Hodgson Russ LLP ATTORNEYS

# WHAT'S IN YOUR "SECRET SAUCE?" THE FTC'S PROPOSED RULE TO BAN NONCOMPETES AND CONSIDERATIONS FOR FOOD AND BEVERAGE BUSINESSES

*Hodgson Russ Food & Beverage Alert*
May 3, 2023

On January 5, 2023, the Federal Trade Commission ("FTC") proposed a new rule that would ban employers from imposing noncompetes on workers, based on the FTC's determination that noncompete agreements constitute an unfair method of competition and therefore violate Section 5 of the Federal Trade Commission Act (the "Proposed Rule").[1] The FTC claims noncompete agreements "suppress wages, hamper innovation, and block entrepreneurs from starting new businesses."[2] The Proposed Rule, if implemented, would affect 47 states across the United States that generally allow noncompete agreements, with some exception. The FTC recently extended the public comment period on the Proposed Rule from March 20, 2023 until April 19, 2023.[3] Now that time is up, companies may be wondering: how could the Proposed Rule affect us?

While food and beverage producing facilities do not impose restrictive employment agreements on all employees, individuals working with a business's key processes, recipes, formulas, and techniques may be subject to certain confidentiality provisions. For example, a company may require certain employees to sign confidentiality provisions regarding its protected trade secrets, or what's in the "secret sauce." A trade secret is something not generally known, like the combination of ingredients and measurements that together create a successful recipe, giving a business some advantage over its competitors. This is especially true for a head chef or a master brewer, who must gain access to all recipes during the course of their employment. These agreements may include terms limiting the employee's ability to seek future employment with similar companies within a certain geographic radius or for a defined period of time. The agreement may include terms further limiting the employee's ability to solicit coworkers and customers.

At odds with the FTC's Proposed Rule is a food or beverage client's interest to protect its so-called "secret sauce," or what makes it unique and helps it to standout from the competition. If the noncompete ban is implemented, any noncompete agreements for former and current employees with knowledge of a company's intellectual property and trade secrets may be rendered unenforceable. So, what can


## Attorneys

Christine Bonaguide
Reetuparna Dutta
Asia Evans
George Eydt
Joshua Feinstein
Emily Florczak
Andrew Freedman
Neil Friedman
Nathaniel Lucek
Ryan Lucinski
Michael Maxwell
Elizabeth McPhail
Michelle Merola
Michael Risman
Hugh Russ III
Christian Soller
Daniel Spitzer


## Practices & Industries

Food & Beverage

food and beverage businesses do if noncompete agreements are taken off the menu?

First, a company should consider what trade secret protections it has in place. Unlike copyright, trademark, and patent protection, a food and beverage business with a trade secret protects itself by never sharing the recipe. If the operation is larger, or if the business is interested in franchising or expanding its market, the steps to take to protect a trade secret are more complex. For example, KFC® takes great effort to protect its trade secrets, and houses its original recipe in a 770-pound safe encased in two feet of concrete guarded by video cameras and motion detectors.[4] Coca Cola® has kept its famous beverage a secret for over 130 years, similarly housed in a high-tech vault.[5] In fact, when KFC® was faced with the threat of distribution of its famous chicken recipe, it immediately filed a lawsuit to obtain the recipe and to protect the quality of its product.[6] Coca Cola® has also relied on litigation when a former high-level employee attempted to sell its confidential information.[7] While KFC® and Coca Cola® have successfully guarded their trade secrets and have severely limited employee access to their recipes, these processes are expensive and extreme.

Employers should consider the strategic use of nondisclosure agreements (NDAs). Notably, the FTC's Proposed Rule does not address the use of NDAs, which are legally enforceable agreements between parties used to ensure that certain information will remain confidential.[8] NDAs are often enforceable so long as their terms are narrowly tailored and seek to protect specific company information. The more specific the terms of the agreement are, the more success a business will have with any enforcement.

In addition, now is the time for businesses to review their internal policies regarding the distribution of sensitive information, and whether information is distributed on a "need-to-know" basis.

Hodgson Russ's team of litigation, labor and employment, and corporate attorneys regularly counsel clients on all aspects of non-compete agreements, restrictive covenants, employment contracts, employee handbooks, and confidentiality and non-disclosure agreements, and assist clients in assessing and minimizing potential risks and legal exposures associated with employment agreements and other contracts. If you have questions about the Proposed Rule, please contact any member of our Non-Compete, Non-Solicit and Trade Secrets Practice Group. If you have any questions about the Proposed Rule and how it affects your food and/or beverage company, please contact Ryan J. Lucinski, Esq. or Emily J. Florczak, Esq.

**Click HERE to read a prior Hodgson Russ alert on this topic.**

**Disclaimer:**