about regulatory developments, training key personnel and communicating changes clearly to employees will help navigate this transition smoothly.

Embracing these changes not only helps with compliance, but also positions companies as forward-thinking and employee-friendly organizations. This, in turn, leads to employee loyalty and lower turnover. Building a strong plan will not only help you protect the employees you have, but it may be a catalyst to attracting new employees as well. ■

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