

A Texas Court Strikes Down the FTC's Non-Compete Rule: What's Next?

Ronald F Wick, Derek Jackson

On August 20, 2024, Judge Ada Brown of the U.S. District Court for the Northern District of Texas granted a nationwide injunction setting aside the Federal Trade Commission's ("FTC") rule banning most non-compete clauses in employment contracts. As a result, the rule will not take effect on September 4, 2024 as scheduled, and businesses can put on hold their plans to notify employees and revise employment agreements to comply with the rule. However, multiple lawsuits concerning the rule remain pending, one of which has reached a contradictory preliminary result. Companies can therefore expect continuing litigation and appeals before the rule's fate is decided.

The case in Texas is brought by Ryan LLC, a tax services and software provider, and several business groups led by the U.S. Chamber of Commerce, which were permitted to intervene as plaintiffs after their separate challenge was stayed to allow Ryan's lawsuit to proceed. The plaintiffs allege that the non-compete ban, announced by the FTC in April, exceeds the FTC's statutory authority, and that any statutory authority the FTC might have to adopt the ban is an unconstitutional delegation of legislative power.

After initially issuing a preliminary injunction in July that enjoined enforcement of the rule only as to the specific plaintiffs in the suit, Judge Brown modified the scope of her ruling at the summary judgment stage to extend to all impacted parties nationwide. Judge Brown held that the rule exceeds the FTC's statutory authority because Congress, through the FTC Act, granted the agency authority to enact only procedural rules concerning unfair methods of competition, and not substantive rules. Additionally, Judge Brown held that the rule is arbitrary and capricious given its breadth in applying to almost all non-compete clauses.

The rule would prohibit employers from entering into, attempting to enter into, enforcing, or attempting to enforce a non-compete clause, which is defined broadly under the rule. Existing non-compete clauses for senior executives (workers who earn more than \$151,164 annually and are in policy-making positions) would be allowed to remain in force, and a handful of other exceptions would apply (including, for example, non-competes entered into pursuant to the bona fide sale of a business entity, or those involving a franchise in the context of a franchisor-franchisee relationship). However, after the rule takes effect, all new non-compete clauses that do not fall under these exceptions would be prohibited, including for senior executives.

Employers would not be required to formally rescind non-compete clauses that are rendered unenforceable by the rule, but they would be required to provide notice to workers (other than senior executives) who are bound by existing non-compete clauses that those clauses will not be enforced.

Other lawsuits challenging the rule remain pending. In *ATS Tree Services, LLC v. FTC*, Judge Kelley B. Hodge of the U.S. District Court for the Eastern District of Pennsylvania declined in July to grant the plaintiff's requested preliminary injunction to stay enforcement of the rule, concluding that the plaintiff was unlikely to succeed on the merits. The case is scheduled to move forward with summary judgment briefing this fall, should the plaintiff elect to proceed with the case in light of Judge Brown's ruling. More recently, a judge of the U.S. District Court for the Middle District of Florida granted a preliminary injunction in *Properties of the Villages, Inc. v. FTC*, although that order limited the effect of the injunction to the plaintiff in the case.

While the FTC has not yet formally responded to the Texas decision, an appeal seems likely. Particularly given the conflicting decisions in different courts, it is all but certain that the validity of the rule ultimately will be decided at the appellate level, and well after September 4. For the moment, however, businesses can put their preparations for compliance with the rule on hold while they await further developments in the appellate process.

The Authors:



Ronald F Wick
Partner

+ 1 202 851 2072
[Email Ronald](#)



Derek Jackson
Associate

+ 1 202 851 2075
[Email Derek](#)

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www.cohengresser.com
info@cohengresser.com
+1 212 957 7600

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