



Ban on FTC's Non-Compete Ban: What It Means For New York Employers

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Earlier this month, the Federal Trade Commission (FTC) appealed the Northern District of Texas federal court's August 20, 2024 ruling that set aside the FTC's ban on non-compete agreements. Despite the FTC's appeal, its proposed rule still cannot be enforced against any employer at this time. So, at least for now, what does this mean for employers in New York?

In New York, non-compete agreements must meet certain criteria and be properly drafted. A non-compete is only permitted to the extent it (1) is necessary to protect the employer's legitimate interests, (2) does not impose an undue hardship on the employee, (3) does not harm the public, and (4) is reasonable in time period and geographic scope. An employer's legitimate interest may include protecting an employer's trade secrets and confidential information and preventing employees from taking specialized skills they gained on the job to a competitor. Any restrictions imposed by the non-compete must be no greater than necessary to protect these legitimate business interests.

To determine enforceability of a non-compete agreement, courts consider an employee's job duties, the employer's business interest, and the language of the agreement, and will not enforce a non-compete unless it meets the criteria above. However, a court may, in its discretion, require an employee to comply with some parts of a non-compete agreement, even if other portions of the agreement are unreasonable. For example, upon finding a non-compete unreasonable in length of time or geographic scope, a court may enforce the agreement for a shorter time period or within a smaller geographic area.

Generally, the use of non-compete agreements is an acceptable practice for upper-level employees with access to trade secrets or confidential information. However, the New York Attorney General's office is not too keen on their use against rank-and-file employees without such access. This is because non-compete clauses risk negatively impacting workers' livelihood by hindering their ability to pursue better employment opportunities. Employees might also feel pressured into signing non-competes without fully understanding their implications or being compensated adequately for their restrictions.

But what about low-level employees *with* access to confidential information? These employees may pose a threat to legitimate business interests, but a non-compete may impose an undue hardship on them. A confidentiality/non-disclosure agreement is a common tool that can help keep confidential information safe from use and disclosure without being an unreasonable barrier to other job opportunities. It's also easier for these agreements to pass judicial scrutiny.

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