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All Eyes on Pennsylvania Federal Court After Texas Court Issues Limited Injunction Against FTC Non-Compete Ban

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July 09, 2024

A first-in-nation ruling in Texas federal court casts serious doubt on the enforceability of the broad-reaching new Federal Trade Commission (FTC) Noncompete Rule. For any company seeking to legitimately protect its hard-earned competitive position, this opinion and the FTC's rule must be considered and understood. While the Texas decision was limited to the parties before that court, the reasoning is important in predicting whether the FTC's Noncompete Rule is likely to go into effect, and all companies need to be constantly reevaluating how they are protecting their corporate secrets.

On April 23, 2024, the FTC issued its Noncompete Rule, a rule that largely banned worker non-compete agreements with limited exceptions, based on the FTC's position that nearly all non-competition agreements constitute an "unfair method of competition" under Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a). The FTC estimated that, upon the Noncompete Rule's planned effective date of September 4, 2024, the rule would invalidate 30 million contracts. Baker Donelson's attorneys initially covered the decision and its significance for employers shortly after it was issued. Click here to read more.

Almost immediately, opponents of the Noncompete Rule filed legal challenges and, on July 3, the United States District Court for the Northern District of Texas (*Ryan LLC v. Federal Trade Commission,* Civil Action No. 3:24-CV-00986-E) became the first to rule on the legality of the Noncompete Rule. As was anticipated, the *Ryan* Court found that injunctive relief was appropriate and temporarily enjoined the Noncompete Rule from going into effect but only as to the named plaintiffs and intervenors to the lawsuit. The Court expressly declined the plaintiffs' invitation to issue a nationwide injunction to non-parties, meaning that the Noncompete Rule is still set to take effect on September 4 for all other affected employers. Notwithstanding the current limitations of the Order, the opinion suggests that the Noncompete Rule is unlikely to survive a challenge on the merits for a few key reasons:

- The FTC likely exceeded its statutory authority when it issued the Noncompete Rule because the FTC Act lacks any indication that the FTC has this substantive rulemaking authority in the context of unfair methods of competition;
- There is a substantial likelihood that the Noncompete Rule is arbitrary, capricious, and unreasonably overly broad, and the FTC's "handful of studies" did not support such an expansive ban, especially given the failure to consider less disruptive alternatives; and
- Plaintiffs demonstrated irreparable harm because compliance with the Noncompete Rule would result in financial injury without an avenue of recovery. If forced to comply with the Noncompete Rule, plaintiffs argued departing workers could take intellectual property and trade secrets to competitors without sufficient recourse to mitigate this harm – it would be "open season for poaching of clients and workers."

The Court ordered the parties to submit a status report by July 9 and further indicated that it will issue its ultimate decision on the merits on or before August 30, 2024. That decision could expand the scope of the

injunctive relief nationwide, but, for now, employers with non-competes need to prepare for the September 4 effective date. In the meantime, all eyes are on a separate challenge pending in the Eastern District of Pennsylvania (*ATS Tree Services, LLC v. The Federal Trade Commission,* 2:2024-CV-01743) in which nationwide injunctive relief has been requested. The *ATS Tree Services* Court has indicated it will issue its decision by July 23.

Notwithstanding the ruling in *Ryan* or the outcome in *ATS Tree Services*, the FTC's issuance of the Noncompete Rule has several practical impacts, many of which we will be discussing in future alerts.

First, regardless of its ultimate enforceability, the Noncompete Rule signaled the FTC's view of non-competes in general by indicating further FTC action regardless of whether the rule is ultimately upheld. This could affect the FTC's treatment of future proposed mergers, and an aggressive campaign to challenge individual non-competes by way of warning letters, investigations, and administrative complaints. Tellingly, the parties alleged in *Ryan* that the threat of litigation was a "harm" that should be considered by the judge. The FTC retorted in a brief cited by the Court that "the Commission may undertake an enforcement action against those same entities pursuant to Section 5 even without the Rule in place." In other words, even a national abrogation of the Noncompete Rule may not change FTC enforcement priorities.

Second, any merits decisions in *Ryan* or the other pending cases will be just a few months before the 2024 presidential election, and those decisions will almost certainly be appealed. The nature of the next administration will inform the direction of further FTC action regarding both the Noncompete Rule and its approach to enforcement generally. Moreover, while the *Ryan* Court cited in passing the new decision by the United States Supreme Court in *Loper Bright Enterprises v. Raimondo*, issued on June 28, 2024, the impacts of the overruling of the long-standing ruling on agency deference under the *Chevron* doctrine was not fully explored.

Third, the bright line drawn by the Noncompete Rule should cause all employers to revisit all the tools available to them to protect their legitimate business interests, whether trade secrets and intellectual property, customer relationships, or a combination of assets. While non-compete agreements have historically been a clear way to set the post-employment boundaries of the employer-employee relationship, companies should revisit and strengthen their contracts to ensure robust confidentiality and non-solicitation terms as a go-forward strategy.

Given the continuing potential for redrawing the boundaries of non-competes, including state law responses to the treatment of the Noncompete Rule, companies need to evaluate their trade secret portfolio, strategies, and protocols for protecting physical and electronic assets and intellectual property. What was a fairly straightforward contract case may now need to be brought as a trade secret matter, subject to its different elements of proof and commensurate need for quick and decisive action.

In short, the Noncompete Rule has also put squarely into workplace discussion the issue of the enforceability of non-competes and what it means going forward. Employers have been increasingly weighing the utility of such agreements and alternatives to protecting their confidential business information. Workers, increasingly aware of the Noncompete Rule and generally increasing scrutiny of non-compete agreements, have become more cautious and resistant to signing such agreements and more emboldened about violating and challenging them.

We expect several developments over the 60 days between now and the effective date of the Noncompete Rule. We will continue to monitor and report on these over the coming weeks. Should you have any questions about this topic, please contact Erin Pelleteri Howser, Theresa M. Sprain, Jennifer L. Anderson, Clinton P. Sanko, or any member of Baker Donelson's Labor & Employment Group.