An Update for Employers on the FTC's Final Rule Banning Non-Compete Clauses

Client Alert

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What You Need to Know

- The circumstances surrounding the FTC's April 2024 final rule banning virtually all non-compete clauses remain fluid; however, it remains vital that both employers and employees understand the rule's provisions and broad-based potential impacts on both future and existing non-compete agreements.
- Almost immediately after the final rule was published, legal action was commenced in various jurisdictions seeking to enjoin or invalidate the rule's ban on non-competes. Court rulings in these cases have muddied the waters concerning the ultimate outcome of the FTC's action.
- Despite this uncertainty, employers should take a hands-on approach to preparing for the final rule's enforcement requirements, which include providing affected workers with notice on or before the rule's effective date of September 4, 2024.

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The Federal Trade Commission's April 2024 final rule on non-compete clauses, as we previously reported, would void and ban nearly all non-compete provisions as of its effective date of September 4, 2024. Among other items, the final rule, which is 570 pages in length, requires employers to send a notice to affected workers by the effective date, informing them that their noncompete clause cannot - and will not - be legally enforced.

In a prior Client Alert on this topic, we indicated certain steps that employers should take in view of the pending effective date of the final rule. Unfortunately, while the pending effective date is less than one month away, the

status of the final rule, and the related actions employers should take in view of it, remain uncertain as of this writing.

Court Challenges to the Final Rule

With the ink barely dry on the FTC's final rule, legal action was commenced in various jurisdictions seeking to enjoin or invalidate the rule's ban on non-competes. Such actions, two of which are discussed below, have muddied the waters concerning the ultimate outcome of the FTC's action.

In *Ryan LLC v. Federal Trade Commission*, the U.S. District Court for the Northern District of Texas granted a preliminary injunction prohibiting the FTC from enforcing its rule against the plaintiff in the case. Although the plaintiff had also requested a preliminary injunction which would prevent the FTC from enforcing its rule against all affected employers (i.e., a nationwide injunction), the *Ryan* Court refused to extend its prohibition on enforcement against any employers other than the plaintiff in this case. In granting plaintiff the requested preliminary injunction, the Court also indicated that by August 30, 2024, it will decide on the ultimate merits of the case. Among other issues, that decision may provide further direction on whether employers must send out a notice to their affected workers by September 4, 2024.

In contrast to the Court's decision in *Ryan*, the Eastern District of Pennsylvania, in *ATS Tree Services, LLC v. Federal Trade Commission*, held that the FTC is likely to prevail in having its rule upheld. Thus, the *ATS* Court declined to issue the preliminary injunction that plaintiff had sought, which would have prevented the FTC from enforcing its rule.

Guidance for Employers

Considering the above court rulings, employers should proactively take the following steps at this time:

- Review all existing non-compete provisions to identify which ones will potentially be impacted by the final rule.
- Be prepared to send notice to the affected workers by the effective date. While the effective date of September 4 may be postponed (and it is possible that the final rule will not take effect either then or at a future date), it would be imprudent to rely on the occurrence of either of those outcomes.
- Work with counsel to develop a plan to review all existing non-compete provisions to determine how, if at all, they should be revised. In view of the many challenges to the enforceability of non-compete provisions – by state legislatures, other agencies, and in the courts – it makes sense at this time for employers to review their existing provisions and decide upon the changes, if any, that should be made even if the FTC's final rule does not ultimately take effect.

We will continue to provide updates on the status of the FTC's final rule and the challenges to it. Please contact the author of this Alert with any questions or to discuss your circumstances.

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