

# Memorandum

## Texas Federal Court Blocks the FTC Non-Compete Ban

August 21, 2024

### Introduction

On August 20, 2024, the United States District Court for the Northern District of Texas set aside the FTC's "Non-Compete Rule" that would have banned substantially all post-employment non-competes. In reaching this decision, the District Court held that (i) the FTC lacks the statutory authority to issue the Non-Compete Rule and (ii) the FTC's issuance of the Non-Compete Rule was arbitrary and capricious. Based on this holding, the District Court ordered that the Non-Compete Rule be "set aside" (*i.e.*, vacated in its entirety), as authorized by the Administrative Procedures Act ("APA").

The District Court's decision is a final adjudication of the parties' dispute. In contrast to the District Court's July 3 preliminary injunction order, which granted relief only to the parties appearing in the suit, this decision has nationwide effect. As a result, absent a specific court order to the contrary, the FTC is barred from enforcing the Non-Compete Rule, and employers are not required to comply with the Non-Compete Rule, including the requirement to issue notices informing current and former employees that their non-competes are unenforceable.

The FTC is expected to appeal the ruling to the U.S. Court of Appeals for the Fifth Circuit, but we believe it is unlikely that the Fifth Circuit will reinstate the Non-Compete Rule while the appeal is pending.

### Procedural History and Decision

*Procedural History.* As detailed more extensively in our prior memos on the Non-Compete Rule and the District Court's July 3 preliminary injunction order,<sup>1</sup> Ryan LLC filed a challenge to the Non-Compete Rule in the District Court, and a number of trade associations, including the Chamber of Commerce of the United States and the Business Roundtable, were permitted to intervene in the case. The *Ryan* plaintiff and intervenors sought both a preliminary injunction and an order permanently setting aside the Non-Compete Rule. On July 3, 2024, the District Court issued a Memorandum Opinion and Order granting preliminary relief but solely as to the named plaintiff and intervenors. Specifically, the District Court's July 3 preliminary injunction order stayed the effective date of the Non-Compete Rule as to the plaintiff and intervenors and issued a preliminary injunction enjoining the FTC from enforcing the Non-Compete Rule, but only as to the named plaintiff. The District Court declined to issue an order with broader relief and invited the parties to submit further arguments regarding the District Court's authority to issue broader relief at the summary judgment stage. The plaintiff, intervenors and the FTC all filed

<sup>1</sup> For our earlier discussions around the issuance of the Non-Compete Rule and the District Court's July 3<sup>rd</sup> order, see [here](#), [here](#) and [here](#).

motions for summary judgment, with the plaintiff and intervenors arguing that the preliminary injunction should be made permanent and have nationwide effect, and the FTC arguing that the agency has statutory authority to issue the Non-Compete Rule.<sup>2</sup>

*Decision and Nationwide Scope.* On August 20, 2024, the District Court granted the plaintiff's and intervenors' motions for summary judgment and denied the FTC's motion for summary judgment. The District Court's reasoning in its August 20<sup>th</sup> Memorandum Opinion and Order was largely identical to its July 3<sup>rd</sup> order and relied on the same two primary bases for issuing a permanent injunction.

- First, the District Court held that the FTC lacks authority to issue substantive rules such as the Non-Compete Rule as the FTC is only authorized to promulgate procedural (“housekeeping”) rules in connection with the prevention of unfair methods of competition. The District Court held that the plain language of the statute does not explicitly give the FTC substantive rule-making authority, and the construction and history of the statute suggest the Congress did not intend to give the FTC that power. The District Court noted, for example, that when Congress gave the FTC the power to make substantive rules with respect to unfair deceptive acts or practices, it did so explicitly, implying that Congress did not do so with respect to the prevention of unfair methods of competition. Therefore, the District Court held that the FTC does not have the authority to issue the Non-Compete Rule.
- Second, the District Court held that issuance of the Non-Compete Rule was arbitrary and capricious because the FTC did not adequately consider and incorporate comments and evidence before issuing the Non-Compete Rule. The District Court was highly critical of the FTC's rulemaking process with respect to the Non-Compete Rule, stating that the Non-Compete Rule “imposes a one-size-fits-all approach with no end date” and noted that that the Non-Compete Rule was “unreasonably overbroad without a reasonable explanation.” The District Court found that the FTC insufficiently considered alternatives to issuing the ban, that none of the “handful of studies” of state policies relied on by the FTC imposed a ban as broad as the FTC's, and that the FTC lacked evidence to support a broad ban as opposed to “targeting specific, harmful non-competes,” therefore rendering the ban arbitrary and capricious.

After holding that the FTC's promulgation of the Non-Compete Rule both exceeded its statutory authority and that the Non-Compete Rule was issued in an arbitrary and capricious manner, the District Court next turned to the appropriate remedy pursuant to the APA. The District Court found that the text of the APA required that the court “hold unlawful” and “set aside” the Non-Compete Rule. In doing so, the District Court found that the language of the APA does not contemplate party-specific relief and therefore its ruling should have nationwide effect and should not be limited to Ryan LLC and the intervening trade associations. The District Court concluded

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<sup>2</sup> There are other ongoing cases challenging the Non-Compete Rule, including *ATS Tree Services, LLC v. FTC*, Case No. 24-cv-01743-KBH (E.D. Pa.) (in which the court declined to issue a preliminary injunction in favor of the FTC, finding the agency had authority to issue the rule) and *Properties of the Villages, Inc. v. FTC*, Case No. 24-cv-00316 (M.D. Fla.) (which granted a preliminary injunction with respect to the named party only). It remains to be seen what will happen with respect to these cases.

Non-Compete Rule “shall not be enforced or otherwise take effect on its effective date of September 4, 2024, or thereafter.”

### **Next Steps**

While we expect that the FTC will appeal the District Court’s decision, it may take years before the matter is finally resolved at the appellate level. In the interim, this decision alleviates the immediate pressure of the September 4<sup>th</sup> effective date of the Non-Compete Rule, so that employers can continue to enter into and enforce non-competes (subject to compliance with applicable state law). In addition, employers will no longer be required to provide notice to current and former employees that their post-employment non-competes are unenforceable, as would have been required by the Non-Compete Rule. In the meantime, non-competition agreements will continue to be governed primarily by state law. It is likely that the District Court’s decision could lead to further legislation at the state or federal levels narrowing or banning post-employment non-competition agreements, so we remind employers to be mindful of the potential for a continued narrowing of the ability to enforce those agreements in practice.

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