FTC Votes to Ban Noncompete Agreements

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The Federal Trade Commission (FTC) voted 3-2 Tuesday to ban noncompete agreements that many employers require employees and contractors to sign, prohibiting them from working for a competitor or starting a competing business once they have left their job. It is estimated that 18% of the US workforce is covered by a noncompete agreement, amounting to about 30 million workers.

The ban prohibits companies from requiring new hires, including senior executives, to sign a noncompete agreement as a condition of employment, and requires companies to inform current and former employees that the company will not enforce any such agreements already in effect. An exception is made for current senior executives, defined as workers in a "policy-making position" who earn more than $151,164 per year.

The FTC argues that noncompete agreements "block workers from freely switching jobs, depriving them of higher wages and better working conditions, and depriving businesses of a talent pool that they need to build and expand." The Commission believes that banning noncompete agreements will promote "greater dynamism, innovation, and healthy competition" and ultimately lead to lower costs for consumers.

Several states, including California and Minnesota already have noncompete agreement bans in place. Noncompete agreements in New Jersey are under attack but currently are enforceable so long as they are reasonable in scope, duration, and geography and protect a legitimate interest of the employer without causing undue hardship on the employee. It is possible that the confusion resulting from having different laws in various states, may, in part, have led to the movement simply to ban noncompete agreements altogether.

Employer advocates believe that noncompete agreements are an essential tool businesses need to protect proprietary information and intellectual property. While some advocates of this ban may suggest that this argument is undercut by the FTC leaving in place an employer's ability to enforce nondisclosure and confidentiality agreements, recent decisions and pronouncements from the National Labor Relations Board severely curtailed employer's rights to enforce nondisclosure and confidentiality agreements. This leaves employers with limited tools at their disposal to protect their trade secrets and their investments in certain employees.

The ban becomes effective 120 days from publication in the Federal Register. Business groups such as the US Chamber of Commerce are expected to sue to block implementation of the ban, questioning the FTC's authority to issue a blanket ban, particularly one that applies retroactively.

One thing is for certain: If the ban is not blocked by court order and becomes law, businesses and their HR departments will be busy identifying and notifying current and past workers that their noncompete agreements will not be enforced and refreshing the confidentiality, inventions assignment, and non-disclosure agreements they currently use in order to comply with the law.

For HR teams and employers generally, the ban would be a bit of a double-edged sword, making it more challenging to prevent key workers from leaving and joining a direct competitor but easier to freely hire talent without the threat of that hire being enjoined as a result of a noncompete clause within a broader confidentiality agreement.

We will keep a close eye on developments in this area. In the meantime, employers should take steps to identify any individuals who may need to receive notification under this new ban. Should you have any questions, please do not hesitate to reach out to us for advice and direction.