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FTC's Noncompete Ban Struck Down for All Employers Nationwide

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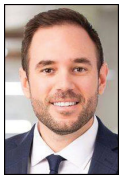

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FEEDBACK

A Texas federal court just struck down the Federal Trade Commission (FTC)'s proposed ban on noncompete agreements on a nationwide basis mere weeks before it was set to take effect, meaning employers across the country can breathe a sigh of relief and continue to maintain noncompetes as their state laws allow. *Ryan LLC v Federal Trade Commission*, No 3:24-CV-00986-E, ___ F Supp 3d ___ (ND Tex Aug 20, 2024). While there is a slim chance the rule could be resurrected by a federal appeals court in the future, what's for certain after yesterday's ruling is that you will not have to comply with the rule by September 4, 2024, as originally scheduled. What do you need to know about this significant development and what should you do now that the landscape has shifted once again?

What Happened?

A Texas employer, the U.S. Chamber of Commerce, and a handful of other business organizations sued the FTC in federal court seeking an order blocking the noncompete rule from taking effect on September 4, 2024, as scheduled.

Judge Ada Brown, from the Northern District of Texas, initially agreed that the rule was an invalid exercise of the agency's power on July 3, 2024, but only blocked the rule as it applied to the parties in the case and left open the question of whether the FTC could proceed with the ban. She later promised to issue a final ruling on the matter by August 30, 2024.

Judge Deploys Two Main Arguments to Kill Noncompete Ban

The judge took a two-pronged attack to the FTC's non-compete ban. Her first line of attack was ruling that the agency didn't have the power to issue the rule because Congress only authorized it to issue procedural rules to address unfair methods of competition, not substantive rules.

"The role of an administrative agency is to do as told by Congress, not to do what the agency thinks it should do," she said.

Her second rebuke was concluding that the rule itself was "arbitrary and capricious" for the following reasons:

- The FTC's rule is unreasonably overbroad without a reasonable explanation.
- The FTC's rule aims to impose a one-size-fits-all approach with no end date.
- No state in the country has enacted a noncompete ban as broad as the FTC's rule.
- The FTC's rule takes a blanket approach instead of targeting specific, harmful noncompetes.
- The FTC failed to consider the positive benefits of noncompetes.

She added that the FTC also failed to sufficiently address potential alternatives to a nationwide ban on just about every noncompete.

Rule Blocked for All Employers Across the Country

Most importantly for employers, Judge Brown concluded that her order setting aside the noncompete ban should apply to all employers across the country. As noted above, she originally just blocked the rule from taking effect for those parties that

had filed suit in the Texas case. In fact, in a separate decision just a week or so after her limited ruling on July 3, 2024, she again declined to extend the preliminary injunction nationwide —leaving employers in a state of uncertainty as the days dwindled down towards the effective date.

Following Judge Brown's ruling, a Pennsylvania court in a separate lawsuit declined a motion to block the rule, and a Florida court granted a limited injunction similar to the Texas court's original order, leaving employers in doubt about whether the rule might be vacated prior to its effective date of September 4, 2024.

But Tuesday's ruling put an end to all of that concern. Judge Brown noted that federal law required her to "hold unlawful" and "set aside" the noncompete ban with nationwide effect. All parties in all judicial districts across the country are equally covered by the ruling, she said.

Post- *Chevron* Shockwaves

The decision is one of the first prominent cases to demonstrate the evolving power of courts to overrule agency actions now that the U.S. Supreme Court has struck down the *Chevron* doctrine. *Loper Bright Enterprises v Raimondo*, Nos 22-451, 22-1219, ___ US ___ (June 28, 2024). For those unfamiliar, the Supreme Court issued the groundbreaking *Loper Bright* ruling on June 28, 2024, tossing out a decades-old standard from *Chevron USA, Inc v National Resources Defense Council, Inc*, 467 US 837 (1984) that had required courts to give substantial deference to agencies like the FTC.

The new standard? Courts should instead exercise their independent judgment when deciding whether an agency's actions are proper exercises of power—essentially enabling courts to strike down agency rules more easily. And the *Ryan LLC* decision is a perfect example of how this new standard will be deployed by courts to significant effect. The first sentence of Judge Brown's analysis section quotes the Supreme Court's *Loper Bright* case, in fact, noting that the Administrative Procedure Act should serve "as a check upon administrators

whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices."

What's Next?

The FTC could try to breathe new life into the rule by filing an appeal of this decision in the coming weeks. It could also seek an emergency order from the appellate court that would cause the rule to take effect as scheduled.

However, any appeal would be heard by the notoriously business-friendly U.S. Court of Appeals for the Fifth Circuit, where the odds of the rule being resurrected are slim. And the next step after that would be a potential visit to the Supreme Court, which has taken direct aim at the regulatory state in recent years and is likely a hostile environment for any attempt by the FTC to wield such power.

What Should Employers Do?

Employers can breathe a sigh of relief. We are now back once again to the status quo, where state-specific restrictions shape the contours of covenants not to compete, and you can continue to have noncompete restrictions as a tool in your arsenal to protect key relationships and confidential information.

Now is an especially critical time for you to ensure your existing noncompetes are precisely tailored to meet the state laws in which you operate and that you are limiting their use to critical employees—as the FTC has already indicated it will try to flex its muscles through targeted investigations if it can't wield the power of a national rule. "Today's decision does not prevent the FTC from addressing non-competes through case-by-base enforcement actions," an agency spokesperson said soon after the court decision.

You might also want to compile an inventory of all existing restrictive covenant agreements, including those that bind former workers. There is a slim chance that an appeals court could bring the noncompete ban back to life, and in such a circumstance it would be beneficial to have a full and complete list of your effective agreements. Even if the rule never sees the

light of day, however, having such an inventory could be a helpful resource for compliance and tracking purposes.

More on this Topic

- FTC Bans Noncompetes and DOL Increases Threshold for FLSA Exemptions
- Federal Trade Commission Proposes Rule Prohibiting Noncompete Clauses

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