

MARKET UPDATE

The FTC Non-Compete Ban



INDUSTRY
INSIGHTS

A guide for businesses on what
the ruling means for regulatory &
legal organizations

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USA Report



Introduction

The Federal Trade Commission's recent ruling banning non-competes could dramatically alter talent retention and competition, with significant implications for hiring managers and organizations like yourself.

According to the CFO¹, the FTC's new rule, originally set to come into effect on 4 September 2024, would prohibit companies from using non-compete agreements for most workers anymore, except for senior executives. Employers would have to tell their workers that these agreements aren't enforceable anymore, with the FTC providing example language to aid compliance of the ruling.

The United States District Court for the Northern District of Texas recently issued final judgment setting aside the ruling, meaning companies do not need to abide at present. However, the FTC is expected to appeal the decision².

While we wait for whether the ruling will ultimately be allowed to take effect, here we cover some of the challenges and opportunities the FTC ruling has thrown up that may affect 30 million Americans, as well as offering insights and advice on how this news may impact the workforce, and businesses, of tomorrow.

It's important for businesses to remember this ruling does not apply to all. It will not be universal across all industries, and certain sectors such as banks, specific nonprofits like healthcare providers, and stockyards will be exempt from compliance. This exemption may allow traditional banks on Wall Street to exert more control over departing employees compared to private equity firms or hedge funds. Another exception is for non-compete agreements already established with company CEOs, presidents, and senior business executives who hold "policy making" authority and earn more than \$151,164 annually. Companies are also protected in the event that they are sold.





Three Challenges Businesses Must Address

1 RETAINING TALENT

Compensation, including bonuses, plays a crucial role in the regulatory and legal industry in creating compelling packages that entice professionals to onboard, and stay.

With bonuses making up to approximately 25% of compensation packages in Big Law (Cravath Scale) and upwards of 100% in some sectors, such as Trust, Estate & Family Office (some heads of trust & fiduciary services receiving \$500-650k base and \$975k-\$1.4m with bonus), the importance of decent compensation cannot be overstated. If talent doesn't feel like their current salary or bonus keeps them motivated, a higher offer elsewhere could easily tempt them. Employers must prioritize retaining their talent by ensuring their employees feel valued and content in their current roles.

Jake Knowlton-Parry, Managing Director of Larson Maddox expects attempts at rival poaching to rise:

"It is something I would take very seriously as a hiring manager to secure your current team, and we may see a change in salaries, bonuses, and benefits as companies seek monetary incentives to keep staff."

Economic instability may have made employees hesitant to seek new opportunities previously, resulting in a tight talent market. However, while this ruling may increase mobility in the market, the best candidates, if they decide to leave, will not stay on the market for long regardless. This emphasizes the importance of showing appreciation for valuable employees and taking proactive steps to retain them.





Three Challenges Businesses Must Address

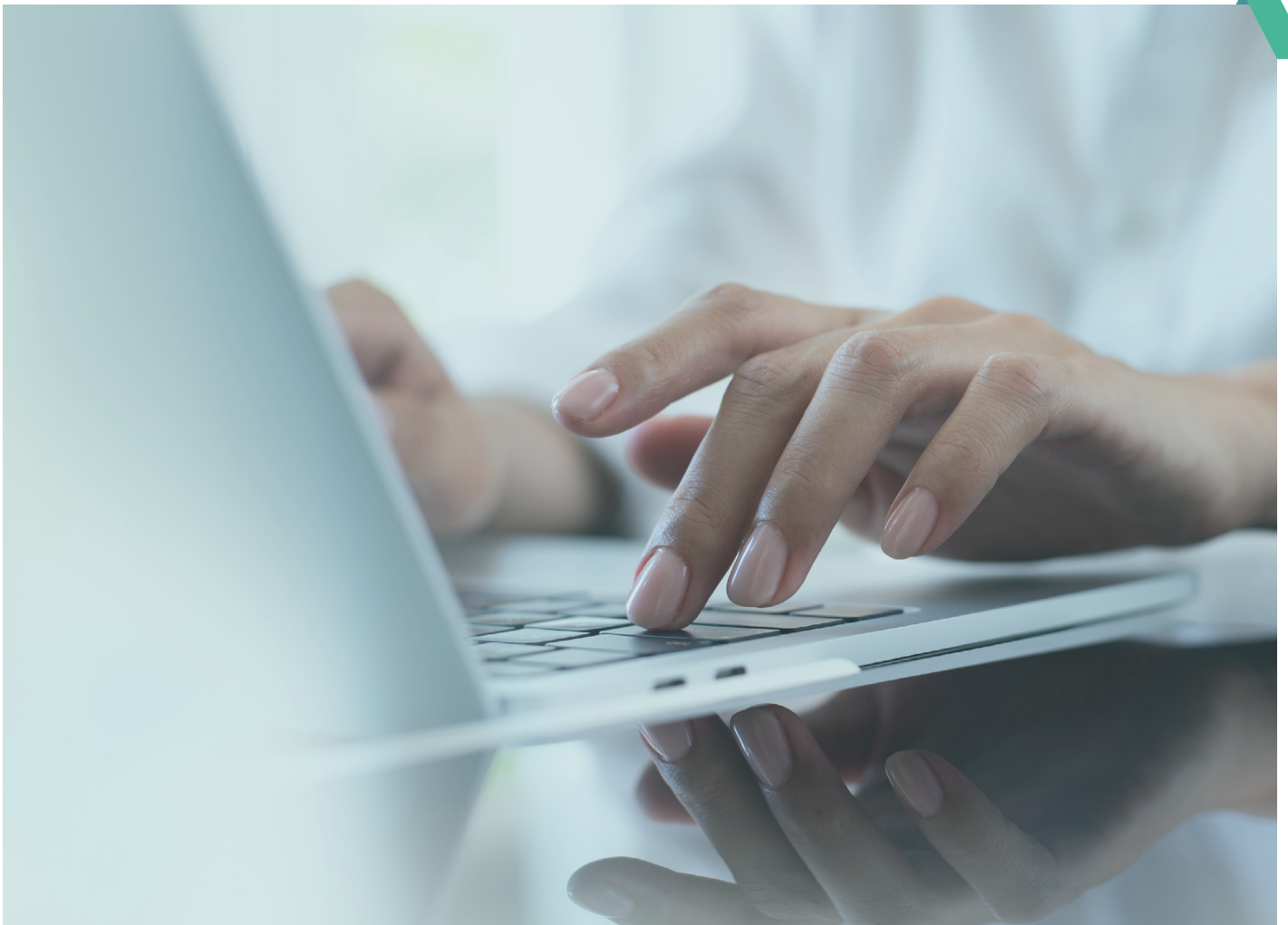
2 SAFEGUARDING INFORMATION

Historically non-competes have been utilized as a tool to safeguard valuable information, preventing talent from moving to competitors and taking ideas, contacts, customers and R&D with them. Such agreements can specify certain durations of time or geographies, tailored to suit an organization best. With the FTC ruling, companies may be concerned that such sensitive knowledge or client relationships are at risk.

Companies can use a non-disclosure agreement (NDA) and increase intellectual property (IP) clauses in employment contracts as a protective measure for confidential information to counter the lack of non-competes in the future. Additionally, various provisions can be incorporated into an employee's contract to further safeguard sensitive

information. Proving unauthorized disclosure of confidential information, especially concerning client relationships rather than specific research and development or projects, can be challenging and raises the questions of where litigation is even a viable option.

Therefore, firms must foster an environment where employees understand the sensitive nature of their roles and respects your organization's information, and nowhere will this be more prudent than for regulatory & legal professionals. Employers should conduct an audit of policies and procedures designed to protect confidential data and information and develop training, update employment agreements, and create onboarding and offboarding protocols to protect trade secrets.





Three Challenges Businesses Must Address

3 FURTHER REGULATIONS & COSTS

Companies must inform those under past non-competes that the ban is retroactive, and while presently the new law doesn't cover senior executives, that could easily change in the future.

From potential litigation and lawsuits to creating new clauses in employment contracts, the non-compete ban is going to increase regulatory and legal requirements. Organizations should monitor any legal challenges and potential litigation due to this ruling. They should also consider bolstering their own in-house general counsel or legal talent to advise on this ruling, plan for notices, update existing agreements, and in general assist in adapting to a post-non-compete landscape.

Jake explains in more depth:

“As we look ahead at how this new ruling could affect the hiring within the regulatory & legal market, I think it's clear our clients will have to re-think contracts and offers made to candidates, as well as some of their own operating systems when dealing with onboarding, replacing talent and creating new ways to protect themselves. Therefore, this new ruling could lead to new operating systems and a different model of internal working which could then create more litigation risk and critical regulatory or legal positions. So, we could not only see a rise in competitor movement but also in new roles being created.”

Adhering to further regulations may also cause businesses to worry about the financial burden associated with compliance costs. The implementation of new regulations often requires companies to invest resources in adjusting their operations, training staff, and updating systems to ensure compliance. These costs can be particularly burdensome for small and medium-sized enterprises (SMEs), which may have limited resources to allocate to regulatory compliance. In response, companies may even need to restructure to allocate budgets to hiring an in-house counsel. Additionally, the fear of fines and penalties for non-compliance adds to the financial strain on businesses, as well as the fact that you may have invested in a workforce that could easily leave.





Three Potential Benefits to Businesses

1 THE ABILITY TO ATTRACT MORE TALENT

While some professionals view non-competes as a way to prevent competitors from poaching them, this approach may not align with the modern workforce's preferences. It could be the case that employees who feel valued and appreciated by their employers are more likely to stay loyal to their current company, regardless of the presence of a non-compete agreement. By fostering a culture of appreciation and recognition, businesses can create an environment where employees are motivated to stay for reasons beyond legal constraints.

Removing non-compete agreements could also foster a more competitive job market. Employees will have the freedom to explore new opportunities and bring their skills and experiences to different companies. This increased mobility could lead to a more efficient allocation of talent across industries, as individuals are free to pursue roles that align with their career aspirations and interests.

Jake believes the move is positive and will improve the immediate performance of firms in the regulatory & legal space, as they will no longer have to tiptoe around complicated non-competes:

“Whilst it works to protect a current firm if a top performer leaves, it also does damage the firm that must wait for the person to join.

“Everyone will hope that employees will want to stay for reasons outside of feeling like they have to due to a non-compete, but it is naïve to think this won't impact hiring. Employees will have more freedom to make decisions, hopefully motivating employers to support and treat current employees better to ensure this ruling doesn't have a negative impact on companies.

“It is another hurdle in the market that firms must tackle and come up with an effective strategy to cope with. Smart companies will be proactive, and those that don't plan ahead are the ones at risk of losing staff. Good businesses that value employees will not see major issues, in other words.”





Three Potential Benefits to Businesses

2 INCREASE INNOVATIONS

Without non-compete agreements, employees will have the freedom to explore new opportunities and bring their skills and experiences to different companies. This increased mobility encourages knowledge-sharing and collaboration across organizations, which could lead to a cross-pollination of ideas and expertise. Driving innovation and industry growth will benefit businesses and the economy as a whole.

Non-compete agreements are banned in some states already, including California, and some proponents of a non-compete ban argue that Silicon Valley and California's status as the tech capital of the world wouldn't exist without the state allowing for more worker mobility. Is keeping people from innovating and from leaving companies to start their own good for the overall US economy is the question? California, Minnesota, North Dakota and Oklahoma have full bans on non-compete agreements, with exceptions of course, while a number of other states have restrictions on non-competes based on an employee's income level.

Additionally, the absence of non-compete agreements can attract entrepreneurial-minded individuals to your firm who are more inclined to take risks and drive innovation within their industries. By embracing a culture of openness and collaboration, companies can attract top talent who are eager to contribute to innovative projects and initiatives.





Three Potential Benefits to Businesses

3 HIRE FASTER

Many non-compete agreements come with a transition period for employees, prohibiting them from working for the competition or themselves during this time. While some businesses believe gardening leave benefits them by preventing employees from taking current and sometimes sensitive information or clients with them when they leave, especially when joining a competitor, it also limits businesses on being able to onboard talent they also need.

If you are a business looking to quickly bring on talent from rival firms, a non-compete ban could be incredibly beneficial. You will be able to identify suitable candidates faster and extend job offers swiftly, reducing the time it takes to fill crucial positions.

Companies as a result may see higher productivity levels, better performance, and more revenue. Getting more people back into work quicker, as opposed to them sitting on the sidelines, can only be good for the US economy as well.

Without the need for complex negotiations and legal agreements regarding non-compete clauses, onboarding talent will also be quicker and therefore businesses can streamline their hiring process.





Summary

As an ever-evolving news story, it's crucial to remain informed about the potential impact of the FTC's ruling. Although the ruling has been blocked and will not take effect on 4 September as originally planned at the time of publishing this guide, the expectation that the FTC will appeal the decision adds to the uncertainty surrounding the issue. It's worth noting once more that senior talent although excluded right now may still be affected by future alterations to non-compete regulations.

However, amidst these challenges and changes, it's important to remember that while laws may be beyond our control, the benefits, compensation, and environment cultivated by businesses, is not. By focusing on creating an attractive work environment and providing competitive benefits and compensation packages, companies can continue to attract and retain top talent, despite potential changes in non-compete regulations.

During this uncertainty, you can benefit from specialist guidance from Larson Maddox. Keeping you informed about relevant regulatory changes while offering access to a wide network of qualified candidates, we assist organizations in developing effective talent retention strategies to help law firms and businesses create attractive work environments and competitive compensation packages. By leveraging the expertise of Larson Maddox, you can navigate the challenges posed by the FTC ruling and ensure your talent requirements are met.





About Larson Maddox

At Larson Maddox, we give essential guidance to leading firms by connecting them with the best talent for their regulatory & legal needs.

From data privacy and formalizing financial resilience, to ensuring umbrella companies are compliant and approving innovative technologies for use, a new regulatory landscape is emerging. Through an increasing amount of laws and governance comes the need to secure the right talent to scale for growth, but also to protect your organization best.

With Larson Maddox as your leading talent partner, you can rest assured that you have the expertise needed to succeed in a regulated market.

Our Specialisms

- In-house Counsel
- Legal Operations
- Contract Management
- Compliance
- Regulatory Reporting
- Government Affairs
- Regulatory Operations
- Data & Privacy

Our Industry Expertise

- Financial Services
- Life Sciences
- Technology, Media & Entertainment
- Consumer Goods
- Energy, Construction & Infrastructure
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* This document was created on 5/31/24 and updated 8/28/24, and the information provided is based on the knowledge available at that time. As this is a fast-moving news story, the details and developments may have changed since the document was created. Readers are advised to verify the latest updates and it is strongly advised that you seek independent legal advice before making any decisions or taking any actions based on the information provided herein. This information is not intended to constitute legal advice, and we make no representations or warranties regarding its accuracy, completeness, or applicability to your specific situation. Laws and regulations vary by jurisdiction and can change over time. Therefore, it is crucial to consult with a qualified legal professional who can assess your individual circumstances and provide tailored advice. By accessing or using this information, you acknowledge that we are not liable for any loss or damage resulting from reliance on it.

1. [https://the-cfo.io/2024/04/30/what-you-need-to-know-about-the-ftcs-ban-on-non-competes/#:~:text=FTC's%20final%20rule%20bans%20non,significant%20implications%20for%20CFOs'%20strategies.&text=The%20Federal%20Trade%20Commission%20\(FTC,particularly%20affecting%20non%2Dcompetite%20clauses](https://the-cfo.io/2024/04/30/what-you-need-to-know-about-the-ftcs-ban-on-non-competes/#:~:text=FTC's%20final%20rule%20bans%20non,significant%20implications%20for%20CFOs'%20strategies.&text=The%20Federal%20Trade%20Commission%20(FTC,particularly%20affecting%20non%2Dcompetite%20clauses)

2. <https://natlawreview.com/article/texas-federal-judge-blocks-ftc-non-compete-ban>

