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FTC Non-Compete Ban Partially Halted but Remains Largely Intact for Most Employers

Key Notes:

- As of now, the FTC's ban on non-competes is still scheduled to go into effect on September 4, 2024 for most employers.
- No nationwide injunction has been issued.
- Multiple courts expect to issue additional rulings prior to the effective date of the rule.

On July 3, 2024, in *Ryan, LLC v. FTC*, Judge Ada Brown of the Northern District of Texas issued a preliminary injunction that temporarily blocks the FTC from implementing its non-compete ban, but only for the plaintiff and intervenors in that case. The ruling prohibits enforcement of the FTC's final rule, which would essentially ban all non-compete agreements as of its September 4, 2024 effective date, with limited exceptions. As a result, the FTC is only enjoined from implementing and enforcing the final rule against Plaintiff Ryan, LLC, and Plaintiff Intervenors, including the U.S. Chamber of Commerce, Business Roundtable, Texas Association of Business, and Longview Chamber of Commerce. The court specifically declined to extend broader injunctive relief, stating that members of the Plaintiff-Intervenors failed to demonstrate the necessary associational standing, as the parties had not addressed associational standing issues in their briefing. The court also did not issue a nationwide injunction that some experts anticipated.

As a result, the non-compete ban remains imminent for most U.S. companies. However, Judge Brown indicated, "While this order is preliminary, the Court intends to rule on the ultimate merits of this action on or before August 30, 2024." A court conference set for July 9 will address issues related to additional briefing. Many believe there will be a significant effort between now and the end of August to persuade the judge to expand the injunction nationwide.

The court's memorandum accompanying the order indicates the high likelihood that the *Ryan* court will ultimately strike down the non-compete ban in its entirety. Judge Brown concluded in the order that the plaintiffs were likely to succeed on the merits because of the FTC's lack of substantive rulemaking authority under the FTC Act concerning unfair competition methods. The bigger question remains whether that ruling will be limited to the parties involved or if it will expand to a nationwide scope.

Plaintiff Ryan, LLC argued that the non-compete ban would inflict "serious and irreparable injuries" to its business by putting its confidential information at risk and enabling its competitors to poach valuable employees who would take with them their knowledge and training.

The FTC, through spokesperson Douglas Farrar, issued a statement Wednesday evening asserting its authority, citing statutory and precedential support. "We will keep fighting to free hardworking Americans from unlawful non-competes, which reduce innovation, inhibit economic growth, trap workers, and undermine Americans' economic liberty."

Notably, another case challenging the FTC's non-compete ban is pending in the Eastern District of Pennsylvania in *ATS Tree Service v. FTC, et al.* That court is set to hear oral arguments regarding a motion seeking a preliminary injunction on July 10, 2024. That court has also said it intends to issue an order regarding injunctive relief by July 23, 2024. The *ATS Tree Service* court's decision may conflict with the *Ryan* court's decision and lead to more uncertainty as the final rule's effective date looms.

For now, employers should prepare for the possibility of the non-compete ban taking effect. Not only would new non-competes entered into after the effective date be banned, but employers would also be required to notify employees with existing non-competes that those provisions are no longer enforceable. Limited exceptions exist for senior executives who meet salary and duty thresholds and for non-competes arising from the sale of a business. Because no nationwide injunction against the FTC's non-compete ban currently exists and the decision in *Ryan* is not expected until five days before the September 4 effective date, employers are advised to review and possibly revise non-solicitation and confidentiality agreements to ensure compliance if the rule becomes effective.

What Should Employers Be Doing Now

- **Identify Existing Non-competes:** Continue identifying individuals with existing non-competes and consider mechanisms for notifying such employees that these provisions may no longer be enforceable after the effective date if the final rule withstands legal challenges. This includes identifying any employees who qualify for the "senior executive" exception, as their non-competes might remain valid following the effective date.
- **Review Agreements:** Examine non-solicitation and confidentiality provisions to ensure they are limited in scope to avoid being deemed de facto non-competes. Properly limited agreements will remain permissible even if the final rule goes into effect.
- **Consult Legal Counsel**: Seek legal advice to discuss how to properly limit non-solicitation and confidentiality provisions and determine which employees might qualify for the "senior executive" exception to the final rule.

FOR MORE INFORMATION

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