FP Snapshot on Manufacturing Industry: 5 Things to Do After FTC Bans Non-Compete Agreements

Insights
4.30.24

Welcome to this edition of the FP Snapshot on Manufacturing Industry, where we take a quick snapshot look at a recent significant workplace law development with an emphasis on how it impacts employers in the manufacturing sector. This edition is devoted to the Federal Trade Commission's (FTC) recently announced rule that bans non-compete agreements in almost all cases. The new rule will make it much harder for manufacturers to use these agreements to protect their interests. It will have a particular impact on manufacturers' ability to prevent employees from leaving and working for a competitor, or from starting their own competing business. Read on to find out the five steps you should consider taking as a result.

Snapshot Look at the New Rule

The new rule is the result of years of advocacy by the FTC, which has long argued that non-compete agreements are anti-competitive and harmful to workers. The FTC's new rule bans non-compete agreements in most cases, with a few exceptions. For example, the rule does not apply to non-compete agreements that are part of a business sale or to agreements that protect trade secrets. The FTC's new rule bans not only new non-competes, but also existing non-competes in almost all circumstances. In addition, employers must provide explicit notice to both current and former employees that their non-competes are no longer enforceable.

For a deeper dive into the situation, you can read our full Insight here.

What Do Manufacturers Need to Know?

The rule defines "non-competition agreements" as any term or condition of employment that prohibits a worker from, penalizes a worker for, or functions to prevent a worker from seeking or accepting employment with another business or operating a business. This new rule will apply to almost all of your employees, from sales employees with key relationships and detailed know-how on how to move product to production engineers.

At the very least, you have a 120-day window before this rule takes effect. With plenty of lead time, these are the steps you should consider taking to ensure your company is ready if/when the rule takes effect:

1. Look at What You Have and Make a Plan Work with your legal counsel as soon as possible to craft an individualized strategy plan. It should take into consideration the size of your business, the number of non-competes in play, the importance of such agreements to your business, your risk tolerance levels, and the resources you have on hand.

Manufacturers should take immediate action to determine which of your employees present the highest risk of competition through the use of company know-how and information. Most often these employees will either serve in high level roles or have closely held information regarding production methods and designs.

2. Understand What the Rule Does Not Include

Importantly, the rule does not explicitly ban other forms of protection for employers, such as customer non-solicitation agreements or employee non-recruitment, confidentiality, or non-disclosure provisions. The validity determinations will be made on a case-by-case basis, but the provisions are valid so long as they do not prevent the employee from getting a job. Now is a great time to sync with your FP counsel to ensure these agreements are tailored to protect your legitimate interests.

3. Understand Who the Rule Does Not Include

One of the few circumstances where employers can still enforce non-competes under this rule is with Senior Executives. The final rule defines "senior executives" as workers earning more than $151,164 annually and who are in policy-making positions. Keep in mind that the FTC estimates "senior executives" make up fewer than 0.75% of all workers – make sure you determine which of your workers fall into this category.

4. Understand Alternative Options

A less burdensome covenant, such as a properly tailored customer non-solicitation or confidentiality provision, could achieve the same goals as a non-compete with less risk involved. Work with your legal counsel to bolster these covenants, particularly as they relate to production, design, and key sales employees.

5. Understand and Maximize Trade Secret Protection

The FTC cites the availability of trade secret protection as a factor that could mitigate the harm of abrogating non-competes. It will be critical to identify trade secrets and ensure that you have proper policies and procedures in place to protect them, limit trade secret access only to those who need it, train employees how to handle trade secrets and protect against theft and implement suitable technological controls.

Frequently, manufacturers will implement non-compete agreements that incorporate trade secret language in a "one size fits all approach." If you maintain such an agreement, it is worth considering separating out trade secret from non-competition.

Want More?

We will continue monitoring workplace law developments as they apply to manufacturers, so make sure you are subscribed to Fisher Phillips' Insight System to have the most up-to-date information sent directly to your inbox. If you have questions, contact your Fisher Phillips attorney, the authors of this Insight, or any attorney on our Manufacturing Industry Team.

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