

Update on Court Rulings on FTC Final Rule Banning Non-Competes

By: John Vering

FTC Ban on Non-Compete Agreements

On April 23, 2024, the Federal Trade Commission (“FTC”) voted 3-2 to issue a Final Rule (“Rule”) that would generally ban employers from entering into non-competes with workers and require employers to notify workers that their existing non-compete agreements are unenforceable. We published a [client alert](#) explaining the Final Rule, which is scheduled to take effect September 4, 2024 (unless enjoined/stopped by a court).

So Far, Court Rulings on Legal Challenges to FTC Ban are Mixed

As we also predicted, the FTC rule banning non-compete agreements was challenged in multiple courts. On July 3, 2024, Judge Ada Brown in the U.S. Northern District of Texas issued a temporary injunction prohibiting the FTC from enforcing its rule against the plaintiffs in that case (a Texas tax firm, the U.S. Chamber of Commerce, and two Texas-based trade groups) finding that the plaintiffs were likely to succeed on the merits of the lawsuit. While Judge Brown’s ruling did not prevent the FTC from enforcing its rule against other employers, Judge Brown did indicate that she planned to decide by August 30, 2024, if a nationwide injunction should be issued prohibiting the FTC from enforcing its ban on non-compete agreements. Although many predict that a nationwide injunction will be issued, no one can be certain.

Meanwhile, Judge Kelley Hodge in the U.S. Eastern District of Pennsylvania reached the opposite conclusion and denied a request for an injunction on July 23, 2024, after she found that the plaintiffs, in that case, were unlikely to succeed on the merits and had failed to show irreparable harm if the FTC non-compete ban were to take effect. Both court decisions will undoubtedly be appealed.

There is also a challenge pending in a Florida federal court, but, due to its current procedural status, it is unlikely to be decided prior to issuance of the Texas decision.

What Should Employers Do?

Given that the effective date of the FTC non-compete ban is September 4, 2024, that August 30 falls on a Friday, and that Monday, September 2, 2024, is Labor Day, there will be very little time for employers to provide the required notice to current and former employees by Wednesday, September 4, 2024, if the Texas court or another court does not issue a nation-wide injunction preventing enforcement of the FTC non-compete ban.

Thus, we recommend that employers take stock of what current and former employees are covered by non-compete agreements, and be prepared to notify them that their non-compete agreements are not enforceable if the Rule is not enjoined (declared unlawful) by a court by September 4, 2024. Keep in mind that, even absent the FTC rule, there are laws in some states that ban or restrict non-compete agreements or make them unlawful as to certain categories of workers.

Employers should monitor legal developments and consider whether they need non-compete

agreements for certain employees or whether non-solicit and non-disclosure agreements adequately protect the employer's trade secrets (confidential information and customer relations), comply with state and local laws, and be prepared to communicate the company's position to employees and prospective employees who may be under the impression that non-compete agreements are now unlawful.

Employers should also protect their interests by reviewing existing non-solicitation and non-disclosure agreements for compliance with federal and state law, to ensure trade secrets are protected, and to remove any non-compete provisions for new employees as they are hired in the future, if the ban goes into effect.

Please contact the Seigfreid Bingham Employment Law team with any questions about this Rule banning non-competes, or if you need assistance preparing to comply with these new regulations or drafting a notice to employees that may need to be qualified in light of the current litigation over whether the FTC can legally ban non-compete agreements. We will be monitoring further developments and legal challenges to the FTC ban.

This article is general in nature and does not constitute legal advice. Readers with legal questions should consult the author John Vering (jvering@sb-kc.com) or other members of the Seigfreid Bingham's Employment Law Group, including Shannon Cohorst Johnson (sjohnson@sb-kc.com), Mark Opara (mopara@sb-kc.com), John Neyens (jneyens@sb-kc.com), Brenda Hamilton (bhamilton@sb-kc.com), Cody Weyhofen (cweyhofen@sb-kc.com), Julie Parisi (jparisi@sb-kc.com), Christopher Tillery (ctillery@sb-kc.com), Katie Conklin (KConklin@sb-kc.com), or your regular contact at Seigfreid Bingham at 816.421.4460.