CLIENT ALERTS & INSIGHTS

Race to the Courthouse: Early Attempts to Block the FTC's Non-Compete Ban Start Pouring In

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Less than one day after the Federal Trade Commission ("FTC") issued its Final Rule that would enact a nationwide ban on most non-competition agreements, at least two lawsuits have been filed against the FTC which seek to invalidate the Final Rule.

As we explained in a prior alert, the Final Rule proclaims that most non-competition agreements are a form of unfair competition and enacts a sweeping ban. Once the Final Rule goes into effect (180 days after officially publication in the Federal Register, barring a court order that would state otherwise), companies are prohibited from entering into any new non-competition agreement with any worker. Similarly, the Final Rule invalidates all previously executed non-competition agreements with all workers *except* for those with "senior executives." Companies would be required to inform all non-senior executives that their non-competition agreements are unenforceable and void. A "senior executive" is limited to an employee in a "policy-making position" who earned the equivalent of $151,164 in the prior year. The only significant exception to the Final Rule is a non-competition agreement executed pursuant to the sale of a business, which would still be permitted so long as the individual subject to the non-competition agreement had an ownership interest in the sold business. Beyond non-competition agreements, the Final Rule would also ban non-solicitation agreements if those agreements have the effect of prohibiting the worker from accepting other employment. The Final Rule would "supersede" any state law that upholds a non-competition agreement.

As anticipated, lawsuits seeking to prevent the non-competition ban from taking effect have come quickly on the heels of yesterday's vote to enact the ban, with tax services firm Ryan, LLC filing its Complaint in the Federal District Court for the Northern District of Texas last night, and the U.S. Chamber of Commerce (among other named plaintiffs) trying their hand in the Federal District Court for the Eastern District of Texas this morning. The Ryan, LLC Complaint seeks declaratory relief which would declare the new rule unenforceable. The Chamber of Commerce Complaint seeks the same declaratory relief, but also requests injunctive relief, which would halt enforcement of the new rule until its enforceability can be adequately litigated.

The parties bringing their claims do not mince words in their characterizations of the new rule. Ryan, LLC pointedly asserts that "[a]ccording to the Commission, it has the authority to take this momentous step, which retroactively invalidates 30 million employment contracts and preempts the regulatory regimes of at least 46 States, because a provision of the Federal Trade Commission Act . . . that authorizes procedural rules supposedly also authorizes a sweeping substantive prohibition on 'unfair methods of competition'-and because, the FTC maintains, non-competes are nearly always 'unfair.' If ever a federal agency attempted to pull an elephant out of a mousehole, this is it." The

Chamber of Commerce's Complaint contends that "[t]he Commission's astounding assertion of power breaks with centuries of state and federal law and rests on novel claims of authority by the Commission" and that the Final Rule's "assessments of costs and benefits demonstrated that it was the product of political pressure, not careful economic analysis."

Ultimately, both Complaints assert the same primary legal grounds for the Final Rule's unenforceability: that the rulemaking exceeds the authority bestowed upon the FTC by Congress. Both Complaints point to the fact that, for over a century since the FTC's inception and until 2022, the FTC "effectively never applied the FTC Act to non-compete agreements." The Chamber of Commerce Complaint goes further, asserting that the FTC "has often taken the position that it lacks authority to issue substantive rules at all."

The two Complaints also assert a number of other tangential arguments, including: that the rulemaking was arbitrary and capricious; that applying the rulemaking retroactively is unlawful; that enforceability of non-competes is a case-by-case inquiry.

These Complaints are among the first seeking to slow or prevent enforcement of the Final Rule but will certainly not be the last. We will continue to provide updates as challenges are lodged and the effective date, anticipated to be late August 2024, approaches.

For more information on this Final Rule or to learn how it can affect your business, contact a member of Benesch's Labor & Employment Practice Group.

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