

# FTC Appeals Texas Court's Decision to Set Aside the Noncompete Ban

## WRITTEN BY

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The Federal Trade Commission (FTC) has filed a notice of appeal of the Northern District of Texas's decision granting plaintiffs' summary judgment motion and "setting aside" the agency's rule banning nearly all employee noncompete agreements. This is the second case appealed by the FTC, following its earlier appeal of a Florida federal court's decision enjoining the FTC rule with respect to the individual Florida plaintiff. A third case challenging the FTC's rule in Pennsylvania federal court was voluntarily dismissed by the plaintiff in early October. For now, the rule will remain on hold as the appeals make their way through the Fifth and Eleventh Circuits.

The Texas and Florida courts' analyses differed. The Texas court held that the FTC did not have the authority to promulgate "substantive rules regarding unfair methods of competition." Instead, the court determined that the pertinent section of the FTC Act — Section 6(g) — is "a housekeeping statute," authorizing rules regarding the agency's practices and procedures. The Florida court, on the other hand, held that Congress granted the FTC the authority to make rules to prevent unfair methods of competition, but that given the economic significance of noncompetes, the noncompete rule likely violates the major question doctrine.

The Pennsylvania court took a third approach, denying plaintiff's request for preliminary injunctive relief and finding that the FTC likely has the authority to issue substantive unfair competition rules, including a rule prohibiting noncompetes as a class and that the rule likely does not violate the non-delegation doctrine. Following the court's decision that the plaintiff's challenge was unlikely to succeed on the merits, plaintiff sought a stay. In opposition to the stay, the FTC argued that it would be unfair to allow the Pennsylvania plaintiff "to avail itself of [the Texas court's] judgment . . . while preserving [p]laintiff's challenge to the Rule indefinitely, for the sole purpose of reviving it in the event the Commission were to prevail in an appeal in another circuit." After the Pennsylvania court refused to stay the proceedings, the plaintiff voluntarily dismissed its challenge.

Regardless of which candidate wins the presidential election, a new administration will decide the leadership of the antitrust agencies and whether to continue the FTC's appeals in the Fifth and Eleventh Circuits. Further, the timing of the appeals is unclear, and so is whether one or more appeals will eventually go to the Supreme Court. The FTC also has suggested that its appeals might not focus solely on the merits and has questioned whether the Texas court had the authority to set aside a rule or issue an injunction on a nationwide basis. Accordingly, an appeal could be decided on a number of different grounds.

For now, the FTC's worker noncompete ban remains stalled and companies need not issue the required employee notice. Employers, however, should remain alert to legal developments, particularly given the state and federal, and bipartisan concern regarding such restrictions, the active role of state attorneys general, and the varied approach state legislatures have taken on the issue.

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