

Not Dead Yet: Noncompetes Survive, the FTC Rule Doesn't (For Now)

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Perhaps there has been no employment law topic written about more in 2023, and to-date in 2024, than the Federal Trade Commission's (FTC) (Proposed) and Final Rule, which broadly (and arguably, unconstitutionally) seeks to ban noncompete clauses between employers and their workers. And for good reason. The FTC's Final Rule represents a sea change in the regulation of noncompetes, which have historically been governed by state law for more than a century (and have existed long before Congress established the FTC). The Final Rule is an extraordinary exercise and test of the FTC's legal authority to regulate unfair methods of competition.

As anticipated, the Final Rule has been met with swift legal challenges attempting to block its implementation, with many questioning the FTC's rule-making authority, and [whether it would survive in the courts](#). To date, those legal challenges have been successful (albeit limited). On July 3, 2024, the court in *Ryan LLC v. FTC* granted a motion for a preliminary injunction against the FTC's Final Rule, and temporarily enjoined the noncompete ban from going into effect against the named plaintiff/intervenors. Importantly, the court in *Ryan* laid out its reasoning for why the FTC's Final Rule is likely unlawful, effectively paving the way for future legal challenges. However, the court in *Ryan* [did not issue a nationwide injunction](#) (meaning the Final Rule, as it stands today, is still set to take effect on September 4, 2024, for all parties not named in the *Ryan* action). Even still, the FTC's Final Rule has taken a significant beating, made worse by the United States Supreme Court's decision in *Loper Bright Enters. v. Raimondo*, which overturned the old reliable [Chevron deference](#) that federal agencies, like the FTC, have come to love and rely upon heavily in issuing rules and regulations based on their interpretations of existing law. Now without *Chevron* in its arsenal, undoubtedly it will be more difficult for federal agencies to regulate noncompete agreements (and other rules) because courts will likely (and should) yield less to administrative agencies' interpretations of existing law.

Currently, the Final Rule will take effect on September 4th for all employers, except for the parties in the *Ryan* action. While this might change, and a nationwide injunction may be issued in *Ryan* (or in other courts), employers must be ready to implement significant changes regarding noncompetes that, if required, will undoubtedly alter the nature of their workforce and business for the foreseeable future. In this article, we demystify the Final Rule, its implications, discuss the current legal challenges and provide practical considerations for employers as they prepare for its (possible) implementation on September 4th.

WHAT DOES THE FINAL RULE MEAN FOR EMPLOYERS?

If the Final Rule goes into effect, it will broadly prohibit employers from imposing noncompetes on workers, which includes any term or condition of employment (whether written or oral) that

“prohibits,” “penalizes” or “functions to prevent” a worker from seeking or accepting work or operating a business in the U.S. after their employment ends. This prohibition applies to all new noncompete clauses between employers and workers, post-the effective date of the rule, and also renders unenforceable existing noncompete clauses other than those pre-existing noncompetes for workers defined as “senior executives” (which the rule defines as a worker earning more than \$151,164 who is in a “policy-making position”). Although the Final Rule does not prohibit nondisclosure agreements, or nonsolicitation agreements, these types of agreements could fall within the rule’s ban if they are “so broad and onerous” that they have “the same functional effect as a term or condition prohibiting or penalizing a worker from seeking or accepting other work or starting a business.”

The Final Rule also requires employers to notify employees subject to the prohibited noncompete (i.e., except for “senior executives”) that existing noncompetes will not be, and cannot be, enforced. The FTC has also provided [model language](#) for the notice requirement. Absent a successful legal challenge (that applies to all employers, not just those named as parties to a given action), prohibiting its implementation, the Final Rule will take effect on September 4, 2024, 120 days after it was published in the Federal Register. As we discuss below, unless a nationwide injunction is issued, employers will be required to comply with the rule and should be preparing now to do so, even if the likelihood of it going into effect is increasingly becoming less likely.

LEGAL CHALLENGES TO THE FINAL RULE – RYAN LLC MAKES WAVES THIS SUMMER

Not surprisingly, it did not take long for legal challenges to the Final Rule to take fold. On April 23, 2024, hours after the Final Rule was passed, Ryan LLC filed the first lawsuit seeking to enjoin the Final Rule in federal court in the Northern District of Texas. That same day, the U.S. Chamber of Commerce (the nation’s largest business advocacy group) filed a similar lawsuit in the Eastern District of Texas seeking to do the same. Since then, another lawsuit was filed in the Eastern District of Pennsylvania (*ATS Tree Services, LLC v. Federal Trade Commission et al.*). Each of these lawsuits take similar form. They contend the FTC lacks authority to engage in rulemaking of substantive competition rules (i.e., prohibit noncompetes), and seek a declaratory judgment and injunctive relief to prevent the Final Rule from taking effect 120 days after its publication in the Federal Register, September 4th.

On July 3, 2024, Judge Ada Brown (a Trump appointee) in *Ryan* issued a blistering 33-page decision preliminarily enjoining the Final Rule from taking effect on September 4, 2024; but, as noted, only with respect to the plaintiffs in the action (Ryan, LLC, the U.S. Chamber of Commerce, the Longview, Texas Chamber of Commerce, and two trade organizations). In finding that plaintiffs would likely succeed on the merits, there are several main takeaways. First, the court explained that, after reviewing the text, structure, and history of the relevant statute (the “FTC Act”), that it does not “expressly grant the [FTC] authority to promulgate substantive rules regarding unfair methods of competition.” This is a major blow to the FTC’s proffered argument that it is an unfair method of competition for persons to enter or enforce noncompete agreements, and that the powers entrusted to the FTC empower it to make substantive rules precluding unfair competition. On this basis alone, we anticipate that future legal challenges to the Final Rule will likely be successful (and indeed, the court in *ATS* has already relied upon the decision in *Ryan*).

Second, the court in *Ryan* went on to say that a categorical ban on nearly all noncompetes would likely be arbitrary and capricious because it is overly broad without any reasonable explanation and

signaled that the Final Rule is unlikely to pass final judicial review on the merits. As explained above, the court in *Ryan* did not grant nationwide injunctive relief and limited its preliminary injunction and the stay of the Final Rule's effective date to the plaintiffs before the court (which means that the Final Rule's effective date still applies to all employers). However, the court explained that it intends to enter a merits disposition on the action on or before August 30, 2024, a decision likely to convert the preliminary injunction to permanent relief.

As if the state of the law could not get any more interesting, before the preliminary injunction decision in *Ryan*, SCOTUS issued a decision on June 28, 2024, in *Loper Bright* which, by itself, was a watershed moment in administrative law. The court in *Loper Bright* eliminated the agency deference afforded by step two of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* In particular, the court held that courts “may not defer to an agency interpretation of law simply because a statute is ambiguous” because courts, rather than agencies, have sole competency to resolve statutory ambiguity. Because countless statutes task federal agencies with administering and enforcing laws, issuing rules and regulations, and deciding disputes—often requiring an agency to fill in a gap or construe statutory text—the end of Chevron deference is a significant change in administrative law. Undoubtedly, the elimination of Chevron deference weakens the FTC's Final Rule even further, as it deals a blow to the FTC's broad interpretation of its rule making authority to curtail unfair competition.

But that's not all. Before the court in *Ryan* enters a merits disposition on August 30th, on July 23, 2024, the court in *ATS* is expected to issue a decision on the plaintiff's motion for preliminary injunction. Presiding Judge Kelley Hodge (a Biden appointee) could order a broader injunction, or a conflicting opinion to *Ryan*, complicating matters even further and creating more uncertainty for employers before the Final Rule's effective date.

THE FINAL RULE'S NOTICE REQUIREMENTS

If the Final Rule stands (which it may not), it requires employers to notify non-expected employees that existing noncompetes will not be, and cannot be, enforced. The FTC's model language contains explicit language to this effect, and the FTC recommends that such notice be provided in multiple languages. The model language says:

A new rule enforced by the Federal Trade Commission makes it unlawful for us to enforce a non-compete clause. As of [DATE EMPLOYER CHOOSES BUT NO LATER THAN EFFECTIVE DATE OF THE FINAL RULE], [EMPLOYER NAME] will not enforce any non-compete clause against you. This means that as of [DATE EMPLOYER CHOOSES BUT NO LATER THAN EFFECTIVE DATE OF THE FINAL RULE]:

- You may seek or accept a job with any company or any person—even if they compete with [EMPLOYER NAME].
- You may run your own business—even if it competes with [EMPLOYER NAME].
- You may compete with [EMPLOYER NAME] following your employment with [EMPLOYER NAME].

As noted, the decision in *Ryan* (at least for now) only applies to the plaintiffs in that action, not all employers. It also remains to be seen whether a broader, or conflicting, decision will issue in *ATS*. While we anticipate future legal challenges will continue, employers must be ready to comply with the Final Rule if a nationwide injunction is not issued.

IF THE FINAL RULE GOES INTO EFFECT ON SEPTEMBER 4, 2024, WHAT SHOULD EMPLOYERS DO?

Assuming the Final Rule remains in effect on September 4th, employers will need to provide notice to employees of its implementation, as noted above. If that becomes the case, we recommend that employers use qualifying language in the notice to preserve its right to enforce the noncompete provisions with its employees should the Final Rule later be eliminated. An example of this language could be, as follows:

The Company is providing you with this notice to comply with the FTC's Final Rule, to which legal challenges are pending. Should the Final Rule not remain in effect, the Company intends to enforce your noncompete provision, in accordance with applicable law.

Because the Final Rule does not require the rescission of a contract with an employee, meaning that the employer would otherwise have to cancel its contract with each employee, the above language is meant to provide the employer with flexibility to enforce the noncompete provision should it be in a position to do so given the status of future legal challenges, all the while complying with existing law. Even if the Final Rule remains, there are still effective tools that employers can use to protect its confidential and proprietary information and ensure that their business interests are protected.

For assistance in navigating the intricacies of compliance with the FTC's Final Rule please contact Kelley Drye's [Labor and Employment team](#).