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FTC's Non-Compete Ban on Shaky Ground: Texas Court Deals Blow, but Uncertainty Reigns

Client Alert

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On July 3, 2024, Judge Ada Brown granted a preliminary injunction in *Ryan LLC v. FTC* regarding the Federal Trade Commission's (FTC's) highly contested non-compete rule. Although the ruling indicates judicial hostility towards the FTC's non-compete rule, the preliminary injunction in *Ryan* is confined solely to the named parties in the case. Until a court grants a nationwide injunction or an order setting aside the FTC's non-compete rule, businesses nevertheless must prepare for the rule's projected enforcement date: September 4, 2024.

FTC Non-Compete Ban

As detailed in our previous Client Alert, the FTC's non-compete rule prohibits employers both from enforcing existing non-compete agreements and from entering new non-compete agreements. The rule broadly defines non-compete agreements such that almost all current non-compete agreements would be prohibited. The rule did contain some exceptions for non-compete agreements involving senior executives, the bona fide sale of a business, and causes of actions predating the rule. Nonetheless, these limited exceptions would not apply to many of the non-compete agreements currently being utilized by employers. As we predicted, the FTC rule drew immediate legal challenges.

Decision in *Ryan LLC*: A Significant Blow to the FTC's Authority

Shortly after the FTC announced the impending non-compete rule, Ryan LLC, a global tax services company, challenged the rule in the U.S. District Court for the Northern District Court of Texas, and the U.S. Chamber of Commerce and others seeking to prevent the rule's enforcement subsequently joined. In granting the motion for a preliminary injunction, the court dealt a significant blow to the FTC's non-compete rule. While the

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injunction is currently limited to the named plaintiffs, Judge Brown's ruling suggests a broader judicial skepticism towards the FTC's authority in this matter.

Judge Brown concluded that the plaintiffs "are substantially likely to prevail on the merits of their challenge," finding that the FTC's ban on non-compete agreements exceeds the agency's authority, is unconstitutional, and "arbitrary and capricious."

Notably, Ryan LLC filed its suit on the basis that the FTC's non-compete ban violated the U.S. Administrative Procedures Act (APA), which governs how agencies develop and issue regulations. Judge Brown's opinion aligns with the recent Supreme Court decision in *Loper Bright Enterprises v. Raimondo*, which eliminated the longstanding *Chevron* deference doctrine.

The *Loper Bright* majority determined that "the [APA] requires courts to exercise their independent judgment in deciding whether an agency has acted within its statutory authority," and that "the deference that *Chevron* requires of courts reviewing agency action cannot be squared with the APA." Based on this reasoning, Judge Brown concluded that the FTC lacks authority to make substantive rules beyond those involving organization, practice, and procedure.

Judge Brown emphatically stated, "Agencies are creatures of Congress. The role of an administrative agency is to do as told by Congress, not to do what the agency thinks it should do." This ruling casts significant doubt on the FTC's perceived authority and suggests that the preliminary injunction may become permanent as the case proceeds.

While the September 4 enforcement date remains in effect for most businesses, this decision marks a critical development in the ongoing legal challenges to the FTC's non-compete rule.

The *Ryan LLC* court will make a final ruling on the merits by August 30. Given the strong language in the court's opinion, the court will likely find the non-compete rule violates the APA. Whether the court issues a permanent nation-wide injunction at that time, however, is uncertain. Yet, even if the merits decision is confined to the parties, the court's reasoning in *Ryan LLC* will likely be considered in similar cases challenging the FTC's non-compete rule.

Other Cases on the Horizon: A Landscape of Uncertainty

As the *Ryan LLC* case unfolds, other legal challenges to the FTC's non-compete ban are pending. Of particular interest is *ATS Tree Services, LLC v. FTC* in the Eastern District of Pennsylvania. ATS Tree Services has also moved for a preliminary injunction, with Judge Hodge scheduled to hold a hearing on July 10.

The outcome of this case could have far-reaching implications. The court might issue a nationwide injunction, grant a limited injunction similar to the *Ryan LLC* case, or deny the motion entirely. Any of these outcomes would likely lead to further appeals, potentially culminating in a Supreme Court review.

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This landscape of legal uncertainty underscores the complexity of the situation and the need for businesses to remain vigilant and adaptable as these cases progress.

Steps to Protect Your Company

Given the fluid legal situation, businesses should consider the following steps to safeguard their interests:

1. Review employment agreements: Carefully examine existing contracts to identify non-compete clauses that may be impacted by the rule. Ensure these agreements comply with state law and be prepared to cease using them and notify affected employees by September 4, 2024. However, refrain from taking action until absolutely necessary, as ongoing legal challenges may alter the rule's implementation.
2. Implement alternative protective measures: Proactively consider other means to protect legitimate business interests. These may include well-crafted non-solicitation agreements, garden leave clauses, non-disclosure agreements (NDAs), and robust trade secret protection policies.
3. Stay informed about legal developments: With multiple legal challenges underway, remain vigilant about any litigation that could impact the rule's enforceability. Regularly monitor legal updates and adjust your company's policies and practices accordingly.

The *Ryan LLC* decision represents a significant development in the ongoing saga of the FTC's non-compete rule. While the September 4th effective date remains in place for most businesses, the legal landscape is rapidly evolving. We strongly advise continued preparation for the rule's potential implementation while closely monitoring these pivotal legal challenges.

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 Client Alert or your Butzel attorney for further guidance.

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