Insights: Alerts

FTC Evades Nationwide Injunction of its Noncompete Ban (For Now) in Pennsylvania Federal Court

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On July 23, the federal district court for Eastern District of Pennsylvania in *ATS Tree Services, LLC v. Federal Trade Commission* denied the plaintiff's motion to enjoin and stay the Federal Trade Commission's ("FTC") rule banning non-compete agreements. In denying the motion, the court determined that the plaintiff was unable to demonstrate a likelihood of success on the merits of its argument that the FTC lacked the requisite rulemaking authority to implement the rule banning non-competes. The court also found that the plaintiff's alleged irreparable harms – costs of complying with the non-compete ban, as well as the loss of contractual benefits related to existing non-compete agreements – were too speculative to support imposition of emergency injunctive relief.

As previously reported, the federal district court for the Northern District of Texas reached the opposite conclusion in *Ryan LLC v. Federal Trade Commission*. While the court there opined that the FTC likely did not have the required rulemaking authority to implement its final rule banning non-competes, it declined to issue an early nationwide injunction. In its ruling, the Texas court indicated it would issue a final decision in *Ryan* by August 30, 2024, just five (5) days before the FTC's final rule's scheduled effective date.

The close temporal proximity between the Texas court's projected merits ruling and the rule's early September effective date gives employers little time to plan and subsequently act if the court declines to issue a nationwide injunction. Kilpatrick's recommendation remains that employers should make contingency plans now to ensure they are on the best footing regardless of what decision the court reaches. Specifically, businesses should be taking the following steps:

1. Audit or take inventory of all current and former employees who are subject to active, operable non-compete agreements.
2. Identify which employees would qualify for grandfathering as "senior executives" and consider whether agreements held by current employees, who are indeed senior executives, should be revised before any effective date to better ensure enforceability as such.
3. For all other employees, make plans to distribute the required notice concerning invalidity of their non-compete provisions. This would include preparing a template notice and also identifying the means for

distributing the notice (e.g., e-mail, letter). Remember, in its final rule, the FTC allowed for the notice to be mass communicated to current and former employees.

4. Under the FTC's final rule other restrictive covenants, like customer nonsolicits, will not automatically be considered noncompete agreements. However, under certain circumstances, the FTC indicated it will consider additional restrictive covenants to be *de facto* noncompetes. Thus, in conjunction with legal counsel, employers should determine if the agreements for employees receiving the notice contain other restrictive covenants that could potentially be labeled as such. If such provisions are identified, employers should consider obtaining revised non-solicits or non-disclosure agreements that are more appropriately tailored/narrowed to avoid losing the ability to enforce them in the future.

While businesses should make plans for distributing the notices required by the FTC's rule, they should not send notices until September 3, 2024 (the day before the scheduled effective date). Even then, businesses should only do so if the Northern District of Texas court declines to issue a nationwide injunction. Kilpatrick will continue to monitor and report on developments related to the FTC's rule banning non-competes, including the Northern District court's anticipated merits decision in *Ryan*.

If you have any questions about this Alert, the status of the FTC's final rule banning non-compete agreements or preparing to comply with the potential effectiveness of the rule, please contact one of the authors or the attorney(s) in our firm with whom you are regularly in contact.

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