WINSTON & STRAWN LLP

BLOG

FTC Ban on Worker Noncompetes Is Blocked Nationwide

AUGUST 22, 2024

The Federal Trade Commission's rule banning nearly all noncompete agreements with workers was blocked, nationwide, by a Texas federal court on August 20. The court's decision found that the rule exceeded the FTC's statutory authority and that it was arbitrary and capricious. The noncompete rule is now entirely set aside and will not take effect on September 4, 2024, as was previously anticipated.

Specifically, the Texas court's opinion found that (i) the statutory provision invoked by the FTC to issue the rule, Section 6(g) of the FTC Act, authorized only procedural rulemaking and not substantive rulemaking like the noncompete ban; and (ii) the rule was arbitrary and capricious under the Administrative Procedure Act, 5 U.S.C. § 706(2), because the FTC disregarded evidence of positive benefits of noncompete agreements and failed to consider less restrictive alternatives to a sweeping nationwide ban. In an earlier ruling in the same case, *Ryan LLC et al. v. Federal Trade Commission*, No. 3:24-cv-00986-E (N.D. Tex.), the court entered a preliminary injunction with respect only to the named plaintiffs, leaving uncertainty for all other employers. After considering the merits and arguments raised in cross-motions for summary judgment, the court's August 20 opinion is now a final ruling with nationwide effect.

The future of the FTC's noncompete rule looks questionable, but the FTC is considering appeal options, and the legal battles are likely to continue. Litigation around the FTC rule is also continuing in other cases pending in Pennsylvania and Florida federal district courts, where the impact of the Texas ruling is still to be seen.[1] The upcoming November 2024 elections add further uncertainty to the future of the FTC rule and broader antitrust policy, although candidates from both major parties have indicated that antitrust enforcement will remain a priority. If the issue ultimately reaches the U.S. Supreme Court, the FTC will face a skeptical Court. In *Loper Bright Enterprises v. Raimondo* and *Relentless, Inc. v. Department of Commerce*, the Supreme Court recently overruled its own landmark *Chevron* decision, which previously held that courts should defer to federal agencies' interpretations when laws passed by Congress do not clearly answer a question arising under a statute administered by the agency. See here for Winston's earlier post about these developments.

While the *Ryan* decision is a major victory for employers that use noncompetes and stops the FTC rule from going into effect for the time being, the future of noncompetes remains uncertain. Regardless of what happens to the federal rule, state-level lawmakers and enforcers continue to scrutinize noncompetes. Several states already significantly limit the use of worker noncompete agreements, while others are considering new restrictions or

enforcement focus on noncompetes. If the FTC rule is invalidated, more state legislatures and enforcers may take up the issue.

Given this uncertainty, businesses should monitor this space and assess their current agreements. It is still a good time for businesses to consider how best to future-proof their employee agreements against changing laws. Winston attorneys are carefully monitoring the developments with noncompetes and regularly advising clients on ways to navigate the shifting landscape.

There are many options in addition to noncompetes that can help protect a company's legitimate interests when workers depart. See here and here for Winston's earlier posts about additional options, such as non-solicitation agreements, enhanced non-disclosure agreements, garden leaves, and training repayment programs. Where noncompetes remain lawful, these provisions can act as complements. And where noncompetes cannot be used, these provisions can protect company interests to the fullest extent possible. In all cases, post-employment restrictive covenants will be at their strongest and most enforceable when they are tailored to clear procompetitive interests that the company wishes to protect. Reach out to the authors of this post or your regular Winston contacts with any questions.

---

[1] In the challenge pending in the Eastern District of Pennsylvania, the court previously denied plaintiff's motion for a preliminary injunction, and indicated it was likely to uphold the FTC rule on the merits. Meanwhile, a judge in the Middle District of Florida issued a preliminary injunction on August 15, 2024, blocking the rule as to the plaintiff in that case, but did so on a different basis than the Texas court in *Ryan.* The Florida court found that the FTC *does* have substantive rulemaking authority under Section 6(g) of the FTC Act, but that this particular rule was still likely unauthorized under the "major questions doctrine" due to its sweeping consequences.

3 Min Read

Authors

Kevin B. Goldstein

Gabi Wolk

Related Topics

Antitrust Intelligence | Federal Trade Commission | Employment Antitrust | Non-Compete

Related Capabilities

Antitrust/Competition | Labor & Employment | Trade Secrets, Non Competes & Restrictive Covenants

Related Professionals

Kevin B. Goldstein

Gabi Wolk

This entry has been created for information and planning purposes. It is not intended to be, nor should it be substituted for, legal advice, which turns on specific facts.