

**FTC NON-COMPETE SCRUTINY WILL  
PROMPT “CREATIVITY”... HOW  
EMPLOYERS AND M&A TEAMS WILL  
STRUCTURE AGREEMENTS TO ACHIEVE  
THEIR GOALS... AND HOW TO STOP  
THEM (WHEN NECESSARY)**

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## I. INTRODUCTION

While many workers merely skim their employment agreements, nearly thirty million Americans are bound by a non-compete clause.<sup>1</sup> In April 2024, the Federal Trade Commission (“FTC” or “Commission”) issued its final rule (“Rule”) to ban non-competes, set to go into effect in September of that year.<sup>2</sup> While the FTC has launched attack on non-competes, the Commission has a long way to go before abolishing these agreements and their counterparts.<sup>3</sup> In the Rule, the FTC anticipated employers using “functional” equivalents to non-competes, but left out specifics for what qualifies as a legal or illegal agreement, leaving room

1. *See Non-Compete Clause Rulemaking*, F.T.C. (Jan. 5, 2023), <https://www.ftc.gov/legal-library/browse/federal-register-notices/non-compete-clause-rulemaking> (explaining the prevalence of non-compete clauses in employment agreements).

2. *FTC Announces Rule Banning Noncompetes*, F.T.C. (Apr. 23, 2024), <https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-rule-banning-noncompetes>.

3. *See infra* notes 102–04 and accompanying text.

for creative employers to find alternative ways to bypass the Rule without technically breaking the law.<sup>4</sup>

Courts have pushed back on the FTC's non-compete Rule, but with split decisions and appeals pending, the future for employers remains uncertain.<sup>5</sup> Employers have access to alternative restrictive agreements which can achieve the same result as non-competes—hindering mobility and restricting competition.<sup>6</sup> While its appeal is pending, the FTC must consider these alternatives beyond a “functional equivalent” standard if the Rule, if enacted, is to have any effect.<sup>7</sup>

This Note will present the history of non-compete law in the United States, and the growing public policy concerns surrounding the agreements.<sup>8</sup> Next, this Note will explain the components of the FTC's proposed ban on non-competes, the legal challenges it is facing, and its relevance regardless of what courts will ultimately decide.<sup>9</sup> Following the Rule discussion, this Note will illustrate the numerous ways employers will attempt to bypass the Rule through other restrictive agreements in attempts to abuse exceptions to the Rule.<sup>10</sup> These “work-arounds” must be addressed if the Rule is to serve the purposes the FTC asserts.<sup>11</sup> This Note then proposes legal solutions for employers to protect their confidential information and workforce without circumventing the Rule.<sup>12</sup> Lastly, this Note addresses ways the FTC can stop employers from using “functional” non-competes by looking at a variety of enforcement mechanisms including prior court decisions and guidance from other agencies.<sup>13</sup>

## II. BACKGROUND

### A. HISTORY OF NON-COMPETE LAW

In the final rule (“Rule”), the Federal Trade Commission (“FTC” or “Commission”) asserted the rationale behind the Rule was based on the concern that non-competes and similar agreements harm

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4. See *infra* notes 208–11 and accompanying text.

5. Clifford R. Atlas & Erik J. Winton, *Battle Over/War Isn't: Employer Considerations Now That FTC Non-Compete Ban Is Set Aside*, JACKSON LEWIS (Aug. 29, 2024), <https://www.jacksonlewis.com/insights/battle-overwar-isnt-employer-considerations-now-ftc-non-compete-ban-set-aside>.

6. See Laura B. Friedel, Peter F. Donati & Jason B. Hirsh, *Key Takeaways from the FTC's Non-Compete Ban*, LEVENFELD PEARLSTEIN (Apr. 24, 2024), <https://www.lplegal.com/content/key-takeaways-from-ftcs-non-compete-ban/> (discussing functional non-competes).

7. See *infra* notes 281–86 and accompanying text.

8. See *infra* notes 14–33 and accompanying text.

9. See *infra* notes 57–101 and accompanying text.

10. See *infra* notes 140–204 and accompanying text.

11. See *infra* notes 215–62 and accompanying text.

12. See *infra* notes 260–80 and accompanying text.

13. See *infra* notes 281–326 and accompanying text.

competition.<sup>14</sup> The Commission referenced concern in this area that has existed for centuries.<sup>15</sup> There are two English common law cases that set the groundwork for non-compete law in the United States: *Dyer's Case*<sup>16</sup> and *Mitchel v. Reynolds*.<sup>17</sup> *Dyer* was first and prohibited the use of most non-competes, until *Mitchel* recognized the legitimacy of these agreements in certain circumstances.<sup>18</sup>

1. *Foundation of non-compete law in Dyer's Case*<sup>19</sup>

The oldest known case concerning non-competes, *Dyer's Case*, dates back to 1414.<sup>20</sup> In that case, John Dyer, a clothing dyer formed a non-compete with his apprentice.<sup>21</sup> The agreement prohibited the apprentice from dying goods in the town for six months after leaving his employment.<sup>22</sup> Dyer brought action after the apprentice breached the agreement, but the judge found the agreement unenforceable.<sup>23</sup> Specifically, the court was concerned with protecting the apprentice's right to earn a living and that Dyer had promised nothing in return for the covenant.<sup>24</sup> Thus, non-competes were scrutinized under English common law until 1711.<sup>25</sup>

2. *English court finds need for reasonable non-competes in Mitchel v. Reynolds*<sup>26</sup>

In 1711, an English court first recognized a potential need for some restraint on trade.<sup>27</sup> The FTC stated that this case formed the basis for non-compete law.<sup>28</sup> There, Reynolds was a baker who agreed to rent his bakery to Mitchel for five years.<sup>29</sup> Reynolds agreed not to compete

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14. *Non-Compete Clause Rule, Federal Trade Commission 16 CFR Parts 910 and 912*, 89 Fed. Reg. 38342 (May 7, 2024) (to be codified at 16 C.F.R. pts. 910, 912).

15. Fed. Reg., *supra* note 14.

16. 2 Hen V, fol. 5 pl. 26 (1414).

17. 24 Eng. Rep. 347 (Q.B. 1711).

18. Compare Paul F. Millus, *The Case for Non-Competes*, MEYER SUOZZI (Apr. 5, 2023), [https://www.msek.com/publications/the-case-for-non-competes#\\_edn4](https://www.msek.com/publications/the-case-for-non-competes#_edn4). (discussing *Dyer's case*, which held non-competes to be unenforceable) with *Mitchel v. Reynolds* (1711) 24 Eng. Rep. 347 (Q.B.) (recognizing legitimate needs for non-competes).

19. Millus, *supra* note 18.

20. Millus, *supra* note 18.

21. Stephen Fox, *Breaking the Non-compete Cycle: A Legal and Economic Analysis of the FTC's Power Move*, 92 U. CIN. L. REV. 607, 612 (2023).

22. *Id.*

23. *Id.*

24. Millus, *supra* note 18.

25. Millus, *supra* note 18.

26. *Mitchel*, 24 Eng. Rep. at 351.

27. Jad Itani, *The ADR Loophole to Restrictive Non-Compete Agreements*, 23 MARQ. INTELL. PROP. L. REV. 57, 75 (2019).

28. Fed. Reg., *supra* note 14.

29. *Non-compete Contracts: Economic Effects and Policy Implications*, OFF. OF ECON. POL'Y: U.S. DEPT. OF THE TREAS. 28 (Mar. 2016).

with the bakery in the local area for five years, and if he did breach the agreement, he would have to pay Mitchel a fifty pound bond.<sup>30</sup> Reynolds broke the agreement, and Mitchel sued.<sup>31</sup> The judge upheld the agreement, explaining some partial restraints on trade are reasonable.<sup>32</sup> This case allowed for non-compete agreements as long as both parties and the community benefitted and employers showed economic necessity for these restrictive agreements.<sup>33</sup>

## B. GROWING CONCERN FOR MODERN USE OF NON-COMPETES

The FTC has acknowledged valid arguments in favor of non-compete clauses, including employer investments in human capital and protection of trade secrets.<sup>34</sup> However, in recent years, there has been growing concern surrounding the widespread use of non-competes.<sup>35</sup> In January 2023, the FTC issued a Notice of Proposed Rule Making (“NPRM”).<sup>36</sup> Additionally, in May 2023, the National Labor Relations Board (“NLRB”) issued memorandums scrutinizing non-competes and similar agreements.<sup>37</sup> The Uniform Law Commission (“ULC”) has also taken interest in the use of non-competes and their respective counterparts.<sup>38</sup> In 2021, the ULC released the Uniform Restrictive Employment Agreement Act (“Uniform Act”).<sup>39</sup> Unlike the FTC Rule, the Uniform Act governs all restrictive agreements, notably, non-solicitation, no-recruit, and training-repayment agreements.<sup>40</sup> The Uniform Act aims to codify the common law’s

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30. *Mitchel*, 24 Eng. Rep. at 347.

31. *Non-compete Contracts: Economic Effects and Policy Implications*, *supra* note 29.

32. *Non-compete Contracts: Economic Effects and Policy Implications*, *supra* note 29.

33. *Non-compete Contracts: Economic Effects and Policy Implications*, *supra* note 29.

34. CONG. RSCH. SERV., LSB1159, THE FEDERAL TRADE COMMISSION’S NON-COMPETE RULE (2024).

35. *See* Fed. Reg., *supra* note 14.

36. *Non-Compete Clause Rulemaking*, *supra* note 1.

37. NLRB Gen. Couns. Mem. 25-01 (Oct. 7, 2024); *noted in* James A. Holt & Brianna Schmid, *The non-compete agreement showdown: After the FTC’s final rule setback, the NLRB gears up to tackle non-compete agreements*, REED SMITH (Oct. 9, 2024), <https://www.employmentlawwatch.com/2024/10/articles/employment-us/the-non-compete-agreement-showdown-after-the-ftcs-final-rule-setback-the-nlr-gears-up-to-tackle-non-compete-agreements/> (explaining the NLRB’s action against non-competes).

38. Stewart J. Schwab, *Noncompete Law, The Uniform Act, and the FTC Proposed Rule*, 34 UNIV. OF FLA. J. OF L. & PUB. POL’Y, 279, 280 (2024).

39. Unif. Restrictive Emp. Agreement Act (Unif. L. Comm’n 2021); *see also* Katie Robinson, *ULC Approves Uniform Restrictive Employment Agreement Act*, UNIF. L. COMM. (July 23, 2021), <https://www.uniformlaws.org/committees/community-home/digest-viewer/viewthread?MessageKey=ef54eaf7-88d8-4bba-8597-7bb794f99867&CommunityKey=d4b8f588-4c2f-4db1-90e9-48b1184ca39a&tab=digestviewer> (explaining implications of the Uniform Act).

40. Schwab, *supra* note 38, at 282.

“reasonableness” standard, paired with specific laws on each type of restrictive agreement.<sup>41</sup>

The Commission stressed many policy concerns surrounding worker protection and free competition.<sup>42</sup> First, the FTC noted the vast number of workers bound by these agreements, estimating about one in five, or thirty million American workers are subject to a non-compete.<sup>43</sup> By hindering competition, the agency argues that all employees face lower wages, even those not bound by a non-compete.<sup>44</sup> In addition, the FTC argues that the restrictive agreements hinder entrepreneurship and prevent employees from sharing novel ideas.<sup>45</sup> Finally, in presenting the NPRM, the Commission estimates a \$250 billion increase in workers’ earnings per year.<sup>46</sup>

### 1. *FTC Brings Judicial Action*

Prior to any Rule enactment, the FTC filed actions against companies and executives for imposing non-compete agreements on workers.<sup>47</sup> In January 2023, the FTC took legal action against three companies and two individuals, marking the first time the FTC had sued to enjoin non-compete agreements.<sup>48</sup> First, the FTC issued a complaint against Prudential Security, Inc., Prudential Command Inc. (“Prudential”), and their owners, alleging that these parties used superior bargaining power to exploit low-wage security guard workers.<sup>49</sup> Prudential required security guards to sign agreements that prohibited them from working for a competitor within a 100-mile radius for two years after leaving Prudential.<sup>50</sup> While the workers only made

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41. Stewart J. Schwab, *Regulating Noncompetes Beyond the Common Law: The Uniform Restrictive Employment Agreement Act*, 98 IND. L.J. 275, 277 (2022).

42. See Jeremy Ben Merkelson et al., *UPDATE: FTC Publishes Final Rule Banning Non-Competes: A Simple Explanation*, DAVIS WRIGHT TREMAINE LLP (May 8, 2024), <https://www.dwt.com/blogs/employment-labor-and-benefits/2024/04/ftc-votes-to-issue-final-rule-banning-non-competes> (explaining justifications for the Rule to include greater worker earnings and “an instrument of ‘economic liberty.’”).

43. *Non-Compete Clause Rulemaking*, *supra* note 1; *FTC Announces Rule Banning Noncompetes*, *supra* note 2.

44. *Non-Compete Clause Rulemaking*, *supra* note 1.

45. *Non-Compete Clause Rulemaking*, *supra* note 1.

46. Merkelson, *supra* note 42.

47. *How FTC History Did Not Affect the FTC’s Approach to Noncompetes (but Should Have?): From the Nader Report to the Present*, BAKER HOSTETLER (May 2, 2024), [https://www.bakerlaw.com/insights/how-ftc-history-did-not-affect-the-ftcs-approach-to-non-competes-but-should-have-from-the-nader-report-to-the-present/#\\_ftn2](https://www.bakerlaw.com/insights/how-ftc-history-did-not-affect-the-ftcs-approach-to-non-competes-but-should-have-from-the-nader-report-to-the-present/#_ftn2) [hereinafter *FTC History*].

48. *FTC Cracks Down on Companies That Impose Harmful Noncompete Restrictions on Thousands of Workers*, F.T.C. (Jan. 4, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-cracks-down-companies-impose-harmful-noncompete-restrictions-thousands-workers> [hereinafter *FTC Cracks Down on Companies*].

49. *Id.*

50. *Id.*

near minimum-wage, they were required to pay \$100,000 for violating the non-compete.<sup>51</sup> Ultimately, the FTC finalized orders, imposing requirements on the company, including one that prohibits use or threatening the use of non-competes.<sup>52</sup>

The FTC also brought action against glass container manufacturers, noting that the industry is highly concentrated and it is challenging for competitors to enter the market due to the need to find skilled and experienced glass container manufacturing workers.<sup>53</sup> The first company, O-I Glass, Inc. (“O-I”), imposed restrictions on more than 1,000 workers, banning them from working in the industry or owning a similar business anywhere in the United States for a year after leaving O-I.<sup>54</sup> The second company, Ardagh Group S.A. (“Ardagh”), imposed non-competes on their workers, which banned workers from providing similar services anywhere in the United States, Canada, or Mexico that involved competing with Ardagh for two years post-employment.<sup>55</sup> As with the order against Prudential, the FTC approved a similar order, essentially prohibiting the glass manufacturers from imposing any of their non-competes, or threatening to do so.<sup>56</sup>

## 2. The “Final” Rule

On April 23, 2024, the FTC voted three to two and issued its Rule banning most employment non-compete agreements.<sup>57</sup> The Rule at issue broadly defines a non-compete as any:<sup>58</sup>

term or condition of employment that prohibits a worker from, penalizes a worker for, or functions to prevent a worker from (i) seeking or accepting work in the United States with a different person where such work would begin after the conclusion of the employment that includes the term or condition; or

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51. *Id.*

52. *FTC Approves Final Order Requiring Michigan-Based Security Companies to Drop Noncompete Restrictions That They Imposed on Workers*, F.T.C. (Mar. 8, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/03/ftc-approves-final-order-requiring-michigan-based-security-companies-drop-noncompete-restrictions>.

53. *FTC Cracks Down on Companies*, *supra* note 48.

54. *FTC Cracks Down on Companies*, *supra* note 48.

55. *FTC Cracks Down on Companies*, *supra* note 48.

56. *FTC Approves Final Orders Requiring Two Glass Container Manufacturers to Drop Noncompete Restrictions That They Imposed on Workers*, F.T.C. (Feb. 23, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/02/ftc-approves-final-orders-requiring-two-glass-container-manufacturers-drop-noncompete-restrictions>.

57. *A Synopsis of the FTC’s Historic Non-Compete Ban*, WILMERTZ, GOLDMAN & SPITZER, P.A. (Apr. 29, 2024), <https://www.wilentz.com/blog/health-law/2024-04-29-a-synopsis-of-the-ftcs-historic-non-compete-ban>.

58. Joshua H. Lerner, Laura E. Schneider & Andrew Stauber, *Understanding the FTC’s Non-Compete Clause Rule and Its Impact on NDAs*, WILMERHALE (May 30, 2024), <https://www.wilmerhale.com/en/insights/client-alerts/20240530-understanding-the-ftcs-non-compete-clause-rule-and-its-impact-on-ndas#:~:text=According%20to%20the%20Final%20Rule,after%20the%20conclusion%20of%20the>.

(ii) operating a business in the United States after the conclusion of the employment that includes the term or condition.<sup>59</sup>

The FTC Rule on non-competes aims to protect workers from the harms of these agreements, specifically, reduction in competition.<sup>60</sup> The FTC proposed the non-compete ban in light of Section 5 and Section 6(g) of the Federal Trade Commission Act (“FTC Act”).<sup>61</sup> Section 5, in part, makes “unfair methods of competition” unlawful and instructs the FTC to prevent unfair methods of competition.<sup>62</sup> Section 6(g) permits the FTC to create rules and regulations pursuant to carrying out provisions of the FTC Act.<sup>63</sup> Prior to any legal pushback, the Rule was set to go into action 120 days after publication in the Federal Register, beginning September 4, 2024.<sup>64</sup>

The Rule categorizes non-compete clauses as those terms of employment that prohibit workers from mobility in seeking employment at the end of employment as well as similar policies of employers that are not in contract form.<sup>65</sup> However, and at issue here, other restrictions placed on employees are still permitted, including non-disclosure and non-solicitation clauses.<sup>66</sup> The FTC draws a distinction between lawful clauses including some non-solicitations, from clauses that claim to be less restrictive; however, serve the same function and outcome as a non-compete itself.<sup>67</sup> Further, some contract forms, such as fixed-term employment agreements may be lawful under the Rule.<sup>68</sup>

The Rule also requires employers to provide to any employees, or former employees who have active non-competes, notice that the

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59. 16 C.F.R. § 910.1.

60. *FTC History*, *supra* note 47.

61. Alexander H. Pepper & Jay B. Sykes, *Federal Courts Split on Legality of the FTC’s Non-Compete Rule*, CONGRESS.GOV (Sept. 16, 2024), <https://www.congress.gov/crs-product/LSB11228>.

62. 15 U.S.C. § 45(a)(2).

63. 15 U.S.C. § 46(g).

64. *Federal Agency’s Noncompete Ban Faces Legal Challenges*, JARDIM MEISNER SALMON SPRAGUE & SUSSER (May 13, 2024), <https://jmslawyers.com/federal-agencys-non-compete-ban-faces-legal-challenges/>; *Federal Trade Commission Issues Sweeping Non-Compete Ban*, ROPES & GRAY LLP (Apr. 24, 2024), <https://www.ropesgray.com/en/insights/alerts/2024/04/federal-trade-commission-issues-sweeping-non-compete-ban>.

65. *FTC History*, *supra* note 47.

66. *FTC History*, *supra* note 47.

67. *Federal Trade Commission Issues Sweeping Non-Compete Ban*, *supra* note 64.

68. See Marc Fosse, *Noncompete Agreements – Employer Options and Strategies to Reduce Risks*, SEYFARTH SHAW LLP (Oct. 3, 2024), <https://www.beneficiallyyours.com/2024/10/03/noncompete-agreements-employer-options-and-strategies-to-reduce-risks/>; see also Devi Dolive, *The Implied Negative Covenant: Can a Fixed-Term Employment Contract Substitute for a Non-Compete Agreement?*, BURR & FORMAN LLP (June 13, 2012), <https://www.jdsupra.com/legalnews/the-implied-negative-covenant-can-a-fix-88498/> (discussing similarities and differences between non-compete agreements and fixed employment contracts).

agreements are unenforceable.<sup>69</sup> However, the Rule allows for employers to enforce claims if the agreement was breached before the effective date of the ban.<sup>70</sup> In the event that an employer is not in compliance with the Rule or issues a non-compete, the employer may be found in violation of Section 5 of the FTC Act.<sup>71</sup> The FTC Act details appropriate penalties for employers in violation.<sup>72</sup> First, the FTC Act provides for equitable remedies which include cease-and-desist orders, consent orders, and judicial orders.<sup>73</sup> Next, the FTC may seek monetary remedies in the form of civil fines and other remedies, such as disgorgement or restitution.<sup>74</sup> Further, the FTC may set a penalty up to \$51,744 for violations.<sup>75</sup> Importantly, each day in violation constitutes a separate offense.<sup>76</sup>

It is important to note that not all employers are subject to the Rule, specifically those outside the FTC's jurisdiction.<sup>77</sup> These employers include certain banks, loan institutions, and entities subject to the Packers and Stockyards Act.<sup>78</sup> While many banks are not covered, non-banks, including employees at hedge funds and private equity firms, likely are in the FTC's jurisdiction.<sup>79</sup> The ban also does not apply to corporations that function not for their own or their member's profit.<sup>80</sup> The Rule explains an entity may not simply claim non-profit status under the tax code, but that the FTC will evaluate the economic reality of an entity.<sup>81</sup> Lastly, the Rule does not ban non-competes between a

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69. *Noncompete Clause Rule: A Compliance Guide for Businesses and Small Entities*, F.T.C., [https://www.ftc.gov/system/files/ftc\\_gov/pdf/Business-and-Small-Entity-Compliance-Guide-updated.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/Business-and-Small-Entity-Compliance-Guide-updated.pdf) (last visited Feb. 24, 2025).

70. *Id.*

71. Merkelson, *supra* note 42.

72. Eric C. Kim et al., *FAQs on Federal Trade Commission's Rule Banning Worker Noncompete Clauses*, MORGAN LEWIS (Apr. 26, 2024), <https://www.morganlewis.com/pubs/2024/04/faqs-on-federal-trade-commissions-rule-banning-worker-noncompete-clauses>.

73. *Id.*

74. *Id.*

75. *Id.*

76. *How Much Could Violating a FTC Rule Cost You "\$50,120 Per Violation"?*, CROWELL (Jan. 13, 2023), <https://www.crowell.com/en/insights/client-alerts/how-much-could-violating-a-ftc-rule-cost-you-50-120-per-violation>.

77. Pepper, *supra* note 61.

78. Pepper, *supra* note 61.

79. Todd Ehret, *Important considerations surrounding the FTC ban on noncompete contracts*, THOMSON REUTERS (May 20, 2024), <https://www.thomsonreuters.com/en-us/posts/government/ftc-ban-noncompete-contracts/>.

80. Pepper, *supra* note 61.

81. Pepper, *supra* note 61; see also *FTC Final Rule Banning Most Non-Competes Passes – What Nonprofits Need to Know*, POLSINELLI (Apr. 26, 2024), <https://www.polsinelli.com/publications/ftc-final-rule-banning-most-non-competes-passes-what-nonprofits-need-to-know> (discussing factors that may cause a nonprofit to fall within the FTC's jurisdiction).

franchisor and franchisee.<sup>82</sup> The franchisor-franchisee relationship is more like a relationship between businesses than between an employer and a worker, and the Rule primarily focuses on the latter.<sup>83</sup> However, franchise non-competes are not completely off the hook, as they are still subject to local and federal common law and antitrust laws, including Section 5 of the FTC Act.<sup>84</sup>

a. Exception 1: Senior Executives

The first main exception under the Rule allows for the “grandfathering” of non-competes with “senior executives.”<sup>85</sup> The FTC defines a “senior executive” as a worker who makes at least \$151,164 in total annual compensation and is in a “policy-making position.”<sup>86</sup> To meet these thresholds, first, total annual compensation includes “salary, commissions, nondiscretionary bonuses and other nondiscretionary compensation,” but excludes room and board, medical insurance, and other fringe benefits.<sup>87</sup> Second, a chief executive officer or president is *per se*, in a policy-making position.<sup>88</sup> Outside of those roles, officers may be deemed in a policy-making position based on the individual’s responsibilities.<sup>89</sup> Notably, however, all new senior executives would be subject to the non-compete ban and would not qualify for the same exception as existing senior executives.<sup>90</sup>

b. Exception 2: Bona Fide Sale of a Business

In addition to an exception for senior executives, the Rule also does not apply to agreements entered into in accordance with a bona fide

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82. Scott Opincar, *FTC excludes a franchisee in the context of a franchisee-franchisor relationship from its final rule banning non-competes*, MCDONALD HOPKINS LLC (May 6, 2024), <https://www.mcdonaldhopkins.com/insights/news/ftc-excludes-a-franchisee-in-the-context-of-a-franchisee-franchisor-relationship-from-its-final-rule-banning-non-competes>.

83. *Id.*

84. *Id.*

85. Andrew Reed, *FTC’s Final Rule Banning Non-Competes: What Is It and How “Final” Is It?*, TROUTMAN PEPPER LOCKE (June 10, 2024), <https://www.troutman.com/insights/ftcs-final-rule-banning-non-competes-what-is-it-and-how-final-is-it.html>.

86. *Id.*

87. Ersal A. Hudson et al., *Who Qualifies As a ‘Senior Executive’ Under the FTC Noncompete Rule?*, MANATT, PHELPS & PHILLIPS, LLP (July 2, 2024), <https://www.manatt.com/insights/newsletters/client-alert/who-qualifies-as-a-senior-executive-under-the-ft#:~:text=The%20Senior%20Executive%20Exception,in%20a%20policy%20making%20position> (quoting 16 C.F.R. § 910.1).

88. *Id.*

89. *Id.*

90. Benjamin Ferrucci et al., *What the FTC’s New Rule on Non-Competes Means for M&A and Private Equity Transactions*, MINTZ (May 23, 2024), <https://www.mintz.com/insights-center/viewpoints/2226/2024-05-23-what-ftcs-new-rule-non-competes-means-ma-and-private>.

sale of a business.<sup>91</sup> Non-compete agreements are most often thought of in the employment context, but are also widespread in M&A and private equity deals.<sup>92</sup> Notably, the FTC decided to forego the 25% stake prerequisite that was discussed in prior drafts of the Rule.<sup>93</sup> However, businesses falling under the bona fide sale exception are still expected to adhere to any existing state and federal laws which often focus on the reasonableness of a restraint concerning scope and duration.<sup>94</sup>

In the bona fide sale exception, the FTC focuses on the importance of goodwill in the sale.<sup>95</sup> The exception requires an “arm’s-length transaction,” such that workers would not be bound by non-competes where they are not exchanging for goodwill or where they lack bargaining power to negotiate terms of the sale or restriction.<sup>96</sup> At this point, the agreements would likely stand, presuming they have independent consideration, such as purchase price rather than wages, which creates a “protected interest in an asset” of the acquired company.<sup>97</sup>

Aside from taking advantage of the bona fide sale of a business exception, M&A attorneys are looking to different drafting structures to achieve the same level of protection for transactions.<sup>98</sup> Currently, attorneys use non-disclosure agreements (“NDAs”) to protect confidential information throughout the deal process.<sup>99</sup> To be enforceable, parties must properly draft NDAs, which require adequate consideration,

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91. 16 C.F.R. § 910.3(a); see *Understanding the Bona Fide Sale Exception to the FTC’s Non-compete Ban*, PHELPS (May 2, 2024), <https://www.phelps.com/insights/understanding-the-bona-fide-sale-exception-to-the-ftcs-noncompete-ban.html#:~:text=The%20rule%20provides%20an%20exception,interest%20in%20a%20business%20entity> (explaining components of the bona fide sale exception).

92. Ferrucci, *supra* note 90.

93. Ferrucci, *supra* note 90.

94. *United States: Still going strong - M&A noncompetes and the FTC’s final rule on noncompetes*, BAKER MCKENZIE (Apr. 26, 2024), <https://insightplus.bakermckenzie.com/bm/capital-markets/united-states-still-going-strong-ma-noncompetes-and-the-ftcs-final-rule-on-noncompetes>.

95. Donald Hammett & Christina Heddesheimer, *FTC Noncompete Rule’s Tentacles Reach M&A and Private Equity*, BLOOMBERG LAW (Apr. 29, 2024), <https://news.bloomberglaw.com/us-law-week/ftc-noncompete-rules-tentacles-reach-m-a-and-private-equity>.

96. *Id.*

97. Michael Sweeney & Sophie Bellacosa, *DOES THE NEW FTC NON-COMPETE BAN IMPACT MY M&A DEAL? NO & YES.*, DUFFY & SWEENEY (June 6, 2024), <https://www.duffysweeney.com/does-the-new-ftc-non-compete-ban-impact-my-ma-deal-no-and-yes/>.

98. See *Creative Solutions for Buyers as Non-Compete Bans Increasingly Affect M&A Deals*, THOMPSON HINE LLP (Oct. 4, 2023), <https://www.thomsonhine.com/insights/creative-solutions-for-buyers-as-non-compete-bans-increasingly-affect-ma-deals> [hereinafter *Creative Solutions*]; see also Lisa A. Sarver, *FTC’s Proposal to Ban Most Noncompetes Would Significantly Alter Middle Market Mergers and Acquisitions*, KUTAK ROCK LLP (Feb. 16, 2023), <https://www.kutakrock.com/newspublications/publications/2023/february/ftcs-proposal-to-ban-noncompetes-alter-m-and-a> (discussing a case study concerning when parties to a deal are exempt under the bona fide sale exception).

99. *4 things you should know about non-disclosure agreements*, THOMPSON REUTERS (Oct. 15, 2024), <https://legal.thomsonreuters.com/en/insights/articles/4-things-to-know-about-non-disclosure-agreements> [hereinafter *4 things*].

protection of confidential information, and a defined time period.<sup>100</sup> In relevance to employee mobility, NDAs not only restrict disclosure of information, but restrict its use as well.<sup>101</sup>

### C. CURRENT STATE OF NON-COMPETE LAW IN LIGHT OF LEGAL SCRUTINY

The Rule was set to go into effect, banning most all non-competes, beginning September 4, 2024.<sup>102</sup> However, plaintiffs have brought suit against the FTC to prevent the Rule from taking effect.<sup>103</sup> Additionally, the NLRB rescinded its memos regarding restrictive covenants in February 2025; however, advisors recommend employers still take caution in this ever-evolving legal landscape.<sup>104</sup>

#### 1. *The Rule Faces Scrutiny in Ryan LLC v. Federal Trade Commission*

On August 20, 2024, the United States District Court for the Northern District of Texas in *Ryan LLC v. Federal Trade Commission*<sup>105</sup> held that the FTC cannot enforce the non-compete ban and the court set aside the rule.<sup>106</sup> Ryan, LLC (“Ryan”), a global tax firm who uses non-competes with shareholders and employees who have access to sensitive information, filed this matter the same day as the proposed Rule was released.<sup>107</sup> The *Ryan* court issued a preliminary injunction, so the FTC could not enforce the Rule against Ryan, in part because two arguments were likely to succeed.<sup>108</sup> The arguments at issue were first, that the FTC does not have authority to make substantive rules under the FTC Act, and second, the Rule is “arbitrary and capricious.”<sup>109</sup> After the preliminary injunction, in August 2024, the court set aside the Rule, due to lack of substantive rulemaking

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100. *Id.*

101. Camilla A. Hrdy & Christopher B. Seaman, *Beyond Trade Secrecy: Confidentiality Agreements that Act Like Noncompetes*, 133 YALE L. J. 669, 683 (2024).

102. *Federal Agency’s Noncompete Ban Faces Legal Challenges*, *supra* note 64.

103. J. Mark Gidley et al., *White & Case Global Non-Compete Resource Center (NCRC)*, WHITE & CASE LLP (Sept. 29, 2025), <https://www.whitecase.com/insight-tool/white-case-global-non-compete-resource-center-ncrc#rule-impact-non-competes>.

104. Rachel Fendell Satinsky & Tanner McCarron, *Rescission of NLRB General Counsel Memos on Non-Compete Agreements Indicates Shift in Enforcement Priorities*, LITTLER (Feb. 19, 2025), <https://www.littler.com/publication-press/publication/rescission-nlr-general-counsel-memos-non-compete-agreements-indicates>.

105. 746 F. Supp. 3d 369 (N.D. Tex. 2024).

106. Gidley, *supra* note 103.

107. Nina T. Martinez et al., *District Court Ruling Bars Federal Trade Commission Non-Compete Rule for the Near Term*, PILLSBURY WINTHROP SHAW PITTMAN LLP (Sept. 10, 2024), <https://www.pillsburylaw.com/en/news-and-insights/us-district-court-federal-trade-commission-noncompete-rule.html>.

108. *Ryan, LLC v. Fed. Trade Comm’n*, 746 F. Supp. 3d 369 (N.D. Tex. 2024); see Martinez, *supra* note 107 (discussing the *Ryan* court’s rationale).

109. Martinez, *supra* note 107.

authority and the arbitrariness of the Rule.<sup>110</sup> At this time, the FTC may not enforce the Rule; however, the Commission appealed the decision to the United States Court of Appeals for the Fifth Circuit on October 18, 2024.<sup>111</sup>

## 2. *The FTC Prevails in ATS Tree Services, LLC v. FTC*

While the *Ryan* court ruled against the FTC, not all courts are on the same page, leading to more uncertainty.<sup>112</sup> In *ATS Tree Services, LLC v. FTC*,<sup>113</sup> plaintiff, ATS Tree Services, LLC (“ATS”) brought a very similar claim against the FTC, seeking a preliminary injunction.<sup>114</sup> ATS is a small tree care company which required its twelve employees to sign non-competes.<sup>115</sup> However, the United States District Court for the Eastern District of Pennsylvania denied ATS’ motion for stay of effective date and preliminary injunction.<sup>116</sup> Ultimately, the court found for the FTC on the grounds that ATS could not show irreparable harm or a likelihood of winning on the merits.<sup>117</sup>

## 3. *Alternative Means of Enforcement*

Even with uncertainty and the FTC ban “set aside,” non-compete agreements may still be at risk through other means of enforcement.<sup>118</sup> Under Section 5 of the FTC Act, banning unfair methods of competition, the FTC is likely to continue reviewing non-compete agreements on a case-by-case basis, and following its review and enforcement process for cases of monopolization or those limiting competition.<sup>119</sup>

The FTC and Department of Justice can prosecute employers using non-competes under the Sherman Antitrust Act (“Sherman Act”).<sup>120</sup> The Sherman Act deems every contract or conspiracy that restrains

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110. Martinez, *supra* note 107.

111. Gidley, *supra* note 103.

112. See *FTC avoids preliminary injunction of non-compete ban*, DAVIS POLK (July 24, 2024), [https://www.davispolk.com/insights/client-update/ftc-avoids-preliminary-injunction-non-compete-ban#\\_ftn1](https://www.davispolk.com/insights/client-update/ftc-avoids-preliminary-injunction-non-compete-ban#_ftn1) (discussing *ATS Tree Servs., LLC v. Fed. Trade Comm’n*, No. CV 24-1743, 2024 WL 3511630 (E.D. Pa. July 23, 2024)).

113. No. CV 24-1743, 2024 WL 3511630 (E.D. Pa. July 23, 2024).

114. *FTC avoids preliminary injunction of non-compete ban*, *supra* note 112.

115. *A Victory for Workers: Understanding the ATS Tree Services, LLC v. Federal Trade Commission Case and Its Impact on Non-Compete*, KWALL BARACK NADEAAUA PLLC (July 23, 2024), <https://www.employeeights.com/blog/2024/july/a-victory-for-workers-understanding-the-ats-tree/>.

116. *FTC avoids preliminary injunction of non-compete ban*, *supra* note 112.

117. *FTC avoids preliminary injunction of non-compete ban*, *supra* note 112.

118. Clifford R. Atlas et al., *Why Employers’ Non-Competes Could Still Be at Risk Despite FTC Rule Being ‘Set Aside’*, JACKSON LEWIS (Oct. 14, 2024), <https://www.jacksonlewis.com/insights/why-employers-non-competes-could-still-be-risk-despite-ftc-rule-being-set-aside>.

119. *Id.*

120. *Id.*

trade illegal, punishable up to \$100 million and ten years in prison.<sup>121</sup> Although this has not been done specifically with non-competes, federal agencies have brought action against employers engaging in “no-poach” or wage-fixing agreements.<sup>122</sup>

#### 4. States are Looking to Ban Non-competes on Their Own

States have and continue to legislate on the legality and scope of non-competes apart from the FTC.<sup>123</sup> The Rule would preempt state laws that allow non-competes but permits states to enforce greater protections.<sup>124</sup> Prior to the current FTC regulation, state law has typically governed non-competes, which has varied significantly by state.<sup>125</sup>

California is a state with more restrictive laws concerning non-competes.<sup>126</sup> There are two laws currently addressing these restraints.<sup>127</sup> California’s two noteworthy bills are Assembly Bill (“AB”) 1076 and Senate Bill (“SB”) 699.<sup>128</sup> SB 699 expanded the scope, declaring any contract that is void under the California Business & Professions Code 16600<sup>129</sup> unenforceable regardless of where the agreement was entered.<sup>130</sup> Section 16600 provides that “every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.”<sup>131</sup> SB 699 also gives employees a private right of action for attorney’s fees rather than seeking solely a declaratory action as was the prior form of relief.<sup>132</sup>

121. 15 U.S.C. § 1.

122. Atlas, *supra* note 118.

123. Peter A. Steinmeyer & Laurie F. Rasnick, *Garden Leave Provisions in Employment Agreements*, THOMPSON REUTERS, [https://www.westlaw.com/w-007-3506?transitionType=Default&contextData=\(sc.Default\)&VR=3.0&RS=cblt1.0](https://www.westlaw.com/w-007-3506?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0) (last accessed Jan. 7, 2024).

124. Carsten Reichel et al., *FTC issues final rule banning non-compete clauses (update)*, DLA PIPER (July 29, 2024), [https://knowledge.dlapiper.com/dlapiperknowledge/globalemploymentlatestdevelopments/2024/ftc\\_bans\\_noncompetes/](https://knowledge.dlapiper.com/dlapiperknowledge/globalemploymentlatestdevelopments/2024/ftc_bans_noncompetes/).

125. Scott R. McLaughlin, Christine Bester Townsend & Tobias E. Schlueter, *FTC’s Ban on Non-Compete Agreements: Definitions, Prohibitions, Requirements, and Employer Considerations*, OGLETREE DEAKINS (May 24, 2024), <https://ogletree.com/insights-resources/blog-posts/ftcs-ban-on-non-compete-agreements-definitions-prohibitions-requirements-and-employer-considerations/>.

126. *Noncompete agreements are void and prohibited by law in California*, CALIFORNIA DENTAL ASSOCIATION (May 6, 2024), <https://www.cda.org/newsroom/hiring-firing/noncompete-agreements-are-void-and-prohibited-by-law-in-california/>.

127. *Id.*

128. Marina C. Tsatalis & Jason M. Storck, *California Extends Prohibition on Noncompete Agreements*, WILSON SONSINI (Feb. 7, 2024), <https://www.wsgr.com/en/insights/california-extends-prohibition-on-noncompete-agreements.html>.

129. Cal. Bus. & Prof. Code § 16600.

130. Benjamin R. Buchwalter, *SB 699 and AB 1076: California enacts further prohibitions on noncompete agreements*, L.A. & S.F. DAILY JOURNAL, Jan. 4, 2024, at 1.

131. Cal. Bus. & Prof. Code § 16600.

132. Danielle Ochs & Zachary V. Zagger, *California Governor Signs Law Prohibiting Employers From Entering Noncompete Agreements*, OGLETREE DEAKINS (Sept. 6, 2023), <https://ogletree.com/insights-resources/blog-posts/california-governor-signs-law-prohibiting-employers-from-entering-noncompete-agreements/>.

The next bill, AB 1076, which became effective January 1, 2024, amended Section 16600 to “void the application of any noncompete agreement in an employment context, or any noncompete clause in an employment contract, no matter how narrowly tailored.”<sup>133</sup> Further, the bill is set up to be “read broadly,” and does not encompass non-competes exclusively, but may include non-solicitation agreements and the like.<sup>134</sup> Further, the law requires employers to comply with notice provisions if the employee (1) was employed by the company after January 1, 2022, (2) is in California, and (3) signed a non-compete or non-solicitation agreement that is unenforceable in California.<sup>135</sup>

Courts in California are also shifting when it comes to non-solicitation clauses.<sup>136</sup> For decades, California upheld these restrictive covenants, pursuant to 1985 Sixth Appellate District Court decision, *Loral Corp. v. Moyes*.<sup>137</sup> However, in 2018 the court in *AMN Healthcare, Inc. v. Aya Healthcare Services, Inc*<sup>138</sup> held that a non-solicitation clause for workers at travel nursing agency did violate trade.<sup>139</sup>

#### D. EMPLOYERS SEEK NON-COMPETE ALTERNATIVES

##### 1. *Non-solicitation*

Employers currently use non-compete agreements for a variety of reasons, including protecting trade secrets and confidential information, maintaining a workforce, and upholding client relations.<sup>140</sup> Non-solicitation agreements are similar to non-competes, but non-solicitation agreements are not completely banned by the Rule.<sup>141</sup>

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133. 2023 Cal. Legis. Serv. 94.; Cal. Bus. & Prof. Code § 16600.

134. *Immediate Obligations for Employers With Noncompete, Customer Nonsolicitation Provisions for California Employees*, COOLEY (Jan. 18, 2024), <https://www.cooley.com/news/insight/2024/2024-01-18-immediate-obligations-for-employers-with-noncompete-customer-nonsolicitation-provisions-for-california-employees>.

135. *Id.*

136. *Future Not Looking Bright For California Employee Nonsolicits*, PROSKAUER (Feb. 26, 2024), <https://www.proskauer.com/pub/future-not-looking-bright-for-calif-employee-nonsolicits>.

137. 174 Cal. App. 3d 268 (Ct. App. 1985).

138. 28 Cal. App. 5th 923 (2018).

139. Carolyn Raashby, *Rulings Question the Enforceability of Employee Non-Solicitation Covenants in California*, COVINGTON (Mar. 8, 2019), <https://www.insidejobsblog.com/2019/03/08/rulings-question-the-enforceability-of-employee-non-solicitation-covenants-in-california/> (discussing *AMN Healthcare, Inc. v. Aya Healthcare Services, Inc.* 28 Cal. App. 5th 923 (2018)).

140. Damian R. Cavaleri & Rose Isaacs, *If Non-Competes Are Out, What's In? Alternative Ways Employers Can Protect Their Companies*, N.Y. L.J. (June 6, 2024), <https://www.law.com/newyorklawjournal/2024/06/06/if-non-competes-are-out-whats-in-alternative-ways-employers-can-protect-their-companies/?sreturn=20250112141046>.

141. Trey Hendershot, *Does the FTC Non-Compete Ban Apply to Non-Solicitation Clauses Too?*, HENDERSHOT COWART P.C. (June 26, 2024) <https://www.hchlawyers.com/blog/2024/june/does-the-ftc-non-compete-ban-apply-to-non-solici/>.

These agreements function to protect employers by limiting what employees can do after leaving their employer, specifically limiting who a former employee may then contact.<sup>142</sup>

In the case, Loral Corporation (“Loral”) brought suit against its former executive officer, Robert Moyes, alleging that he breached a non-solicitation agreement by “inducing” Loral employees to work for his new employer.<sup>143</sup> Moyes contended that the termination agreement was void under Section 16600 which prohibited contracts restraining one from engaging in a profession or business.<sup>144</sup> The court looked to the history of the statute and determined that it invalidates an agreement that punishes a former employee from working for a competitor, but that the statute does not necessarily impact an agreement determining how he may later compete.<sup>145</sup> The question was then whether the noninterference agreement was more like a non-compete agreement or more like a non-disclosure, non-solicitation agreement.<sup>146</sup> The court assessed the impact the agreement had on trade and found that it simply restrained Moyes from disrupting or interfering with his prior employer by “raiding” his former employer’s employees.<sup>147</sup> Further, the agreement expressly permitted him to work for a competitor.<sup>148</sup> Thus, the court held that the restriction was not void on its face under Section 16600 because it only limited Moyes’ business practices in a small way.<sup>149</sup> For years following this decision, employers relied on *Loral Corp.*, to use post-employment restrictions on employees who may have attempted to take confidential information from an employer and its workforce.<sup>150</sup>

#### a. Departure from Prior Non-solicitation Law

A California court of appeal in 2018 disagreed with the precedent set in *Loral*, holding that the non-solicitation agreement at issue did violate trade under section 16600.<sup>151</sup> The employees at issue were recruiters for a travel nursing agency at AMN.<sup>152</sup> The recruiters signed agreements prohibiting them from both “directly or indirectly” contacting any employee of AMN for at least one year after leaving the company.<sup>153</sup>

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142. *FTC Non-Compete Ban: What Employers Need To Know*, WYRICK ROBBINS YATES & PONTON (Apr. 26, 2024), <https://www.wyrick.com/news-insights/ftc-non-compete-ban-what-employers-need-to-know/>.

143. *Loral Corp. v. Moyes*, 174 Cal. App. 3d 268, 271 (Ct. App. 1985).

144. *Loral Corp.*, 174 Cal. App. 3d at 274–75.

145. *Id.* at 276.

146. *Id.*

147. *Id.* at 279.

148. *Id.*

149. *Id.* at 280.

150. *Future Not Looking Bright For California Employee Nonsolicits*, *supra* note 136.

151. *AMN Healthcare Inc.*, 28 Cal. App. 5th 923; *noted in Raashby*, *supra* note 139.

152. *AMN Healthcare Inc.*, 28 Cal. App. 5th at 928.

153. *Id.* at 936.

The court found that such a restriction could limit the total earnings a recruiter would receive after leaving AMN.<sup>154</sup> While recognizing the validity of *Loral*, the court found the circumstances to be different here, acknowledging the nature of the recruiting position, especially with the temporary nature of the travel nursing jobs.<sup>155</sup> Thus, the court held that the restriction was void because it restricted the workers from engaging in their profession, even if just in a limited manner.<sup>156</sup>

## 2. M&A Work-arounds

Buyers typically include a non-compete restriction in a purchase agreement to prevent a seller of a business to use its funds and business knowledge to leave the venture and create a competitor.<sup>157</sup> Imposing a non-compete agreement in a key employee's employment agreement provided some security in retaining people in these roles.<sup>158</sup> However, if implemented, the non-compete ban would increase the risk of key employees leaving for competitors upon sale.<sup>159</sup> Additionally, there is concern regarding the status of non-competes for owners with continued equity after the transaction.<sup>160</sup> In private equity deals, it is also unclear which parties are considered "workers" under the statute.<sup>161</sup> The statute defines a worker as:

a natural person who works or who previously worked, whether paid or unpaid, without regard to the worker's title or the worker's status under any other State or Federal laws, including, but not limited to, whether the worker is an employee, independent contractor, extern, intern, volunteer, apprentice, or a sole proprietor who provides a service to a person.<sup>162</sup>

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154. *Id.*

155. *Id.* at 939.

156. *Id.*

157. Ferrucci, *supra* note 90.

158. See Ryan M. Mardini, *To Compete or Not to Compete: The Importance of Non-Competition Agreements in M&A Deals*, ATTORNEY AT LAW MAGAZINE (July 29, 2022), <https://attorneyatlawmagazine.com/public-articles/business-law/mergers-acquisitions/to-compete-or-not-to-compete-the-importance-of-non-competition-agreements-in-ma-deals> ("Without [a non-compete agreement] in place, the owner or key employees could, hypothetically, form a new entity and utilize their knowledge of the industry to compete with the business that the buyer acquired, reducing the value of the overall business.")

159. See Jennifer Banzaca, *FTC non-compete ban would accelerate turnover, increase retention costs*, PRIVATE FUNDS CFO (July 11, 2024), <https://www.privatefundscfo.com/ftc-non-compete-ban-would-accelerate-turnover-increase-retention-costs/> ("The Federal Trade Commission's ban on non-compete agreements, approved in late April, could increase turnover in an already fierce market for talent in private markets.")

160. See Ferrucci, *supra* note 90 ("The continued enforceability of non-competes against equity holders will depend, in part, on the context of the particular agreement and whether the equity holder is also a 'worker.'")

161. See Ferrucci, *supra* note 90 ("Note that it is unclear whether this broad definition in intended to encompass board members who may be considered non-traditional 'workers.'")

162. 16 C.F.R. § 910.1.

### 3. *Garden Leave*

Garden leave agreements are restrictive agreements that may serve as an alternative to non-competes if the Rule takes action.<sup>163</sup> Garden leave is a time period after resignation where the company continues to pay the former employee, but cuts off all job duties and may terminate access to company property or information.<sup>164</sup> During that time period, an employee may not begin work for a new employer.<sup>165</sup> During the time the employee is collecting a salary, the employee also remains bound by agency laws, including the duty of loyalty to the employer.<sup>166</sup> This type of agreement is uncommon in the United States, except for the financial services industry, but is widespread in the United Kingdom.<sup>167</sup> When drafting agreements, parties can include garden leave clauses in a variety of contracts.<sup>168</sup>

While garden leave is an alternative to non-competes, especially if the Rule is enacted, there are some drawbacks which do not afford employers all the same protections as traditional non-competes.<sup>169</sup> First, garden leave typically lasts between thirty to ninety days, which is much shorter than standard non-competes, ranging from six to eighteen months.<sup>170</sup> The Rule may also make garden leave more expensive for employers than it was prior.<sup>171</sup>

### 4. *Use of Trade Secret Doctrines*

While employers may fear their sensitive information is in danger without non-competes, Congress has enacted laws which provide greater protection for employers and their information than the protection offered by non-competes.<sup>172</sup> If the employer does not ensure safety measures are in place, employers may lose the protection because a

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163. *FTC Addresses Garden Leave Under the New Noncompete Rule*, HORTON (May 29, 2024), <https://www.thehortongroup.com/resources/ftc-addresses-garden-leave-under-the-new-noncompete-rule/>.

164. *Id.*

165. *Id.*

166. John H. Chunn & Rodger T. Quigley, *Potential Impact of FTC Non-Competes Ban on Forfeiture-for-Competition Clauses*, BL (Mar. 2023), <https://www.bloomberglaw.com/external/document/XEFOR8L8000000/employment-professional-perspective-potential-impact-of-ftc-non->.

167. Steinmeyer, *supra* note 123.

168. Nancy J. Townsend, *Non-Compete A Non-Option? Consider Garden Leave*, KRIEG DeVAULT LLP (Mar. 25, 2024), <https://www.kriegdevault.com/insights/test-2-non-compete-a-non-option-consider-garden-leave>.

169. Steinmeyer, *supra* note 123.

170. Steinmeyer, *supra* note 123.

171. Banzaca, *supra* note 159.

172. R. Mark Halligan, *Trade secrets and the death of non-competes*, THOMPSON REUTERS (Aug. 13, 2024), <https://www.reuters.com/legal/legalindustry/trade-secrets-death-non-competes-2024-08-13/>; Matthew J. Bakota & Emily M. Snively, *Trade Secret Protection as a “Trade-Off” for Non-Competes*, DINSMORE (Oct. 9, 2024), <https://www.dinsmore.com/publications/trade-secret-protection-as-a-trade-off-for-non-competes/>.

trade secret is something that is not generally known or readily ascertainable by others.<sup>173</sup> Amidst uncertainty, advisors recommend limiting physical and technological access to any trade secrets.<sup>174</sup>

Historically, courts recognized the inevitable disclosure doctrine as a trade secret protection that essentially functioned as a non-compete agreement.<sup>175</sup> Under this doctrine, an employer could bring a claim of trade secret appropriation by proving that a former employee's new job would "inevitably lead to the use of the trade secrets."<sup>176</sup> In *PepsiCo, Inc. v. Redmond*,<sup>177</sup> the United States Court of Appeals for the Seventh Circuit enjoined a defendant from working for a new employer under the inevitable disclosure doctrine.<sup>178</sup> The inevitable disclosure doctrine was questioned in 2016 when Congress passed the Defend Trade Secrets Act ("DTSA").<sup>179</sup> However, the doctrine was brought back in 2024 in *My Fav Electronics, Inc. v. Currie*,<sup>180</sup> where a non-disclosure agreement prohibited future employment.<sup>181</sup> The court noted the difference between protecting legitimate trade secrets and completely prohibiting future employment.<sup>182</sup> In *Orthofix, Inc. v. Hunter*,<sup>183</sup> the Sixth Circuit even held that certain confidential information that does not qualify as a trade secret can be protected by contract.<sup>184</sup>

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173. Amol Parikh et al., *Revisiting Trade Secret Strategies Following the FTC's Ban on Noncompete Agreements*, MCDERMOTT WILL & SCHULTE (May 16, 2024), <https://www.mwe.com/insights/revisiting-trade-secret-strategies-following-the-ftcs-ban-on-noncompete-agreements/>.

174. Leeron G. Kalay & Katherine D. Prescott, *Legal Alert: What the FTC's Ban on Noncompete Agreements Means for Trade Secrets*, FISH & RICHARDSON P.C. (May 1, 2024), <https://www.fr.com/insights/thought-leadership/blogs/legal-alert-what-the-ftcs-ban-on-noncompete-agreements-means-for-trade-secrets/>.

175. Joseph M. Casino, Thomas Landman & Rikesh P. Patel, *A Guide to Trade Secret Protection without a Non-Compete*, AMERICAN BAR ASSOCIATION (Sept. 15, 2020), <https://www.americanbar.org/groups/litigation/resources/newsletters/commercial-business/guide-trade-secret-protection-without-noncompete/>.

176. *Id.*

177. 54 F.3d 1262 (7th Cir. 1995).

178. See Justin K. Beyer, *No Non-Compete? Maybe not a problem as PepsiCo appears to be alive and well.*, SEYFARTH SHAW LLP (Oct. 25, 2024), <https://www.tradesecretslaw.com/2024/10/articles/dtsa/no-non-compete-maybe-not-a-problem-as-pepsico-appears-to-be-alive-and-well/> ("[A] court had the inherent power to enjoin a former employee from working with a new employer, in whole or in part, if that defendant misappropriated trade secrets, and their conduct was duplicitous in so doing.").

179. *Id.* ("In 2016, the Defend Trade Secret Act, 18 U.S.C. § 1836 (the "DTSA"), passed Congress and went into effect."); 18 U.S.C. § 1836.

180. No. 24 C 1959, 2024 WL 4528330 (N.D. Ill. Oct. 18, 2024).

181. *My Fav Elecs. Inc. v. Currie*, No. 24 C 1959, 2024 WL 4528330 at 3 (N.D. Ill. Oct. 18, 2024).

182. Beyer, *supra* note 178.

183. 630 F. App'x 566 (6th Cir. 2015).

184. *Orthofix, Inc. v. Hunter*, 630 F. App'x 566 (6th Cir. 2015).

a. Inevitable Discovery Doctrine

*PepsiCo* was a landmark decision, establishing the “inevitable discovery doctrine” without specifically naming it.<sup>185</sup> There, PepsiCo sought to enjoin a high-level former manager from working for a competitor.<sup>186</sup> Redmond, the former employee, had signed a confidentiality agreement, but had not signed a non-compete agreement.<sup>187</sup> The United States Court of Appeals for the Seventh Circuit agreed with the district court’s decision to grant a preliminary injunction, reasoning that Redmond’s position at Quaker would lead to disclosure of trade secrets and force him to breach his non-disclosure agreement.<sup>188</sup> Thus, the decision in *PepsiCo* essentially created a non-compete without the parties ever explicitly agreeing to it.<sup>189</sup>

Years after *PepsiCo*, in 2016, Congress passed the DTSA.<sup>190</sup> There was concern that the statute would displace the inevitable disclosure doctrine due to 18 U.S.C. § 1836(b)(3), which permits a court to grant an injunction, but must not “prevent a person from entering into an employment relationship.”<sup>191</sup> Further, some courts even held that the doctrine was no longer available under the DTSA.<sup>192</sup> However, in October 2024, a case from the Northern District of Illinois appeared to bring back the doctrine.<sup>193</sup>

b. Inevitable Discovery Doctrine Stands

Almost 30 years after *PepsiCo*, the court in *Currie* applied a similar analysis and outcome.<sup>194</sup> The plaintiff, an Apple device buyback partner, brought action against former procurement leadership employees who went to work for a competitor.<sup>195</sup> One employee signed a non-disclosure agreement, and another signed an employment contract with a non-disclosure provision, concerning the employee’s access to sensitive, confidential company information.<sup>196</sup> The court granted the plaintiff’s preliminary injunction in part.<sup>197</sup> The defendant was

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185. Beyer, *supra* note 178.

186. *PepsiCo v. Redmond*, 54 F.3d 1262, 1263 (7th Cir. 1995).

187. *Casino*, *supra* note 175.

188. *PepsiCo*, 54 F.3d at 1271.

189. *See Id.* (preventing the defendant from working for a new employer for a period of time to prevent disclosure of confidential information).

190. Beyer, *supra* note 178 (“In 2016, the Defend Trade Secret Act, 18 U.S.C. § 1836 (the “DTSA”), passed Congress and went into effect.”); 18 U.S.C. § 1836 (the “DTSA”).

191. Beyer, *supra* note 178 (quoting 18 U.S.C. §1836(b)(3)).

192. Beyer, *supra* note 178.

193. Beyer, *supra* note 178.

194. *See PepsiCo*, 54 F.3d at 1271; *see also Currie*, No. 24 C 1959 (enforcing a preliminary injunction prohibiting the defendant from performing certain work, based on the inevitable disclosure doctrine).

195. *Currie*, No. 24 C 1959 at 2–4.

196. *Id.*

197. *Id.* at 18.

restricted from soliciting or contacting any of the former employer's existing customers for one year in the procurement of Apple device buyback services.<sup>198</sup>

This case exhibited the validity of the inevitable disclosure doctrine and the DTSA.<sup>199</sup> While the statute does not allow for a complete prohibition on new employment, it does allow for the employer to place conditions on subsequent employment.<sup>200</sup> Thus, the doctrine appears to remain good law, as long as the employer does not seek a complete prohibition of new employment.<sup>201</sup>

### 5. TRAPs

Training Repayment Agreement Provisions (“TRAPs”) require workers to pay their employers for training costs if they leave their employer, often for any reason, within a specific time period.<sup>202</sup> Recently, employers have increased the use of TRAPs in agreements with entry-level workers.<sup>203</sup> Of specific concern is when employers impose TRAPs on individuals lacking bargaining power, for example, nursing school graduates often facing debt.<sup>204</sup>

## III. ANALYSIS

The Federal Trade Commission (“FTC” or “Commission”) designed the non-compete ban (“Rule”) to promote competition and protect workers.<sup>205</sup> Without such agreements, companies will look to other methods including restrictive agreements to achieve the same level of protection.<sup>206</sup> While the Rule does ban “functional” non-competes, the lack of clarity poses a gray area and room for interpretation in drafting other restrictive covenants.<sup>207</sup> If implemented as is, the Rule would not serve its purpose because other restrictive covenants are available and have the same result.<sup>208</sup> However, this Note will also demonstrate that there are less restrictive means for employers to protect their business

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198. *Id.* at 19.

199. Beyer, *supra* note 178.

200. Beyer, *supra* note 178.

201. Beyer, *supra* note 178.

202. Daniel A. Hanley, *State Law Provides an Untapped Route to Combat TRAPs and Other Coercive Contracts*, NAT'L EMP. L. PROJECT (July 24, 2024), <https://www.nelp.org/state-law-provides-an-untapped-route-to-combat-traps-and-other-coercive-contracts/>.

203. Jonathan F. Harris, *History Absolves the FTC: A Defense of the Rule on Non-Competes and Functional Non-Competes*, HARV. L. REV. (Jan. 5, 2025), <https://harvardlawreview.org/blog/2025/01/history-absolves-the-ftc-a-defense-of-the-rule-on-non-competes-and-functional-non-competes/>.

204. *Trapped at Work*, STUDENT BORROWER PROTECTION CTR. 14 (July 2020), [https://protectborrowers.org/wp-content/uploads/2022/07/Trapped-at-Work\\_Final.pdf](https://protectborrowers.org/wp-content/uploads/2022/07/Trapped-at-Work_Final.pdf).

205. *FTC Announces Rule Banning Noncompetes*, *supra* note 2.

206. *Federal Trade Commission Issues Sweeping Non-Compete Ban*, *supra* note 64.

207. ROPES & GRAY LLP, *supra* note 64.

208. *See infra* notes 211–59 and accompanying text.

and proprietary information.<sup>209</sup> Ultimately, this Note will conclude by asserting that the FTC should clarify its Rule to specifically account for functional non-competes.<sup>210</sup>

A. THE USE OF ALTERNATIVE RESTRICTIVE AGREEMENTS WOULD RENDER THE RULE OBSOLETE WITHOUT FURTHER FTC ACTION.

1. *Non-solicitation agreements*

While a non-solicitation agreement may legally serve a business' needs, there is potential for the agreement to "function as a non-compete."<sup>211</sup> The FTC did not provide explicit guidance on non-solicitation agreements, but in California, *Loral Corp. v. Moyes*<sup>212</sup> provides a potential framework for the analysis.<sup>213</sup> Lawyers call to attention the potential for change in enforceability of non-solicitation agreements.<sup>214</sup> While California courts had upheld non-solicitation agreements, a long-upheld precedent may have been pushed aside by two cases.<sup>215</sup> In *Loral*, the court distinguished provisions which precluded a former employee from hiring his former employer's employees from a provision which restricted solicitation of those employees.<sup>216</sup> In light of these cases, *Loral* still remains good law.<sup>217</sup> Courts have viewed the provisions differently, but non-solicitation provisions may stand if they are "reasonably narrowly tailored."<sup>218</sup> Without specific guidance in place from the FTC, employers are likely to push the limits on non-solicitation agreements, claiming their use as "reasonably tailored."<sup>219</sup>

2. *M&A Implications*

With such a broad definition of a worker, there is concern of whether parties such as board members will be considered workers, and

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209. See *infra* notes 260–80 and accompanying text.

210. See *infra* notes 281–326 and accompanying text.

211. *FTC Non-Compete Ban: What Employers Need To Know*, *supra* note 142.

212. 174 Cal. App. 3d 268 (Ct. App. 1985).

213. Compare Hendershot, *supra* note 141 (explaining the Rule does not expressly prohibit non-solicitation agreements) with *Loral Corp. v. Moyes* 174 Cal. App. 3d 268 (Ct. App. 1985) (explaining that a non-solicitation agreement has the potential to function as a non-compete agreement).

214. Ochs, *supra* note 132.

215. Compare *Loral*, 174 Cal. App. 3d at 271 (holding a restriction on post-employment solicitation of a former employer's employees lawful), with *AMN Healthcare, Inc. v. Aya Healthcare Services, Inc.* 28 Cal. App. 5th 923 (2018) (holding a non-solicitation provision in a nurse recruiter's employment contract was unlawful).

216. *Future Not Looking Bright For California Employee Nonsolicits*, *supra* note 136.

217. *Future Not Looking Bright For California Employee Nonsolicits*, *supra* note 136.

218. *Future Not Looking Bright For California Employee Nonsolicits*, *supra* note 136.

219. See generally Hendershot, *supra* note 141 (explaining the FTC's vague commentary on enforceability of non-solicitation clauses and the Rule's lack of an absolute position).

whether their non-compete agreements would be enforceable.<sup>220</sup> Law firms around the country expect businesses to get creative in using the bona fide sale exception, turning to more partnership transactions and equity ownership offerings so that executives of a target company can qualify under the exception.<sup>221</sup> While transactions concerning majority ownership appear to fall clearly in the exception, there is still uncertainty when it comes to minority interests.<sup>222</sup>

Aside from concern, advisors are also proposing “creative solutions” for buyers and sellers in these transactions to work around the Rule.<sup>223</sup> First, entities can issue restricted stock with forfeiture rights, aiming to keep employees with the company in order to share in a company’s success.<sup>224</sup> Next, buyers can bargain for “earn-outs.”<sup>225</sup> Earn-out provisions and other contingency consideration models depend on the target company’s success post-closing in determining its total valuation.<sup>226</sup>

M&A teams may begin to structure more rollover equity into transactions as an alternative protection.<sup>227</sup> Through this structure, owners will “roll over” some of their equity into equity of the acquiring entity.<sup>228</sup> In addition to rolling over, the buyer typically imposes a non-compete for the time the owner holds the equity.<sup>229</sup> The parties, in seeking to enforce this agreement, may first argue that the restriction falls under the sale of business exception.<sup>230</sup> Next, the equity-holder may not be a worker, and thus the Rule would not apply.<sup>231</sup> Finally, parties may argue the covenant is an “in-term non-compete clause” as opposed to a “post-termination non-compete clause” rendering it valid.<sup>232</sup>

### 3. Garden leave

Garden leave provisions may benefit employers, and harm employees, in ways similar to non-competes.<sup>233</sup> First, garden leave provisions prevent an employee from taking confidential information to a new

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220. Ferrucci, *supra* note 90.

221. *United States: Still going strong - M&A noncompetes and the FTC’s final rule on noncompetes*, *supra* note 94.

222. Sweeney, *supra* note 97.

223. *Creative Solutions*, *supra* note 98.

224. *Creative Solutions*, *supra* note 98.

225. *Creative Solutions*, *supra* note 98.

226. *Creative Solutions*, *supra* note 98.

227. Sarver, *supra* note 98.

228. Sarver, *supra* note 98.

229. Sarver, *supra* note 98.

230. See Sarver, *supra* note 98 (discussing parts of the Rule open to interpretation); see also *Understanding the Bona Fide Sale Exception to the FTC’s Noncompete Ban*, *supra* note 91.

231. Sarver, *supra* note 98.

232. Sarver, *supra* note 98.

233. *FTC Addresses Garden Leave Under the New Noncompete Rule*, *supra* note 163.

employer immediately.<sup>234</sup> Next, these provisions can ease concern that a former employee will poach clients.<sup>235</sup> Lastly, some advisors suggest that they can provide for an easier transition overall, where the former employee will have availability to answer questions and help others fulfill job duties.<sup>236</sup> Again, the FTC declined to use a blanket approach to garden leave, such that a garden leave provision would not be prohibited if the worker at issue is still employed and is still receiving the same pay and benefits, which may be determined pro-rata.<sup>237</sup>

State legislatures have addressed garden leave in the realm of non-compete law.<sup>238</sup> Generally, courts are more willing to uphold garden leave or similar restrictions when there is a “legitimate business interest” at stake.<sup>239</sup> While there is less case law than for non-competes, courts have still viewed garden leave provisions with scrutiny at times.<sup>240</sup> Because workers subject to garden leave are still considered employees, courts have not specifically enforced agreements because doing so would force employees to work against their will.<sup>241</sup> On the contrary, courts have imposed periods of time where these workers may not compete during the garden leave time instead.<sup>242</sup> Changing the classification of how long a worker is considered an employee is a technical way to create a non-compete agreement, which again, undermines the purpose of the Rule.<sup>243</sup>

#### 4. Trade Secret Protection

Employers may also look to enforce functional non-compete agreements under the guise of trade secret protection.<sup>244</sup> Historically, courts recognized the inevitable disclosure doctrine as a trade secret protection that essentially functioned as a non-compete agreement.<sup>245</sup> Under this doctrine, an employer may bring a claim of trade secret

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234. *FTC Addresses Garden Leave Under the New Noncompete Rule*, *supra* note 163.

235. *FTC Addresses Garden Leave Under the New Noncompete Rule*, *supra* note 163.

236. *FTC Addresses Garden Leave Under the New Noncompete Rule*, *supra* note 163.

237. *FTC Addresses Garden Leave Under the New Noncompete Rule*, *supra* note 163 (explaining the similarities between garden leave provisions and non-competes).

238. Steinmeyer, *supra* note 123.

239. Steinmeyer, *supra* note 123.

240. See Steinmeyer, *supra* note 123 (explaining reluctance to enforce garden leave because it forces employees to remain in an “at will employment relationship against their will[.]”); see also, *FTC Addresses Garden Leave Under the New Noncompete Rule*, *supra* note 163 (noting a Massachusetts law requiring 50% pay to survive the state’s laws).

241. Steinmeyer, *supra* note 123.

242. Steinmeyer, *supra* note 123.

243. Compare 16 C.F.R. § 910.1 (defining “worker” under the Rule), with Steinmeyer, *supra* note 123 (explaining that an employee is still considered employed during a garden leave period).

244. See *infra* notes 175–178 and accompanying text.

245. Casino, *supra* note 175.

appropriation by proving that a former employee's new job will "inevitably lead to the use of the trade secrets."<sup>246</sup>

### 5. TRAPs

Training Repayment Agreement Provisions ("TRAPs") have the potential to cause greater burden for workers than traditional non-competes because the agreements have the possibility to charge workers thousands of dollars for simply leaving a job.<sup>247</sup> Under the Rule, the FTC has not banned all TRAPs, affording an alternative for employers who are no longer able to use non-compete agreements.<sup>248</sup> Commenters have expressed concerns that employers will use TRAPs as an alternative to non-competes.<sup>249</sup> Moreover, if an employee is subject to a term or restriction that prohibits or penalizes the employee from "seeking or accepting other work or starting a business after their employment ends," then that restriction is classified as a functional equivalent and is thus, a non-compete under the Rule.<sup>250</sup>

These restrictive covenants have hit specific industries, including health care, transportation, and retail.<sup>251</sup> One company notorious for subjecting workers to TRAPs is PetSmart.<sup>252</sup> PetSmart advertises free training for dog groomers, valued at \$6,000.<sup>253</sup> However, what the advertisement fails to note is that the groomers must pay \$5,000 for the training if they leave the company prior to two years after the training and owe \$2,500 if they leave after staying only one year following training.<sup>254</sup> Additionally, these groomers are not walking away with any recognized degree or certification.<sup>255</sup> If some TRAPs are legal while others are prohibited, it leaves the opportunity for employers to exploit this option, claiming they sought a legal alternative to a non-compete agreement.<sup>256</sup>

### 6. Non-disclosure Agreements

Lastly, non-disclosure agreements ("NDAs") are enforceable agreements where parties agree to keep certain information confidential.<sup>257</sup>

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246. Casino, *supra* note 175.

247. Hanley, *supra* note 202.

248. See Hanley, *supra* note 202 (describing businesses turning to other contractual protections, focusing on TARPS, in light of the Rule).

249. Fed. Reg., *supra* note 14.

250. Fed. Reg., *supra* note 14.

251. *Trapped at Work*, *supra* note 204.

252. *Trapped at Work*, *supra* note 204 at 20.

253. *Trapped at Work*, *supra* note 204 at 20.

254. *Trapped at Work*, *supra* note 204 at 21.

255. *Trapped at Work*, *supra* note 204 at 21.

256. See Hanley, *supra* note 202 (describing TRAPs as a "leading contractual weapon").

257. *4 things*, *supra* note 99.

These agreements are used in a variety of settings, including M&A deals, to protect information during negotiations, and in employment settings where a worker has access to confidential information.<sup>258</sup> Like with trade secrets, careful drafting may create an NDA so burdensome that it prohibits a worker from seeking new employment while flying under the FTC's radar.<sup>259</sup>

## B. EMPLOYERS CAN STILL PROTECT TRADE SECRETS AND BUSINESS GOALS THROUGH LESS HARMFUL MEANS

### 1. *Retention Incentives*

In general, non-compete agreements in the M&A context have received less scrutiny than non-compete agreements in the employment context.<sup>260</sup> When considering the need for key personnel post-closing, these personnel play a major role not only in transitioning the business, but also in moving it forward on its own.<sup>261</sup> This is a concern in the long-run, particularly if the people leaving carry great value, possessing company knowledge, unique skills, or customer relationships.<sup>262</sup>

In a world without non-competes, there are still legal alternatives to retain employees in an M&A transaction.<sup>263</sup> When a valuation of the target company includes continued employment of key employees, failure to take alternative measures can lead to problems if the non-compete ban goes into action.<sup>264</sup> Advisors should consider retention incentives for key employees.<sup>265</sup> These can include deferred compensation agreements, vesting provisions, and conditional equity.<sup>266</sup>

### 2. *Trade Secret Law*

Without protection from non-competes, employers can protect their sensitive information by deeming it a "trade secret."<sup>267</sup> Trade secrets

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258. *4 things*, *supra* note 99.

259. *Compare* *Casino*, *supra* note 175 (explaining the inevitable discovery doctrine that permits trade secret protection to function as a non-compete), *with 4 things*, *supra* note 99 (describing the purpose behind NDAs, limiting both disclosure *and* use of business information).

260. *Mardini*, *supra* note 158.

261. *See* *Mardini*, *supra* note 158 ("It is important to note that employer/employee non-competition agreements are often also relevant to M&A transactions to the extent the buyer desires to retain certain employees of the seller who have special talents, knowledge, and experience with business operations to help develop the business post-sale.")

262. *See* *Mardini*, *supra* note 158 (discussing the importance of non-compete agreements in protecting corporate assets).

263. *Sweeney*, *supra* note 97.

264. *Sweeney*, *supra* note 97.

265. *Sweeney*, *supra* note 97.

266. *Sweeney*, *supra* note 97.

267. *Bakota*, *supra* note 172.

generally include business or other information of value because they are “not known or accessible to the public” and “the owner has taken reasonable steps to keep it a secret.”<sup>268</sup> In addition, experts recommend employers with trade secrets use this time of uncertainty as an opportunity to assess their current trade secret plans and protections.<sup>269</sup> These measures include reviewing employee handbooks and training materials to set expectations for employees up front.<sup>270</sup> Next, employers should consider limiting “physical access to high-security areas” in addition to NDAs for those employees needing access.<sup>271</sup>

Further, the DTSA enables an employer to bring civil action if an employee misappropriates a trade secret related to a good in interstate or foreign commerce.<sup>272</sup> Additionally, the statute provides for a federal court to order a civil seizure.<sup>273</sup> An injunction and damages are remedies for a violation of the DTSA, remedies often sought in breach of non-compete cases.<sup>274</sup>

### 3. *Fixed-duration Contracts*

The FTC asserts there are less restrictive alternatives, such as fixed-duration contracts, to achieve these asserted protective purposes.<sup>275</sup> In the United States, the default rule for most employment contracts is that employment is “at will” and that the employee or employer may end the employment relationship for any or no reason.<sup>276</sup> In contrast, parties may negotiate for a fixed-term employment agreement.<sup>277</sup> A fixed-duration agreement sets restrictions on competing with the employer while employed, and is not subject to the same scrutiny as a post-employment restriction.<sup>278</sup> If an employee breaches this type of contract, the court is unlikely to grant specific performance because doing so may amount to involuntary servitude.<sup>279</sup> Courts have instead, considered granting “negative specific performance.”<sup>280</sup>

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268. Bakota, *supra* note 172.

269. Kalay, *supra* note 174.

270. Kalay, *supra* note 174.

271. Kalay, *supra* note 174.

272. 18 U.S.C. § 1836.

273. *Id.*

274. Bakota, *supra* note 172.

275. CONG. RSCH. SERV., *supra* note 34 at 5.

276. Dolive, *supra* note 68.

277. Dolive, *supra* note 68.

278. Fosse, *supra* note 68.

279. Dolive, *supra* note 68.

280. Dolive, *supra* note 68.

C. THEREFORE, THE FTC SHOULD ISSUE MORE SPECIFIC GUIDANCE TO ENJOIN COMPANIES FROM USING WORK-AROUNDS AND ENSURE THAT FUNCTIONAL NON-COMPETES DO NOT UNDERMINE THE RULE

Under the FTC's "functional equivalent" language in the Rule, the Commission has a general framework for stopping employers attempting to evade the Rule.<sup>281</sup> First, the FTC should issue more specific guidance on the scope of non-solicitation agreements.<sup>282</sup> In determining which agreements function as non-competes, criterion such as broad restrictions and specialized roles may come into play.<sup>283</sup> For example, an agreement that prohibits a salesperson from contacting any client regardless of the industry may limit the worker's ability to find a job.<sup>284</sup> Additionally, those in highly specialized roles may be prevented from finding work due to a non-solicitation agreement and the small size of a relevant market.<sup>285</sup> Ultimately, applying an analysis like the ones in *Loral Corp.* and *AMN* may help the FTC differentiate between lawful and unlawful non-solicitation agreements.<sup>286</sup>

1. *Bona fide sale*

The FTC has taken precautionary measures in allowing the bona fide sale exception, with hopes to prevent employers from using it to evade the Rule itself.<sup>287</sup> The FTC defined a bona fide sale as a "arm's length transaction made between independent parties, in which the seller had a reasonable opportunity to negotiate the terms of the sale."<sup>288</sup> This qualification is an attempt to prevent parties from entering sham transactions to take advantage of the exception.<sup>289</sup> Further, the FTC has provided specific examples including transactions between wholly owned subsidiaries and mandatory stock redemption programs as sales that will not qualify under the exception.<sup>290</sup> Interestingly, the Rule did not proscribe a minimum equity stake or purchase threshold

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281. See *infra* notes 4–7 and accompanying text.

282. See Hendershot, *supra* note 141 (discussing the FTC's vague commentary on enforceability of non-solicitation clauses and the Rule's lack of an absolute position).

283. Hendershot, *supra* note 141.

284. Hendershot, *supra* note 141.

285. Hendershot, *supra* note 141.

286. See *infra* notes 143–56 and accompanying text.

287. See *Understanding the Bona Fide Sale Exception to the FTC's Noncompete Ban*, *supra* note 91 (addressing the "bona fide sale" requirement as implemented to prevent sham transactions or other stock transfer schemes to evade the Rule).

288. *Understanding the Bona Fide Sale Exception to the FTC's Noncompete Ban*, *supra* note 91.

289. *Understanding the Bona Fide Sale Exception to the FTC's Noncompete Ban*, *supra* note 91.

290. *Understanding the Bona Fide Sale Exception to the FTC's Noncompete Ban*, *supra* note 91.

to take advantage of the exception, though a 25% interest sale had been proposed.<sup>291</sup>

In the M&A context, while the FTC does impose a “bona fide sale” requirement to the exception, there is still gray area which should be addressed to combat abusive deal structures.<sup>292</sup> The FTC must clarify whether non-traditional workers, such as board members, are included in its definition.<sup>293</sup> As discussed, buyers and private equity sponsors often impose non-competes to those rolling over equity.<sup>294</sup> Not uncommon in this setting is pairing the restriction with punitive rights, such that in the event of a breach, the party must sell its equity to the buyer at a pre-determined, typically lower price.<sup>295</sup> The FTC has recognized the use of a forfeiture provision as a non-compete provision.<sup>296</sup> Furthermore, the FTC has taken precautionary measures to prevent the use of sham transactions in commentary—“springing” non-competes—or ones effective upon breach will not be enforceable.<sup>297</sup> Next, some creativity in structuring the transaction may not provide the desired outcome, as the FTC has also noted in commentary that non-competes arising from repurchase rights, mandatory redemption, and a restriction effective upon redemption of vested equity are not considered bona fide sales for the purpose of the Rule.<sup>298</sup> The FTC should provide more clarity in this area, in part, whether investment funds are subject to the Rule when dealing with carried interest vehicles, partnerships, and LLCs.<sup>299</sup>

## 2. *Claiming Non-profit Status*

To avoid parties taking advantage of the non-profit exemption to the Rule, the FTC will apply a two-part test to determine whether a party qualifies or is outside the Commission’s jurisdiction.<sup>300</sup> Under Section 4, the FTC will look to (1) the source of income and (2) the

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291. Ferrucci, *supra* note 90.

292. *See* Ferrucci, *supra* note 90 (discussing the bona fide sale exception’s lack of clarity concerning forfeiture and repurchase rights).

293. Ferrucci, *supra* note 90.

294. *See infra* notes 157–60 and accompanying text.

295. Ferrucci, *supra* note 90.

296. Ferrucci, *supra* note 90 (“The FTC rule generally treats a forfeiture (and ostensibly any other penalty) for breach of a non-compete as an unenforceable non-compete provision.”).

297. Hammett, *supra* note 95.

298. *See* Hammett, *supra* note 95 (“There is significant uncertainty for investment funds regarding the applicability of the final rule to carried interest vehicles such as a partnership or LLC.”).

299. Hammett, *supra* note 95.

300. *FTC Final Rule Banning Most Non-Competes Passes – What Nonprofits Need to Know*, *supra* note 81.

destination of the income.<sup>301</sup> This test is vital to go beyond general tax-filing status and make sure the organization is actually aimed at a charitable purpose and that the corporation and its members are not walking away with a profit.<sup>302</sup>

### 3. *Partner with other Agencies*

The FTC should partner with other agencies focusing on other elements of the same issue.<sup>303</sup> Specifically, the National Labor Relations Board (“NLRB”) also weighed in on “stay-or-pay” provisions including TRAPs, as often, but not always unlawful.<sup>304</sup> Following the FTC’s focus on non-competes, in October 2024, NLRB General Counsel Jennifer Abruzzo issued a memo focusing on the broad use of non-competes and similar agreements.<sup>305</sup> Specifically, there is concern that these restrictive covenants infringe on a worker’s rights under Section 7 of the National Labor Relations Act (“NLRA”), which include seeking better working conditions or seeking different employment.<sup>306</sup> The memo proposes solutions for employers to continue to use these agreements lawfully.<sup>307</sup> First, agreements must be “fully voluntary and tied to a conferred benefit” without burdening a worker’s Section 7 rights.<sup>308</sup> Additionally, they should meet three benchmarks: a reasonable and specific repayment amount, a reasonable “stay” period, and no repayment if terminated without cause.<sup>309</sup> In 2025, the NLRB rescinded the memos, indicating a potential shift in enforcement focus, but leaving employers with the same questions remaining.<sup>310</sup>

The Uniform Law Commission (“ULC”) has also taken interest in the use of non-competes and their respective counterparts.<sup>311</sup> Unlike the FTC Rule, the Uniform Restrictive Employment Agreement Act (“Uniform Act”) governs all restrictive agreements, notably, non-solicitation, no-recruit, no-business, confidentiality, payment-for-competition, and training-repayment agreements.<sup>312</sup> The Uniform Act

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301. *FTC Final Rule Banning Most Non-Competes Passes – What Nonprofits Need to Know*, *supra* note 81.

302. *FTC Final Rule Banning Most Non-Competes Passes – What Nonprofits Need to Know*, *supra* note 81.

303. See Holt, *supra* note 37 (explaining the NLRB’s action against non-competes).

304. Memorandum from the NLRB General Counsel on Remedying the Harmful Effects of Non-Compete and “Stay-or-Pay” Provisions that Violate the National Labor Relations Act to All Regional Directors, Officers-in-Charge, and Resident Officers (Oct. 7, 2024); see Holt, *supra* note 37 (explaining the NLRB’s action against non-competes).

305. Holt, *supra* note 37.

306. Holt, *supra* note 37.

307. Holt, *supra* note 37.

308. Holt, *supra* note 37.

309. Memorandum from the NLRB General Counsel, *supra* note 37.

310. Satinsky, *supra* note 104.

311. Schwab, *supra* note 38 at 280.

312. *Compare* Unif. Restrictive Emp. Agreement Act § 9 (Unif. L. Comm’n 2021), *with* 16 C.F.R. §§ 910.

aims to codify the common law's "reasonableness" standard, paired with specific laws on each type of restrictive agreement.<sup>313</sup> Pursuant to Section 9 of the Uniform Act, a confidentiality agreement is "prohibited and unenforceable" unless the worker may utilize and reveal information that "(1) arises from the worker's general training, knowledge, skill, or experience, whether gained on the job or otherwise; (2) is readily ascertainable to the relevant public; or (3) is irrelevant to the employer's business."<sup>314</sup>

To illustrate the specificity of the Uniform Act on each restriction, Section 11 prohibits non-solicitation agreements unless the agreement: "(1) applies only to a prospective or ongoing client or customer of the employer with which the worker had worked personally; and (2) lasts not longer than one year after the work relationship between the employer and worker ends."<sup>315</sup> Paired with the Uniform Act's notice and time restrictions, the Act may provide clarity to non-compete law, and provides details regarding "functional" non-competes that the FTC's Rule is missing.<sup>316</sup>

#### 4. Confidentiality Agreements

The overlap of laws governing trade secrets and confidentiality agreements can provide a means for the FTC to stop overly broad confidentiality agreements from functioning as non-competes.<sup>317</sup> While confidentiality agreements governing proprietary information may stand, the risk is that employers will include restrictions concerning the sharing, and more importantly, the use of the information.<sup>318</sup> Courts have held that general knowledge cannot be classified as a trade secret, and that to protect such information, employers should turn to contract law.<sup>319</sup>

In the Sixth Circuit case, *Orthofix, Inc. v. Hunter*,<sup>320</sup> the court provided guidance on when a non-disclosure functions essentially as a non-compete.<sup>321</sup> There, an NDA prohibiting employees from using their general knowledge, or experience from their former employer, was more like a non-compete agreement.<sup>322</sup> Some courts are even asserting that confidentiality agreements that go beyond trade secrets are unenforceable.<sup>323</sup> Thus, the FTC should clarify which information is

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313. Schwab, *supra* note 41 at 277.

314. Unif. Restrictive Emp. Agreement Act § 9 (Unif. L. Comm'n 2021).

315. Unif. Restrictive Emp. Agreement Act § 11 (Unif. L. Comm'n 2021).

316. *See* Schwab, *supra* note 38 at 279.

317. *See infra* notes 172–84 and accompanying text.

318. Hrды, *supra* note 101 at 684.

319. Hrды, *supra* note 101 at 688–90.

320. 630 F. App'x 566 (6th Cir. 2015).

321. *Orthofix, Inc. v. Hunter*, 630 F. App'x 566 (6th Cir. 2015).

322. *Orthofix*, 630 F. App'x 566 at 573.

323. Hrды, *supra* note 101, at 712.

proprietary under such restrictive agreements and which information serves to only stifle competition.<sup>324</sup>

All things considered, the FTC has an interest in clarifying its position on alternative restrictive covenants.<sup>325</sup> While employers and parties to M&A transactions are anxious to protect their workforce and business information under standard practices, the FTC has an opportunity to lay the groundwork for alternative measures that, in the end, are better for all parties involved.<sup>326</sup> Furthermore, guidance and regulations from other authorities provide a helpful starting place for the FTC to implement these clarifications.<sup>327</sup>

#### IV. CONCLUSION

With proposed goals of increased competition and employee mobility, the FTC's Rule on its face appeared to benefit the economy as a whole, with the FTC estimating a 2.7% increase in business formation as a result.<sup>328</sup> However, the FTC Rule will cause employers to find creative solutions to work around the non-compete ban through other restrictive agreements that serve the same purpose as non-competes.<sup>329</sup> Although the FTC ban is halted and waiting appeal, non-competes are not necessarily safe.<sup>330</sup> Non-compete agreements are still facing scrutiny in the courts and at the state level.<sup>331</sup>

The FTC anticipated employers would find alternative restrictive agreements and included language banning functional equivalents in hopes to circumvent the potential for loop-holes.<sup>332</sup> Although the "function equivalent" language provided more insight on the Rule's

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324. Compare *Orthofix*, 630 F. App'x 566 at 573 (discussing non-disclosure agreements functioning as non-competes), with *Hrdy*, *supra* note 101, at 714 ("Courts tend to be far more lenient when reviewing confidentiality agreements in the business-to-business context, where there are typically sophisticated parties on both sides of the transaction with relatively equal bargaining power, and where both sides typically have independent legal representation.").

325. See *Federal Trade Commission Issues Sweeping Non-Compete Ban*, *supra* note 64 (explaining the lack of clarity in the Rule leading to room for interpretation in contract drafting).

326. See CONG. RSCH. SERV., *supra* note 34 at 5 (naming fixed-duration contracts as a potential less restrictive alternative); see also *Bakota*, *supra* note 172 (encouraging businesses to seek protection under trade secret laws as a less restrictive alternative to non-competes).

327. See *infra* notes 303–16 and accompanying text.

328. *FTC Announces Rule Banning Noncompetes*, *supra* note 2.

329. See *Creative Solutions*, *supra* note 98 (describing non-compete alternatives).

330. See *Atlas*, *supra* note 118 (predicting that the FTC will consider the scope and reasonableness of non-compete agreements on a case-by-case basis).

331. See *infra* notes 123–39 and accompanying text.

332. Fed. Reg., *supra* note 14 ("The Commission finds that the functional equivalents of non-competes—because they prevent workers from engaging in the same types of activity—are likewise restrictive and exclusionary conduct that tends to negatively affect competitive conditions in a similar way.").

intent, the lack of specificity in what type of restrictions actually function as non-competes opens the door to an ineffective rule and endless litigation.<sup>333</sup> Employers will continue to push the limits on employment agreement drafting, turning to non-solicitation, non-disclosure, TRAPs, and a variety of similar restraints aimed at protecting trade secrets and preserving talent.<sup>334</sup> The proposed alternatives offer employers legal solutions to a non-compete ban, and in the event employers do cross the line, there are ways the FTC can stop them.<sup>335</sup>

## V. ADDENDUM

Since the conclusion of this Note, the Federal Trade Commission (“FTC”) has since withdrawn its appeals and has essentially vacated the non-compete ban (“Rule”).<sup>336</sup> While the FTC has abandoned the Rule, non-competes continue to face scrutiny from state laws.<sup>337</sup> Further, the FTC issued a statement expressing its intent to continue “assessing the lawfulness of noncompete agreements” on a case-by-case basis.<sup>338</sup> The Chairman of the FTC indicated a commitment to continued enforcement pursuant to Section 5 of the FTC Act and Section 1 of the Sherman Act.<sup>339</sup> While the Rule has been set aside, the analysis concerning non-competes and their “functional equivalents” remains relevant.<sup>340</sup>

–Katherine M. Cox, ‘26†

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333. See *infra* notes 211–59 and accompanying text.

334. Hendershot, *supra* note 141; Hanley, *supra* note 202.

335. See, *infra* notes 260–327 and accompanying text.

336. Barbara A. Grandjean, *FTC Abandons 2024 Non-Compete Rule, Signals Priority in Non-Compete Enforcement Actions*, HUSCH BLACKWELL (Sept. 16, 2025), <https://www.huschblackwell.com/newsandinsights/ftc-abandons-2024-non-compete-rule-signals-priority-in-non-compete-enforcement-actions>.

337. *Id.*

338. Statement of Chairman Andrew N. Ferguson Joined by Commissioner Melissa Holyoak, *In re Matter of Gateway Pet Memorial Services*, FTC Matter No. 2210170, at 4 (Sept. 4, 2025).

339. *Id.* at 3.

340. See G. Scott Fiddler & Michael A. Drab, *The Non-Compete Conundrum: The Ban, The Backlash, And What's Next*, JACKSON WALKER (Oct. 6, 2025) <https://www.jw.com/news/insights-ftc-rule-banning-noncompetes/> (“It is clear the FTC hasn’t let non-compete agreements out of the crosshairs, and state legislatures have shown increasing interest in further regulating restrictive covenants.”).

† This Note is dedicated to my cross country coach, professor, and mentor, Tony Sorrentino, JD, CPA. Thank you for the constant support and encouragement. You exemplify what it means to have a successful career while prioritizing faith, family, and of course, running.

