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FEDERAL COURT BLOCKS FTC'S NON-COMPETITION BAN

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As reported in Shumaker's prior Client Alert, on April 23, 2024, the Federal Trade Commission (FTC) implemented a Final Rule banning nearly all non-competition agreements as of September 4, 2024. Under this Final Rule, employers would have been prohibited from entering into or enforcing non-competition agreements in most instances and were required to provide written notice to all workers subject to a non-competition agreement of their invalidity by the September 4, 2024 effective date.

Since the Final Rule's publication, there have been multiple legal challenges with varying outcomes. Earlier this year, a U.S. District Court in Texas held that the FTC lacked the authority to issue the Final Rule and granted a temporary injunction prohibiting the FTC from enforcing it. However, the Court specified that this injunction was only applicable to the FTC's attempt to enforce the rule against the parties in that lawsuit. Subsequently, a U.S. District Court in Pennsylvania issued a contrary ruling and held that the FTC did have the authority to issue the Rule prohibiting non-competition agreements. Just last week, a U.S. District Court in Florida also granted a temporary injunction prohibiting enforcement of the FTC's Final Rule but again limited the injunction to only the parties in the lawsuit. With the September 4, 2024 effective date fast approaching, employers were anxiously awaiting further guidance as to whether the Final Rule would go into effect.

On August 20, 2024, the U.S. District Court in Texas that had previously issued the limited temporary injunction granted summary judgement to the parties challenging the Final Rule. The Court invalidated the FTC's Final Rule on two grounds: the FTC lacked authority to issue the Final Rule, and the Rule was arbitrary and capricious. Specifically, the Court held that "the FTC lacks substantive rulemaking authority with respect to unfair methods of competition…" and therefore, "the Commission has exceeded its statutory authority in promulgating the Non-Compete Rule." The Court further held that the Final Rule's "one-size-fits-all approach" and "lack of evidence as to why [the FTC] chose to impose such a sweeping prohibition… renders the Rule arbitrary and capricious."

Finding that the FTC exceeded its statutory authority and that the Rule was arbitrary and capricious, the District Court then set aside the Final Rule. The setting aside of the Final Rule "has nationwide effect, is not party-restricted, and affects persons in all judicial districts equally." With this ruling, the FTC's Final Rule will not go into effect on September 4, 2024, and employers will not need to comply with it by this date.

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However, this is likely not the last that employers will hear about the FTC's Final Rule. The FTC has already announced an intent to consider an appeal of this decision, which may last for multiple years. While employers should remain vigilant, the Texas and Florida District Court opinions suggest that it is unlikely that the FTC will be successful with such an appeal.

Although employers may not need to worry about the FTC's Rule on non-competition agreements for now, it is not the only federal agency seeking to curb employers' use of non-competition and non-solicitation provisions. As reported in Shumaker's Client Alert, the National Labor Relations Board (NLRB) issued guidance in 2023 that many non-competition and non-solicitation provisions were in violation of federal law. Since this guidance was issued, the NLRB has filed multiple enforcement actions against employers as to their use of such provisions. If employers have not reviewed their existing non-competition and non-solicitation agreements since 2023, they are advised to do so, notwithstanding the blocking of the FTC's Final Rule.

If you have any questions or need assistance with your restrictive covenants, please contact Jan Pietruszka or Brad deBeaubien.

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