

CLIENT ALERT

Texas Federal Court Strikes FTC Non-Compete Ban

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AUTHORS

**Wesley R. Powell | Katrina Robson | James C. Dugan | Andrew Spital
Jordan A. Messinger | Kathryn Garrett**

On August 20, 2024, the U.S. District Court for the Northern District of Texas issued a final order (the “August 20 Order”) – *with nationwide effect* – setting aside the Federal Trade Commission’s (“FTC”) final rule prohibiting substantially all employee non-compete agreements in the U.S. (“Final Rule”).

The case was brought by plaintiff Ryan LLC (“Ryan”), a tax services firm, and plaintiff-intervenors, the Chamber of Commerce of the United States of America (the “Chamber”), Business Roundtable, Texas Association of Business, and Longview Chamber of Commerce (collectively, “Plaintiffs”). The Final Rule had been scheduled to take effect on September 4, 2024 (the “Effective Date”). As a result of the Order, the FTC is barred from enforcing the Final Rule against *any* employer.¹

Background

The Final Rule, which we discussed in a previous client alert (available [here](#)), prohibited substantially all employee non-compete clauses in the United States. It was published in the Federal Register on May 7, 2024, available [here](#).²

¹ See Memorandum Opinion and Order, *Ryan, LLC v. Fed. Trade Comm’n*, No. 3:24-cv-00986 (N.D. Tex. Aug. 20, 2024).

² Fed. Trade Comm’n, Non-Compete Clause Rule, 16 C.F.R. Part 910 (2024) (“Final Rule”).

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Ryan was the first of several plaintiffs to challenge the Final Rule on constitutional and other grounds by filing a complaint in the Northern District of Texas (the “District Court”) the same day the Final Rule was issued.³ The Chamber quickly followed suit, filing a separate complaint in the Eastern District of Texas.⁴ After the Chamber’s and other Plaintiffs’ cases were stayed pursuant to the first-to-file doctrine, they successfully intervened in Ryan’s lead case.⁵

On July 3, 2024, the District Court issued a temporary injunction barring enforcing the Final Rule *only with respect to Plaintiffs*, concluding that it lacked authority to issue a nationwide injunction pending resolution of the merits.⁶

Two other challenges to the Final Rule are pending in other states: one in the Eastern District of Pennsylvania⁷ and one in the Middle District of Florida.⁸ On July 23, 2024, the Pennsylvania federal court declined to enjoin the FTC from enforcing the Final Rule.⁹ On August 15, 2024, the Florida federal court issued a preliminary injunction against enforcement of the Final Rule, but only in favor of the named plaintiff.¹⁰

The August 20 Order

In its August 20 Order, the District Court held that the FTC lacks authority to promulgate the Final Rule under the FTC Act and that the Final Rule is arbitrary and capricious under the Administrative Procedure Act (“APA”).

While acknowledging that the FTC has “some authority” to promulgate rules precluding unfair methods of competition, the District Court determined that the text, structure, and history of the FTC Act fail to support the FTC’s claimed authority to issue substantive rules broadly prohibiting categories of business conduct, like the Final Rule.¹¹ The Court also found that the Final Rule is “arbitrary and capricious” under the APA because it is “unreasonably overbroad without a reasonable explanation.”¹² As the District Court explained, “[t]he Commission’s lack of evidence as to why they chose to impose such a sweeping prohibition—that prohibits entering or enforcing virtually all non-competes—instead of targeting specific, harmful

³ See Complaint, *Ryan, LLC v. Fed. Trade Comm’n*, No. 3:24-cv-00986 (N.D. Tex. Apr. 23, 2024).

⁴ See Complaint, *Chamber of Commerce of the U.S. v. Fed. Trade Comm’n*, No. 6:24-cv-00148 (E.D. Tex. Apr. 24, 2024).

⁵ See Order, *Chamber of Commerce of the U.S. v. Fed. Trade Comm’n*, No. 6:24-cv-00148 (E.D. Tex. May 3, 2024); Unopposed Motion to Intervene as Plaintiffs, *Ryan, LLC v. Fed. Trade Comm’n*, No. 3:24-cv-00986 (N.D. Tex. May 8, 2024).

⁶ See Order, *Ryan, LLC v. Fed. Trade Comm’n*, No. 3:24-cv-00986 (N.D. Tex. July 3, 2024).

⁷ *ATS Tree Serv., LLC v. Federal Trade Comm’n*, No. 2:24-cv-01743 (E.D. Penn.).

⁸ *Prop. of the Vill., Inc., v. Federal Trade Comm’n*, No. 5:24-cv-00316 (M.D. Fla.).

⁹ See Memorandum Order, *ATS Tree Serv., LLC v. Federal Trade Comm’n*, No. 2:24-cv-01743 (E.D. Penn. July 23, 2024).

¹⁰ See Order, *Prop. of the Vill., Inc., v. Federal Trade Comm’n*, No. 5:24-cv-00316 (M.D. Fla. Aug. 15, 2024).

¹¹ See Memorandum Opinion and Order at 17-22, *Ryan, LLC v. Fed. Trade Comm’n*, No. 3:24-cv-00986 (N.D. Tex. Aug. 20, 2024).

¹² *Id.* at 22-26.

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non-competes, renders the Rule arbitrary and capricious.”¹³ The Court noted that the FTC “failed to sufficiently address alternatives” to the Final Rule or “consider the positive benefits of non-compete agreements.”¹⁴

The August 20 Order makes clear that it is the final decision on the merits for purposes of appeal. It remains to be seen whether the FTC will promptly seek to appeal the District Court’s decision and risk an affirmance at the federal appellate court, or focus its efforts for now on litigating in the Eastern District of Pennsylvania, which seems poised to uphold the Final Rule.

Additional Considerations

While the August 20 Order sets aside the Final Rule, for now, non-compete agreements may still be subject to enforcement action. The FTC remains empowered under Section 5 of the FTC Act to investigate and bring enforcement actions against unfair methods of competition, which the FTC has deemed to include non-compete practices. Without the Final Rule’s broad prohibition, the FTC is still required to show how each challenged non-compete violates Section 5. Moreover, States continue to have the authority to ban or restrict non-compete provisions pursuant to State statutes or judicial precedent. In May 2023, Jennifer Abruzzo, General Counsel for the National Labor Relations Board, issued a memorandum, which we discussed in a previous client alert (available [here](#)), contending that non-compete agreements in employment contracts, unless “narrowly tailored to special circumstances justifying the infringement,” unlawfully interfere with employee rights under the National Labor Relations Act. Relatedly, in June 2024, an Administrative Law Judge ruled that a twelve month non-compete provision that was limited to the county and contiguous counties in which the employee worked violated the National Labor Relations Act.¹⁵ Employers should continue to monitor State law and agency guidance in order to assess which non-compete agreements may be challenged as an “unfair practice.”

Willkie’s antitrust and employment law teams are available to advise clients on navigating the non-compete enforcement landscape.

¹³ *Id.* at 24.

¹⁴ *Id.* at 24-25.

¹⁵ See Decision, *J.O. Mory, Inc. v. Indiana State Pip Trades Assoc., et al.*; Case Nos. 25-CA-309577, 25-CA-336995 (June 13, 2024), available [here](#).

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If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

Wesley R. Powell

212 728 8264

wpowell@willkie.com

Katrina Robson

202 303 1096

krobson@willkie.com

James C. Dugan

212 728 8654

jdugan@willkie.com

Andrew Spital

212 728 8756

aspital@willkie.com

Jordan A. Messinger

212 728 8799

jmessinger@willkie.com

Kathryn Garrett

212 728 3924

kgarrett@willkie.com

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