

The FTC's Noncompete Rule Is Likely Dead

By Neil C. Schur and Bennett Pine

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The FTC's rule banning most covenants not to compete (widely known as "noncompetes") nationwide is likely dead.

Noncompetes are agreements between employees and employers in which the employee promises not to "compete" with the employer—e.g., take a job with a competitor or start a competing business—for a specific period of time and/or within a particular geographic area should the employment relationship terminate.

We believe that the FTC rule banning noncompetes, the enforcement of which is currently enjoined by a federal district court in Texas, is unlikely to survive for two reasons.

First, Republicans will soon hold a majority of the 5-member FTC and they will likely withdraw the pending appeals discussed below, effectively killing the rule, a version of which the FTC first unveiled for public comment in January 2023. Commissioner Andrew N. Ferguson has been named the new FTC chair, Commissioner Melissa Holyoak will continue as commissioner and,



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subject to Senate confirmation, Mark Meador, currently in private practice at Kressin Meador Powers LLC, will form the Republican majority.

The precise timing of the change in control is unclear, as FTC Chair Lina Khan is not required to step down until the Senate confirms Ferguson as her replacement.

Second, even if the FTC presses its appeals of rulings enjoining enforcement of the rule described below, it is likely to lose.

- The FTC has appealed an August 2024 ruling of a federal district court in Texas permanently enjoining the FTC's enforcement of its rule nationwide. The district court found that "the FTC lacks statutory authority to promulgate the Non-Compete Rule, and that the Rule is arbitrary and capricious. Thus, the FTC's promulgation of the Rule is an unlawful agency action." That appeal is pending in the U.S. Court of Appeals for the Fifth Circuit.

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• The FTC has also appealed an August 2024 ruling of a federal district court in Florida permanently enjoining the FTC 's enforcement of the rule as to the plaintiffs in those cases only. The court found it substantially likely that the rule presents a major question under the so-called "major questions" doctrine, and further found that Congress has not rendered a sufficiently clear expression of legislative intent to authorize the final rule under that doctrine. That appeal is pending in the U.S. Court of Appeals for the Eleventh Circuit.

A third challenge to the FTC rule's enforceability in federal court in Pennsylvania was dropped after that court let the rule stand.

Given these recent developments nationwide, employers and employees should monitor the law governing noncompetes closely, particularly if they conduct business in multiple states.

The Fifth Circuit is likely to affirm the Texas district court's ruling enjoining enforcement of the ban, if the FTC does not drop its appeal, and the Supreme Court is likely to decline to hear the case or affirm the Fifth Circuit's ruling. This will resolve both cases. Alternatively, the high court could hear both challenges to the FTC rule together and, in that case, would likely find the rule arbitrary and capricious and an overreach of the FTC's rulemaking authority.

By way of context, in June 2024, in the *Bright Loper* case, the Supreme Court overruled its landmark 1984 *Chevron* decision. Under the oft-cited *Chevron* doctrine, if Congress has not directly addressed the question at the center of a

dispute, a court was required to uphold a federal agency's interpretation of the statute as long as it was reasonable. That ruling makes it highly likely that the Court would find the FTC ban to be an overreach of the Commission.

On Dec. 31, 2024, the Democratic FTC commissioners (Khan, joined by Rebecca Kelly Slaughter and Alvaro M. Bedoya) issued a 21-page statement regarding the rule, arguing that the objections raised by their Republican colleagues were unfounded.

The Democratic commissioners argued at length that Commissioners Ferguson and Holyoak's assertion that the FTC lacks authority to promulgate the rule is "at odds with the plain text of the FTC Act, case law and the Act's statutory history." They further contended that the rule complies with the Administrative Procedures Act, as the FTC has "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"

And finally, they concluded, "Free and fair competition is a key pillar of our free enterprise system. Noncompetes undermine this basic premise, locking workers in place and depriving our economy of the full benefits that competition delivers." However eloquent, the Democratic Commissioners' statement will not be able to breathe life into the rule.

Of course, further state legislative initiatives are possible, and bipartisan federal legislation to limit noncompetes already introduced in Congress may also be taken up again.

What Should Employers and Employees Do Now?

Where does the rule's likely demise leave employers and employees?

For now, the Texas federal court's ruling on the FTC rule allows employers and employees to enter into and enforce noncompetes—subject to applicable state law. Employers will no longer be required to provide notice to current and former employees that their post-employment noncompetes are unenforceable, as would have been required by the FTC's rule had the Commission's enforcement not been enjoined prior to enactment. In the meantime, non-competition agreements will continue to be governed primarily by state law, which varies from state to state.

A number of states have imposed more restrictions in recent years. It is worth noting that this area of law has typically been governed by state law, and the death of the FTC's federal ban will restore the status quo.

Enforcement in New York

In New York, in mid-December 2023, the Legislature delivered to Governor Kathy Hochul's desk a bill—S3100A/A12878B—that would add a new section to New York Labor Law banning employers from requiring workers to sign noncompete pacts and restricting the use of certain restrictive covenant agreements. But Wall Street and top business groups lobbied vigorously against the bill, arguing that the noncompetes are needed to protect investment strategies and keep highly-paid employees from leaving their companies with valuable insider information.

At the last minute, Governor Hochul vetoed the bill. Although there was speculation at the time that the bill would be re-introduced in a revised form, that has not yet happened.

As a result, covenants not to compete in the employment context currently remain enforceable in New York as long as they meet certain

conditions.

Under long-standing New York precedent, in the employment context, covenants not to compete are common and enforceable so long as they are reasonably limited as to time, geographic area and scope, are necessary to protect the employer's interests, not harmful to the public, and not unduly burdensome. However, the covenant must be construed strictly and should not be extended or expanded beyond the literal meaning of its term.

Although many states' laws take a similar approach, noncompetes—particularly when they restrict lower-income employees—have been under attack in recent years. As detailed below, in the last two years, states have implemented or tightened bans on noncompete agreements and other states have full or partial bans of older vintage.

Threshold Earnings

Noncompetes for employees earning less than a threshold amount are currently banned in some states and Washington, D.C. This listing is illustrative and is not intended to be exhaustive.

- In Colorado, noncompete clauses are void except where they apply to a “highly compensated worker,” which is updated annually. The 2025 threshold for noncompetes is \$127,091. See Colo. Rev. Stat. Ann. sec. 8-2-113(2)(a)-(b); Colo. Code Regs. sec. 1103-14:1.2.
- In Illinois, noncompetes are banned unless the worker's actual or expected earnings exceed \$75,000/year. See 820 Ill. Comp. Stat. 90/10(a) (effective Jan. 1, 2017). This threshold amount is set to increase in 2027.
- In Maryland, noncompetes are null and void as against public policy unless the employee

earns greater than 150% of the minimum wage, which rose to \$15.00/hour on January 1, 2024 for employees who are at least 18 years old. MD Code, Labor and Employment §§3-413(c) (1) & (d), 3-716(a)(1)(i) & (b). If the minimum wage continues to rise, the threshold will also increase. No 2025 change has been announced.

- In Massachusetts, noncompete clauses shall not be enforceable against: (1) workers classified as nonexempt under the Fair Labor Standards Act (*i.e.*, employees paid on an hourly basis or below a given salary threshold, currently \$35,568; (2) undergraduate or graduate students who partake in an internship or enter into a short-term employment relationship with an employer while in school; (3) employees that have been terminated without cause or laid off; or (4) employees age 18 or younger. See Mass. Gen. Laws Ann. ch. 149, sec. 24L(c) (effective Jan. 14, 2021).

- In Virginia, employers cannot “enter into, enforce, or threaten to enforce a covenant not to compete” with any “low-wage employee.” See VA ST §40.1-28.7:8. A determination as to what constitutes such an employee is made annually by the Virginia Employment Commission, but the statute defines the term as an employee whose average weekly earnings are less than the average weekly wage of the Commonwealth. See VA ST §40.1-28.7:8. The 2025 threshold is \$76,081.25.

- Washington bans noncompetes for employees with annual incomes of less than a threshold amount adjusted annually by the State

Department of Labor and Industries. In 2025, the threshold is \$123,394.17, or \$308,485 for independent contractors. See RCW §49.62.020.

- In Washington, D.C., noncompetes are prohibited if an employee earns less than a threshold amount, which was \$154,200 in 2024 and has not yet been released for 2025 (higher for medical specialists). See DC CODE §§32-581.01-32-581.02.

Some States Ban Noncompetes Altogether

Noncompetes are already unenforceable in California, subject to a handful of limited exceptions related to the sale of a business, partnership or LLC or if the noncompete is necessary to protect an employer’s trade secrets. See Cal. Bus. & Prof. Code, §16600-16602. But California recently strengthened its ban. Two California bills took effect on Jan. 1, 2024 and beefed up the state’s law by: (1) providing for a private right of action; (2) requiring that by Feb. 14, employers notify all employees who are subject to a non-compete clause that it is void; and (3) prohibiting employers from enforcing in California noncompetes signed in another state.

Minnesota and North Dakota have similar laws. See MN ST §181.988; ND ST §9-08-06. And Oklahoma law also makes noncompetes unenforceable but does not include the exceptions for the sale or dissolution of a business. See OK ST T. 15 §219A.

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