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The FTC's Noncompete Ban Is Dead—For Now

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Employers finally have the answer they've been waiting for: they don't need to comply with the Federal Trade Commission's (“FTC”) Rule banning noncompete agreements—for now.

The FTC's Rule was set to go into effect on September 4, 2024. But, on August 20, 2024, a federal judge from the Northern District of Texas set aside the Rule and barred the FTC from enforcing it. The same judge previously put the Rule on hold as to only the parties who brought the lawsuit, but this new decision applies to all employers.

The Court rejected the Rule for two reasons: 1) the Rule exceeded the FTC's statutory authority, and 2) the Rule is arbitrary and capricious.

The Court found that the plain language of the Federal Trade Commission Act (FTCA) does not expressly give the FTC authority to create substantive rules regarding unfair methods of competition. Additionally, the Court found that even if the FTCA empowers the FTC to create some rules, it only empowers rulemaking related to unfair or deceptive acts or practices—and noncompete agreements are not unfair or deceptive practices. In the end, the Court stated that the “role of an administrative agency is to do as told by Congress, not to do what the agency thinks it should do.”

The Court determined that the Rule was arbitrary and capricious because the Rule “is unreasonably overbroad without a reasonable explanation.” It found that the FTC could not point to evidence explaining why it needed to prohibit all noncompete agreements rather than target specific, harmful noncompete agreements. The Court also found that the FTC failed to explain why the Rule was the best alternative among other actions it could have taken to address the issue.

Finally, for those keeping track, the Court relied in part on the recent US Supreme Court decision rejecting the *Chevron* doctrine, which previously mandated deference to agency actions in certain situations.

We fully expect the FTC to appeal the decision, especially because a July 23, 2024 decision out of the Eastern District of Pennsylvania directly conflicts with the August 20, 2024 decision. The July 23, 2024 decision found that “the FTC is empowered to make both procedural and substantive rules as is necessary to prevent unfair methods of competition” and that the FTC did not exceed its authority by banning all noncompete agreements. The FTC may face an uphill battle, though; a judge in the Middle District of Florida also recently determined that the Rule was

improper.

For now, employers do not need to comply with the Rule. Still, employers who were already auditing their noncompete agreements should continue those audits. Although unlikely, the Rule may eventually be put into effect. Additionally, states are increasingly passing their own legislation limiting—or even prohibiting—noncompete, non-solicitation, and other restrictive covenant agreements. Employers would do well to finish their audits to ensure that any restrictive covenant agreements comply with any current or upcoming state or local laws.

Holland & Hart is following all legal challenges to the Rule.
