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Paws on Noncompete Agreements…Maybe

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In late April, the Federal Trade Commission (FTC) issued its final rule banning noncompete agreements that is scheduled to become effective on September 4, 2024 (Rule). The Rule upends arrangements many employers—including veterinarians—have relied on to protect their business interests when practitioners and key employees leave to start their own practice or work for a local competitor.

The Rule broadly bars employers from entering noncompete agreements with employees, invalidates existing agreements except for highly compensated individuals in a policymaking position, and requires employers to provide notice to current and former employees bound by existing agreements that the agreement will not be enforceable once the Rule takes effect. Future noncompete agreements will not be allowed.

One exception—that could apply to Pet Care industry sellers—provides that noncompete agreements are permissible if the restricted party is selling a business entity, its ownership interests, or operating assets as part of a bona-fide sale.

The substance of the Rule was challenged by employers, employer groups, and business organizations in federal courts in several states. These challenges also sought preliminary injunctions to pause implementation of the Rule while courts consider the underlying substantive legal issues, or a ruling on the merits.

Texas Court Bans Rule

In the first case to reach a court, on July 8, Judge Brown of the Northern District of Texas granted a preliminary injunction barring the FTC from enforcing its Rule against the plaintiff (Ryan LLC) and the plaintiff-intervenors (the US Chamber of Commerce and other business associations), but she did not issue a nationwide preliminary injunction as requested.

In siding with the plaintiff and plaintiff-intervenors, Judge Brown reasoned that the FTC lacked statutory authority under Section 6(g) of the Federal Trade Commission Act (FTC Act) because it is a “housekeeping statute” that authorizes only procedural—not substantive—rule making. She reached this conclusion by looking to “the text, structure, and history of the FTC Act.” Judge Brown further concluded the Rule violates the Administrative Procedure Act's prohibition against arbitrary and capricious rules “because it is unreasonably overbroad without a reasonable explanation.”

Pennsylvania Court Upholds Rule

Three weeks later, on July 23, 2024, Judge Brisbane Hodge of the Eastern District of Pennsylvania denied the challengers' request for a preliminary injunction, reaching contradictory legal conclusions from the Texas federal court.

Judge Brisbane Hodge held the FTC Act empowers the FTC to make both procedural and substantive rules as is necessary to prevent unfair methods of competition. She also 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.

Employers in Limbo

Because there are now conflicting federal court decisions, the enforceability of the Rule remains unsettled. Employers may be in limbo for a while as it is expected the decisions will be appealed and could make their way to the US Supreme Court. In the near term, all eyes turn back to Judge Brown in Texas, who is expected to issue a decision on the merits of the Rule by August 30, and to another federal judge of the Middle District of Florida who is expected to rule on the same issue.

Until there is more guidance from the courts as to the Rule's enforceability, employers may want to wait to issue notices to individuals with existing noncompete agreements until the scope and effect of the Rule become more certain.

Pet care industry employers should consult with legal counsel on how to handle any existing noncompete agreements. Some steps to consider preparing for if the Rule withstands the legal challenges and goes into effect include

- Revisiting strategies for safeguarding confidential and trade-secret related information;
- Consider alternative strategies and tools to protect proprietary and sensitive information, such as trade secret laws and confidentiality/non-disclosure agreements, as suggested by the FTC;
- Consider limiting access to sensitive/proprietary information;
- Prepare to issue notices to individuals with existing noncompete agreements no later than the effective date of the rule, including an explanation that those noncompete agreements “will not be, and cannot legally be, enforced against the worker.” (See § 910.2(b));
- Review and implement non-solicitation provisions.

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