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The FTC's Noncompete Rule Is Likely Dead

By Neil 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 or within a particular geographic area should the employment relationship terminate.


Courtesy photos

Neil Schur, left, and Bennett Pine, right, of Anderson Kill.

The FTC rule banning noncompetes is unlikely to survive for two reasons.

First, Republicans will soon hold a majority of the five-member FTC and 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 and which it finalized in April 2024. Commissioner Andrew N. Ferguson has been named the new FTC chair, Commissioner Melissa Holyoak will continue as commissioner and, subject to Senate confirmation, Mark Meador, currently in private practice at Kressin Meador Powers, will become a commissioner. Commissioners Ferguson, Holyoak and Meador will form a 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, in any event, the FTC is likely to lose both appeals of rulings enjoining enforcement of the rule.

- The FTC has appealed an August 2024 ruling of a federal district court in Texas permanently enjoining the FTC's enforcement of the rule nationwide before its Sept. 4 effective date. That district court found that "the FTC lacks statutory authority to promulgate the noncompete 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.

- 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. That district 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 the court let the rule stand.

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 ban together and, in that case, would likely find the rule both arbitrary and capricious and an overreach of the FTC's rulemaking authority.

By way of context, in June 2024, in the highly publicized *Relentless* decision, the Supreme Court overruled its landmark 1984 *Chevron* decision. Under the previously oft-cited *Chevron* doctrine, if Congress had 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. The *Relentless* ruling and the composition of the court together make it highly likely that the court would find the FTC ban to be an overreach of the commission's authority.

On Dec. 31, the Democratic FTC commissioners (Chair 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 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 "examined the relevant data and articulated 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, but the FTC's rule will not emerge from hospice care.

Pennsylvania's New Law Regarding Noncompetes for Doctors and Other Medical Professionals Further Complicates the Landscape

To further complicate the legal landscape for noncompetes in Pennsylvania, the commonwealth recently passed a new law effective Jan. 1 that limits noncompetes for doctors and other medical professionals to one year.

The Pennsylvania law does not affect the geographic component of noncompetes (i.e., the size of the area in which the employees may not compete) and leaves in place noncompetes signed prior to 2025. It also allows enforcement of a noncompete when a practice is sold.

What Should Employers and Employees Do Now?

Where does that leave you?

For now, the Texas federal court's ruling allows employers and employees to enter into and enforce noncompetes—subject to applicable state law. This will likely remain the state of the law, since the FTC rule will not survive. Noncompetes will continue to be governed primarily by state law, which varies from state to state but is trending in some states toward more restrictions. 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 effectively restore the status quo.

In Pennsylvania, although the statute governing doctors and medical professionals is new, the commonwealth's case law will continue to strongly disfavor restrictive covenants such as noncompetes, but will enforce them if they are incident to an employment relationship between the parties, the restrictions imposed by the covenant are reasonably necessary for the protection of the employer, and the restrictions imposed are reasonably limited in duration and geographic extent.

Although many states' laws take a similar approach, noncompetes—particularly as to lower income employees—have been under attack in recent years. In the last two years, states including Massachusetts, Colorado, Maryland and California have implemented or tightened bans on noncompete agreements, while New York almost did the same until its governor vetoed the bill at the eleventh hour. Other states have full or partial bans of older vintage.

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

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