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Employers Face Uncertainty Over FTC Noncompete Ban and Litigation Impact

On April 23, the Federal Trade Commission (FTC) approved a final rule banning almost all worker noncompete clauses. The rule is set to go into effect on September 4, but a variety of court challenges leave the future of the rule – and employers' obligations – in limbo.

On July 3, in *Ryan, LLC v. FTC*, Judge Ada Brown in the Northern District of Texas, in a ruling limited to the plaintiff and intervenors in that case, entered a preliminary injunction enjoining the FTC from implementing or enforcing its final rule, which would essentially ban all noncompetes (with limited exceptions) as of the rule's September 4, 2024 effective date. As a result, the FTC is only enjoined from implementing and enforcing the final rule against plaintiff Ryan, LLC and plaintiff-intervenors U.S. Chamber of Commerce, Business Roundtable, Texas Association of Business, and Longview Chamber of Commerce. The court specifically declined to extend injunctive relief to members of the plaintiff-intervenor organizations because it found that the members had not demonstrated 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, as some experts anticipated.

The ruling left noncompete agreements looming for the majority of U.S. companies. However, Judge Brown wrote that "While this order is preliminary, the Court intends to rule on the ultimate merits of this action on or before August 30, 2024." There has been a concerted effort since the initial ruling to persuade Judge Brown to block the ban nationwide. Groups including the American Hospital Association have filed amicus briefs urging the court to vacate the ban.

A separate action in Pennsylvania has yielded an opposite result. On July 23, the Eastern District of Pennsylvania denied the plaintiff's motion for a preliminary injunction in *ATS Tree Service v. FTC, et al.,* ruling that the FTC acted within its authority under the FTC Act to promulgate substantive unfair methods of competition rules and the FTC has the authority to enforce the final rule.

The most recent litigation challenging the rule was filed on July 2 in the Middle District of Florida. In *Properties of the Villages Inc. v. FTC,* the plaintiff also requested injunctive relief blocking the noncompete rule from going into effect. The FTC filed its opposition on July 25. The court allowed several financial services trade associations and other *amici curiae* to file amicus briefs and set a hearing on the plaintiff's motion for August 14.

So, what's next? There are a variety of potential outcomes with the lawsuits that are currently pending:

- The court in the *Ryan* case could grant a national injunction or vacate the noncompete rule entirely in its final ruling on August 30. Such a ruling would apply universally, not just to the litigating parties, and would undoubtedly be subject to appeal.
- The *Ryan* court could follow its preliminary injunction reasoning and limit its ruling to the *Ryan* plaintiffs, meaning that the noncompete rule would still go into effect on September 4 for all others.
- Although unlikely, the *Ryan* court could reverse course, dissolve the preliminary injunction and allow the noncompete rule to go into effect for all entities, including the *Ryan* plaintiffs.

- The Middle District of Florida could issue a nationwide injunction following the preliminary injunction hearing on August 14.
- Presuming the courts in *Ryan* and *ATS Tree Services* maintain their preliminary rulings, there will be conflicting orders, one upholding the noncompete rule as within the FTC's authority and another holding that the noncompete rule is invalid. This split of opinions would set up an appeal process that will likely lead to the U.S. Supreme Court and could take years. If there is ultimately a nationwide ban, it would likely remain in effect during the appeals process.

For now, employers should keep in mind that if the noncompete ban goes into effect, not only would new noncompetes entered into after September 4 be banned, but employers would also be required to notify employees with existing noncompetes that those provisions are no longer enforceable. There are some limited exceptions for senior executives who meet salary and duty thresholds and for noncompetes arising from the sale of a business. Because no nationwide injunction against the ban currently exists and the decision in *Ryan* is not expected until five days prior to the September 4 effective date, employers are advised to be prepared to comply with the rule if it goes into effect.

What Should Employers Do Now?

- Continue to identify individuals with existing noncompetes and consider mechanisms for providing them with notice that those provisions are no longer enforceable after the effective date if the final rule survives its existing legal challenges. This includes identifying any employees who qualify for the "senior executive" exception, as their noncompetes may remain in force following the effective date.
- Review nonsolicitation and confidentiality provisions to ensure they are limited in scope to avoid being deemed *de facto* noncompetes. If the scope of these agreements is limited, they will be permissible even if the final rule goes into effect.
- Consult with counsel to determine how to properly limit nonsolicitation and confidentiality provisions and whether employees may qualify for the final rule's "senior executive" exception.

Trade Secret Suits: Who Needs to Know?

When employers file suit in a trade secret matter, there is always a delicate balancing act in deciding how to handle the trade secret(s) at issue. Key documents are often exchanged on an attorneys' eyes only (AEO) basis to avoid further damage to the integrity of the trade secret information. A recent case from the Southern District of New York, *Jane St. Group, LLC v. Millennium Mgmt., LLC*, however, took a different approach and put the trade secrets back in the hands of the employees who allegedly stole them.

The plaintiff investment company sued two of its former traders and their new employer under the Defend Trade Secrets Act and New York trade secret law, claiming misappropriation of a confidential trading strategy regarding options trading in a certain geographic area. The trade secrets were generally described as "validated trading methods" based on "key signal information and insights" and "methods and heuristics" to interpret signal information and optimize profits; results of time and capital investment from a trading investigation; and models used to inform and trigger trading. The defendants demanded access to the plaintiff's particularized trade secret disclosure even before filing an answer.

The court ultimately ordered the plaintiff to provide a "detailed identification of all alleged trade secrets" in advance of the interrogatory deadlines. Then the dispute began about who could have access to the trade secret information. The documents were provided on an AEO basis, but counsel for the defendants proposed that they also be shared with the individual defendants and with certain in-house counsel and other designated "business professionals." The defendants argued that withholding the disclosure from these individuals would deprive them of "fair notice and their ability to effectively defend this case and would impinge on their outside counsel's ethical obligation to inform and advise their clients."

The court agreed with the defendants and issued an order last month allowing the individual defendants access to the trade secret disclosure, finding that it would be "unreasonable" for the plaintiff to allege that the individual defendants misappropriated certain information and then deny them access to that information. Key to the court's finding was that the information was already known to the individual defendants and that it was of "central importance" to allow the defendants to prepare their defense.

FOR MORE INFORMATION

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