



Meet the New Boss – Same as the Old Boss? Cryptic FTC Filings Suggest Non-Compete Ban May Not Be Dead After All

Insights

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Most observers following the saga of the Federal Trade Commission's non-compete ban expected a final nail in the coffin last week – voluntary dismissal of the appeal that Biden-era leadership filed to keep the ban alive. That didn't happen. Instead, the FTC, now run by a 3-0 Republican majority, filed an original and "corrected" motion for additional time on July 10 that raises serious questions about whether the FTC will try keep the ban alive, despite its current Commissioners' forceful rebukes of the rule when it originally passed. Employers don't need to take any action, yet, but this has gone from an afterthought to an issue to watch.

Background

Here's a quick review of how we've gotten to this point.

- **Republican Commissioners Object to Ban** – When the Biden-era FTC promulgated its near-complete ban on non-compete agreements in April 2024, then-Commissioner (now Chairman) Andrew Ferguson and Commissioner Melissa Holyoak voted against the measure and issued scathing dissenting statements. They explained that they believed the ban exceeded the FTC's authority and was unlawful.
- **Reminder That FTC Retains Regulatory Oversight** – But the Commissioners didn't say that employers had unlimited authority when it came to non-competes. They both made clear that non-compete abuses can violate federal antitrust laws in specific cases. And then, under Chairman Ferguson, the FTC recently launched a new Task Force to investigate potential abuses of non-compete agreements, termination penalties, and other provisions that may impact the labor market. In fact, a recent profile on Chairman Ferguson describes the high-wire act he's attempting to perform and notes the common focus he shares with past-Chairwoman Khan – particularly on agreements that impact the labor market
- **Biden-Era FTC Files Appeal** – When a Texas federal district court judge set aside the ban as unlawful in *Ryan v. FTC* last year, the FTC (under Democratic leadership) appealed to the 5th Circuit Court of Appeals.
- **Trump FTC Puts Pause on Appeal** – In March of this year, the new Republican-led FTC moved to hold the *Ryan* appeal in abeyance for 120 days, through July 10. The court granted that motion. At the time, the FTC had four active Commissioners – two Democrats and two Republicans. The

speculation was that the FTC did not have the votes to dismiss the appeal at that time, but would eventually do so once they had a majority in power.

- **FTC Gains Republican Majority** – Since then, the Senate approved Mark Meador as the third Republican Commissioner, and President Trump fired the two Democratic Commissioners, leaving the FTC with a 3-0 Republican majority. (The Democratic Commissioners have since sued over their terminations.)

No Death Knell Yet

Most observers anticipated that, by July 10, the FTC would dismiss its appeal of the *Ryan* decision (and the more limited decision from Florida in the *Properties of the Villages* case, which is pending before the 11th Circuit) and discontinue its defense of the non-compete ban.

That is not what happened. Late last week, the FTC filed an original and a “corrected” status report and motion to hold the appeal in abeyance for 60 additional days. The sole difference between the original and “corrected” motion is interesting and possibly telling.

- The original motion said, “The Chairman of the Commission continues to believe that the Commission should reconsider its defense of the rule challenged in this case, although some additional time is necessary to allow for that reconsideration.”
- The “corrected” motion replaced that sentence with the following: “In light of these [personnel] changes and the press of Commission business, some additional time is necessary to determine **whether** the Commission should reconsider its defense of the rule challenged in this case.” (emphasis added)

Reading the Tea Leaves

Why did the FTC feel the need to “correct” the statement that Chairman Ferguson “continues to believe that the Commission should reconsider its defense of the rule”? And why does the “corrected” motion indicate that the FTC still needs to decide “whether” it will reconsider its defense of the rule?

One wonders why the 3-0 Republican-dominated FTC needs so much time to decide whether it will fight for a rule Chairman Ferguson characterized as “by far the most extraordinary assertion of authority in the Commission’s history,” among other sharp critiques.

The FTC very well may dismiss the *Ryan* appeal in due course, and this could be an innocent timing issue.

But if the Republican-controlled FTC decides to fight for the Biden-era non-compete ban, which its Commissioners so harshly criticized, it will be a stunning reversal. Even if that happens, the FTC would still face steep odds getting the lower court decision overturned, no matter who’s in charge.

Conclusion

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