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BLOG

FTC Asks Appeals Courts to Revive Ban on Worker Non-Compete Agreements after Nationwide Block

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As we previously posted, last August, a Texas federal court blocked, nationwide, a Federal Trade Commission (FTC) rule that would have banned nearly all worker non-compete agreements (the Non-Compete Rule). On October 18, 2024, the FTC appealed the Texas ruling, setting the stage for the Fifth Circuit Court of Appeals to consider the case.

BACKGROUND ON CHALLENGES TO THE NON-COMPETE RULE'S IMPLEMENTATION

Since announcing the Non-Compete Rule in April 2024, the FTC has faced an uphill battle in the rule's implementation, principally in the form of three federal lawsuits filed in Pennsylvania, Florida, and Texas. Challenges to the FTC's rule had faced an early setback when, on July 23, 2024, a federal court in Pennsylvania declined to block the rule for the time being. The plaintiff in that case later voluntarily withdrew the lawsuit. The tide turned when a federal court in Florida later relied on the "major questions" doctrine to block the FTC from enforcing the rule. But that decision only affected the plaintiff in that case and left the rule intact as to others. Similarly, the Texas court initially blocked the Non-Compete Rule as applied to the plaintiffs in that case, but then ultimately blocked the Non-Compete Rule on a nationwide basis.

FTC OCTOBER APPEAL

On October 18, 2024, the FTC appealed the Texas federal court's August decision. When implementing the nationwide ban, the Texas court held that the non-compete ban exceeded the FTC's rulemaking authority under the FTC Act and was arbitrary and capricious. The Texas court rejected the FTC's position that the agency had substantive rulemaking authority under Section 6(g) of the FTC Act, explaining that Section 6(g) only authorized "housekeeping" rules.

Since August, the FTC has appealed both the Texas and Florida decisions. These appeals face uncertainty on two fronts:

- First, the U.S. Supreme Court's 2024 decision in *Loper Bright v. Raimondo* and *Relentless v. Department of Commerce* overruled the Court's landmark decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*(1984), which required courts to defer to administrative agencies' reasonable interpretations of statutes they

administered when those statutes were ambiguous. The end of *Chevron* deference may directly or indirectly influence the courts' review of agency assertions of authority like the non-compete ban.

- Second, following the 2024 election, the incoming administration may decide not to pursue the appeals.

Assuming the FTC does not withdraw the appeals, the stakes in the Texas case will be higher given its nationwide effect. But the courts involved in both the Texas and Florida cases may issue decisions with far-reaching impact.

Please contact a member of the Winston & Strawn Employee Benefits and Executive Compensation Practice, our Labor & Employment Practice or your Winston relationship attorney for further information.
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