



May 10, 2024

Pivot, Don't Panic: How Employers Should Respond to the FTC's Ban on Non-Compete Agreements

By: [Dylan W. Wiseman](#) and [Sarah Andrzejczak](#)

On April 23, 2024, the Federal Trade Commission approved and issued its final rule effectively banning employers' use of non-compete agreements (subject to very few exceptions). The rule becomes effective 120 days after publication in the *Federal Register*, heralding yet another stride towards enhanced employee mobility.

Despite the unfavorable reception from many employers, it's important to understand that all is not lost. Notably, since the Gold Rush era, California employers have successfully operated without non-compete agreements. So what's the secret? How did California become the fifth largest economy in the world? Leaning into confidentiality, intellectual property, and trade secret provisions in employment agreements is one of the best ways to pivot to safeguard their businesses. The FTC's new rule will force U.S. employers to adopt practices that California companies have used for generations.

Some or all of the FTC's final rule will survive the legal challenges made by the U.S. Chamber of Commerce and other entities. The FTC's ruling is one of the cornerstone initiatives of the Biden administration, and will ultimately help grow the U.S. economy. Employers should start to pivot their practices away from using non-compete clauses as a method to protect their competitive advantage.

The focus of this article is to provide practical guidance that can help employers make that necessary pivot toward protecting its trade secrets.

- 1. Draft separate, stand-alone agreements to address confidentiality, intellectual property, and trade secret provisions.** Provisions addressing confidentiality, intellectual property, and trade secrets are now more important than ever. While inclusion in an employment handbook is acceptable to show that the employer undertook efforts to protect the trade secrets, the best way to draw attention to key policies is to create a separate, stand-alone agreement for employees to review and sign. Courts are often reluctant to enforce handbook provisions as contracts.
- 2. Include an attorneys' fee provision.** It is very likely that the employer, not the employee, will seek to enforce a confidentiality, intellectual property, and/or trade secret provision of an employment agreement. As such, employers should strongly consider including a prevailing party provision to recover attorneys' fees and costs incurred to enforce such an agreement. Such provisions give the employers significant leverage if litigation proves to be necessary.
- 3. Craft a measured "confidential information" definition.** In every workplace, certain files or records, if taken or disclosed, would significantly harm the company's financial standing. Identifying information that would injure the company if it fell into a competitor's hands is critical. Be as specific as possible



and avoid generic terms and catch-all phrases. Also, as companies evolve, what they seek to protect changes. It makes sense to update agreements every 3 to 5 years. Typically, courts are more inclined to enforce confidentiality agreements when the categories of “confidential information” are specific, clear, and reasonably limited.

- 4. Technical measures to protect trade secrets.** It is imperative that employers take “reasonable measures” under the circumstances to protect confidential information. Technical security measures include password protected devices, the ability to remotely access or wipe devices, firewalls, passwords and configuring the network so that information is accessed on a need-to-know basis. When judges review an employer’s motion for an injunction, they typically review both the strength of the company’s confidentiality agreement and also what electronic or technical measures were in place when the information was allegedly taken.
- 5. Know your (shop) rights.** “Shop rights” refer to the legal rights of an employer to use or benefit from intellectual property created by employees during the scope of their employment duties or using the employer’s resources. Given that shop rights vary by state, it’s imperative for employers to familiarize themselves with the specific regulations before incorporating references to them in employment agreements. Including an accurate depiction of the shop rights law in your state could mitigate the risk of costly litigation based on employee misconceptions about ownership rights.
- 6. Improve the exit process.** When employers learn an employee is leaving, that employee’s work computer should be reviewed by a qualified computer forensic examiner, particularly if the employee’s departure could impact the company’s revenue or harm its competitive advantage. Often a company’s internal IT department will conduct some form of informal assessment, which can irreparably damage or alter the evidence. Further, during the exit interview process, the company should make clear its objectives and provide the employee with their signed confidentiality agreement. Often times, employees do not appreciate the fact they have no ownership in the company’s information, and many disputes can be avoided through a thorough exit interview.
- 7. Hiring the right lawyer if a dispute arises.** Trade secret litigation is highly specialized, and very fast-moving. It often involves extensive computer forensics, litigating under a protective order, and can be very hard-fought. A typical commercial or business litigator may have 2 or 3 cases over the course of their entire career. Hiring a specialist is necessary because trade secret litigation often involves computer forensics, complex damages modeling and litigating under a protective order. You would not see a primary care doctor for a problem suitable for a cardiologist to handle. Retaining the right lawyer should also be part of a company’s overall effort to pivot away from relying upon non-compete terms.

At the end of the day, a version of the FTC’s ruling will survive legal challenges. By deploying these California-proven methods, employers should pivot toward protecting their intellectual property, and not restricting employee mobility.

If you have any questions about this new rule, please feel free to contact the attorneys listed below:



[Dylan W. Wiseman](#)

Shareholder
(916) 945-5185
dwiseman@buchalter.com



[Sarah Andrzejczak](#)

Attorney
(303) 253-6745
sandrzejczak@buchalter.com