Trade Secret Quarterly

March 2025

Noncompetes Still Under Federal Scrutiny: FTC Launches Joint Labor Task Force

It appears that the FTC's now infamous rule seeking to ban noncompetes may see its death knell soon, but that does not mean noncompetes will escape further scrutiny at the federal level.

On April 23, 2024, the FTC adopted a final rule that would have banned nearly all noncompete agreements in the employment context, which was scheduled to go into effect on September 4, 2024, but faced immediate legal challenges. In August 2024, the U.S. District Court for the Northern District of Texas invalidated the rule nationwide, finding that it exceeded the FTC's authority and was arbitrary and capricious. The U.S. District Court for the Middle District of Florida also blocked the rule as to the parties in the case. The FTC appealed both rulings to the Fifth and Eleventh Circuits, respectively.

Following President Trump's election to his second term, questions have swirled as to whether the federal government would continue to pursue the appeals and defend the rule. Notably, on President Trump's first day in office, he designated FTC Commissioner Andrew Ferguson as the agency's new Chair. As a Commissioner, Ferguson had voted against the rule, arguing that the FTC lacked authority for broad rulemaking and that such a ban would negatively impact businesses. He has stated that he believes the FTC should reconsider its defense of the rule, commenting that it took a "blunderbuss approach to a problem that probably requires a scalpel." Consistent with Ferguson's statements, on March 7, the FTC filed motions for a 120-day stay of its challenges in both the Fifth and Eleventh Circuits. Ferguson has stated that a decision about whether to fully abandon those appeals will be announced soon.

Nevertheless, the FTC has signaled that it does not intend to abandon its scrutiny of noncompetes. The Trump administration has directed a number of federal agencies, including the FTC, to protect American workers – an arguable divergence from prior Republican administrations' pro-employer platforms. In response, Ferguson recently announced the formation of a Joint Labor Task Force responsible for investigating and prosecuting deceptive, unfair, and anticompetitive labor market conduct including:

- "Noncompete agreements, which employers can use to impose unnecessary, onerous, and often lengthy restrictions on former employees' ability to take new jobs in the same industry after they leave their employment"
- "No-poach, non-solicitation, or no-hire agreements, where employers agree to refrain from hiring each other's employees"

In a social media post, Ferguson emphasized that the Joint Labor Task Force "will scrutinize noncompete agreements, deceptive job advertisements, wage-fixing schemes, unlawful coordination on DEI employment metrics, and much more." These statements appear to reflect an about-face to then-Commissioner Ferguson's dissenting statements against the FTC's final rule banning noncompete agreements in which he claimed that noncompete agreements can "promote an employer's investment in its employees by mitigating the risk that a rival will ride freely on those investments by luring the employee away before the investing employer can recoup the return on those investments."

In another development, President Trump nominated Mark Meador to fill the third Republican seat as an FTC Commissioner. During his nomination hearing, Meador stated that the FTC should use its "traditional enforcement powers" to address the harms of noncompetes.

These actions and comments indicate that the FTC intends to continue scrutinizing restrictive covenants, albeit through targeted enforcement rather than the broad rulemaking approach of the Biden administration. However, it is not yet clear what level of scrutiny or priority the FTC will apply to noncompetes.

Ohio Senators Introduce Bipartisan Bill Aiming to Ban Noncompetes

In the aftermath of the court ruling halting the FTC's noncompete ban, individual states have shown renewed interest in their own noncompete restrictions. Ohio is one of the latest to join the fray.

Ohio Senators Louis Blessing (R-Colerain Township) and Bill DeMora (D-Columbus) recently introduced Senate Bill 11 (SB 11), a bipartisan effort aimed at prohibiting noncompetes. The proposed language specifically prohibits an employer from entering into an agreement with, presenting an agreement to, or enforcing an agreement with a worker that "prohibits the worker from, penalizes the worker for, or functions to prevent the worker from seeking or accepting work with a person, or operating a business, after the conclusion of the relationship between the employer and worker." SB 11 broadly defines "worker" to include an "employee, independent contractor, extern, intern, volunteer, apprentice, sole proprietor who provides service to a client or customer, and an individual who provides service through a business or nonprofit entity or association." SB 11 targets agreements that:

- Prohibit the worker from working for another employer for a specified period of time, working in a specified geographical area, or working in a similar capacity
- Impose penalties on the worker leaving the employment relationship (such as for lost profits, lost goodwill, liquidated damages, or reimbursement for training or orientation expenses, including immigration or visa-related costs)

The current language of SB 11 not only explicitly prohibits new agreements with such restrictions, but also makes clear that existing noncompete agreements or similar restrictive clauses would also be unenforceable after the effective date.

Other Key Provisions of SB 11

Restrictions on venue and choice of law. SB 11 prohibits an employer from requiring that any dispute arising out of an employment agreement be resolved outside of Ohio or under a legal framework that would deprive the worker of legal protections provided by the state of Ohio. However, if an employee is represented by legal counsel and negotiates venue, forum, or choice of law provisions outside of Ohio, the negotiated choice(s) will be allowed.

Enforcement and remedies. SB 11 would provide workers with a right of action to bring civil claims against employers for violations and seek damages, including costs, attorney's fees, actual damages, punitive damages up to $5,000, and injunctive relief. Workers could also lodge complaints with the Attorney General or Director of Commerce, who are empowered to investigate and bring actions on behalf of workers.

If SB 11 is enacted, Ohio would join a select group of states – such as California, Minnesota, North Dakota, and Oklahoma – that have implemented similar bans. Ohio is currently one of the only remaining states without legislation restricting the use of noncompetes. Instead, Ohio courts use a set of factors to consider whether a restrictive covenant is reasonable and based upon a protectable business interest, which were derived from the 1975 Ohio Supreme Court case *Raimonde v. VanVlerah*.

Steps for Employers

It is too early to predict whether SB 11 will gain momentum, but the nationwide trend has been toward limiting restrictive covenants at the state level. As SB 11 travels through the legislative process, employers may still enter into and enforce noncompete agreements, but they should begin reviewing existing agreements and consider how they would fare if SB 11 becomes law. Employers should also consider SB 11 as another reminder to practice good hygiene with respect to protecting their confidential, proprietary, and trade secret information. They should consult with counsel to review existing practices, policies, and agreements to ensure that their most valuable assets are protected, regardless of whether SB 11 becomes law.

We will continue to monitor and provide updates on the status of SB 11.

NDAs Are Key to Demonstrating Reasonable Safeguards

In order to prevail in a trade secret case under the Defend Trade Secrets Act or various state statutes, a plaintiff must prove not only the existence of a trade secret, but also that the plaintiff used reasonable safeguards and measures to preserve the secrecy of the information. Unfortunately, there is no statutory definition or bright line rule regarding what constitutes "reasonable measures." The assessment is necessarily a fact-intensive process. Some recent cases have shed light on the critical nature of confidentiality or nondisclosure agreements (NDAs) in satisfying this burden.

In 2024, courts reiterated that the existence of NDAs is a critical consideration in determining if plaintiffs utilize reasonable safeguards in protecting their trade secrets. Indeed, a Massachusetts court declared that the failure to utilize NDAs "often dooms trade secret claims." A Tennessee court likewise recognized that the failure to use an NDA weighed against a finding that the information at issue was entitled to trade secret protection. In that case, the plaintiff disclosed its alleged trade secrets to independent contractors without having them sign NDAs or even notifying them of the confidential nature of the information.

However, the mere existence of an NDA is not enough; it must also be properly drafted. An NDA may actually undermine a trade secret claim if it does not cover the information at issue or if the plaintiff has not complied with its own obligations set forth in the NDA. Misappropriation occurs when a trade secret is acquired under circumstances that give rise to a duty to maintain its secrecy. As the U.S. Court of Appeals for the Federal Circuit has explained, when there is an NDA, "the 'circumstances' giving rise to a duty to maintain the secrecy of the disclosed information is dictated by the terms of the NDA." *Convolve, Inc. v. Compaq Computer Corp.*, 527 F. App'x 910, 925 (Fed. Cir. 2013). For example, a trade secret claim could be derailed if the NDA requires covered documents to be marked as confidential and the plaintiff fails to mark the document(s) at issue. Likewise, if the NDA only protects certain documents or information for a specified time period, the expiration of that time limit may jeopardize trade secret claims that arise later.

The takeaway here for companies is to consult with counsel in preparing – and using – well-crafted NDAs in order to preserve potential trade secret claims that may arise as a result of sharing their critical information.

FOR MORE INFORMATION

For more information, please contact:

Deborah S. Brenneman
513.352.6638
Deborah.Brenneman@ThompsonHine.com

Brittany A. Mallow
216.566.5654
Brittany.Mallow@ThompsonHine.com