Texas Judge Blocks FTC's Ban on Noncompetes, But Appeals and State Action Are Ongoing

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In April 2024, the Federal Trade Commission issued a broad rule banning most noncompetes in for-profit businesses, subject to limited exceptions, including an exception for senior executives (defined as workers earning more than $151,164 annually who are in policymaking roles). Existing noncompete agreements would not need to be formally rescinded under the ban, but employers *would* be required to inform their employees that they are no longer enforceable.

The FTC's rule was promptly challenged by numerous businesses seeking to enjoin it, including Ryan LLC, a tax services firm in Dallas that sued to block the rule immediately after its issuance. In requesting relief, Ryan argued that the ban on noncompetes would inflict "serious and irreparable injuries" on its business, including by putting its confidential information at risk and enabling its competitors to poach valuable employees, whose knowledge and training would go out the door. Ryan's lawsuit was joined by several organizations that represent a broad swath of American businesses, including the U.S. Chamber of Commerce, Business Roundtable, and the Texas Association of Business.

On August 20, 2024, Judge Ada Brown of the Northern District of Texas issued a final judgment in *Ryan LLC v. Federal Trade Commission*, blocking the FTC ban nationwide. In doing so, Judge Brown expanded what was a narrower preliminary injunction, ruling that the FTC had exceeded its rulemaking authority with respect to unfair methods of competition, and opining that the FTC lacked statutory authority to promulgate the ban. In determining that the agency exceeded its authority, Judge Brown analyzed the text, structure, and history of the agency, concluding that while the FTC has "some authority" to promulgate rules to preclude unfair methods of competition, it lacks the authority to create substantive rules. Among other things, Judge Brown confirmed that Section 6(g) of the Federal Trade Commission Act (the section the FTC relied upon as its authority to issue the ban) is indeed a "housekeeping statute," authorizing only rules of agency organization procedure or practices and not substantive rules. She found support for this conclusion by pointing to the lack of a penalty provision in Section 6(g), which indicates a lack of "substantive force," along with the fact that the FTC did not "promulgate a single substantive rule under Section 6(g)" until its noncompete ban. Judge Brown concluded that the FTC's arguments about its rulemaking authority constituted a "piecemeal attempt to confer rulemaking authority that Congress has not affirmatively granted to the FTC. The role of an administrative agency is to do as told by Congress, not to do what the agency thinks it should do."

The *Ryan* opinion blocked the FTC's noncompete ban, which had been scheduled to go into effect weeks later on September 4, 2024. The decision tees up a probable Fifth Circuit appeal from the FTC, which has sixty days from the *Ryan* final judgment to appeal it—until October 20, 2024.

Meanwhile, in July 2024, a federal judge for the Eastern District of Pennsylvania reached the opposite conclusion from the *Ryan* opinion, ruling in *ATS Tree Services, LLC v. Federal Trade Commission* that the FTC *is* empowered to issue a broad noncompete ban. The parties are currently briefing ATS's motion to stay proceedings.

On September 24, 2024, the FTC filed a notice of appeal in the U.S. Circuit Court of Appeals for the Eleventh Circuit in *Properties of the Villages, Inc. v. Federal Trade Commission*. The appeal challenges a preliminary injunction issued by the Middle District of Florida finding (much like the *Ryan* opinion) that the FTC's ban, which sought to effectively ban all noncompete agreements between employers and their employees, exceeded the FTC's authority.

Thus, there will be ongoing litigation in the district courts and courts of appeals across the country regarding the validity of the FTC ban. The issue is already before the Eleventh Circuit and likely to come before the Third and Fifth Circuits. The

possibility of circuit conflict also means that the issue could potentially receive review by the Supreme Court of the United States.

At the same time, states are also undertaking their own efforts to restrict noncompete clauses. Rhode Island and Maine each passed noncompete bills in both chambers this year, but the governors in each state vetoed the respective bills. Similarly, after a New York noncompete bill was passed by both chambers last year, Governor Hochul vetoed the bill for being too broad. All three bills had proposed broad bans on most noncompete agreements.

But new noncompete laws in other states have taken effect. In Washington State, SB 5935—which includes worker-friendly amendments related to expanding the definition of noncompetes, minimum compensation, duration requirements, disclosure or consideration requirements, and garden-leave-type payments—took effect on June 6, 2024.

California Assembly Bill 1076, which took effect January 1, 2024, requires employers to provide notice to certain current and former employees by February 14, 2024, if their employment agreements contain provisions unenforceable under California law.

In Minnesota, SF 3035, a bill that prohibits most covenants not to compete between employers and employees or independent contractors, went into effect on July 1, 2023. Nondisclosure agreements, non solicitation agreements, agreements designed to protect trade secrets or confidential information, and noncompete agreements agreed to as part of a sale or dissolution of a business are explicitly exempted from the law.

Takeaways for Employers:

- The FTC's noncompete ban did not take effect as scheduled following the *Ryan* ruling from the Northern District of Texas and remains enjoined for now. Although no Fifth Circuit appeal of *Ryan* has yet been filed by the FTC, one is expected by October 20, 2024.
- The FTC's notice of appeal in the Florida case signals its plans to defend the noncompete ban until a final ruling by respective appellate courts and/or the Supreme Court of the United States.
- Until a final resolution on the validity of the FTC noncompete ban is reached, employers should focus on state law compliance (which is ever evolving) and careful drafting to achieve no greater protections than necessary for their business needs.
- However, employers that may be affected by the FTC noncompete ban should additionally have plans in place to comply with the FTC rule, in case compliance is needed in short order following the outcome of the pending and forthcoming appeals on this issue.

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