Gernandt & Danielsson

# The future ban on non-compete clauses in employment contracts – the revival of NDAs?

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There will soon be a need to review how companies effectively retain and protect their know-how and customer relationships in the context of employee turnover.

On January 5, 2023, the US competition authority (Federal Trade Commission, "FTC") issued a Notice of Proposed Rulemaking for a new federal regulation regarding non-compete clauses in employment contracts. The FTC proposes a categorical ban for employers to apply contractual provisions that block a leaving employee from working for a competing employer, or starting a competing business.

The FTC proposal appears "all-inclusive" covering all types of employer-employee relationships (irrespective of contractual classification) and without distinction across industries or level of company hierarchy.

According to the FTC, studies indicate that non-compete clauses lead to lower wages, reduced innovation and entrepreneurship as well as higher prices for consumers. FTC argues that the success of Silicon Valley, the global hub for tech innovation, was facilitated by the fact that non-compete clauses have long been prohibited in California.

While competition rules across Europe do not generally cover non-compete clauses in employment contracts (unless ancillary to transactions), the development in the US will have an impact on European businesses and workers. First, future European legislative initiatives and case law are likely to draw inspiration from the development in the US. Second, as US based companies review their employment contract templates, they might choose to remove non-compete clauses globally. Third, European companies with US presence may, in a similar way, review and amend their templates globally.

Consequently, as non-competes in employment contracts are phased out, companies will have to shift to more fine-tuned measures to protect their know-how and trade secrets in the context of staff turnover. Examples of such are targeted NDAs and updated protocols for how valuable information is stored and used within the company. In fact, a basic requirement for obtaining protection under many trade secret acts, is that reasonable steps have been taken to keep the information secret.

Moreover, Sweden recently introduced new rules on copyright assignments. Under these rules, authors of copyright protected works (with the exception of computer programs) are entitled to fair remuneration when copyright is assigned. This entails that careful consideration should be applied, in particular in relation to remuneration, before inserting provisions in employment contracts governing the assignment of the employees' copyrights.

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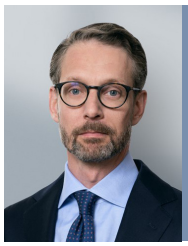

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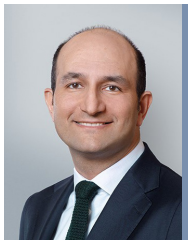

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