

Publications

FTC Non-compete Ban Partially Blocked – For Now

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As we reported previously, the Federal Trade Commission (FTC) announced a new rule that "[i]t is an unfair method of competition—and therefore a violation of Section 5 of the FTC Act—for employers to enter into non-compete clauses with workers." As a result, the final rule generally bars most non-compete agreements. The rule's effective date is September 4, 2024.

Immediately after the rule was announced, several lawsuits were filed in federal courts in Texas and Pennsylvania challenging the rule. On July 3, the U.S. District Court for the Northern District of Texas issued a preliminary injunction in the suit brought by tax firm Ryan LLC and the U.S. Chamber of Commerce, holding the plaintiffs are "substantially likely to prevail on the merits of their challenge to the FTC's Non-Compete Rule."

The court first held that "the text, structure, and history of the FTC Act reveal that the FTC lacks substantive rulemaking authority with respect to unfair methods of competition." Further, the court found that the justifications the FTC marshalled in support of the rule was "based on inconsistent and flawed empirical evidence" and failed to "sufficiently consider alternatives" to the rule's categorical ban. "The Commission's lack of evidence as to why they chose to impose such a sweeping prohibition—that prohibits entering or enforcing virtually all non-competes—instead of targeting specific, harmful non-competes, renders the Rule arbitrary and capricious."

Next, the court held that "compliance with the Rule would result in financial injury," which demonstrates the plaintiffs would suffer irreparable harm absent the injunction.

Finally, the court held that "it is evident that if the requested injunctive relief is not granted, the injury to both Plaintiffs and the public interest would be great." This "tips the balance" in favor of injunctive relief.

The preliminary injunction is limited to just the plaintiffs in the case (Ryan LLC, the U.S. Chamber of Commerce, and some local business groups), and the court intends to rule on the ultimate merits by August

30, 2024. Importantly, the court did not issue a nationwide injunction. In fact, the court stated it “declines to view the circumstances of this proceeding as an appropriate circumstance that would merit nationwide relief.” The court further noted that plaintiffs “have offered virtually no briefing (or basis) that would support universal or nationwide injunctive relief.” So, the scope of any injunctive relief will not be known until August 30 (and perhaps later, should the FTC appeal).

Decisions in the other cases challenging the FTC’s rule remain pending, and we will report on significant developments. In the interim, contact your Vorys lawyer if you have questions about the FTC rule.