

PUBLICATION

Non-Competes Still Play but Employers Need to Keep Their Eye on the Ball

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If you bet against the FTC's Rule banning non-competes, the odds in your favor just got better. Yesterday, a Texas federal court entered an order with *nationwide* effect, holding that the FTC Non-Compete Rule "shall not be enforced or otherwise take effect" as planned on September 4, 2024. The holding is consistent with the analysis the court applied last month in entering a preliminary injunction applicable only to the parties. Yesterday's order framed the threshold question in the case as "not what the [FTC] thinks it should do but what Congress has said it can do," and determined that Congress did not authorize the agency to promulgate substantive rules regarding unfair methods of competition. The court also found the rule to be arbitrary and capricious. The court found the Rule "unreasonably overbroad without a reasonable explanation," concluding "in sum, the Rule is based on inconsistent and flawed empirical evidence, fails to consider the positive benefits of non-compete agreements, and disregards the substantial body of evidence supporting these agreements." *Ryan, LLC v. Federal Trade Commission*, Civil Action No. 3:23-00986, Memorandum and Opinion Order (N.D.Tex. August 20, 2024).

As with the decisions in *ATS Tree Services* and *Properties of the Villages*, covered in our prior alerts: "All Eyes on Pennsylvania Federal Court After Texas Court Issues Limited Injunction Against FTC Non-Compete Rule," "Employers Should Consider Alternative Protections to Address Lack of Clarity Around Non-Compete Rule," "Trust, but Verify: The Power of Audits to Protect Your Competitive Edge as Non-Compete Ban Looms," and "Guardians of the Goldmine: Building an Effective Confidentiality Program," the decision is subject to appeal. Given that the next stop for *Ryan* is the more employer-friendly Fifth Circuit, and then to the Supreme Court in a post-*Chevron* deference world, the FTC's Non-Compete Rule's chances of revival in its current form do not seem promising.

So what should employers do now? The court's decision should not be considered a sign to go back to business as usual. Even without the FTC Non-Compete Rule, the FTC has other enforcement mechanisms, there are increasing state law restrictions, and some courts are hostile toward non-competes, all of which will continue to make enforcing non-competes a challenge. Instead, this near miss gives a fresh opportunity to evaluate all available steps to getting your house in order when it comes to protecting against competitive threats. Employers who put all their eggs in the non-compete basket may experience the consequences of not having a broader system of safeguards for protecting their most valuable intellectual property, confidential information, and customer goodwill. That is why we are hosting a multidisciplinary panel, "Preparing for September 4: Protecting Your Company's Trade Secrets, Competitive Edge, and Goodwill Amid the FTC's Ban on Non-Competition Agreements" on August 27 focusing on the many ways, independent of non-competes, companies can protect their most valuable assets. Creating a culture of security, confidentiality, and compliance requires more than just a contract with employees. It's easier to accomplish when your confidentiality becomes a program or functional area of your business in the same way as your teams, like Safety or Accounting. A programmatic approach to safeguarding the confidential and proprietary assets that make your company successful is the best way to neutralize the impact of threats like a non-compete ban on your business.

If you have questions regarding the recent decision on the FTC's Non-Compete Rule or the multidisciplinary panel we are hosting, please reach out to [Jennifer L. Anderson](#), [Theresa M. Sprain](#), or a member of Baker Donelson's [Labor & Employment Group](#).