

For Now, the FTC's Rule Banning Noncompetes is Still in Place

Client Alerts

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Courts Have Not Yet Delayed the Effective Date of the FTC's Non-Compete Rule

Contrary to what has been reported in the popular press, the rule broadly banning noncompetes that was issued by the Federal Trade Commission (“FTC”) this past April^[1] is not yet dead and may stay alive long enough for it to take effect. Accordingly, employers should consider what steps they may need to take to comply with the rule’s requirement that they notify, with very limited exception, all current and former employees with active noncompetes that their noncompete is no longer in effect by the rule’s September 4, 2024 effective date.^[2]

While the FTC’s non-compete rule was challenged almost immediately after its passage both in the Northern District of Texas and in the Eastern District of Pennsylvania, neither court set aside the rule nor banned its enforcement generally. First, on July 3, 2024, the court in *Ryan LLC et al. v. Federal Trade Commission* granted Ryan LLC and the US Chamber of Commerce’s motion for a preliminary injunction, holding that the FTC may not implement or enforce the rule but only against the plaintiffs in that case.^[3] Crucially, this ruling did not enjoin the FTC from enforcing the rule against non-parties. And yesterday, on July 23, 2024, the court in *ATS Tree Services LLC v. Federal Trade Commission et al.* denied outright plaintiff’s motion for a preliminary injunction or a stay of the ruling’s effective date.^[4]

These rulings demonstrate that at least these two judges in the posture of a preliminary injunction are perhaps less favorable towards challenges against the FTC’s non-compete rule than was initially anticipated. The *ATS Tree Services* court did not enjoin enforcement of the rule at all, and the *Ryan* court did so for only the plaintiffs in that case, meaning that the FTC’s non-compete rule is still scheduled to go into effect on September 4, 2024 for all others.

Employers Need to Plan Now Given the Early September Effective Date

It should be noted that the *Ryan* court is set to rule on the merits on August 30, 2024. While it is unlikely that the court there will issue a nationwide injunction given the standard it set for such an injunction in its prior order—especially after its denial of plaintiffs’ motion for reconsideration on

those very grounds^[5]—the court still could set aside the rule on any number of grounds concerning the FTC’s authority to issue the rule and the rule’s scope. Because that ruling is less than one week before the current effective date of the rule, employers should begin to evaluate what would be required of them to provide the required notice under the FTC’s non-compete rule assuming the current effective date of September 4, 2024 stands. The rule includes a limited exception allowing existing noncompetes to remain in effect for senior executives who make over \$151,164 annually and have policy-making authority, which the rule defines narrowly.

For employers that have historically used noncompetes sparingly with only a select group of employees, the effort to identify the current and former employees to whom notice must be sent and to prepare and deliver that notice by the effective date might not be burdensome. However, for those employers whose practice of using noncompetes for its workforce is pervasive, significant time, cost, and effort will likely be needed to identify which current and former employees are subject to a noncompete and to ensure such employees have up-to-date contact information on file. Ensuring that correct contact information is readily available will make it easier for employers to notify all parties to non-competes that the provisions of such agreements are no longer enforceable, as the FTC’s non-compete rule requires.

Relatedly, while the FTC’s non-compete rule includes safe harbor language for the required notice, employers should evaluate whether they want to modify that language in case the rule is later invalidated and affected noncompetes are no longer deemed unenforceable as a result. In other words, employers should be wary of a potential outcome where they send out notices stating non-competes are unenforceable, and then are left with no protection from covered personnel competing in the event the non-compete rule is successfully challenged after such notices are delivered. Employers should consult with legal counsel about recommended language to use in the notice and to understand the relative risks of the various notice options, including the possibility of losing out on the benefits of the safe harbor.

Finally, as of the effective date of the FTC’s non-compete rule, employers are prohibited from using noncompetes with the majority of current and new employees. Other than the limited exception noted above for existing noncompetes for certain senior executives making over \$151,164 annually, a noncompete entered into between a seller and buyer of a business presents the only other circumstance where a noncompete may be enforceable under the FTC’s rule. Employers will want to analyze whether additional measures should be taken to protect their confidential information in the event that the ban goes into effect. Additionally, employers will need to evaluate how they may want to address this ban if the rule is later invalidated.

Jenner & Block’s Trade Secrets and Restrictive Covenants practice group is poised and ready to assist organizations as they navigate the current uncertainty surrounding whether and when the FTC’s non-compete rule will go into effect, to navigate the steps necessary to comply should the rule become effective, and to strategize ways to protect their confidential information in the event that non-compete restrictions are no longer permissible with a majority of workers.

Footnotes

[1] FTC Finalizes Near Total Ban of Noncompetes – How You Can Prepare Now (Apr. 25, 2024), <https://www.jenner.com/en/news-insights/publications/steps-for-employers-to-consider-in-light-of-ftcs-near-total-ban-of-non-competes>.

[2] The rule defines non-compete provisions as “contractual term[s] between an employer and a worker that prevents the worker from seeking or accepting employment with a person, or operating a business, after the conclusion of the worker’s employment with the employer.” Non-Compete Clause Rule, Federal Register (Jan. 19, 2023), <https://www.federalregister.gov/documents/2023/01/19/2023-00414/non-compete-clause-rule>.

[3] *Ryan LLC et al. v. Federal Trade Commission*, No. 3:24-cv-00986-E, ECF No. 154 (N.D. Tex. Jul. 3, 2024).

[4] *ATS Tree Services, LLC v. Federal Trade Commission, et al.*, No. 24-1743, ECF No. 81 (E.D. Penn. Jul. 23, 2024).

[5] *Ryan LLC v. Federal Trade Commission*, No. 3:24-cv-00986-E, ECF No. 161 (N.D. Tex. Jul. 11, 2024).

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