

FTC'S NON-COMPETE BAN EFFECTIVE DATE NEARS, PA JUDGE DENIES PRELIMINARY INJUNCTION

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With the effective date of the FTC's ban on non-competes looming, a federal Judge in Pennsylvania declines to issue a preliminary injunction.

A federal judge in Pennsylvania recently declined to enter an injunction against the Federal Trade Commission's ("FTC") final rule banning employment non-compete agreements ("final rule"). In substance, the final rule bans all non-compete agreements with very limited exception. The decision comes on the heels of a Texas federal court decision, which, unlike the Pennsylvania decision, granted a limited preliminary injunction against enforcement of the final rule applicable only to the moving plaintiff and confined to Texas, *i.e.*, the Texas federal court declined to enter a nationwide injunction.

A Refresher on the Final Rule

The final rule was issued on April 23, 2024, and becomes effective on September 4, 2024. The final rule bans non-compete agreements in employment relationships as an unfair method of competition. There are some limited exceptions which include non-competes related to the sale of a business, non-solicitation terms, and non-competes for bona fide senior executives. The final rule also requires employers to issue a notice to impacted employees regarding the final rule and its impact on enforcement of non-competes that had previously applied to those employees. Our April 26, 2024 alert provides additional detail on the final rule.

Current Challenges to the Final Rule

The Pennsylvania federal court's decision this week found that the plaintiff is unlikely to win its challenge on the merits, indicating the FTC is empowered to regulate what it deems as unfair methods of competition—including non-competes. The Texas federal court concluded the opposite, stating that the FTC likely exceeded its statutory authority by promulgating the final rule in addition to procedural defects in the final rule's publication. A more substantive opinion regarding the FTC's authority to enforce the final rule is expected from the Texas case by August 30, 2024. A third challenge to the FTC final rule is pending in a Florida federal court, though no ruling has been issued yet.

Other Developments Relevant to the Final Rule

Since the FTC promulgated the final rule banning non-competes in April, the Supreme Court issued an opinion in *Loper Bright Enterprises v. Raimondo* which overturned *Chevron v. Nation Resources Defense Council*. The 1984 *Chevron* decision was a cornerstone of administrative law, which instructed courts to defer to a government agency's reasonable interpretation of statutory authority when the underlying statute was ambiguous and subject to more than one reasonable interpretation. The *Loper Bright* decision likely provides an additional avenue for

employers challenging the final rule banning non-competes on the grounds that the FTC exceeded its statutory authority when promulgating the final rule.

Takeaway for Employers

The Texas and Pennsylvania challenges to the FTC's final rule will nearly certainly be appealed. In the meantime, however, the FTC's final rule remains in effect. As the September 4, 2024 effective date rapidly approaches, employers should take proactive steps to prepare for compliance with the rule. Employers should understand what exactly they are trying to protect with non-competes, consider alternative avenues to protecting it (including business goodwill, employee talent, or customer relationships or information), ensure that their employment agreements, policies, and procedures adequately protect confidential information, and otherwise coordinate with counsel to ensure they are ready for the impending changes brought about by the final rule.

There will certainly be more to come on these developments. In the meantime, we stand ready to help our clients navigate these important changes. Contact Alexander Nassar to leverage the experience of Royer Cooper Cohen Braunfeld LLC's Employment Practice Group.

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