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FTC Appeals Noncompete Ban Ruling

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The Federal Trade Commission ("FTC") has appealed a ruling from a federal court in Texas that blocked its sweeping ban of noncompete agreements. As Benesch previously highlighted in August, a federal district court in Texas permanently blocked the FTC's attempt to ban noncompete agreements, determining that the ban exceeded the FTC's authority and, thus, was an illegal attempt to expand the FTC's rulemaking authority. The Texas Court also found that the ban was arbitrary and capricious and in violation of the Administrative Procedure Act. If it had been implemented, the FTC rule would have banned nearly all noncompete agreements between employers and employees as "unfair method[s] of competition."

On October 18th, the FTC filed a notice of appeal with the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit is unlikely to reverse the Texas Court's opinion. Many of the Biden Administration's regulatory endeavors have been struck down by the Fifth Circuit in the past (such as the Department of Labor's tip credit rule, which the Fifth Circuit vacated in August). Whether the FTC continues its litigation also could depend on the outcome of the 2024 presidential election, as the FTC previously voted 3-2 along party lines to approve the ban, with both Republican commissioners voting against the ban.

The notice of appeal does not, by itself, impact the status of the noncompete ban, and employers can continue to use noncompete agreements (subject to the many state law considerations that apply). However, employers should continue to review their noncompete practices as this litigation continues. Benesch attorneys are ready to assist employers in reviewing their noncompete agreements and practices and will continue to monitor the status of this litigation as it heads to the Fifth Circuit. For more information, please contact:

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