

ALERT

EMPLOYMENT & LABOR

FTC Non-Compete Ban Barred by Court, No Employer Action Required



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Employment and Labor Alert

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A Texas federal district court has barred the Federal Trade Commission's (FTC) ban on most non-competition agreements ("non-competes") slated to take effect on September 4, 2024, as previously [reported](#). This decision halts the quickly approaching requirement for employers to cease the use of most non-competes and notify workers of their unenforceability. At least for the immediate future, employers may continue to use non-competes as they did before the proposed ban.

The Court Decision

On August 20, U.S. District Judge Ada Brown granted summary judgment against the FTC in a suit brought by a tax company and the U.S. Chamber of Commerce, ruling that the non-competes ban exceeded the FTC's statutory authority. In *Ryan LLC, et al. v. Federal Trade Commission*, the FTC argued that the Federal Trade Commission Act (the Act) permits it to promulgate rules prohibiting unfair methods of competition, but the court determined that the FTC's power in this regard is limited to creating rules of agency procedure. The court held that the creation of substantive rules like the non-competes ban stretches beyond the Act, as evidenced by the fact that the Act contains no penalty provisions to allow the FTC to seek sanctions for unfair methods of competition.

The court further concluded that the non-competes ban is arbitrary and capricious because it is unreasonably overbroad without a reasonable explanation for the "one-size-fits-all approach with no end date." The court noted that the FTC provided no evidence as to why it imposed a national, sweeping ban on nearly all non-competes rather than targeting "specific, harmful non-competes." Further, the FTC did not adequately analyze whether there are alternative approaches that would have sufficiently addressed unfair competition other than the proposed broad, nationwide prohibition.

What this Means for Employers

The *Ryan* decision sets aside the non-competes ban nationally, meaning the ban cannot be enforced or take effect on September 4. All requirements of the FTC rule—including banning the use of new non-competes and notifying workers and former workers with existing non-competes of the unenforceability of those agreements, with few exceptions—are no longer in effect. Employers may continue to utilize non-competes, in the manner prescribed by state statutes and case law.

Any employer that proactively notified workers of the unenforceability of their non-competes in anticipation of the ban going into effect on September 4 should speak to its attorney promptly regarding the status of those non-competes. They may still be enforceable if the notices did not include a true invalidation or release, but legal counsel should evaluate any such notice on a case-by-case basis.

There is a reasonable likelihood of an appeal, in which case, there may be additional developments to follow. Babst Calland will continue to monitor this situation and will advise as to whether employers must take any action in the future.

If you have questions about the status of the now-barred FTC non-compete ban, use of non-competes under existing state law, or strategies to deal with the ever-changing landscape of non-competes, please contact Alexandra G. Farone at (412) 394-6521 or afarone@babstcalland.com, Steven B. Silverman at 412-253-8818 or ssilverman@babstcalland.com, or Stephen A. Antonelli at 412-394-5668 or santonelli@babstcalland.com.

