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Texas Federal Judge Halts FTC's Pending Noncompete Ban

By Bennett Pine and Neil C. Schur

On August 20, 2024, U.S. District Judge Ada E. Brown of the Northern District of Texas permanently blocked the Federal Trade Commission's ("FTC") impending nationwide ban on most noncompete agreements, which was supposed to go into effect on September 4.

Judge Brown concluded 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." She had previously temporarily enjoined enforcement of the FTC ban but has now made the injunction permanent.

The FTC's rule, approved by a 3-2 vote along party lines in early May 2024, would have banned most non-compete agreements in the workplace. It made it illegal for an employer:

(i) To enter into or attempt to enter into a non-compete clause;
(ii) To enforce or attempt to enforce a non-compete clause (subject to the exceptions described below); or
(iii) To represent that the worker is subject to a non-compete clause.

Significant exceptions would have applied to: (i) existing non-competes for senior executives in policy-making positions earning over $151,164; and (ii) non-compete clauses agreed to in connection with a bona fide sale of a business entity, of the person's ownership interest in a business entity, or of substantially all of the business entity's operating assets.

The FTC has contended that the practice of allowing noncompetes suppresses wages, hampers innovation, and blocks entrepreneurs from starting new businesses. It has estimated that its rule would impact about 30 million Americans and boost wages by nearly $300 billion per year.

The FTC rule was challenged by the U.S. Chamber of Commerce and tax company Ryan LLC. In separate actions, it had been allowed to stand in a slightly narrowed form by a Pennsylvania federal judge and a Florida federal judge.

In her decision, Judge Brown acknowledged that Congress vested the FTC with the power to prevent unfair methods of competition but concluded that the "plain reading" of Section 6(g) of the FTC Act, pursuant to which the rule was created, does not give the commission the authority to create "substantive rules regarding unfair methods of competition."

She continued: "After reviewing the test, structure, and history of the Act, the court concludes the FTC lacks the authority to create substantive rules through this method, Section 6(g) is indeed a 'housekeeping statute,' authorizing what the APA terms 'rules of agency organization procedure or practice' as opposed to 'substantive rules'."

The FTC announced it is considering an appeal, although we expect the U.S. Court of Appeals for the Fifth Circuit to affirm and the U.S. Supreme Court to affirm or refuse to hear the case.

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We invite you to contact the authors with any questions.