

STILL ON TRACK, FOR NOW: PENNSYLVANIA COURT DENIES REQUEST TO BLOCK FTC NON-COMPETE BAN, BUT OTHER CHALLENGES CONTINUE

Insights

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A Pennsylvania federal judge has just declined to issue an order to preliminarily block the FTC's non-compete ban ahead of its September 4 effective date. The court rejected the employer's argument that the rule is an improper exercise of the agency's authority, which conflicts with a ruling issued by a Texas federal court earlier this month, creating more confusion for employers. So, what happened with yesterday's ruling, what can we expect next, and what should you do to prepare for this game-changing rule to take effect?

[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's Going On?

The Federal Trade Commission aims to upend the world of non-competition agreements with a startlingly broad rule that would block businesses from enforcing most non-competes and require employers to provide notice to current and former workers that their non-competes are no longer valid. If you want more details, here are two resources for you to learn more:

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- [Feds Ban Non-Compete Agreements: A 5-Step Plan for Employers](#) (April 24)
- [Frequently Asked Questions About the FTC's Rule Banning Non-Compete Agreements](#) (May 16)

Texas Lawsuit Was a Mixed Bag

As we reported just a few weeks ago, the U.S. Chamber of Commerce and others joined a lawsuit in Texas filed by an employer seeking to block the rule from taking effect.

Technically, [the parties to that lawsuit won in a July 3 ruling that concluded that the FTC likely lacked the authority to issue the rule.](#)

But the ruling wasn't a complete cause for celebration for most employers. The court refused to issue a nationwide injunction. Instead, it issued a preliminary injunction that only applies to the five entities that sued the FTC and no one else. And the judge again further declined to extend the ruling nationwide in a separate ruling on July 11.

Second Court Ruling Goes Fully in the FTC's Favor

Those who wanted a nationwide injunction from the Eastern District of Pennsylvania will be disappointed by yesterday's ruling. In this case, a tree services company filed a claim attacking the non-compete rule in much the same way as the U.S. Chamber did in Texas. But the Pennsylvania judge's July 23 ruling swiftly and comprehensively swatted away all of the employer's arguments.

- The employer argued that the **FTC didn't have authority** to issue substantive rules that prevent unfair methods of competition. But the judge concluded the text of the FTC Act clearly empowered the FTC to make both procedural *and substantive* rules.
- The employer argued **it would suffer irreparable harm** if the non-compete ban took effect. The judge said any costs incurred to comply with the rule did not rise to the level of "irreparable" injury, particularly since the employer only has 12 employees, and any concern that its employees would leave to work for competitors was speculative.
- The employer expressed concern that **it could lose proprietary business information** if their workers were free to join competitors. The judge pointed to the fact that

it could deploy permissible alternatives to address such a concern, such as non-disclosure agreements.

- The employer also raised several additional arguments – that the federal government shouldn't step in where states have already issued their own laws, that the Major Questions Doctrine prevented the agency from issuing the rule without clear legislative authorization, and that Congress could not constitutionally delegate such broad authority to an agency. The judge rejected each of these arguments, concluding that this rule “falls squarely within the FTC’s core mandate” and is similar to previous FTC rulemaking.

In a footnote, the court on its own accord acknowledged the fact that [the Supreme Court recently scrapped the Chevron doctrine](#) that called for judges to afford great deference to agencies. But neither party briefed the case, and so the issue of deference was not relevant to the court’s ruling.

What’s Next?

All eyes turn now back to **Texas**, where the judge indicated she would issue a final merits disposition in the U.S. Chamber case by August 30. The parties have asked for a permanent nationwide injunction in that case. Recall that this judge disagreed with the Pennsylvania court and concluded the FTC’s non-compete ban is likely unlawful.

There is also another challenge pending in a **Florida** federal court, which could produce a nationwide injunction, but that case is procedurally well behind the Pennsylvania and Texas actions.

And if none of these avenues results in an injunction at the trial court level, the next avenue of relief lies with the **federal courts of appeal**. The U.S. Chamber could ask the 5th Circuit Court of Appeals, or the Pennsylvania employer ask the 3rd Circuit Court of Appeals, for relief prior to the September 4 effective date.

We will be tracking the litigation developments closely.

What Should You Do? Your 5-Step Plan

If you haven’t acted yet, you may want to start investing some time and resources to prepare for compliance given the advancing effective date. [You can read our full five-step recommended plan by clicking here](#). A quick overview:

1. **Develop a Personalized Strategy Plan** – Work with your legal counsel to come up with a solution that works for your business.
2. **Use the Next Six Weeks to Take Stock** – You might want to take some preliminary steps to hedge your bets.
3. **Begin Plotting Alternatives** – There are other ways to protect your interests.
4. **Don't Ignore Other Restrictive Covenants** – Review your non-solicitation, non-recruitment, non-servicing, and non-disclosure clauses for compliance with state law.
5. **Get Your Trade Secrets House in Order** – Identify your trade secrets and ensure that you have proper policies and procedures in place to protect them.

Conclusion

We will be monitoring the situation and providing updates as the court battles begin 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. 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](#).