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FTC Bans Noncompetes

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The Federal Trade Commission (FTC) has issued a new rule broadly banning noncompete agreements, marking a sea change in their regulation, which previously has been primarily governed by state law. Once effective, existing noncompete agreements will generally become unenforceable, except for certain highly compensated senior executives. Future noncompete agreements will not be allowed. (See § 910.2). An exception to the rule may apply if the restricted party is selling a business entity, its ownership interests, or operating assets as part of a bona-fide sale. (See § 910.3 (a)). The rule is expected to take effect 120 days after its publication in the Federal Register.

Legal challenges to the FTC's rule are anticipated. The rule's survival through potential judicial and political developments, which could call into question the FTC's authority, the rule's scope, and its enforcement, is uncertain.

Some proactive steps employers can take to prepare for complying with the new rule if it withstands anticipated legal challenges include:

- Revisiting strategies for safeguarding confidential and trade-secret related information;
- Consider alternative strategies and tools to protect proprietary and sensitive information, such as trade secret laws and confidentiality/non-disclosure agreements, as suggested by the FTC;
- Consider limiting access to sensitive/proprietary information;
- Prepare to issue notices to individuals with existing noncompete agreements no later than the effective date of the rule, including an explanation that those noncompete agreements “will not be, and cannot legally be, enforced against the worker.” (See § 910.2(b));
- Review/implement non-solicitation provisions.

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