CONTRACT LAW—FTC'S NON-COMPETE BAN: THE UNCERTAIN ROAD AHEAD FOR EMPLOYERS AND EMPLOYEES AMIDST A CIRCUIT SPLIT

For roughly a century, the Federal Trade Commission (FTC) has enforced non-compete agreements under the Federal Trade Commission Act to help prohibit unfair methods of competition.[1] However on April 23, 2024, the FTC passed a new rule to ban non-compete clauses in most employer-employee contracts.[2] Following a Texas Judge's decision, this new rule—originally set to take effect on September 4, 2024—is now subject to delay or all out ban itself.[3] With a total of three legal challenges to the FTC's new rule and differing decisions by federal judges, the opportunity for appellate review is ripe in the wake of this district-level split within the Fifth and Eleventh Circuits.[4] Given the inconsistency of rulings and lack of direction, employers and employees must tread lightly until courts resolve the legality of the ban.

So, what exactly is the FTC's new non-compete directive? The final rule specifies any non-compete clause between employers and employees is an unfair method of competition and a violation of section 5 of the Act.[5] Senior executives that already have a contractual non-compete provision are grandfathered in and therefore excepted from the new rule.[6]

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[1] *See* Jonathan Harris, *History Absolves the FTC: A Defense of the Rule on Non-Competes and Functional Non-Competes*, HARV. L. REV. BLOG (Jan. 5, 2025) (discussing the century-long history of FTC regulation of labor markets), https://harvardlawreview.org/blog/2025/01/history-absolves-the-ftc-a-defense-of-the-rule-on-non-competes-and-functional-non-competes.

[2] *See* J. Mark Gidley et al., *White & Case Global Non-Compete Resource Center (NCRC)*, WHITE & CASE (Feb. 11, 2025), https://www.whitecase.com/insight-tool/white-case-global-non-compete-resource-center-ncrc.

[3] 16 C.F.R. § 910.2 (preventing employers from enforcing noncompete with all workers including senior executives.); Ryan, LLC v. Fed. Trade Comm'n, No. 3:24-CV-00986-E, 2024 WL 3879954, at *14 (N.D. Tex. Aug. 20, 2024) ("The Rule shall not be enforced or otherwise take effect on its effective date of September 4, 2024, or thereafter.").

[4] *See* David J. Clark, *Two Appeals to Determine Fate of FTC's Noncompete Ban*, EPSTEIN BECKER GREEN (Oct. 30, 2024), https://www.tradesecretsandemployeemobility.com/two-appeals-to-determine-fate-of-ftcs-noncompete-ban.

[5] Lina M. Khan et al., Press Release, *FTC Announces Rule Banning Noncompetes*, FED. TRADE COMM'N (Apr. 23, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-rule-banning-noncompetes.

[6] *Id*. ("Under the final rule, existing noncompetes for senior executives can remain in force.").

Empirical studies and over 26,000 public comments have enabled the FTC to see how non-compete clauses hinder wage growth, suffocate innovation, and ultimately impair the American economy.[7] In offering remedy suggestions for employers, the agency cited to safeguards like non-disclosure agreements (NDAs) and trade secret laws.[8] Although such alternatives may provide redress, the suggestions have proven to be an inefficient means of placating employers as legal battles have surfaced across the country.

Beginning in the Fifth Circuit, a federal district court in Texas set aside the FTC's non-compete ban after the plaintiff in *Ryan, LLC v. Federal Trade Commission* motioned for a stay of the ban's effective date and a preliminary injunction.[9] Ryan, LLC is a global tax services firm which uses non-competes for principals and shareholders with access to proprietary business data.[10] In its motion for summary judgment, Ryan, LLC contended the new rule is patently unconstitutional, arbitrary and capricious under the Administrative Procedure Act (APA), and beyond the FTC's statutory authority.[11] However, the FTC claimed the non-compete provisions were "unfair methods of competition" under section 5 of the Act.[12] The FTC argued it had the authority to issue such a rule under 6(g) of the Act which enables it to make substantive rules related to unfair methods of competition.[13] The court ultimately sided with the plaintiff and underscored the fact that the FTC groundlessly dismissed

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[7] *Id*.

[8] *Id*. (observing an estimation by researchers that roughly 95% of workers under non-compete agreements already have an NDA).

[9] No. 3:24-CV-00986-E, 2024 WL 3879954, at *1 (N.D. Tex. Aug. 20, 2024).

[10] *See* Nina T. Martinez et al., *District Court Ruling Bars Federal Trade Commission Non-Compete Rule for the Near Term*, PILLSBURY WINTHROP SHAW PITTMAN (Sept. 10, 2024), https://www.pillsburylaw.com/en/news-and-insights/us-district-court-federal-trade-commission-noncompete-rule.html.

[11] 15 U.S.C. § 45(a)(2); *Ryan, LLC*, 2024 WL 3879954, at *14 (emphasizing the plaintiff's assertion that the Non-Compete Rule violates the APA since Congress did not give authority for such a rule and a rule of the kind would be "in violation of the non-delegation doctrine.").

[12] *Ryan, LLC*, 2024 WL 3879954, at *4.

[13] 15 U.S.C. § 45(a)(1) ("Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful."); *Ryan, LLC*, 2024 WL 3879954, at *4.

alternative ways of achieving their objective at a lower cost.[14] In addition to granting the plaintiff's summary judgment, the court ordered that the Rule would not be enforced or take effect on or after September 4, 2024.[15]

Conversely, in a similar case involving the FTC non-compete ban in the Eleventh Circuit, a Florida district court sided with a majority of the arguments put forth by the FTC.[16] Properties of the Villages, Inc. (POV) is a real estate broker that brought counts under the APA and the U.S. Constitution on behalf of their agents who are governed by non-compete provisions.[17] The suit arose when a group of realtors who were former POV agents challenged a two-year noncompete forbidding them from working for a neighboring agency in the region.[18] POV presented allegations similar to those of Ryan, LLC containing claims regarding the FTC's lack of substantive rulemaking authority, exceedance of rulemaking authority, and impermissible retroactive authority; however, the court here decided to address the Major Questions doctrine where the *Ryan, LLC* court declined to do so.[19] Although the court granted the plaintiff's motion for a preliminary injunction, the court generally sided with the FTC because the court found the FTC has substantive rulemaking abilities and that it did not commit a Commerce Clause violation or exceed its authority.[20] In addition, the court did not enter a

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[14] *Ryan, LLC*, 2024 WL 3879954, at *14; Gidley et al., *supra* note 2 ("Without Chevron deference now, the FTC's legal arguments in supporting of its authority to promulgate the rule are on equal footing as the plaintiffs . . . .").

[15] *See Ryan, LLC*, 2024 WL 3879954, at *14.

[16] *See* Props. of the Vills., Inc. v. Fed. Trade Comm'n, No. 5:24-CV-316-TJC-PRL, 2024 WL 3870380, at *1 (M.D. Fla. Aug. 15, 2024); *see also Breaking Down the FTC Non-Compete Ban Appeals: Heading to a Circuit Split and SCOTUS Intervention?*, FISHER PHILLIPS (Oct. 22, 2024), https://www.fisherphillips.com/en/news-insights/breaking-down-the-ftc-non-compete-ban.html.

[17] *Prop. of the Vill., Inc*., 2024 WL 3870380, at *2 (detailing the various counts of the plaintiff's complaint).

[18] *See e.g.* Elizabeth B. Wydra et al., Case Summary, Properties of the Villages, Inc. v. Federal Trade Commission, CONST. ACCOUNTABILITY CTR., https://www.theusconstitution.org/litigation/properties-of-the-villages-inc-v-federal-trade-commission.

[19] *Props. of the Vills., Inc*., 2024 WL 3870380, at *5-6 ("When an agency claims to have the power to issue rules of 'extraordinary . . . economic and political significance,' it must point to 'clear congressional authorization' for the power it claims.").

[20] *See id*. at *9-11 (granting a preliminary injunction since POV would suffer actual and imminent harm which would be unable to be remedied through money damages

stay regarding the final rule and concluded the injunction only be applicable to the POV case.[21]

Beyond the Fifth and Eleventh Circuit legal challenges, a third legal challenge to the FTC's non-compete ban emerged out of the Eastern District of Pennsylvania. The plaintiff in *ATS Tree Services, LLC v. Federal Trade Commission* is a tree care company operating out of Bucks County, Pennsylvania with roughly a dozen employees.[22] ATS Tree Services, LLC (ATS) argued that it would suffer irreparable harm if there were no mechanisms to impede employees from separating and working for a regional competitor.[23] Like the other legal challenges, the plaintiff claimed the FTC lacked statutory authority, exceeded statutory authority, exercised unconstitutionally delegated power, and imposed an arbitrary and capricious ban.[24]

Importantly, the ATS court noted the Third Circuit does not adopt the rule that non-recoverable costs and purely economic costs provide a valid basis for finding irreparable harm—a requisite factor in a court's determination of whether a preliminary injunction is warranted.[25] As opposed to the district courts in the Fifth and Eleventh Circuit, the court here found the plaintiff failed to establish a reasonable likelihood of succeeding on the merits of its claims and denied the motion for a stay and a preliminary injunction.[26] Although ATS raised noteworthy points regarding the FTC non-compete ban, there will be no appeal since the plaintiff voluntarily dismissed the case.[27]

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had the FTC not been enjoined from enforcing the rule).

[21] *Id*. at *11.

[22] No. CV 24-1743, 2024 WL 3511630, at *1 (E.D. Pa. July 23, 2024).

[23] *See id*. (contending that ATS will lose return on investment regarding specialized training provided to each employee).

[24] *Id*. at *2 ("ATS moved this Court for a stay of the Final Rule's September 4, 2024 effective date and for a preliminary injunction preventing enforcement of the Rule, and requested oral argument.").

[25] *Id*. at *8.

[26] *See id*. at *19 (rejecting to analyze the final two prongs of the preliminary injunction analysis: the balance of equities and the public interest).

[27] Nalee Xiong & Brian D. Pedrow, *ATS Withdraws Challenges to the FTC's Final Non-Compete Rule After the Eastern District of Pennsylvania Denies its Motion to Stay Proceedings*, BALLARD SPAHR LLP (Oct. 8, 2024), https://www.hrlawwatch.com/2024/10/08/ats-withdraws-challenges-to-the-ftcs-final-non-compete-rule-after-the-

In the Fifth and Eleventh Circuits, the FTC has already appealed and maintains it does have the power to ban noncompete provisions.[28] Moreover, the FTC believes the final rule will empower Americans to launch new businesses, seek new employment, and introduce innovative ideas to the market without obstruction from such restrictive provisions.[29] Despite the voluntary dismissal in the Third Circuit, the ban and ensuing legal objections have galvanized employers to take legal action and fight back to defend their use of non-compete provisions.[30] The rationale behind these non-compete clauses has always been to equip employers with tools to preserve the security and sustainability of their companies. Considering similar accusations in the differing circuits, the circuit split could end up at the Supreme Court depending on how the Fifth and Eleventh Circuit Courts of Appeals interpret the Act.[31]

Finally, it is worth noting the recent decision in *Loper Bright Enterprises v. Raimondo* could play into the court's interpretation of the statutory language.[32] In most antitrust enforcement cases, *Loper Bright* is not likely to alter the courts' practices established during the *Chevron* era.[33] With that said, courts will be less prone to defer to the FTC

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[28] *See generally* Joseph S. Adams et al., *FTC Asks Appeals Courts to Revive Ban on Worker Non-Compete Agreements after Nationwide Block*, WINSTON & STRAWN LLP (Nov. 8, 2024), https://www.winston.com/print/v2/content/1095122/ftc-asks-appeals-courts-to-revive-ban-on-worker-non-compete-agreements-after-nationwide-block.pdf (providing a procedural history).

[29] Khan et al., *supra* note 5.

[30] Theresa Panensky & David Renner, *FTC's Non-Compete Ban: What Does it Mean for Your Business?*, WILLIS TOWERS WATSON (Aug. 8, 2024), https://www.wtwco.com/en-us/insights/2024/08/ftcs-non-compete-ban-what-does-it-mean-for-your-business.

[31] *See* 16 C.F.R. § 910.1–.6.

[32] 603 U.S. 369, 412 (2024) (overruling Chevron and holding that courts are required by the APA to independently determine whether an agency has acted within its statutory authority).

[33] Leon B. Greenfield et al., *Antitrust Updates: The FTC's Non-Compete Rule and the Impact of Loper Bright on Federal Antitrust Enforcement*, WILMER HALE (July 8, 2024), https://www.wilmerhale.com/en/insights/client-alerts/20240708-antitrust-updates-the-ftcs-noncompete-rule-and-the-impact-of-loper-bright-on-federal-antitrust-enforcement.

regarding statutory interpretation questions.[34] Moreover, *Loper Bright* has raised the bar for agencies to defend their regulations and will require airtight justifications to guarantee strict compliance with statutory text.[35] Going forward, it will be wise for employers to brace for the law's enforcement to prevent unforeseen issues.[36]

For circuits that have upheld non-compete provisions in employer-employee contracts,

See Cretor Constr. Equip. LLC v. Gibson, 738 F. Supp. 3d 950, 973 (S.D. Ohio 2024) ("[T]aking the four factors as a group, and particularly in light of Cretor's inability to identify any pro-competitive effect from enforcing the type of noncompete at issue here, the Court concludes that preliminary injunctive relief is not warranted."); Quest Car Care Prods., Inc. v. Titus, 708 F. Supp. 3d 1338, 1345 (W.D. Mich. 2023) (observing that Michigan public policy supports reasonable non-compete clauses in employment contracts); Mercy Health Servs.-Inc. v. Efstratiadis, 579 F. Supp. 3d 1096, 1117 (N.D. Iowa 2022) (finding the noncompete clause was valid in each of its terms since it works to service the interest of the public); U.S. Sec. Assocs., Inc. v. Parretti, 405 F. Supp. 3d 328, 333 (D. Mass. 2019) (concluding that even though the non-compete restricts the Defendants freedom of employment, it guarantees the plaintiffs the ability to freely carry out their business); Waguespack v. Medtronic, Inc., 185 F. Supp. 3d 916, 930 (M.D. La. 2016) (citing Louisiana's strong public policy restricting overly broad noncompetition agreements); McKissock, LLC v. Martin, 267 F. Supp. 3d 841, 857 (W.D. Tex. 2016) (holding that the non-compete provision is likely enforceable since McKissock demonstrated a strong likelihood of prevailing on the merits); Daily Instruments Corp. v. Heidt, 998 F. Supp. 2d 553, 567 (S.D. Tex. 2014) (holding that even a worldwide non-competition agreement may still be enforced in situations where identifying the geographical scope of the former employment is difficult); Cap. One Fin. Corp. v. Kanas, 871 F. Supp. 2d 520, 538 (E.D. Va. 2012) (finding the court will uphold a reasonable and limited covenant mutually agreed upon by both parties for substantial consideration, recognizing their right to the benefit of the bargain); Am. Express Fin. Advisors, Inc. v. Scott, 955 F. Supp. 688, 693 (N.D. Tex. 1996) ("[T]he Contract is enforceable, and the non-competition covenant is ancillary to the Contract, limited in scope and no broader than necessary to protect Plaintiff's interests. Accordingly, the Court finds that Plaintiff has a substantial likelihood of

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[34] *See id*.

[35] Christopher Wood, *Experts Weigh in on Implications of Failed FTC Non-Compete Ban*, THOMSON REUTERS (Sept. 5, 2024), https://tax.thomsonreuters.com/news/experts-weigh-in-on-implications-of-failed-ftc-non-compete-ban.

[36] *Id*. (suggesting employers prepare to draft non-compete notices and modify overbroad NDA's to be ready for any scenario).

prevailing on its breach of contract claim in Count 2 based on the facts in the pleadings."); Campbell Soup Co. v. Desatnick, 58 F. Supp. 2d 477, 493 (D.N.J. 1999) (concluding Desatnick did not meet his burden of showing he was likely to succeed at trial on the merits of his allegation that his non-competition agreement with Campbell was invalid and thus the non-compete was unenforceable).

For circuits that have held non-compete provisions in employer-employee contracts unenforceable,

See TruGreen Ltd. P'ship v. Okla. Landscape, Inc., 526 F. Supp. 3d 1080, 1093 (N.D. Okla. 2021) ("But because the TruGreen employment contracts prohibit former employees not only from direct, but also *indirect* solicitation of, contact with, or sales to TruGreen's customers, the contracts violate 15 O.S. § 219A, and are therefore unenforceable."); Ipsos-Insight, LLC v. Gessel, 547 F. Supp. 3d 367, 381 (S.D.N.Y. 2021) (holding that as a result of the court's ruling regarding the Non-Compete Clause, the two-week-notice provision in the contract was categorically unenforceable); O'Sullivan Films, Inc. v. Neaves, 352 F. Supp. 3d 617, 626 (W.D. Va. 2018) ("The lack of any geographic scope in [the Noncompete], which extends to places around the world where O'Sullivan has no legitimate business purpose in suppressing competition, renders it overbroad and unenforceable."); Distrib. Serv., Inc. v. Stevenson, 16 F. Supp. 3d 964, 973-74 (S.D. Ind. 2014) (concluding the non-compete was overbroad and unenforceable since the plain language of the non-compete clause would forbid Mr. Stevenson from engaging in a "[c]ompetitive [b]usiness [a]ctivity"); AMX Int'l, Inc. v. Battelle Energy All., 744 F. Supp. 2d 1087, 1095 (D. Idaho 2010) ("The court held that the absence of any geographic limitation, coupled with a prohibition against doing business with any Pinnacle client, rendered the noncompete agreement overly broad."); Lanmark Tech., Inc. v. Canales, 454 F. Supp. 2d 524, 531 (E.D. Va. 2006) (holding that since the non-compete clause was ambiguous and unreasonably strained Canales's opportunities to earn a living, it was unenforceable under Virginia law); Olander v. Compass Bank, 363 F.3d 560, 563 (5th Cir. 2004) (determining the non-compete provisions were unenforceable and concluding Compass had a low likelihood of success on the merits); Orthoflex, Inc. v. Thermotek, Inc., No. 3:10-CV-2618-D, 2011 WL 5879330, at *1 (N.D. Tex. Nov. 23, 2011) ("Under Texas law, when a court determines that a noncompete covenant is unenforceable as written, the court is required to reform it to the extent necessary to be reasonable. Therefore, if Wilford is correct and the noncompete covenant is unenforceable as written, the court must reform the covenant."); Palmer & Cay, Inc. v. Marsh & McLennan Cos., 404 F.3d 1297, 1306 (11th Cir. 2005) ("Applying this standard, Georgia courts refuse to enforce employment non-competition agreements that prohibit the employee from accepting unsolicited business from former clients after leaving employment.").

For references on how different circuits have interpreted the FTC's substantive rulemaking power under the Act,

See Nat'l Auto. Dealers Ass'n v. F.T.C., No. 24-60013, 2025 WL 304460, at *8 (5th Cir. Jan. 27, 2025) (finding the FTC breached Section 706(2) of the APA by issuing an advance notice of proposed rulemaking before finalizing the Combating Auto Retail Scams Trade Regulation Rule, disregarding its own regulatory requirements—an innocuous procedural error); Nat'l Horsemen's Benevolent & Protective Ass'n v. Black, 107 F.4th 415, 426 (5th Cir. 2024) (stating that the Horseracing Integrity and Safety Authority's rulemaking power is subordinate to the FTC's in light of a congressional amendment to the Horseracing Integrity and Safety Act, giving the FTC the same rulemaking authority as the SEC in regards to Financial Industry Regulatory Authority); Pharm. Rsch. & Mfrs. of Am. v. F.T.C., 790 F.3d 198, 212 (D.C. Cir. 2015) ("The FTC action is supported by reasoned decisionmaking; the agency did not rely on factors which Congress did not intend for it to consider; and the Rule was promulgated in observance of procedures required by law. In sum, there is nothing in the record to support PhRMA's claims that the FTC violated 5 U.S.C. § 706(2)(A) or (D) when it promulgated the Rule."); POM Wonderful, LLC v. F.T.C., 777 F.3d 478, 497 (D.C. Cir. 2015) (holding that it is well-established that an agency is not barred from introducing new precepts during an adjudicative proceeding and the line between rulemaking and adjudication primarily rests within the agency's discretion); Pharm. Rsch. & Mfrs. of Am. v. F.T.C., 44 F. Supp. 3d 95, 117 (D.C. Cir. 2014) (noting the FTC has broad rulemaking authority to prescribe rules which are necessary and appropriate to carry out purposes of under the section); Nat'l Petroleum Refiners Ass'n v. F.T.C., 482 F.2d 672, 709 (D.C. Cir. 1973) ("Thus the history of the pertinent 1914 debates leaves us with a few affirmative indications that Section 6(g) encompassed substantive rule-making and a few cryptic indications that this is not so. As a consequence, the need to rely on the section's language is obvious."); Am. Fin. Servs. Ass'n v. F.T.C., 767 F.2d 957, 991 (D.C. Cir. 1985) ("[W]e conclude that the FTC has not exceeded its authority to promulgate rules proscribing unfair practices under [section] 5(a) . . . of the FTC Act.") ; Katharine Gibbs Sch. (Inc.) v. F.T.C., 612 F.2d 658, 661 (2d Cir. 1979) ("The Commission proceeded originally under the rulemaking power granted it in section 6(g) of the Federal Trade Commission Act, 15 U.S.C. s 46(g), which in National Petroleum Refiners Association v. FTC, . . . was held broad enough to permit the issuance of substantive as well as procedural rules.").

For relevant secondary sources that would be useful for additional research or discussion,

See William Holmes & Melissa Mangiaracina, *§ 1:2. Significant Sherman Act § 1 Developments*, Antitrust Law Handbook (Nov. 2024 Update) ("[A]nd by the

FTC's finalization in 2024 of a rule banning most employee non-compete agreements in the U.S. as an unfair method of competition in violation of § 5 of the FTC Act, but that was immediately challenged in the courts with conflicting results as to its validity."); *§ 16:1. Overview, Callmann on Unfair Competition, Trademarks & Monopolies* (4th ed.), Unlawful Conduct of Business (Dec. 2024 Update) ("For non-compete clauses that existed prior to the effective date, those for senior executives can remain in force, but non-compete agreements with other workers do not remain in force."); Steven C. Kahn et al., *§ 8:20. Covenants Not to Compete in Employment Agreements—Federal Trade Commission Final Rule*, Legal Guide to Human Resources (Nov. 2024 Update) ("The final rule requires employers to provide notice to current and former workers who are covered by a noncompetition agreement. The notice, which can be delivered by email, text message, or hard copy (via regular mail or by hand), must explain that such agreements are no longer enforceable."); *§ 3.4. Employment Contracts for Founders*, Representing Startups (Nov. 2024 Update) ("From the company's standpoint, the agreement should also provide for the nondisclosure of trade secrets and proprietary data, and, if enforceable in the applicable jurisdiction, noncompetition agreements covering the period both during and after employment."); Joe Canterbury, Jr. & Brad Gaswirth, *§ 2.23. Business and Contractual Relations and Competition—Covenants Not to Compete, Disclose, or Solicit*, Texas Construction L. Man. (3d ed.) (Dec. 2024 Update) ("[C]onsideration for a noncompete that is reasonably related to an interest worthy of protection, such as trade secrets, confidential information or goodwill, satisfies the statutory nexus; and there is no textual basis for excluding the protection of much of goodwill from the business interests that a non-compete may protect.") (citing Marsh USA Inc. v. Cook, 354 S.W.3d 764, 775 (Tex. 2011)); James Langenfeld et al., *The Evidentiary Foundations of the Federal Trade Commission's Non-Compete Rule*, ANTITRUST SOURCE (Oct. 2024) ("The FTC states that it is not finding that non-competes in business entity sales are procompetitive, rather that because it has 'seen fewer changes [related to non-competes and business entity sales] recently than the laws applicable to non-competes that arise solely out of employment, there have not been natural experiments allowing researchers to assess this type of non-compete's effect on competition.'").

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