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# Update on Legal Challenges to FTC Non-Compete Clause Rule

## Current state of affairs

Two different federal district courts have now issued two different rulings in similar challenges to the same FTC Non-Compete Clause Rule. In the first, *Ryan, et al.* v. *Federal Trade Commission*, No. 24-cv-986 (N.D. Tex. July 3, 2024), the court granted plaintiffs' motions for preliminary injunction and stayed the effective date of the rule pending a ruling on the merits. In the second, *ATS Tree Services, LLC* v. *Federal Trade Commission*, *et al.*, No. 24-cv-1743 (E.D. Pa. July 23, 2024), the court denied the plaintiff's motion for stay of effective date and preliminary injunction.

Here, then, is the current state of affairs.

- The FTC is currently "wholly enjoined from implementation of or enforcement of" the Non-Compete Clause Rule against the named plaintiffs in the *Ryan* action only.[*] This injunction is in place until the court's final adjudication on the merits. The effective date of the rule – September 4, 2024 – is stayed as to the named plaintiffs in the *Ryan* action only.

- The FTC is *not* enjoined from enforcing the rule and the September 4 effective date is still operative as to all entities covered by the rule except the *Ryan* plaintiffs.

- This means that the rule would become effective on September 4 as to all entities covered by the rule except for the *Ryan* plaintiffs unless a court of competent jurisdiction issues an order to the contrary or the FTC itself takes some action.

- If the rule becomes effective against an entity, new non-compete agreements would be prohibited; existing non-senior executive non-compete clauses would become retroactively void; and the entity would be required to provide its workers clear and conspicuous notice that any existing non-compete clause will not be, and cannot legally be, enforced against the worker.

- Litigation is active and ongoing in several courts, and much could happen between now and September 4 and beyond to alter the current state of affairs.

## Possible scenarios going forward

The courts in the *Ryan* and *ATS Tree Services* actions have thus far dealt only with requests for preliminary relief from the rule. Plaintiffs in both actions are seeking a final order to "set aside" the Non-Compete Clause Rule under the Administrative Procedure Act. Plaintiffs in the *Ryan* action filed a motion for summary judgment on July 19. The FTC is due to respond to that motion and file a cross-motion for summary judgment on July 26. According to the scheduling order in that case, the court intends to rule on those motions on or before August 30.

[*] The plaintiffs and plaintiff-intervenors in that action are: Ryan, LLC; Chamber of Commerce of the United States of America; Business Roundtable; Texas Association of Business; and Longview Chamber of Commerce.

A third challenge to the Non-Compete Clause Rule, *Properties of the Villages* v. *Federal Trade Commission*, No. 24-cv-316 (June 21, 2024), was filed nearly two months after the other challenges and is pending in a federal court in Florida. The plaintiff in this case contracts with real estate sales associates "who work exclusively in The Villages community" in central Florida and agree that for 24 months after leaving the company "they will not compete to sell homes within The Villages community in central Florida." The plaintiff is seeking relief similar to what is being sought by the plaintiffs in the other actions on similar grounds, and is additionally asserting that the rule is invalid insofar as it purports to ban the plaintiff's non-compete agreements which are allegedly purely intra-state in nature and therefore beyond the jurisdiction of the FTC.

There are several possible outcomes for the Non-Compete Clause Rule, including the following.

**The rule is vacated and of no legal effect**. One possible outcome is that on or before August 30, the court in the *Ryan* case grants plaintiffs' motion for summary judgment and enters an order to "set aside" or vacate the rule. In contrast to the court's preliminary injunction, an order of vacatur would likely mean that the rule has no legal effect (and would not be limited to the litigating parties). This outcome would be consistent with the court's earlier ruling which found that the plaintiffs were likely to succeed on the merits. With the notable exception of the court's opinion in *ATS Tree Services* – which the *Ryan* court may or may not find persuasive – not much of legal significance has changed since the *Ryan* court ruled.

**The rule is found to be valid and goes into effect**. On the other hand, if the court were to deny the *Ryan* plaintiffs' motion for summary judgment but grant the FTC's motion and enter final judgment for the FTC, the preliminary injunction would dissolve. Depending on the status of other pending legal challenges to the rule and any extant orders, the FTC could then be free to enforce the rule against the *Ryan* plaintiffs and all others subject to the rule.

**Litigation continues and the rule is effective as against some but not all entities**. Another possibility is that the court denies both the plaintiffs' and the FTC's motions for summary judgment and the matter proceeds to trial. In this scenario, the *Ryan* court's preliminary injunction would remain in effect for the named plaintiffs unless the court alters it. This is perhaps a very low likelihood outcome given that there are unlikely to be material facts in dispute, thus allowing the court to dispose of the mater on the law alone.

**A temporary thicket of inconsistent rulings**. Given the importance of the Non-Compete Clause Rule, it is highly likely that the losing party in any of the pending challenges would appeal. This likelihood remains high in light of the *Ryan* and *ATS Tree Services* courts' contrasting preliminary rulings. If their final rulings align with their preliminary rulings, there is a strong possibility that there would be two (or more) inconsistent court orders, including one which allows the FTC to enforce the rule and another which renders it to be a legal nullity. This state of affairs would have to be resolved by the courts of appeals and perhaps the Supreme Court. Those courts would determine whether the rule would go into effect pending litigation and an ultimate ruling on the merits.

We continue to closely monitor developments in these actions.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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