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Tampa attorneys weigh in on non-compete ban: It's 'taking a sledgehammer to the issue'



Image: Getty Images

The Federal Trade Commission voted to pass a controversial ban on noncompete agreements that will impact every area of the U.S. workforce.

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By **Christina Georgacopoulos** – Reporter, Tampa Bay Business Journal
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After more than a year of debate, the Federal Trade Commission **voted to pass a controversial ban** on noncompete agreements that will impact every area of the U.S. workforce.

Attorneys in Tampa Bay said the ruling may make employers more reluctant to invest in training and development for younger, early-career employees and make it more challenging to protect trade secrets and confidential information.

“Businesses invest a lot into their people in terms of training and development. Is it going to make sense to do that if they are free to leave and take that knowledge with them at any moment?” said Carlton Fields labor and employment attorney Janet Goldberg McEnery.

The ban is “taking a sledgehammer to the issue,” she said.

“There’s been many, many years of precedent, and smart judges who have handled [noncompete] cases and delineated what the rules are. And the rules are there to protect both sides. I don’t think what the FTC has done balances all the concerns. ... Employers have a need to protect their information,” she said.

The FTC’s ruling states that NCAs are an unfair method of competition, that they prevent workers from taking a new job or starting a business and ultimately prevent competition of wages and salaries, the agency said in a statement after the ruling.

“Noncompetes don’t allow employers to tie up employees forever, but they do make them more willing to invest in an employee and forego short-term gains because there is some modicum of protection,” McEnery said.

Read more: [A ban on non-competes could make Tampa Bay banks more vulnerable to poaching](#)



Janet Goldberg McEnery, Carlton Fields labor and employment attorney in Tampa

CARLTON FIELDS

While businesses can no longer rely on NCAs, they can use numerous federal and state laws to protect sensitive and valuable information, according to Holland & Knight attorney David Lisko.

Employers can take current and former employees to court for breach of duty of loyalty, tortious interference, unjust enrichment, computer fraud and abuse, violations of non-solicit agreements, misappropriation of trade secrets, and deceptive and unfair practices, according to Lisko.



David J. Lisko

HOLLAND & KNIGHT

“It will take business owners more vigilance to protect themselves,” Lisko said.
“Noncompetes were easier and simpler to enforce because they’re less fact intensive.”

Here’s what other attorneys who spoke with the Tampa Bay Business Journal said about the repeal of NCAs.



John D. Goldsmith, a shareholder at Trenam and attorney in the firm's litigation and dispute resolution practice

TRENAM

Trenam, John Goldsmith

“The idea of banning noncompetes for minimum-wage jobs – jobs that don’t require special skills and training – makes some sense. The purpose of noncompetes in that context is to depress wages.

“But noncompetes involving workers who have access to significant trade secrets and confidential information, and companies that have made significant investments in their training and development, that’s a significant problem.

“[The ban] will impact a lot of businesses. For example, commission sales representatives for a wide range of products, from pharmaceuticals to medical devices to software – all of those fields will be affected because they develop relationships with their customers and now they can freely take those customers to another company.”



John Anthony, managing member, Anthony & Partners

ANTHONY & PARTNERS

Anthony & Partners, John Anthony

“The notion that NCAs stifle business is at best misguided and unexamined. American business stays competitive by investing in talented people, trusting them and teaching them. Ethical employers and employees both benefit from the reciprocal benefits of NCAs. And really it’s about freedom of contract, freedom to shape your career.

“This isn’t just about having control over senior executives; it’s people who are in line to be trained.

“I understand there are different views on freedom of contract in the U.S. and at what level that is fair, but I don’t think there should be any real doubt about whether five people on a committee should be making laws.

“There’s a legal, constitutional issue, but there are also bigger issues that relate to our economy, internally and internationally.

“American businesses will become more vulnerable to competitors inside and outside its borders. There will be tremendous motivation to hire away people who have trade secrets, who can be acquired much more cheaply than acquiring a business. It would be unfair to expect American business to maintain its strength and ability to compete internally through robust commerce and internationally, when we open up our largest companies – and smallest – to the possibility of poaching.”