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Employers Should Consider Alternative Protections to Address Lack of Clarity Around Non-Compete Rule

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The Federal Trade Commission's (FTC) impending Non-Compete Rule invalidating almost all non-compete agreements nationwide received new life after a recent federal decision in Pennsylvania district court. Employers and employees are faced with two competing and opposed court orders, setting up a question on the national stage about the future of employee non-competition covenants. For employers that rely on these agreements – which the FTC approximated covered over 30 million employees – it is time to consider whether alternative protections should be investigated and adopted.

After a strong signal from the Northern District of Texas in *Ryan v. FTC* that the FTC likely exceeded its authority when issuing the Non-Compete Rule, a Judge in the Eastern District of Pennsylvania reached the opposite conclusion in *ATS Tree Services, LLC v. FTC, et al*. The *ATS* court rejected ATS's request for a preliminary injunction, finding that ATS had not demonstrated that it would be irreparably harmed by compliance with the Non-Compete Rule or that it was likely to be successful on its merits-based challenge. More particularly, the court determined that:

- Neither nonrecoverable out-of-pocket expenses to comply with the Non-Compete Rule, nor the lost contractual benefit to the employer of employee compliance, constituted "irreparable harm" sufficient to forestall the effective date of the rule;
- "The plain text of the [FTC] statute provides no express limitations on the FTC's rulemaking authority and the Court will not read in such limitations";
- The use of the word "prevent" in the statute means "the FTC was intended to act prophylactically to stop 'incipient' threats of unfair methods of competition, not solely responsively through adjudications…"; and
- "Had Congress intended to limit the FTC's substantive rulemaking authority under Section 6, it would have done so at any time over the last century, and more specifically, any of the times it amended the Act."

This is an unprecedented grant of virtual unlimited rule-making authority to the FTC affecting 30 million employees, potentially upsetting well-established state law and precedent and requiring close examination of existing contracts to determine whether they contain language that "functions to prevent" an employee's mobility in the same way as a non-compete. In addition, the FTC Rule would require employers to provide explicit notice to employees that any non-compete will not be enforced, and according to the FTC model notice, that the employee may seek or accept a job with a competing employer and compete with the current employer. The breadth of the FTC Rule is far removed from any rulemaking conducted by the FTC under its authority to challenge unfair methods of competition. The *ATS* court declined to overturn the FTC Rule on the basis of the major question doctrine, holding that this doctrine is limited to "extraordinary" cases in which the political and economic significance of the action provide "a reason to hesitate" before concluding Congress meant to confer such authority. Given the significance of the FTC Rule, other courts may come to a different conclusion.

This is not the final chapter of the FTC Non-Compete Rule. Briefing by the FTC is to be completed by July 25, 2024, in another case challenging the Non-Compete Rule and pending in the Middle District of Florida, *Properties of the Villages, Inc. v. Federal Trade Commission*. There is not currently an announced deadline for a ruling in that matter. But given the expedited nature of the injunctive relief sought, we anticipate a ruling in August. Also, the *Ryan* court has indicated that its merits decision will be issued no later than August 30, just days before the Non-Compete Rule's September 4, 2024, effective date. In that ruling, the *Ryan* court could expand the injunctive relief beyond the party plaintiffs and issue a nationwide injunction. Finally, an appeal in either *Ryan* or *ATS* could request that the appellate court stay the enforcement of the Non-Compete Rule.

Every business, regardless of size or industry, has valuable and competitively sensitive information that it seeks to legally protect. While we will continue to monitor and provide updates on this ongoing litigation regarding the FTC Non-Compete Rule, employers should be consulting with counsel to determine how best to protect their confidential business information, including trade secrets, as well as prepare for compliance with the notice requirement of the Non-Compete Rule should it go into effect. A panoply of alternative options exist beyond just non-competition agreements. For instance, nondisclosure and confidentiality agreements and non-solicitation agreements do not necessarily impair employee mobility. The *ATS* court noted that employers "regularly use" non-disclosure agreements "to protect trade secrets and other confidential business information."

For the foreseeable future, Baker Donelson will be issuing subsequent alerts on both the legal developments and the additional and proactive strategic steps companies can and should consider taking in the wake of the uncertainty regarding non-compete agreements. Employers should be considering the full range of options available to proactively protect against the business damage that can flow from the improper use of confidential business information, without running afoul of the FTC Non-Compete Rule. To cover these issues and more, Baker Donelson will be hosting a webinar on August 27, 2024, regarding best practices to prevent departing employees from using confidential business information and trade secrets to benefit competitors.

If you have questions regarding this alert and what this means for your company, please reach out to Erin Pelleteri Howser, Clinton P. Sanko, Theresa M. Sprain, or any member of Baker Donelson's Labor & Employment Group.