

Client Alert: The Rule Is Dead

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By: Andrew W. Vail, Jason M. Bradford, Debbie Berman

On Tuesday, President-Elect Trump named Andrew Ferguson as incoming Federal Trade Commission (FTC) Chair. After earning his law degree from the University of Virginia, Mr. Ferguson clerked on the DC Circuit and for Supreme Court Justice Clarence Thomas. Mr. Ferguson then spent several years at law firms in Washington DC. Most recently, Mr. Ferguson served as chief counsel to Senator Mitch McConnell and as Republican counsel to the US Senate Judiciary Committee, before he became an FTC Commissioner in April 2024. Notably, Mr. Ferguson authored a particularly scathing dissent of the FTC's rule banning noncompetes, which was passed in April but which has yet to go into effect.^[1]

In his dissent, Mr. Ferguson highlighted three main critiques of the noncompete rule. First, he stated that the FTC lacked authority under the FTC Act to issue the rule.^[2] He explained that not only does the text of the Act not empower the FTC to issue such a wide-sweeping rule, but this would also deviate from over one hundred years of precedent in which the FTC "did not bring a single enforcement action against any noncompete agreement between an employer and employee." Second, he explained that, even if the FTC Act did empower the FTC to issue the rule, such a delegation of authority would be unconstitutional and violate the separation of powers. Finally, Mr. Ferguson argued that the rule "violates the basic requirements of the Administrative Procedure Act," including that the agency engage in "reasoned decision-making." With this backdrop, it is almost certain that the rule will be dead if Mr. Ferguson is confirmed as FTC Chair. Such an outcome would be no surprise for the second Trump Administration, given President-Elect Trump's own use of restrictive covenants in business and other contexts.

The end of the noncompete ban will likely set up reengagement by state and local governments to continue crafting their own rules governing noncompetes. This may create a challenging framework where companies need to patch together a variety of different rules in different jurisdictions to make sure they are complying with all applicable laws. With the increasingly remote and nationwide workforce, this will become especially complicated. Jenner & Block's Trade Secrets and Restrictive Covenants team remains prepared to assist employers in navigating this ever-changing environment.

Footnotes

[1] See 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] Dissenting Statement of Commissioner Andrew N. Ferguson, Federal Trade Commission (June 28, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/ferguson-noncompete-dissent.pdf.

Related Attorneys



Andrew W. Vail

Partner
avail@jenner.com
+1 312 840 8688



Jason M. Bradford

Partner
jbradford@jenner.com
+1 312 840 7225



Debbie Berman

Partner

dberman@jenner.com

+1 312 923 2764

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