



FTC Non-Compete Ban and Upcoming Practical Considerations for Employers

ISSUE

AUGUST 19, 2024 – Earlier in the year, Federal Trade Commission (FTC) issued a new rule which essentially bans non-compete limitations for workers in the United States. The rule banning non-competes is scheduled to take effect on September 4, 2024.

Although the business community has been anticipating a nationwide preliminary injunction to derail the ban, federal courts to date have only temporarily enjoined the FTC from enforcing the rule against Ryan LLC, a global tax services and software provider. The judge in Ryan LLC v Federal Trade Commission has refused to extend the scope of the preliminary injunction beyond applicability to Ryan. The judge in Ryan LLC has indicated she will release her final ruling by August 30th, which is mere days from the rule's scheduled effective date.

As September draws near, senior management and human resources teams should consider:

- 1) Working with counsel to review the terms of outstanding non-competes;
- 2) Assess how best to utilize the ability to grandfather preexisting non-competes with senior executives;
- 3) Develop a strategy for distributing notices to current and former employees stating their non-competes may no longer enforceable; and
- 4) Identify other avenues to mitigate the potential damage competing employees could cause the company.

Employers should consider carefully reviewing the non-compete provisions their current and former employees are party to and classifying the employees based on whether they are able to qualify as senior executives for purposes of grandfathering certain non-competes. In order to be enforceable, any new non-competes will require additional new consideration in exchange for the executives' entry and continued compliance. The FTC's rule also includes model language for notifying current and former employees that their non-competes are no longer enforceable (when applicable). Employers should be developing notices that align with their business goals and making plans to efficiently deliver compliant notices to affected employees.

POSSIBLE RELIEF

Notwithstanding the practical considerations for developing a plan of action for compliance, employers can still reasonably anticipate a protracted legal battle for the FTC to successfully implement this rule in its entirety. There are a number of other challenges in other jurisdictions and a court could still issue a broader nationwide injunction or vacate the rule in its entirety prior to the scheduled effective date.

ACTION

INEDA and Associated Equipment Distributors (AED) have a formal agreement to collaborate on federal advocacy efforts. Together we are advancing dealer interests in Washington, D.C.

AED joined comments on the proposed rule and urged the FTC to delay implementation to allow for judicial review in an industry letter.

While AED is hopeful the courts will strike down the non-compete ban, employers should plan to comply

with the mandate. If you have specific questions about the rule and its application to your company, please contact your attorney for further guidance.

UPDATE

AUGUST 21, 2024 – Yesterday, Judge Ada Brown of the U.S. District Court for the Northern District of Texas ruled that the Federal Trade Commission (FTC) lacks legal authority to implement its “non-compete” rule. As we alerted you in the below update, on April 23, 2024, the FTC ban on nearly all non-compete agreements was set to take effect on September 4. However, Judge Brown concluded that the FTC exceeded its statutory authority in promulgating the rule and that the rule itself was arbitrary and capricious. Therefore, the rule is considered unlawful and, for the moment, is now set aside (i.e., not enforceable).

The FTC will likely appeal the decision, opening the door to further review by higher courts. Nonetheless, at this time, **the non-compete ban is not enforceable.**