Insights, News & Events

BREAKING NEWS: FTC'S NON-COMPETE BAN STRUCK DOWN FOR ALL EMPLOYERS NATIONWIDE

Insights
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A Texas federal court just struck down the FTC's proposed ban on non-competition agreements on a nationwide basis mere weeks before it was set to take effect, meaning employers across the country can breathe a sigh of relief and continue to maintain non-competes as their state laws allow. While there is a slim chance the rule could be resurrected by a federal appeals court in the future, what's for certain after yesterday's ruling is that you will not have to comply with the rule by September 4 as originally scheduled. What do you need to know about this significant development and what should you do now that the landscape has shifted once again?

What Happened?

A Texas employer, the U.S. Chamber of Commerce, and a handful of other business organizations sued the Federal Trade Commission (FTC) in 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)
- Frequently Asked Questions About the FTC's Rule Banning Non-Compete Agreements (May 16)

Judge Ada Brown from the Northern District of Texas initially agreed that the rule was an invalid exercise of the agency's

Related People

Risa B. Boerner, CIPP/US, CIPM

Partner

610.230.2132

Jonathan Crook

Partner

704.334.9313

power on July 3, but only blocked the rule as it applied to the parties in the case and left open the question of whether the FTC could proceed with the ban. You can read about that ruling here. She later promised to issue a final ruling on the matter by August 30.

Judge Deploys 2 Main Arguments to Kill Non-Compete Ban

The judge took a two-pronged attack to the FTC's non-compete ban. Her first line of attack was ruling that the agency didn't have the power to issue the rule because Congress only authorized it to issue *procedural* rules to address unfair methods of competition, not *substantive* rules. "The role of an administrative agency is to do as told by Congress, not to do what the agency thinks it should do," she said.

Her second rebuke was concluding that the rule itself was "arbitrary and capricious" for the following reasons:

- She found that the rule is arbitrary and capricious because it is **unreasonably overbroad** without a reasonable explanation.
- The rule aimed to impose a **one-size-fits-all** approach with no end date.
- She pointed out that **no state in the country** has enacted a non-compete ban as broad as the FTC's rule.
- She questioned why the rule didn't target **specific, harmful non-competes** instead of taking a blanket approach.
- The agency failed to consider the **positive benefits** of non-competes, she said.
- She added that the agency failed to sufficiently address **potential alternatives** rather than a nationwide ban on just about every non-compete.

Rule Blocked for All Employers Across the Country

Most importantly for employers, Judge Brown concluded that her order setting aside the non-compete ban should apply to all employers across the country. As noted above, she originally just blocked the rule from taking effect for those parties that had filed suit in the Texas case. In fact, in a separate decision just a week or so after her July 3 limited

Michael P. Elkon

Partner

404.240.5849

Michael R. Greco

Regional Managing Partner

303.218.3655

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ruling, she again declined to extend the preliminary injunction nationwide – leaving employers in a state of uncertainty as the days dwindled down towards the effective date.

Following Judge Brown's ruling, a Pennsylvania court in a separate lawsuit declined a motion to block the rule, and a Florida court granted a limited injunction similar to the Texas court's original order, leaving employers in doubt about whether the rule might be vacated prior to its September 4 effective date.

But yesterday's ruling put an end to all of that concern. She noted that federal law required her to "hold unlawful" and "set aside" the non-compete ban with nationwide effect. All parties in all judicial districts across the country are equally covered by the ruling, she said.

Post-*Chevron* Shockwaves

The decision is one of the first prominent cases to demonstrate the evolving power of courts to overrule agency actions now the Supreme Court has struck down the *Chevron* doctrine. For those unfamiliar, SCOTUS issued the groundbreaking *Loper Bright* ruling on June 28 tossing out a decades-old standard that had required courts to give substantial deference to agencies like the FTC.

The new standard? Courts should instead exercise their independent judgment when deciding whether an agency's actions are proper exercises of power – essentially enabling courts to strike down agency rules more easily. You can read about that decision here and check out our Post-Chevron Employers' Resource Center here and get a sense for how that new standard will impact various aspects of workplace law and various industries.

And this decision is a perfect example of how this new standard will be deployed by courts to significant effect. The first sentence of Judge Brown's analysis section quotes the Supreme Court's *Loper Bright* case, in fact, noting that the Administrative Procedure Act should serve "as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices."

What's Next?

The FTC could try to breathe new life into the rule by filing an appeal of this decision in the coming weeks. It could also seek an emergency order from the appellate court that would cause the rule to take effect as scheduled.

However, any appeal would be heard by the notoriously business-friendly 5th Circuit Court of Appeals, where the odds of the rule being resurrected are slim. And the next step after that would be a potential visit to the Supreme Court, which has taken direct aim at the regulatory state in recent years and is likely a hostile environment for any attempt by the FTC to wield such power.

What Should You Do?

- Employers can breathe a sigh of relief. We are now **back once again to the status quo**, where state-specific restrictions shape the contours of covenants not to compete, and you can continue to have non-compete restrictions as a tool in your arsenal to protect key relationships and confidential information.

- In order to **keep track of the nuances of each state's restrictive covenant law**, check out one of FP's latest resources – Blue Pencil Box, an especially helpful tool for employers with multi-state operations. This comprehensive resource not only provides detailed daily summaries of cases and bills involving non-competes and other restrictive covenants, but also maintains a comprehensive database and customizable checklists to help you comply.

- Now is an especially critical time for you to ensure your existing non-competes are **precisely tailored to meet the state laws** in which you operate and that you are limiting their use to critical employees – as the FTC has already indicated it will try to flex its muscles through targeted investigations if it can't wield the power of a national rule. "Today's decision does not prevent the FTC from addressing non-competes through case-by-case enforcement actions," an agency spokesperson said soon after the court decision.

- You might also want to compile an **inventory of all existing restrictive covenant agreements**, including those that bind former workers. There is a slim chance that an appeals court could bring the non-compete ban back to life, and in such a circumstance it would be beneficial to

have a full and complete list of your effective agreements. Even if the rule never sees the light of day, however, having such an inventory could be a helpful resource for compliance and tracking purposes.

Conclusion

We will be monitoring the situation and providing updates as the court battles continue. 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.