

Texas District Court Sets Aside FTC Non-Compete Ban: What Employers Should Consider

Update

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The Federal Trade Commission's (FTC) Non-Compete Rule, which was scheduled to become effective on September 4, 2024, was set aside last month by US District Judge Ada Brown of the Northern District of Texas in *Ryan LLC v. FTC*, 2024 U.S. Dist. LEXIS 117418 (N.D. Tex. July 3, 2024).

The Non-Compete Rule, 89 FR 38342 (implementing 16 C.F.R. § 910), would have prohibited, broadly, most non-compete agreements, with limited exceptions for existing non-compete agreements with "senior executives" — as defined by the Non-Compete Rule, and non-compete agreements made in conjunction with the *bona fide* sale of a business. Employers would also have been permitted to prosecute violations of non-compete agreements that accrued prior to the Non-Compete Rule's presumed effective date.

However, immediately after the FTC issued the Non-Compete Rule on April 23, 2024, Ryan, LLC sued to set it aside on the basis that the FTC violated the Administrative Procedure Act (APA) because the FTC's issuance of the rule was arbitrary and capricious. The US Chamber of Commerce, and other industry groups, later joined the lawsuit as plaintiff-intervenors challenging the Non-Compete Rule on the same basis as Ryan, LLC.

On July 3, 2024, Judge Brown issued a preliminary injunction prohibiting the FTC from enforcing the Non-Compete Rule against the plaintiffs only. However, the court directed the parties to move for summary judgment and committed to issuing a ruling on the merits of the challenge before the Non-Compete Rule's presumed September 4, 2024, effective date.

Following the parties' motions for summary judgment, and the filing of multiple amicus briefs by various interested parties both in support of, and in opposition to, the Non-Compete Rule, on August 20, 2024, Judge Brown issued an

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opinion and order setting aside, nationally, the Non-Compete Rule (the Decision).

Non-Compete Ban Halted

In the Decision, Judge Brown concluded that the FTC lacked the statutory authority to ban practices it considers to be “unfair methods of competition” by adopting *substantive* rules such as the Non-Compete Rule. The Decision further holds that even if the FTC had the power to adopt the rule, the APA requires a rule-issuing agency, such as the FTC, to show evidentiary support for its rule. In this case, Judge Brown found the FTC had failed to demonstrate why it enacted such a sweeping ban on non-compete agreements, rather than issuing a narrowly targeted prohibition. The FTC’s failure to satisfy its evidentiary burden rendered the Non-Compete Rule, according to the Decision, “arbitrary and capricious” and required the court to set it aside.

Notably, the court’s decision was influenced by the recent US Supreme Court decision in *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024), which rejected the longstanding doctrine that allowed courts to defer to the administrative agency when there was a dispute over the interpretation of the statutes that the agency administers (the *Chevron* Doctrine). Citing *Loper Bright*, Judge Brown emphasized that “the deference that *Chevron* require[d] of courts reviewing agency action cannot be squared with the APA.” This shift away from agency deference led the court to scrutinize the FTC’s powers and conclude that Congress had not provided the FTC with the expansive authority it claimed in issuing the Non-Compete Rule.

Employer Considerations

The Decision, which is expected to be appealed, is unlikely to be overturned by the US Court of Appeals for the Fifth Circuit. Employers should consider the current landscape for non-compete agreements to be status quo. To maximize enforceability, non-compete agreements should continue to be reserved for employees who receive confidential and proprietary information. Employers should also be mindful of the general hallmarks of an enforceable restrictive covenant, including reasonable geographic and temporal scopes — but understand that enforceability of a restrictive covenant often hinges on the applicable local jurisdiction’s precedent and the presiding judge’s appetite to enforce it.