

ISSUE ALERTS

TEXAS FEDERAL COURT BLOCKS FTC'S NON-COMPETE BAN ENFORCEMENT FOR PLAINTIFFS IN THE CASE – WITH POTENTIAL FOR BROADER INJUNCTIONS

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By: Clayton J. Kaiser

On July 3, 2024, in *Ryan LLC v. Federal Trade Commission*, the United States District Court for the Northern District of Texas (“the Court”) weighed in on the propriety of the Federal Trade Commission’s (“FTC”) freshly minted rule banning non-compete agreements in nearly all circumstances (“the Rule”). While the Court temporarily enjoined enforcement of the Rule, it refused to grant a nationwide injunction. Therefore, the Rule is on track to go into effect on Sept. 4, 2024, for everyone but the plaintiffs in *Ryan*. With that said, the Court may still issue a more far-reaching injunction before the Rule’s effective date. Plus, as the new decision shows, there is reason to believe that the Rule is not enforceable even if it is permitted to go into effect.

THE CASE

As discussed in our April 25, 2024, issue alert (FTC Issues Final Rule Banning Non-Compete Agreements), following the FTC’s issuance of the Rule, a number of legal challenges were brought seeking to block enforcement of the Rule. The first decision in these challenges was rendered in *Ryan* last week. There, at the preliminary injunction stage, the Court found, among other things, that the “FTC lacks substantive rulemaking authority” to issue the Rule and that the Rule was arbitrary and capricious because there was a “lack of evidence as to why [the FTC] chose to impose such a sweeping prohibition — that prohibits entering or enforcing virtually all non-competes — instead of targeting specific, harmful non-competes.” In light of this, along with its conclusion that the other requirements for a preliminary injunction were met, the Court stayed the effective date of the Rule and temporarily enjoined the FTC from implementing or enforcing it. However, the Court limited its order to just the plaintiffs in the case — a Texas employer, the United States Chamber of Commerce, and two Texas-based trade groups — and explicitly rejected the plaintiffs’ request for a nationwide injunction, stating that the “Plaintiffs ha[d] offered virtually no briefing (or basis) that would support ‘universal’ or ‘nationwide’ injunctive relief.” Based on the Court’s discussion regarding the dearth of argument on the scope issue, coupled with its substantive finding that the Rule was likely not enforceable, it appears possible that a more far-reaching injunction may ultimately be issued by the Court when

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it makes its final merits determination, which the Court indicated would happen by Aug. 30, 2024.

OTHER PENDING CASES

Although it has not gotten as much attention as *Ryan*, another challenge to the Rule is currently pending before the United States District Court for the Eastern District of Pennsylvania, *ATS Tree Services, LLC v. Federal Trade Commission*, and will also likely be decided before the Rule's Sept. 4 effective date. The plaintiff in *ATS* has raised many of the same arguments that were made in *Ryan* and is seeking similar relief. However, unlike in *Ryan*, no nationwide trade group has intervened in the suit (though, a number have filed amicus). Additionally, it does not appear that the venue is as favorable to the plaintiff employer as the one in Northern Texas is. Thus, it appears possible that not only will a nationwide injunction not be granted in *ATS*, but a conflicting order on the merits may actually come from that case. A hearing on the injunction requested in *ATS* will be held on July 10 and a ruling is set to be issued by July 23.

TAKEAWAYS

The *Ryan* court confirmed what many in the field already believed: that the Rule is legally infirm. Unfortunately, the *Ryan* court did not issue a nationwide injunction that would give employers the peace of mind that they were hoping for from the case. Accordingly, at this point, employers should prepare for the Rule going into effect on Sept. 4 and determine whether they are comfortable with their existing restrictive covenant agreements in light of the Rule's pending implementation.

FOR MORE INFORMATION

If you have questions or want more information regarding the Rule or strategies regarding it, contact your legal counsel. If you do not have regular counsel for such matters, Foulston Siefkin LLP would welcome the opportunity to work with you to meet your specific needs. For more information, contact Scott C. Nehrbass at 913.253.2144 or snehrbass@foulston.com or Clayton J. Kaiser at 316.291.9539 or ckaiser@foulston.com. For more information on the firm, please visit our website at www.foulston.com.

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