

PUBLICATIONS | 08.09.2024

Uncertainty for Employers as September 4th Effective Date for FTC Non-Compete Ban Approaches

In April, the Federal Trade Commission (FTC) adopted a new rule to ban nearly all non-compete agreements that employers have with their workers. The rule applies to all workers in the United States (including employees and independent contractors), and bans “non-compete” provisions, which are defined as either oral or written contracts that prevent a worker from (i) seeking or accepting work within the United States with a different employer after the employment concludes; or (ii) operating a business in the United States after the conclusion of employment. The rule generally does not affect confidentiality or non-solicitation provisions, but does require employers to provide written notices to employees with non-compete provisions by the effective date of the rule, which is currently set for September 4, 2024. For more information on the scope of the rule, please see our [previous alert](#).

Since the rule was enacted, two primary legal challenges have created uncertainty. In *Ryan v. Federal Trade Commission*, pending in the Northern District of Texas, the court preliminarily enjoined the implementation and enforcement against the plaintiffs in that case, but declined to issue a nation-wide preliminary injunction. In granting the preliminary injunction, the judge concluded that plaintiffs were likely to succeed on the merits of their claim: namely, that the FTC lacked proper authority to ban essentially all non-compete agreements between employers and their employees. The judge indicated that she plans to issue a final decision by August 30, 2024. This decision might include a nation-wide injunction, which would prevent the FTC from enforcing the rule just two business days before its effective date. Notably, however, in *ATS Tree Services, LLC v. Federal Trade Commission*, pending in the Eastern District of Pennsylvania, the judge reached the opposite conclusion, declared that the FTC is likely to prevail in upholding the rule, and declined to issue a preliminary injunction.

Given the uncertainty, most employers will not find they need to take immediate action on existing non-compete agreements. However, since the Texas court decision will likely be released the Friday before Labor Day weekend, just two business days before the effective date of the rule, it would be prudent for employers to do the following:

1. audit existing agreements so that they understand what agreements exist (with both current workers and former workers whose noncompete provisions are still in effect), and
2. consider drafting a notice to those workers, so it is ready to send if the rule takes effect on September 4th. The FTC has provided a [model notice](#) that can be sent via electronic mail and does not have to be personalized for each worker.

In addition, for so long as the status of the FTC rule remains unclear, employers should carefully consider whether to include non-competition provisions in new employment-related agreements, or whether other forms of robust restrictive covenants are sufficient to protect the employer’s interests. We will aim to keep you posted as the legal challenges evolve, but please do not hesitate to reach out to your legal counsel if you have questions or would like assistance.

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