

District Courts Split on FTC's Authority to Issue Noncompete Rule

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The FTC's historic rule banning most employment-based noncompetition agreements (the noncompete rule), and its authority to issue such a rule, were the subject of court decisions handed down in the month of July. However, the decisions by the U.S. District Court for the Northern District of Texas and the U.S. District Court for the Eastern District of Pennsylvania were in direct conflict. The conflicting decisions created even more uncertainty regarding whether the FTC has the power to issue substantive rules preventing unfair methods of competition.

On Jan. 5, 2023, the FTC proposed a rule banning the use of employment-based noncompetition agreements nationwide. Over the next 15 months, the FTC received over 26,000 public comments on the noncompete rule. The FTC issued its final version of the noncompete rule on April 23, 2024. The final rule, if it were to take effect, would prevent an employer from entering into new noncompete agreements, or enforcing noncompete agreements with any employee who is not a senior executive.

The noncompete rule is scheduled to go into effect on Sept. 4, 2024. In the interim, several parties filed lawsuits challenging the FTC's authority to issue the noncompete rule. On April 23, 2024, Ryan LLC filed a lawsuit in the Northern District of Texas seeking an injunction to block the implementation of the rule. The U.S. Chamber of Commerce also filed suit to block the rule, but decided to join Ryan LLC's suit after its suit was dismissed pursuant to the first-to-file doctrine. On April 25, 2024, ATS Tree Services filed suit in the Eastern District of Pennsylvania.

The Northern District of Texas was the first court to rule in *Ryan LLC v. FTC*. On July 3, 2024, Judge Ada Brown of the Northern District of Texas granted an injunction preventing the noncompete rule from going into effect. The court held that the FTC Act does not authorize the commission to create broad substantive rules preventing unfair methods of competition. Rather, the court held that Section 6(g) only authorizes the FTC to make "rules of agency organization procedure or practice" rather than "substantive rules." Because the FTC relied on Section 6(g) to promulgate the noncompete rule, the court held Ryan LLC would likely be successful on the merits of the case and blocked the noncompete rule from going into effect. However, Brown declined to issue a nationwide injunction, meaning the injunction only applied to the case before the court. The Northern District of Texas later indicated it would issue a ruling on the merits of the case by Aug. 30, 2024, and the parties are currently briefing Ryan LLC's motion for summary judgment.

Less than a month later, on July 23, 2024, Judge Kelly Hodge of the Eastern District of Pennsylvania considered similar arguments but denied the ATS's motion for an injunction in *ATS Tree Services v. FTC*. Noting that the words "procedural" or "substantive" do not limit the language of Section 6(g), the court held "it is clear that the FTC is empowered to make both procedural and substantive rules as is necessary to prevent unfair methods of competition."

The court also stressed that the FTC's purpose, as well as the goals of the FTC Act, supported its holding. Hodge also rejected a number of additional arguments from the plaintiff, including: that regulation of noncompetition agreements should be left to the states; the Major Questions Doctrine applied and prevented the FTC from issuing the noncompete rule; and Congress improperly delegated authority to the FTC. Hodge did not comment on Brown's decision.

The dueling rulings create significant uncertainty as to the FTC's ability to issue substantive rules and the validity of the noncompete rule. The noncompete rule is still set to take effect on Sept. 4, 2024. However, given there are other lawsuits still pending and appeals of the Northern District of Texas and Eastern District of Pennsylvania decisions are likely, it is unclear whether the fate of the noncompete rule will be decided by the FTC's deadline of Sept. 4. Stay tuned.

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