

# The FTC Rule To Ban Non-Competes is (Maybe) 30 Days Away - What You Need To Know and What You (May) Want To Do

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The hot mess known as the FTC Rule to Ban Non-Competes (“Rule”) continues to get hotter and messier as two Federal District Courts issue conflicting opinions. This conflict between the Federal Courts will not be resolved before the Rule’s “enactment” date of Sept. 4, 2024. Given the uncertainty over the Rule, below is a short Q&A follow-up to our April 23, 2024 Client Alert that provides the latest updates on the Rule and the options companies have regarding compliance.

## **Q: Remind me again, what does the Rule state exactly about banning Non-Competes?**

The Rule states that “it is an unfair method of competition for a person:

- (i) To enter into or attempt to enter into a non-compete clause;
- (ii) To enforce or attempt to enforce a non-compete clause; or
- (iii) To represent that the worker is subject to a non-compete clause.”

The Rule contains an exception for “Senior Executives,” which is discussed below.

## **Q: Ok. And how does the Rule define a Non-Compete clause?**

According to the rule, a “*non-compete clause* means a contractual term between an employer and a worker that prevents the worker from a) seeking or accepting work in the United States with a person” or b) operating a business in the United States after the conclusion of the [worker’s] employment.”

## **Q: I thought a Texas Federal Court blocked the Rule?**

It did, but not permanently. On July 3, 2024, the United States District Court for the Northern District of Texas (“Texas Court”) issued a *preliminary* injunction partially blocking the Rule. In doing so, the Texas Court agreed with the plaintiffs (most notably, the US Chamber of Commerce) that the FTC lacked the substantive rulemaking authority to issue a Non-Compete Ban and the Rule was arbitrary and capricious. Consequently, the plaintiffs were entitled to a preliminary injunction.

## **Q: If the Texas Court blocked the Rule, what happened in Pennsylvania? Doesn’t the Pennsylvania Court have to follow the decision from the Texas Court?**

Generally speaking, Federal District Courts located in one state are not bound by the decisions of Federal District Courts located in other states. Thus, the United States District Court for the Eastern

District of Pennsylvania (“Pennsylvania Court”) was not required to follow the Texas Court’s decision to block the Rule. And it chose not to do so.

Specifically, the Pennsylvania Court found that a) the plaintiff (a small tree trimming company) could not demonstrate a need for a preliminary injunction because its concerns of an employee exodus resulting from a Non-Compete Ban were “too speculative,” and b) the FTC has the regulatory authority - which the Pennsylvania Court acknowledged has gone essentially unused for decades - to enact the Rule under the guise/claims of protecting against unfair methods of competition.

**Q: So now what is going to happen in Texas and Pennsylvania? And is there any other lawsuit/challenge I need to be aware of?**

Let’s start in Pennsylvania. As of today, the plaintiff has not appealed the decision. For those of you who have been involved in lawsuits involving injunctive relief, you know that it can be an uphill battle (but not impossible) to have a court grant a permanent injunction after initially denying a request for a preliminary injunction. Here, it is unlikely that the Pennsylvania plaintiff will be able to raise any claims or arguments that were not raised and decided when the Pennsylvania Court initially declined to block the Rule. As such, the likelihood of the Pennsylvania Court changing its mind and blocking the Rule seems remote and the best course of action for the Pennsylvania plaintiff is to not appeal the preliminary injunction ruling at this time. Accordingly, additional immediate action in the Pennsylvania Court is unlikely.

There is also a lawsuit challenging the Rule in the United States District Court for the Middle District of Florida (“Florida Court”). The Florida lawsuit, which was brought by a real estate company, is still in the briefing stage and the Florida Court scheduled an Aug.14 hearing on the plaintiff’s request to block the Rule. Notably, several financial services companies have filed amicus briefs in support of the Florida plaintiff. Still, the Florida Court’s decision will likely not move the needle with respect to the Rule. Rather, it will simply give one side of the argument the claim of having two courts siding on its behalf, and we predict that the Florida Court will side with the Texas Court and block the Rule. Consequently, all eyes are (and should be) on Texas.

The Texas Court plans to make its final ruling on Aug. 30. Although the preliminary injunction in the Texas Court was limited to only the plaintiffs in the Texas case, several Amicus Briefs have been filed - including briefs from the American Hospital Association, the Federation of American Hospitals and the American Property Casualty Insurance Association - and it appears likely that the Texas Court will nationally ban the Rule. The Texas Court’s decision will then be appealed by the FTC to the United States Fifth Circuit Court of Appeals, which is known for its opposition to President Biden’s policies. In other words, it is highly unlikely that the Fifth Circuit will find for the FTC.

**Q: So, what are my options?**

Companies currently have two options. One is to wait until the Texas Court issues its final ruling on Aug. 30. The other choice is to take steps now to *prepare* for the Rule’s Sept. 4 enactment in the event the Texas Court does not nationally ban the Rule on Aug. 30. Companies should *not*, however, issue any notices rescinding their non-competes until after the Texas Court issues its Aug. 30 ruling, and then only if the Texas Court does not block the Rule.

**Q: What can I do to prepare in case the Texas Court decides to not issue a permanent injunction on Aug. 30?**

As discussed in our April 23, 2024 [Client Alert](#), all non-competes, outside of those with senior executives, regardless of when the non-competes were executed, are banned. For senior executives, all existing non-competes remain enforceable but the company will not be able to enter into new non-competes with senior executives. A senior executive under the Rule is a worker who:

(1) Was in a policy-making position; and

(2) Received from a person for the employment (see our April 23, 2024 [Client Alert](#)):

(i) Total annual compensation of at least \$151,164 in the preceding year; or

(ii) Total compensation of at least \$151,164 when annualized if the worker was employed during only part of the preceding year; or

(iii) Total compensation of at least \$151,164 when annualized in the preceding year prior to the worker's departure if the worker departed from employment prior to the preceding year and the worker is subject to a non-compete clause.

A "policy-making position" means:

A business entity's president, chief executive officer or the equivalent, any other officer of a business entity who has policy-making authority, or any other natural person who has policy-making authority for the business entity similar to an officer with policy-making authority. An officer of a subsidiary or affiliate of a business entity that is part of a common enterprise who has policy-making authority for the common enterprise may be deemed to have a policy-making position for purposes of this paragraph. A natural person who does not have policy-making authority over a common enterprise may not be deemed to have a policy-making position even if the person has policy-making authority over a subsidiary or affiliate of a business entity that is part of the common enterprise.

Accordingly, step one is to identify who qualifies as a "senior executive." Once this identification is made, the next step is to decide whether and how to notify the senior executive that s/he is still subject to a non-compete.

Step two is to draft a notice that "provides clear and conspicuous notice to the worker that the worker's non-compete clause will not be, and cannot legally be, enforced against the worker." The notice must a) identify the company that entered into the noncompete with the worker and b) be "paper delivered by hand to the worker, by mail at the worker's last known personal street address, by email at an email address belonging to the worker, including the worker's current work email address or last known personal email address, or by text message at a mobile telephone number belonging to the worker." A sample notice can be found in our April 23, 2024 [Client Alert](#).

Step three is to identify former employees who are still subject to your company's non-compete because the Rule requires the company to provide notice to all "workers" subject to a non-compete, not just current employees.

Step four is to remove non-compete language from your agreements.

**Q: What should we do if the Texas Court does not block the Rule or only decides to block the Rule with respect to the named plaintiffs? Will my company be at risk for violating the Rule because of the Pennsylvania Court decision?**

The answer to these two questions comes down to a company's risk tolerance level and goals. If the company does not want any potential issues with the FTC, it could simply decide to live with the Rule, rescind its non-competes and issue the required notices. The challenge with this approach is that the company will not be able to "claw back" its non-competes if/when the Appellate Courts or United States Supreme Court strike down the Rule, or a new President appoints a Republican majority to the FTC board, and the FTC board rescinds the Rule.

If a company wants to take an aggressive posture, it could file its own legal action against the FTC seeking a Declaration and Injunction similar to the one given to the Texas plaintiffs. This would obviously require the company to invest business resources and incur legal costs to challenge the FTC.

A third option is to keep the non-competes in place while the court cases work through the Federal court system. The Rule states that a company does not violate the Rule if the company "has a good-faith basis to believe that [the Rule] is inapplicable." In its explanatory support for the Rule, the FTC stated that "the absence of a judicial ruling on the validity of the final Rule does not create a good-faith basis for non-compliance." The Texas Court, however, has determined that the Rule is invalid and, as such, a judicial ruling that invalidates the Rule exists. Consequently, the Texas Court's ruling appears to provide a company with a good faith basis for not complying with the Rule and continuing to enforce its non-competes.

**Q: Of the three options, which do you recommend?**

Obviously, the answer to this question depends on the goals and risk tolerance of your company. That said, we believe relying on the good faith exception (assuming the Texas Court bans the Rule on Aug. 30) is the most prudent course of action for most companies.

**Q: Who can I talk to if I have additional questions about the Rule?**

Benesch's Trade Secrets, Restrictive Covenants and Unfair Competition Group is here to answer any questions you may have regarding the Rule, the pending litigation, whether your restrictions may be covered by the Rule, and/or how to notify your workers if the Rule takes effect.

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