

# Memorandum

## Texas District Court Stays FTC Non-Compete Ban But Declines (For Now) To Issue Nationwide Injunction

July 8, 2024

On July 3, 2024, the United States District Court for the Northern District of Texas issued a preliminary injunction order that enjoins the Federal Trade Commission from enforcing the FTC's so-called "Non-Compete Rule," which would have banned most non-competes.<sup>1</sup> However, the District Court's injunction order is unusually narrow, as the court declined to issue a nationwide injunction that would have effectively shielded all employers in the country against enforcement actions by the FTC, and instead preliminarily enjoined the FTC from enforcing the Non-Compete Rule against only a small number of parties that appeared in the suit. As a result, the September 4, 2024 effective date of the Non-Compete Rule presently is not impacted for other employers. That said, the District Court said it expects to issue a final ruling by August 30, 2024, and we expect that ruling likely will vacate the Non-Compete Rule or otherwise include a more general broad-based injunction.<sup>2</sup>

### Procedural History and Decision

***Procedural History.*** On April 23, 2024, the day that the FTC issued its non-competes ban, Ryan LLC filed a challenge to the Non-Compete Rule in the District Court, and sought both a preliminary injunction staying the September 4, 2024 effective date of the Non-Compete Rule and a permanent injunction striking down the Non-Compete Rule. On April 24, 2024, the Chamber of Commerce of the United States ("U.S. Chamber") and other associations filed a similar complaint in another Texas district, but the District Court counseled the U.S. Chamber to intervene in the *Ryan LLC* litigation, and under the "first to file" rule, ultimately dismissed the U.S. Chamber's suit once the U.S. Chamber had been permitted to intervene in *Ryan LLC*. Several other cases challenging the Non-Compete Rule remain pending, including *ATS Tree Services, LLC v. FTC*, Case No. 24-cv-01743-KBH (E.D. Pa.) and *Properties of the Villages, Inc. v. FTC*, Case No. 24-cv-00316 (M.D. Fla.).

***Substantive Decision.*** The District Court's decision in *Ryan LLC* found that the plaintiffs met the burden for the granting of a preliminary injunction and postponed the September 4, 2024 effective date of the Non-Compete

<sup>1</sup> For our earlier discussions around the issuance of the Non-Compete Rule, see [here](#) and [here](#).

<sup>2</sup> The District Court seems poised to issue a permanent injunction that protects the members of the Chamber of Commerce and the other associations party to the lawsuit under a theory of "associational" standing, and there is reason to be optimistic that the District Court will entertain arguments that the FTC should be enjoined from enforcing the Non-Compete Rule as to any employer. The District Court recognized its authority to issue nationwide injunctive relief and/or associational relief but declined to do so on the basis of the current record. The logic of the District Court's decision should, however, weigh in favor of granting nationwide and/or associational relief on the basis that the Non-Compete Rule is "based on inconsistent and flawed empirical evidence, fails to consider the positive benefits of non-competes agreements, and disregards the substantial body of evidence supporting these agreements."

Rule as to Ryan LLC, the U.S. Chamber, and the other parties in that suit. In reaching this decision, Judge Ada Brown found that the plaintiffs had met their burden that they would likely succeed on the merits of their lawsuit for two primary reasons:

- FTC Lacks Statutory Authority to Make the Rule. The District Court ruled that, as a matter of law, although the FTC is authorized to enjoin unfair methods of competition and to promulgate procedural rules as to how that authority will be implemented, the FTC lacks the statutory authority to make substantive rules to prevent unfair methods of competition. In reaching this conclusion, the District Court held that the FTC is authorized to promulgate only procedural (rather than substantive) rules in connection with the prevention of unfair methods of competition (calling that section a “housekeeping statute” allowing for “rules of agency organization procedure and practice”).
- Rule Is Unreasonably Overbroad and, Therefore, Arbitrary and Capricious. The Non-Compete Rule does not comply with applicable administrative law because it is unreasonably broad without a reasonable explanation and therefore is arbitrary and capricious. Indeed, according to the District Court, because the Non-Compete Rule “imposes a one-size-fits-all approach with no end date,” there is not sufficient evidence to support the broad scope of the Non-Compete Rule.<sup>3</sup>

In addition, Judge Brown found that the plaintiffs met the other requirements for the issuance of a preliminary injunction. The District Court said implementing the Non-Compete Rule posed a substantial risk of irreparable harm to the business of the plaintiffs as their existing non-competes with current and former employees would be invalid and that they could not enter into new non-competes. The District Court also held that the balance of the equities favored the plaintiffs as there would be no harm to the FTC should the effective date of the Non-Compete Rule be postponed.

Limited Scope of Relief. While the District Court issued the preliminary injunction sought by the parties, it is narrower than expected. Judge Brown declined to order nationwide injunctive relief with respect to the Non-Compete Rule, instead limiting the reach of the injunction to the plaintiffs in the case. Judge Brown found that, while the District Court did have the power to issue a nationwide injunction in “appropriate circumstances,” the plaintiffs had not demonstrated why such a nationwide preliminary injunction was necessary to provide themselves with complete relief. The District Court also found that the briefing to date did not demonstrate “associational standing,” and without such “developed briefing,” the District Court declined to extend injunctive relief to the members of the U.S. Chamber and the other intervening associations.

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<sup>3</sup> On this point, the District Court was particularly critical of the FTC’s rule-making process, saying:

- The FTC’s evidence did not warrant an expansive ban, and the FTC insufficiently considered alternatives to issuing the ban.
- The FTC relied on a “handful of studies” of state policies, but that no state had ever enacted a ban as broad as the FTC’s.
- The FTC lacked evidence to support a broad ban as opposed to “targeting specific, harmful non-competes,” rendering the ban arbitrary and capricious.

## Next Steps

We believe the District Court is poised to either issue a broader injunction on August 30, 2024 or vacate the Non-Compete Rule (which would have the effect of preventing the FTC from enforcing the Non-Compete Rule against any party). The District Court's reasoning on the merits of the Non-Compete Rule signal that, as a matter of law, the District Court does not believe the FTC has the authority to issue the Non-Compete Rule and, in all events, would be unjustified in issuing such a broad-based ban on non-competes based on the present record. That reasoning should apply with equal force as to all employers nationwide. The District Court's hesitation with extending preliminary injunctive relief as to a broader set of parties also appears to be based on the lack of sufficient briefing by the parties. Assuming the parties provide adequate briefing on these issues, we expect that the District Court will have the basis to issue a broader permanent injunction and/or issue an order that vacates the Non-Compete Rule.

It is also possible the FTC will immediately appeal this decision. The FTC's initial response was to say it "stands by our clear authority, supported by statute and precedent, to issue this rule." It is not clear whether the FTC will seek an appeal now or wait until the issuance of a full merits decision by the Court in August.

There also are a number of other challenges to the Non-Compete Rule pending in other courts (including a U.S. Federal Eastern District Court in Pennsylvania that is holding hearings this week and says it will issue a ruling by July 23, 2024). It is likely that new challenges may be filed given the lack of a nationwide injunction.

At present, the Non-Compete Rule is scheduled to go into effect on September 4, 2024 as to employers not party to *Ryan LLC*. While we believe it is highly likely that the Non-Compete Rule will ultimately be enjoined more broadly, absent further court intervention, the *Ryan LLC* decision has left most employers with more uncertainty going forward. We believe that it is prudent for employers in the coming weeks to inventory existing non-competes and to prepare for the possibility of providing notices to current and former employees that their non-competes are not enforceable, but we would not recommend sending those notices until there is further clarity (which may not be until August 30, 2024, just days before the Non-Compete Rule's effective date). For companies without binding non-competes for senior executives, it may be prudent to implement non-competes for those employees, as pre-existing senior executive non-competes will be grandfathered under the FTC's rule.

## Changing Non-Compete Landscape at the State Level

Even if the FTC rule is ultimately enjoined, we remind employers that many state legislatures have implemented laws narrowing the use of non-competition agreements, and others have considered complete legislative bans. Employers should always consider additional (or alternative) approaches to protect from the harm potentially caused by a departing employee, including expanded confidentiality and trade secret protections, non-solicitation provisions, retention bonuses, notice periods, garden leaves, fixed term employment agreements, and extended periods for vesting of economic benefits.

We will continue to send any relevant updates as we learn more information on this topic.

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