

July 5, 2024

The FTC vs. Noncompete Agreements: Ban on Noncompete Agreement Hits a Roadblock



David Michael



Alec Cerqueira

Human Resources & Employment

The Federal Trade Commission (FTC) issued a much-debated “Final Rule” earlier this year that banned most noncompete agreement nationwide. In support of its position, the FTC declared that such agreements are an “unfair method of competition” in violation of Section 5 of the FTC Act.

The specific language of the Final Rule adopts a comprehensive ban on new noncompete agreements with all workers, including senior executives, while permitting the validity of existing noncompete agreements with senior executives and rendering existing noncompete agreements with other workers unenforceable after the effective date.

There are specific exceptions to the application of the Final Rule:

1. the Final Rule does not apply to noncompetes entered into by an individual pursuant to a sale of a business entity,
2. the Final Rule does not prohibit employers from enforcing noncompete clauses where the cause of action occurred prior to the effective date of the Final Rule, and
3. the Final Rule provides that it is not an unfair method of competition to enforce or attempt to enforce a noncompete or to make representations about a noncompete when a person has a good-faith basis to believe that the final rule is inapplicable.

More importantly, the FTC’s Final Rule would supersede all state laws to the extent that the state’s law permits or authorizes conduct prohibited under the Final Rule. The FTC’s Final Rule was set to go into effect on September 4, 2024.

Almost immediately, opponents of the FTC’s Final Rule took to the courts to challenge the measure, seeking an order vacating the Final Rule. The first – and prevailing – action filed was the Ryan LLC v. Federal Trade Commission matter in the U.S. District Court for the Northern District of Texas. In that case, plaintiffs Ryan LLC and the U.S. Chamber of Commerce allege that:

1. the FTC lacks authority under the FTC Act to issue substantive rules, as opposed to procedural rules,
2. the FTC lacks the authority to ban noncompete agreements by declaring them an unfair method of competition, due to the large reach of such an issue,
3. the FTC lacks constitutional authority to enact such a rule prohibiting most noncompete agreements nationwide,
4. the FTC acted arbitrarily and capriciously in failing to consider alternative proposals to the current noncompete agreement rules, and
5. the FTC acted contrary to law by invalidating noncompete clauses without individualized consideration.

Plaintiffs also sought a preliminary injunction staying the September 4, 2024, effective date of the Final Rule and enjoining the FTC from enforcing it through any ongoing or future administrative action. Further, plaintiffs sought injunctive relief nationwide from the FTC's Final Rule. The district court promised a ruling on the preliminary injunction by July 3, 2024, without oral arguments to discuss each side's position.

As promised, on July 3, 2024, the trial court issued its ruling, granting the plaintiffs' motion for preliminary injunction and declaring its intention to decide on the ultimate merits of the case on or before August 30, 2024. Specifically, the trial court granted the preliminary injunction on the basis that the FTC "lacks substantive rulemaking authority with respect to unfair methods of competition under Section 6(g)" of the FTC Act.

The ruling only applies to enforcement of the FTC Final Rule on some named plaintiffs within the district, including Ryan LLC, the U.S. Chamber of Commerce, Business Roundtable, Texas Association of Business and Longview Chamber of Commerce. This ruling delays the FTC's ban on noncompete agreements until August 30, 2024, a mere five days before the FTC Final Rule was to go into effect. Gould & Ratner will provide additional developments regarding the August 30, 2024, decision's impact on employers.

Stay tuned for further developments in this extremely important area of employment law and do not hesitate to contact any of the [Human Resources and Employment Law](#) attorneys at Gould & Ratner to review the specifics of your situation.