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Update on the FTC's Non-Compete Ban: Recent Court Rulings and Implications for Employers

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As we previously reported, in April 2024, the [Federal Trade Commission \(FTC\) issued a rule banning almost all employment-based non-compete restrictions](#). While the rule has garnered significant opposition, it is still currently scheduled to go into effect September 4, 2024. This alert will provide an overview of the current legal challenges facing the rule, and further give practical guidance to help prepare for (possible) implementation of the rule on September 4th.

Pending Law Suits Against the FTC

At least three lawsuits are currently pending in the federal courts, each of which challenges the enforceability of the pending rule. Most recently, in *ATS Tree Services, Inc. v. Federal Trade Commission*, filed in the U.S. District Court for the Eastern District of Pennsylvania, the court issued a July 23, 2024 decision denying plaintiff's request for a preliminary injunction, which would have halted implementation of the rule. Previously on July 3, 2024, in *Ryan, LLC v. Federal Trade Commission*, filed in the U.S. District Court for the Northern District of Texas, a court did issue a preliminary injunction against implementation of the rule, but importantly limited the injunction only to the specific plaintiffs in the case, meaning that the injunction does not otherwise impact the FTC's ability to enforce the rule against other US businesses. The plaintiffs have requested that the court reconsider expanding the scope of its injunction to apply to businesses nationwide, and the court has said it will issue a decision on or about August 30, 2024. Thus, as of now, the rule has yet to be struck down or enjoined by the courts (except in a very limited manner).

The Chevron Doctrine and Its Overturn

The recent US Supreme Court case overturning the long standing Chevron doctrine further adds to the already complex web of legal challenges. Historically, under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, decided in 1984, courts deferred to federal agencies in interpreting ambiguous laws, allowing the agencies discretion in rule implementation. However, on June 28, 2024, the Supreme Court overturned Chevron by way of *Loper Bright Enterprises v. Raimondo*, deciding that while agency interpretations may still inform courts, courts may no longer defer to such interpretations. This change makes it easier for opponents to challenge agency rules, and in particular potentially impacting the ongoing lawsuits against the FTC's non-compete ban. It is still very early to tell the practice impact of the overturn of Chevron, and we will update you on any developments.

Practical Steps for Employers

As of now, despite much movement in the legal landscape, the non-compete ban is set to become effective on September 4, 2024. Employers need to prepare for compliance. Below are certain practical steps to take:

1. Identify "Senior Executives"

The rule does not restrict employment-based non-compete restrictions imposed on "senior executives" (as

defined in the rule), provided those restrictions were entered into before September 4, 2024. Determining who is a “senior executive” is a fact-specific inquiry, and you should contact legal counsel for guidance in analysis.

2. Prepare a Form of Notice

On or before September 4th, businesses must notify current and former employees (excluding “senior executives”) that their non-compete restrictions are no longer enforceable. A template for the notice is available from the FTC.[1] Notifications must be in writing and can be hand delivered, sent via email, text message, or mail/courier. If you don't have contact information for a former employee, you are not required to send the notice. You should identify all current and former employees currently bound by a non-compete, so that by September 4th you are able to send out such notices (provided the rule is not otherwise enjoined or struck down before then).

3. Review Your Current Form Documents

Ensure that all future employment contracts, paperwork, employee handbooks, workplace policies, and websites do not include non-compete clauses for all workers, including “senior executives.”[2]

4. Consult and Stay Informed

Despite implementation of the rule, there will still be various other ways to protect your business, including by use of non-solicitation provisions and non-competition restrictions not tied to employment. You should consult legal counsel to help protect your business while ensuring compliance and stay updated on any further developments that could affect the rule's implementation.

If you have more questions about the FTC's new rule, please contact [Jason Krisza](#) and [John Barry](#).

[1] Federal Trade Commission, Non-Compete Rule - Model Notices, <https://www.ftc.gov/legal-library/browse/rules/noncompete-rule>

[2] Federal Trade Commission, Non-Compete Clause Rule: A Compliance Guide for Businesses and Small Entities, After September 4, 2024, when the Rule is set to go into effect, you can't enter into a new non-compete with any worker covered by the Rule—that includes senior executives. However, an existing non-compete with a senior executive is still valid. In contrast, for workers other than senior executives, you cannot enforce existing non-competes after the effective date, set to be on September 4, 2024, and you must give these workers notice that their non-competes will not be enforced.

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