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Second Decision on FTC's Noncompete Ban Is In

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On July 23, 2024, a federal judge from the Eastern District of Pennsylvania declined to issue a preliminary injunction that would block the Federal Trade Commission's ("FTC") rule banning most noncompete agreements, current and future, that is set to take effect on September 4 ("Rule").

In reaching this decision, the judge concluded that the plaintiff failed to demonstrate a substantial likelihood of success on the merits. First, the judge rejected the plaintiff's argument that Section 6(g) of the Federal Trade Commission Act ("FTC Act" or "Act") only authorizes procedural rulemaking, explaining it "is inherently inconsistent and therefore untenable" to read the word "procedural" but not "substantive" into the FTC Act when neither word appears within the Act. She explained, "it [is] clear that the FTC is empowered to make both procedural and substantive rules as is necessary to prevent unfair methods of competition." Second, unpersuaded by the plaintiff's supporting reasons, the judge rejected the plaintiff's alternative argument that—even if the FTC Act empowers the FTC with authority to make substantive rules—the FTC exceeded its authority by banning all noncompete agreements.

Because this decision conflicts with an earlier decision by a federal judge in the Northern District of Texas, the enforceability of the Rule remains unsettled. As a result, all eyes turn back to the judge sitting in Northern District of Texas, who is expected to rule on the merits of the Rule by August 30, and to a judge sitting in the Middle District of Florida who is expected to rule on the same issue. Until we receive an answer on the Rule's enforceability, employers should consult with legal counsel and continue following the guidelines outlined in Holland & Hart's earlier article on the Rule.

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