Keeping Your Business Safe Outside of the FTC's Final Ruling on Non-Competes

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By now, most of us are aware of the recent Federal Trade Commission (FTC) Final Rule banning non-compete agreements. Although the underlying validity of the FTC Final Rule will be challenged, manufacturers and businesses across varying industries must consider and/or review other mechanisms to protect their business, financial and competitive interests.

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First and foremost, the FTC Final Rule only applies to "workers." Not covered by the rule are strategic non-compete agreements entered into between a business and a third party. Therefore, to the extent a business has a vendor, supplier or other strategic arrangement with a third party, outside of the employer-employee relationship, tailored non-compete agreements can and should still be utilized.

However, even within the workplace, businesses must review and/or implement accepted means of protecting trade secrets, confidential information, processes, pricing, procedures and related matters. After all, regardless of competition, businesses need to protect themselves from a former employee walking out the door and taking with them key components of the company's operations. Therefore, key components should be reviewed and addressed to protect the legitimate interests of a business in light of the Final Rule.

Work-for-Hire/Inventions/Work Product

Copyright law provides that an employer who "commissions" the work is deemed the owner, and, therefore, work product reduced to a writing is owned by the employer and not the employee(s) who participated in the project. Notwithstanding this protection, additional broader and specific language should be added to each employee handbook and/or policy manual to specifically provide that all work product is that of the business, and that employees are prohibited from retaining copies, disclosing or otherwise making any use of the work performed that is not for the benefit of the employer.

Confidential Information

In the same vein as the work product, employers should update and review the same employee handbooks and/or policy manuals to properly define and identify what constitutes "confidential information" of a company. This will vary from company to company, but a key consideration is to tailor exactly what each enterprise considers "confidential" rather than simply cutting and pasting a generic and all-encompassing definition. Care should be taken to include items that a company would consider taking legal action to protect and/or prevent disclosure of, such as customers, suppliers, purchase/sale terms, projects in development, means and methods of production, and pricing details.

Non-Solicitation Provisions

Ensuring employees are prohibited from soliciting both employees and customers is essential to protect the interests of a business. Such a prohibition should be limited in time and scope but nonetheless be specific enough to ensure clear applicability to an employee's actions post-employment.

The above are a mere sampling of the mechanisms and topics to address in an employee handbook, employee agreement and/or other company policy. Beyond reviewing these documents on a periodic basis to ensure the document is current and consistent with a company's practices and any changing regulatory requirements, this forms the "contract" upon which an employee agrees to perform services on behalf of the employer. As a result, now is the time to ensure appropriate safeguards are both disclosed and clearly delineated to ensure enforceability if needed to protect a company's interests in light of this ban on non-compete agreements.

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