

EMPLOYERS AREN'T OUT OF THE WOODS YET: 3 TAKEAWAYS ON THE NARROW COURT RULING PAUSING THE FTC'S NON-COMPETE BAN

Insights
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A Texas federal judge temporarily blocked the Federal Trade Commission from enforcing its final rule banning essentially all non-compete agreements – but the July 3 ruling only applies to the five entities in the suit. For the rest of employers around the country, nothing has changed quite yet and we're still on course to see the non-compete ban take effect in early September. However, it's worth paying attention to this fluid situation because another pending lawsuit could result in a nationwide injunction that would press pause for all employers within the next few weeks.

[EDITOR'S NOTE: A Texas federal court struck down the FTC's proposed ban on non-competition agreements on a nationwide basis on August 20, meaning employers across the country can continue to maintain non-competes as their state laws allow. Employers will not have to comply with the rule by September 4 as originally scheduled. [Read more about the decision and practical pointers on next steps by clicking here.](#)]

What Happened?

A Texas employer, the U.S. Chamber of Commerce, and a handful of other business organizations sued the FTC in Texas federal court seeking an order blocking the non-compete rule from taking effect on September 4 as scheduled. If you want a reminder about the non-compete ban, here are two resources for you to learn more:

- [Feds Ban Non-Compete Agreements: A 5-Step Plan for Employers](#) (April 24)

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■ [Frequently Asked Questions About the FTC's Rule Banning Non-Compete Agreements](#) (May 16)

Technically, the parties to that lawsuit won in Wednesday's ruling. The court agreed that the FTC lacked the authority to issue the final rule, and that the rule is "arbitrary and capricious," because, among other reasons, it imposes a "one-size-fits-all approach" instead of targeting "specific, harmful non-competes."

But don't celebrate quite yet. The court refused to issue a nationwide injunction, or even extend the ruling to the U.S. Chamber's (and other organizations') member entities. The Court stated that "Plaintiffs have offered no briefing as to how or why nationwide injunctive relief is necessary to provide complete relief to Plaintiffs." So, even though there is a preliminary injunction now in effect, it only applies to the five entities that sued the FTC and no one else.

The result is a mixed bag. The FTC took a serious blow on the merits, but the final rule survives – for now – as to the vast majority of employers.

What's Next?

There is another lawsuit challenging the non-compete ban pending in Pennsylvania federal court. A hearing on the plaintiff's motion to pause the effective date is set for July 10, and the court said it should issue a ruling by July 23.

This is another bite at the apple for employers around the country who oppose the non-compete ban. You can expect the lawyers in the Pennsylvania case will be well-prepared at oral argument to address the issue of a nationwide injunction. Additionally, the Texas court states that it intends to enter a merits disposition in its action on or before August 30, so there is also a chance that it will revisit the scope of relief.

What Should You Do Now?

Because this Texas decision is limited to the parties in that suit, it really doesn't change the strategy for other employers.

[As we mentioned in our five-step plan for employers](#), you should use this time to:

- Develop a personalized strategy.

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- Take stock of existing restrictive covenant agreements to understand how many non-compete provisions may be impacted if the non-compete ban takes effect. September 4 is quickly coming up, so this should be a priority.
- Revisit restrictive covenants – including non-solicitation and confidentiality provisions – to ensure they are reasonably tailored to protect legitimate interests.
- Consider whether non-competes are necessary for your business.
- Get your trade secrets house in order.

Conclusion

A federal judge dealt a blow to the FTC's final rule banning non-competes, but not a fatal one. You should continue to prepare for the final rule to take effect September 4, even though the odds are now better that the non-compete ban, ultimately, will not survive legal challenge.

We will be monitoring the situation and providing updates as the court battles continue and the effective date approaches. Make sure you are subscribed to [Fisher Phillips' Insight System](#) to gather the most up-to-date information directly to your inbox. Check out [Blue Pencil Box](#) for our daily updates on restrictive covenant law. If you have questions, please contact the authors of this Insight, your Fisher Phillips attorney, or any attorney in our [Employee Defection and Trade Secrets Practice Group](#).