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A Workplace Law Update

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Federal Trade Commission Proposes Broad Ban on Non-Compete Agreements

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The Federal Trade Commission (FTC) has issued a Proposed Rule which, if implemented, would prohibit employers from entering into or attempting to enter into, "a non-compete clause with a worker; maintain with a worker a non-compete clause; or represent to a worker that the worker is subject to a non-compete clause where the employer has no good faith basis to believe that the worker is subject to an enforceable non-compete clause."

Employers would also be required to rescind any existing non-compete agreements by providing individual notice to anyone currently subject to a non-compete, including former employees.

Since our initial client alert on the Proposed Rule, the deadline for comments closed on April 19, 2023. Once FTC leaders review the nearly 27,000 comments received, the agency will consider possible alterations to the Proposed Rule. Due to the number of comments and the potential widespan impact, the FTC is not expected to vote on its final version of the Proposed Rule until April 2024.

If the Proposed Rule is implemented, it will almost certainly be challenged in court, which will delay enactment of the final rule. However, at this stage, it is critical for employers to begin considering the implications of this rule, particularly employers with protectable trade secrets as we are seeing a clear trend toward reducing the enforceability of non-compete clauses. Several states including California, North Dakota, and Oklahoma adopted statues that void non-compete clauses in their entirety while others are moving to pass greater restrictions on non-compete clauses.

From an intellectual property perspective, restrictions or bans of non-compete clauses would greatly weaken an employer's ability to protect their trade secrets. If the Proposed Rule passes, employers may be left with the burdensome task of altering existing agreements to comply with the Proposed Rule while still leaving them broad enough to show the employer is protecting its valuable, non-public information.

Employers should consider strategies beyond non-compete clauses to appropriately protect trade secrets and confidential information. For example, ensuring that current policies and procedures aimed at protecting intellectual property are in place, up-to-date, and actually adhere to practice (*i.e.*, firewalls, access restrictions, etc.), and reviewing which employees have access to protectable trade secrets to ensure a limited scope of access on a need-to-know basis. Also, non-disclosure agreements (NDAs) or other confidentiality agreements with employees should adequately account for trade secrets, such as with respect to ongoing confidentiality requirements and obligations to return confidential materials.

Bodman's Workplace Law Practice Group is available to assist employers with a full range of employment-related legal services including employment law counseling and litigation and traditional labor law matters including collective bargaining and labor relations.

Bodman's Intellectual Property Practice Group is available to assist employers with their national and international protections, licensing, and litigation of trademark, copyright, trade secret, right of publicity, and patent matters.

Bodman may not be able to respond to your questions or receive information from you without first clearing potential conflicts with other clients. Thank you for your patience and understanding.

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