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The FTC's Rule Banning Noncompetes is Not in Effect

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In June, we provided an update regarding the Federal Trade Commission's (FTC) Non-Compete Clause Rule which banned most existing non-competition agreements and comprehensively banned employers from entering into new non-competition agreements. The Rule was scheduled to go into effect on September 4, 2024, but was challenged in several courts throughout the country. One of those courts recently issued a decision declaring the Rule unlawful and ruled that the decision should be given "nationwide effect."

The decision, issued on August 20, 2024 by Judge Ada Brown of the United States District Court for the Northern District of Texas, granted a motion for summary judgment filed by the U.S. Chamber of Commerce and other parties representing Texas businesses. Judge Brown found that the FTC lacked the statutory authority to issue the Rule. Judge Brown also found the FTC's noncompete ban was arbitrary and capricious as it was unreasonably overbroad, had a one-size-fits-all approach, and failed to address potential alternatives to the Rule's blanket nationwide noncompete ban. Judge Brown rejected the FTC's argument that relief should be limited to only the named plaintiffs in the suit and instead found that the appropriate remedy was to find the Rule unlawful and set aside the unlawful agency action nationwide. Accordingly, the Rule will not be enforced and will not otherwise take effect on September 4, 2024. The FTC can appeal Judge Brown's decision to the Fifth Circuit Court of Appeals. If an appeal is filed by the FTC, whether the litigation is further pursued may depend on the results of the upcoming election.

At this point, state laws will continue to control whether noncompete agreements are enforceable. Some states, like California and Minnesota, have broad prohibitions against noncompetes with narrow exceptions while other states prohibit the use of noncompetes for hourly or low wage workers. For example, last year the Michigan legislature introduced a bill that would require any business utilizing noncompete agreements to provide written notice to applicants of the requirement, disclose the terms of the noncompete before hiring the employee, and post a summary of the new law at the workplace. Moreover, the proposed legislation would ban all noncompetes with minors and all "low-wage employees," defined as employees who annually earn less than \$34,306.08. Numerous states are considering similar legislation. Therefore, even though the FTC's ban has been overturned, employers need to keep a watchful eye on legislative developments in jurisdictions in which they do business. Finally, even in states like Ohio, with no legislative restrictions against noncompete agreements, state-specific judicial opinions may restrict the enforceability of those agreements based upon a multitude of factors.

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