

October 21, 2024

FTC Appeals Judgment Setting Aside Non-Compete Clause Rule

- In August, a Texas federal court set aside the FTC's non-compete clause rule. On Friday, October 18, the FTC appealed that judgment to the U.S. Court of Appeals for the Fifth Circuit.
- As of this writing, the Texas court's judgment continues to remain in effect and the FTC is enjoined from enforcing the rule.

The District Court's Order Setting Aside the Non-Compete Clause Rule

On August 20, 2024, in *Ryan LLC, et al. v. Federal Trade Commission*, No. 24-cv-986 (N.D. Tex.), Judge Ada E. Brown of the United States District Court for the Northern District of Texas issued a final order setting aside the Federal Trade Commission (FTC) [Non-Compete Clause Rule](#), which was to have taken effect on September 4, 2024. According to the court's order, the rule "shall not be enforced or otherwise take effect on" that date "or thereafter." As the court explained, the relief "has nationwide effect, is not party-restricted, and affects persons in all judicial districts equally." The order is a consequence of the court finding that "the FTC lacks statutory authority to promulgate" the rule, and that the rule is "arbitrary and capricious." Under the applicable provision of the Administrative Procedure Act, when a court reaches either of these conclusions, it must set aside the rule in question.

The FTC's Appeal to the Fifth Circuit

The FTC filed a notice of appeal on October 19, 2024. Unless and until a court issues an order staying the judgment of the district court pending appeal, the lower court order setting aside the non-compete rule with nationwide effect will remain in force. Many factors will influence the timing of the appeal and the handing down of the appeals courts' judgment.

In addition, on August 15, 2024, the court in a separate action challenging the non-compete clause rule, *Properties of the Villages v. Federal Trade Commission*, No. 24-cv-316 (M.D. Fla.) granted the plaintiff's motion for stay and preliminary injunction, but limited this relief to the named plaintiff. The FTC has also appealed that ruling. While the *Properties of the Villages* action is at an earlier procedural stage (preliminary injunction as opposed to final judgment) the pendency of two appeals in different federal circuits could potentially lead to a circuit split and increase the chances that the Supreme Court would become involved.

Reminder: Enforcement Against Non-Competes Through Individual Adjudication

Notwithstanding the enforceability of the non-compete clause rule, the FTC has asserted that non-competes are unfair methods of competition under section 5 of the FTC Act and that it is consequently empowered to "prevent" entities under its jurisdiction from "using" them through administrative cease-and-desist orders directed at individual companies. The FTC asserted this power in several adjudicative actions just prior to the promulgation of the non-compete clause rule, but these were resolved on consent and the FTC's claimed authority in this area has not been tested by an adversarial proceeding on the merits. Also, under certain circumstances a non-compete agreement may be found to violate the rule of reason under section 1 of the Sherman Antitrust Act. There are also numerous state laws regulating non-competes.

We continue to monitor developments in these actions and the FTC's treatment of non-compete clauses.

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