

FTC’s BAN ON NON-COMPETE AGREEMENT: A LESSON FOR VIETNAM?

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On April 24, 2024, the US Federal Trade Commission (“**FTC**”) announced a nationwide ban on non-compete agreements and non-compete clause under labor contracts (collectively, “**NCA**”) to enhance competition and preserve employees' job mobility. The final rule will be enacted 120 days subsequent to its publication in the Federal Register. While celebrated as a triumph for worker autonomy, it's crucial to delve into the application of the ruling in the US and thoroughly analyze how Vietnam can learn from to boost the labor market and improve pertinent labor regulations, particularly in terms of NCA.

1. Context of the FTC’s Rule on Non-Compete Agreement

According to statistics provided by FTC, approximately 30 million workers in the United States, constituting around 18% of the total workforce, are bound by NCAs. These restrictive agreements have several adverse consequences for employees, limiting their job mobility and potential for innovation. The FTC Rule on NCA aims to protect regular employees from excessively restrictive agreements that hinder their ability to seek new employment opportunities. By prohibiting the NCA, the rule intends to provide employees with the freedom to pursue new career prospects without the threat of legal action. Furthermore, it is projected that the implementation of this ban will lead to a 2.7% increase in new firm formation, translating to

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over 8,500 new businesses annually, thereby positively contributing to the overall economy.

2. Key Aspects of the FTC's Rule on NCA

The FTC Rule on NCA introduces significant changes aimed at bolstering worker mobility and competition in the labor market. Specifically:

Prohibition of New NCAs: The rule bans the inclusion of new NCAs in agreements between employers and employees. This measure aims to protect the employees' freedom to pursue alternative employment opportunities without undue restriction.

Rendering Existing NCAs Unenforceable: With exceptions for senior executives, existing NCAs with employees are deemed unenforceable under the rule. All employers are required to notify the affected employees of this change, thereby providing clarity and transparency regarding the enforceability of these NCAs.

Exceptions for bona fide acquisition: The rule allows for exceptions to non-competes in the context of legitimate business sales. Additionally, existing legal actions related to the NCAs predating the rule may continue unaffected, providing a degree of continuity and legal recourse for parties involved.

3. NCA Alternatives

Beyond the inclusion of the NCA in labor contracts to protect business, there are still several existing alternatives already in place:

Non-Disclosure Agreements (NDAs): These agreements prevent employees from divulging confidential information to competitors, thereby safeguarding proprietary data and trade secrets.

Non-Solicitation Clauses: These clauses restrict employees from soliciting clients or colleagues from their former employer upon transitioning to a new job, preserving business relationships and preventing unfair competition.

No-Hire Clauses: These provisions prohibit companies from actively recruiting employees from their competitors, maintaining a level playing field in the labor market. Collectively, these measures strike a delicate balance between protecting business interests and facilitating smooth employee transitions.

4. Vietnam's Labor Rule Horizon

In Vietnam, the NCAs between employers and employees are ubiquitous in labor contracts, but there are almost no specific rules governing these agreements. The only relevant regulation pertains to non-disclosure agreements, as outlined in Article 21.2 of Labor Code 2019.

However, such NCAs may infringe upon the rights of employees. A non-compete agreement included as a provision in the labor contract violates the right to work of workers, hindering the principle of "freedom to work" specified in Article 35, Constitution 2013.

In addition, whether the NCA is lawful or not, courts and arbitrations in Vietnam have not yet reached consensus on how to resolve cases related to the NCA. Some typical cases may appear as follows:

- (a) In 2018, in the case between X Company Limited and Ms. Do Thi Mai T, the Arbitral Tribunal of the Vietnam International Arbitration Center (VIAC) accepted the validity of the NCA.

(b) In the case between Company U and Mr. Phan Thanh B, the People's Court of Ho Chi Minh City did not accept the validity of the NCA because it believed that the agreement infringed on constitutional rights which is “freedom to work” of the employee.

Prevailing Purview of Vietnamese Law

If non-compete agreements are not recognized in Vietnam, there are still other instruments specified in various laws to protect the trade secrets of businesses and prevent unfair competition, namely Civil Code 2015, Labor Code 2019, Intellectual Property Law 2005 (as amended), and Competition Law 2018. These legal frameworks collectively ensure the protection of business interests and the maintenance of fair competition in the market.

A comprehensive rule similar to the FTC's ban on non-competes should be weighed up to (i) ensure a balance in the rights, obligations, and interests of employers and employees, and (ii) enhance employees' ability to innovate in the workplace and pursue new horizons by providing greater freedom to work.