

Re-Evaluating Trade Secret Policies After FTC Adopts Rule Banning Non-Compete Agreements

A photograph of a modern building's curved glass facade, showing multiple stories and windows, set against a light blue sky.

2 MIN READ

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Today, the U.S. Federal Trade Commission (“FTC”) adopted a final rule (3-2) banning new non-compete agreements for both senior executives and non-senior executives. Companies may continue to enforce existing non-compete agreements entered into with “senior executives.” However, preexisting non-compete agreements for all other workers will become unenforceable (rescission not required) and companies will be obligated to provide adequate notice to all such workers. The final rule will go into effect in 120 days, and its legality will be challenged in court on multiple grounds.

The final rule aims to reduce the suppression of new business formation and innovation by supporting senior executives’ roles in “establishing new firms, serving on new firms’ executive teams, and setting strategic direction of firms with respect to innovation.” FTC also asserts that the final rule concerning non-senior executives “would lead to over 8,500 new businesses/year and average increase of 17,000-29,000 patents/year over the next decade.”

How much of this forecasted business development and innovation will be “new” as opposed to potentially “borrowed” from a former employer’s trade secret information? A non-compete agreement has long been a staple of trade secret protection policies for many companies for many years. After all, a trade secret owner must demonstrate that it has taken “reasonable measures” to maintain the secrecy of its trade secret information. However, the FTC points to less restrictive means for protecting trade secrets, including confidentiality agreements and

existing IP laws, and safeguarding human capital, including fixed-duration contracts and pay and benefits. The FTC also points out that non-compete agreements have been unenforceable in the States of California and North Dakota with limited effect on business formation, innovation, and employee retention.

Regardless of your viewpoint on the FTC's final rule, if you own protectable trade secrets you will need to review your trade secret policies and programs to ensure that the measures implemented to maintain their secrecy are reasonable in the absence of or limited applicability of non-compete agreements. In addition, trade secret owners will want to revisit and appropriately modify new or existing confidentiality and non-disclosure agreements to adequately safeguard protected information. Finally, trade secret owners might consider updating trade secret audits, including the scope of employee access, for the purpose of identifying critical information and narrowing potential disclosures.



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