

# CLIENT ALERTS

## FTC's Non-Compete Ban: Courts Split as Legal Battle Intensifies

### Client Alert

7.26.2024

The legal battle over the Federal Trade Commission's (FTC) non-compete ban has taken another unexpected turn, further complicating an already contentious issue. On July 23, 2024, just 20 days after a Northern District of Texas court enjoined the FTC's non-compete ban for the named plaintiff in *Ryan LLC v. FTC*, citing that the ban exceeds the agency's authority, is unconstitutional, and "arbitrary and capricious," Judge Kelley Brisbon Hodge of the Eastern District of Pennsylvania refused to follow suit in *ATS Tree Services, LLC v. FTC*. This conflicting decision only adds to the confusion surrounding the ban's future, providing a clear victory for neither side. As the September 4, 2024, effective date of the ban approaches, the potential for increased legal challenges could result in further changes to the landscape, leaving businesses in a state of uncertainty.

### FTC Non-Compete Ban

After the FTC's non-compete ban commences on its projected enforcement date, September 4, 2024, employers are prohibited from enforcing existing non-compete agreements and from entering new non-compete agreements. Almost all current non-competes would be prohibited under the rule's broad restrictions. Although the rule contains several exceptions for agreements involving senior executives, the bona fide sale of a business, and causes of actions predating the rule, many non-compete agreements used by employers fall outside the limited exceptions. As a result, the rule stimulated various legal challenges.

For instance, Ryan LLC's challenge in the Northern District Court of Texas proved fruitful when Judge Brown granted its motion to preliminarily enjoin the non-compete ban. Although the court limited the relief to the named parties in the action, it will issue a final ruling on the merits by August 30. Judge Brown's strong language in the opinion insinuates that the court is likely to hold

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## CLIENT ALERTS

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the non-compete rule violates the Administrative Procedures Act.

The court in *ATS Tree Services*, without mentioning the court's decision in *Ryan LLC*, strongly stated its disagreement with "claims that the FTC lacks substantive rulemaking authority under its enabling statute, that the FTC exceeded its authority, and that Congress unconstitutionally delegated legislative power to the FTC."

### **Decision in *ATS Tree Services, LLC*: Federal District Courts Split**

ATS Tree Services, LLC (ATS) is a tree care company that operates in Pennsylvania with 12 employees, all of whom signed non-compete agreements. Seeking to protect the validity of its non-competes, ATS challenged the FTC's rule in federal court on April 25, 2024, two days after the FTC announced it voted to adopt the non-compete ban.

To support its assertion that the FTC's non-compete ban is unlawful, ATS claimed the "FTC lacks statutory authority to promulgate substantive rules to prevent unfair methods of competition." ATS further declared that, even if the court determines the FTC has substantive rulemaking power, banning *all* non-competes "exceeds its statutory authority to prevent methods of unfair competition." Likewise, ATS commenced a constitutional challenge by alleging "the FTC Act unconstitutionally delegates legislative power to the FTC."

As part of its challenge, ATS sought a preliminary injunction and asked the court to stop the rule's effective date. The court denied ATS's request and held it failed to demonstrate (1) a reasonable probability of success on the merits and (2) it would be irreparably injured by denial of the relief.

With respect to the "irreparable harm" factor, Judge Hodge dismissed ATS's assertions that it would be harmed by the ban through its nonrecoverable compliance efforts and its lost "contractual benefits from its existing non-compete agreements." The court emphasized that compliance costs are "not a valid basis for a finding of irreparable harm" under Third Circuit precedent. The court further stated that, in any case, ATS failed to proffer sufficient, particularized evidence supporting its notion that compliance costs arising from informing employees of the change, modifying its business strategy, and altering its training program would meet the standard associated with monetary harm. Similarly, the court declined to find the alleged lost contractual benefits qualified as irreparable harm, because ATS relied predominantly on speculations.

Despite having sufficient grounds to deny ATS's motion for a preliminary injunction based on the lack of irreparable harm alone, Judge Hodge chose to address the merits of the case as well. In doing so, she rejected all of ATS's arguments challenging the FTC's authority to issue the non-compete ban. The court's opinion notably asserted that "the FTC's Rule falls squarely within its core mandate...". This stance diverges significantly from the reasoning in *Ryan LLC*. By addressing the merits in this way, Judge Hodge's decision adds another layer of complexity to the ongoing legal debate surrounding the FTC's non-compete ban.

## CLIENT ALERTS

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### **Other Cases on the Horizon: Uncertainty Persists**

Several pending legal challenges to the FTC's non-compete ban continue to fuel uncertainty:

- *Ryan LLC v. FTC*: A final decision is expected on August 30, potentially providing more clarity
- *Properties of the Villages, Inc. v. FTC*: Another key case in Florida, as the FTC filed its response on July 25, opposing yet another preliminary injunction motion

The conflicting decisions in *ATS Tree Services* and *Ryan LLC* suggest that further appeals are likely, possibly leading to Supreme Court review. Additionally, new cases could emerge in other districts, potentially putting pressure on the FTC to suspend the rule's effective date.

This legal landscape underscores the complexity of the situation and the need for businesses to remain vigilant as these cases progress. The potential for circuit splits increases the likelihood of eventual Supreme Court intervention.

Notably, the outcome of the upcoming presidential election could significantly impact the FTC's position. A Republican administration could potentially dissolve the rule, adding another layer of uncertainty to the future of non-compete regulations, leaving it to the states to legislate.

Butzel's Non-Compete & Trade Secret Team will be diligently monitoring the FTC rule and the associated litigation to block the rule's enforcement. If you have questions or comments about the new rule or its impact on the agreements with your workforce, please contact the authors of this article or your Butzel attorney for further guidance.

**Mitchell Zajac**

313.225.7059  
zajac@butzel.com

**Sarah Nirenberg**

248.258.2919  
nirenberg@butzel.com

**Michelle Cirino**

313.225.5306  
cirino@butzel.com