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To Compete or Not Compete? The FTC Weighs In.

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Federal Judge in Texas Strikes Down FTC's Ban on Non-Compete Agreements

The Federal Trade Commission's (FTC) ban on non-compete agreements was set to take effect in early September 2024, which would have invalidated many employment contracts nationwide. However, in a ruling on August 20, 2024, the U.S. District Court for the Northern District of Texas set aside the new rule, reasoning that the FTC exceeded its authority and determined the rule was arbitrary and capricious in violation of the Administrative Procedure Act (APA). *Ryan LLC v. Federal Trade Commission*, Civil Action No. 3:24-CV-00986-E.

Setting aside the rule blocks enforcement of the ban nationwide. Thus, employers can breathe easier knowing they do not have to

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comply with the new rule by next month. The FTC will likely appeal the court's decision to the U.S. Court of Appeals for the Fifth Circuit. If appealed, the FTC will likely seek a stay of the court's decision to set aside the rule pending the outcome of the appeal.

Employers should continue to monitor the challenges of the new rule until appeals are exhausted.

Non-compete agreements will be prohibited starting Summer 2024—with few exceptions

On Tuesday, April 23, 2024, the Federal Trade Commission (“FTC”) issued a final rule banning non-compete clauses in worker contracts. The Non-Compete Clause Rule (“final rule”) applies to all levels of employment, and includes both employees and independent contractors.

Under the final rule, employers will be prohibited from entering a contract with a worker that includes a non-compete provision. Existing non-competes will no longer be enforceable, except for existing non-competes with “senior executives,” which are defined as employees in a policy-making position with an annual compensation of over \$151,164. However, employers are banned from entering or attempting to enforce any new non-competes, even if they involve senior executives. Importantly, employers must provide notice to workers who are not senior executives that their

existing non-competes are no longer enforceable. The requirements of the notice are outlined in § 910.2 (b). The final rule includes proposed language for employers to use to satisfy the notice requirement. § 910.2 (b)(4).

The FTC's rationale for the final rule is that non-compete agreements are an unfair method of competition. The final rule is purported “to promote competition by banning noncompetes nationwide, protecting the fundamental freedom of workers to change jobs, increasing innovation, and fostering new business formation.” Press Release, FTC Announces Rule Banning Noncompetes, <https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-rule-banning-noncompetes>. Proposed alternatives to non-competes include non-disclosure agreements and improving wages and working conditions.

South Carolina's current law regarding non-competes will likely be preempted

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Although disfavored, South Carolina enforces non-compete agreements if they are reasonable, supported by valuable consideration, and necessary to protect the employer's legitimate interests. To be reasonable, the agreement must be reasonably limited in operation with respect to time and place, not unduly harsh and oppressive in curtailing the efforts of the employee to earn a living, and be reasonable from the standpoint of sound public policy. See *Fay v. Total Quality Logistics, LLC*, 419 S.C. 622, 630 (Ct. App. 2017).

The FTC's final rule preempts State laws unless a state's law restricts non-competes and does not conflict with the final rule. Stated another way, "the final rule supersedes such laws to the extent, and only to the extent, that such laws would otherwise permit or authorize a person to engage in conduct that is an unfair method of competition . . . or conflict with the notice requirement in § 910.2 (b)." Although South Carolina common law restricts the enforceability of non-competes, those restrictions in the FTC rule are broader. Thus, South Carolina's common law regarding non-competes will almost certainly conflict with the new rule and be preempted.

The final rule's effective date may be delayed due to likely legal challenges

The final rule does carve out an exception for non-competes entered by a person pursuant to a bona fide sale of a business entity. Additionally, the rule does not apply where a cause of action related to a non-compete accrued prior to the effective date of the rule. The final rule is set to go into effect 120 days after publication, but it is likely to face legal challenges that could delay the effective date.

If you would like more information about the FTC's ruling and how the ruling may affect you, please contact [Lillian Keeling](#), [Ross Plyler](#), or visit our [website](#).

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