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FEDERAL TRADE COMMISSION BLOCKED FROM ENFORCING NEW RULE BARRING NON-COMPETE AGREEMENTS

A Texas Federal Court recently struck down the Federal Trade Commission's (FTC) nationwide ban on non-compete agreements. We previously wrote about the new FTC rule issued on April 23, 2024 that sought to ban non-compete agreements for nearly all workers of for-profit employers with limited exceptions. Specifically, except for workers in a few specified industries, the rule would have prohibited any new non-competes for all workers and it would have prohibited enforcement of existing non-competes except for a limited class of employees meeting the definition of a "senior executive." The FTC ban was scheduled to go into effect on September 4, 2024. Our prior legal alert, *New Federal Trade Commission Rule Potentially Bars Most Non-Compete Agreements*, laying out the specifics of the FTC rule can be found on our website [here](#).

FTC rule challenged in court. Following the issuance of the FTC non-compete ban, several challenges were filed in courts around the country challenging the legal enforceability of the ban. The challenges asserted that the FTC lacks authority to engage in rulemaking regarding unfair methods of competition, the FTC lacks congressional authorization to issue this final rule, the FTC's action is an impermissible delegation of legislative authority, and the FTC's enactment of the rule fails to take into consideration the economic impact of the rule on employers and businesses.

FTC non-compete ban stricken. Prior to the rule going into effect on September 4, 2024, the Federal District Court for the Northern District of Texas in Ryan LLC v. FTC, struck down the FTC's non-compete ban. The Court issued a final judgment on August 20, 2024, holding the FTC rule unlawful and prohibiting the FTC from enforcing the new rule on a nationwide level. This means that the FTC's rule does not apply to any employer throughout the country. The Court found that the FTC exceeded its statutory authority (to issue procedural rules to address unfair methods of competition on a case-by-case basis, but not substantive rules invalidating nearly all non-competes) in issuing the non-compete ban and that the rule was "arbitrary and capricious" including being unreasonably overbroad in its blanket prohibition.

Similarly, the Federal District Court in the Middle District of Florida in Properties of the Villages, Inc. v. FTC, also struck down the FTC rule as likely violative of the "major questions doctrine" which requires federal agencies to point to clear congressional authorization for rules of extraordinary economic and political significance. The Florida Court's ruling was limited to the FTC's enforcement of the rule against the named plaintiff in the case and is not applicable to all employers. It is worth noting that in another case in the Federal District Court in the Eastern District of Pennsylvania, ATS Tree Services, LLC v. FTC, the Court denied a request for a preliminary injunction against the FTC, finding that the rule barring non-compete agreements was a valid exercise of the FTC's authority.

FTC appealing the court rulings. On October 18, 2024, the FTC appealed the Court’s decision in the Texas case barring enforcement of the FTC non-compete ban on a nationwide basis. It also has appealed the Florida case decision. These appeals will be heard by the respective Court of Appeals for those courts. Given the potential for a split of authority in the Federal Circuits hearing the appeals, the issue may eventually need to be resolved by the U. S. Supreme Court. Separate from the appeals, the FTC has stated and taken the position that the Texas decision does not prevent the FTC from addressing non-compete agreements that trigger unfair competition through case-by-case enforcement actions.

Current status of the FTC rule. At present, the FTC rule banning non-compete agreements is not in effect. The FTC has been barred and enjoined from enforcing the rule on a nationwide basis. Employers do not need to comply with the FTC rule at this time while the appeals process plays out.

Implications for employers. Employers do not need to disclaim the enforceability of any existing non-compete agreements or inform their employees that such agreements are not enforceable, as had been required under the FTC rule. The applicable state laws that govern enforcement of non-compete agreements that existed prior to issuance of the FTC’s rule remain the governing law. Employers may continue to enter into new non-compete agreements with their employees if such agreements are otherwise enforceable under state law (and assuming the FTC would not single out a particular employer’s use of non-competes as anti-competitive). Both existing and new non-compete agreements will be subject to the applicable state laws and standards that govern such agreements.

Given the uncertainty of how the appeals process will play out, employers should consider all options and alternatives to non-compete agreements to protect their confidential business information and customer relationships and consult legal counsel for guidance specific to their situation. Finally, local employers in Illinois should ensure that non-compete agreements are in compliance with the Illinois Freedom to Work Act, which went into effect on January 1, 2022, including the minimum compensation requirements for non-compete and non-solicitation agreements under that Illinois Act.

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