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COMMENTARY

## FTC Rule Banning Noncompete Agreements Blocked Nationwide

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By Adam S. Chotiner | August 28, 2024 at 12:48 PM

In January 2023, the Federal Trade Commission (FTC) issued a proposed rule that would ban most noncompete agreements throughout the United States. After receiving more than 26,000 public comments, this past April the FTC voted 3-2 to approve a final rule. The final rule covers any type of worker, including employees and independent contractors. Any existing noncompete agreement for a “senior executive” (defined as a worker earning more than \$151,164 who is in a “policy-making position”) could remain in force, but no new noncompete agreements would be permitted for any workers. For existing noncompete agreements (except for a “senior executive”), the final rule would require employers to notify their employees that their non-compete agreements are no longer enforceable. Noncompete agreements that are part of the sale of business would continue to be permitted and enforceable.

The final rule purported to allow nondisclosure/confidentiality agreements and nonsolicitation agreements (for example, an agreement restricting an employee from soliciting an employer’s clients or customers). However, such provisions could still be

prohibited if they are so broad in scope that they essentially function as a noncompete agreement. The final rule was scheduled to become effective on Sept. 4, 2024.

The FTC's final noncompete rule was challenged via lawsuits filed in different federal courts around the country. On July 3, 2024, a federal judge in Texas issued a preliminary injunction finding that the FTC lacks authority to ban noncompete agreements. However, at that time, the judge declined to issue a nationwide injunction against enforcement of the new rule. Instead, the preliminary injunctive relief only benefited the U.S. Chamber of Commerce and the other plaintiffs in that particular case. About three weeks later, on July 23, 2024, a different federal judge in Pennsylvania reached the opposite result, upholding the FTC's authority to issue the non-compete rule and refusing to block it from going into effect on Sept. 4. A third federal judge based in Florida also weighed in on the rule and followed the lead of his Texas counterpart's July 23 ruling by issuing a preliminary injunction that only applies to the specific parties in that case.

On Aug. 20, the same federal judge in Texas who issued the preliminary injunction on July 23— U.S. District Judge Ada Brown, appointed by President Donald Trump—issued a ruling blocking the FTC rule banning noncompete agreements from going into effect. After analyzing the text and history of the Federal Trade Commission Act, Judge Brown concluded that the FTC lacked the statutory authority to issue the rule. Going further, Judge Brown determined that even if the FTC had the necessary authority, the rule was arbitrary and capricious under the Administrative Procedures Act. Nothing that the rule imposed a “categorical ban” on noncompete agreements,

Judge Brown held that the FTC's “lack of evidence as to why they chose to impose such a sweeping prohibition—that prohibits entering or enforcing virtually all noncompetes—instead of targeting specific, harmful noncompetes, renders the rule arbitrary and capricious.” Judge Brown also found that the FTC “failed to sufficiently address alternatives to issuing the rule.”

Based on her findings and the APA, Judge Brown held the rule to be unlawful and set it aside on a nationwide basis. Accordingly, absent some extraordinary, unexpected intervention by an appellate court, the rule will not go into effect on Sept. 4, 2024.

The competing orders issued by the different judges are likely to be appealed, and a conclusive ruling may ultimately require a decision from the U.S. Supreme Court, so we have not yet reached the end of the story on the FTC's noncompete rule. But for now, businesses can at least pump the brakes on their efforts to comply with the rule, and noncompete agreements will remain governed by existing law.

**Adam S. Chotiner** is Board Certified in labor and employment law by The Florida Bar, and he oversees the labor and employment law practice group at Shapiro, Blasi, Wasserman & Hermann.