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Pennsylvania Court Denies Injunction Against FTC's Noncompete Ban

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In direct conflict with a recent Texas court ruling, on July 23, an Eastern District of Pennsylvania court denied ATS Tree Services' motion for a preliminary injunction to stay the effective date of the Federal Trade Commission's (FTC) noncompete ban. The *ATS* court limited application of its decision to the plaintiff, but its holding — "the FTC is empowered to make both procedural and substantive rules as is necessary to prevent unfair methods of competition" — conflicts with the Texas federal court's conclusion that "the FTC lacks the authority to create substantive rules." The Texas court intends to rule on the merits of its case by August 30, just four days before the ban's effective date. While it seems likely that the Texas court will strike down the noncompete ban, given that this decision may not come down until the eve of the ban (and may not ultimately rule in favor of plaintiffs), employers should take steps now to prepare for the possibility of the ban becoming effective right after Labor Day.

The *ATS* court found that the plaintiff failed to meet two requirements for the entry of a preliminary injunction, that it is likely to succeed on its claim that the FTC lacked authority to issue the noncompete rule, and that it will be irreparably harmed if the rule goes into effect. The merits arguments were essentially the same in the *ATS* case as in the Texas case, but the *ATS* court rejected the arguments that the FTC exceeded its authority.

Applying the U.S. Supreme Court's recent decision in *Loper Bright Enterprises v. Raimondo,* the *ATS* court analyzed whether the FTC exceeded its statutory authority under the FTC Act by issuing the noncompete ban rather than applying the principle of *Chevron* to defer to the agency's interpretation of the FTC Act. Despite this lack of deference, however, the court relied heavily on the FTC's nonbinding 2022 policy statement. Less than a month after Chair Khan's senate confirmation, the FTC, in a 3-2 vote along party lines, withdrew its 2015 policy statement, replacing it with the more controversial, less stringent, and more flexible 2022 policy statement. The nonbinding policy statement lays out the FTC's current position regarding the scope and history of Section 5 of the FTC Act.

Additionally, the court accepted the FTC's contention that noncompete agreements are "not justified by legitimate business purposes" and are "exploitative and coercive" when entered into with employees who are not senior executives. The former is significant because, under traditional antitrust analysis, if a plaintiff succeeds in proving that a restraint harms competition, the burden shifts to the defendant to show that its behavior has procompetitive justifications.

The court's opinion did not address the dissenting statements of the two Republican commissioners and dismissed the arguments of ATS and the *amici* supporting the stay. For example, the fact that the agency did not issue substantive rules until 1962, and even doubted that it had the authority to issue substantive rules, was left to

a footnote. Importantly, the court offered little guidance as to what principles exist to limit the FTC's issuance of other substantive rules under Section 6(g), besides that such rules must concern "unfair methods of competition," a phrase the court states Congress wrote to be "intentionally vague."

The court found further that ATS failed to meet its burden of proving irreparable harm and characterized the arguments that its employees could quit absent a noncompete provision and that it would have to scale back its training program as "speculative."

The court's ruling on the preliminary injunction motion is not a final judgment in the case, but its approach to preliminary injunction and its finding that the plaintiffs did not demonstrate either a "substantial likelihood of success on the merits" or "irreparable harm" strongly suggest that it will ultimately deny the plaintiff's request for a permanent injunction. While the Texas court has committed to issuing a decision on the merits by August 30, the *ATS* court has not signaled when it will do so. Meanwhile, a parallel case has been filed in a third federal court, this one in Florida. This means that at least the Third, Fifth, and Eleventh Circuits will each have an opportunity to address the important issues regarding the FTC's authority and noncompete agreements. If, after appellate review, a conflict remains, Supreme Court review is likely. What is not likely, however, is that this issue will be resolved definitively before the September 4 effective date of the FTC ban.

The FTC's noncompete rule, if it becomes effective, will apply to any written or oral employment provision or policy that penalizes or prevents a worker from (a) seeking or accepting work in the U.S. with a different employer, or (b) operating a business in the U.S. after the conclusion of employment that includes the noncompete term or condition. The rule prohibits entering into new noncompete agreements on or after the September 4, 2024 effective date with any worker and enforcing or attempting to enforce a noncompete clause that existed before the effective date for any worker except for those who qualify as senior executives. The FTC ban also requires employers to give notice to all current and former individuals under a noncompete that their noncompete is unenforceable. The ban does not apply to customer or employee nonsolicitation agreements. It also does not apply in the context of the sale of a business.

For a more thorough review of the rule see FTC Bans Employee Noncompete Clauses | Troutman Pepper.

What's Next?

The noncompete ban has a lengthy legal battle ahead of it. The Pennsylvania court decision does not modify the Texas court decision, which limited its preliminary injunction ruling to only the plaintiffs and rejected a request to issue a nationwide preliminary injunction. Therefore, companies should continue to plan for implementation of the rule on September 4.

A few things employers can do to be prepared include:

- Assess existing agreements imposing post-employment restrictions, including noncompetition agreements that would be banned under the FTC rule, and confidentiality and nonsolicitation agreements that are not.

- Consider improvements and clarifications that could strengthen your nonsolicitation and confidentiality agreements regardless of the noncompete ban's future. Clear and precise drafting is essential, and employers

with workers in multiple states must account in their agreements for the many different and evolving state laws.

- Prepare to provide the required notice under the final rule to all workers (other than senior executives) who are subject to oral or written noncompete provisions or policies. Compile the relevant worker contact information and draft the notices. If the rule becomes effective, notification must be made by the effective date.

Troutman Pepper will continue to monitor the developments and progress concerning the rulemaking, the lawsuits challenging the ban, and its potential impact on employers and their operations. If you have any questions, comments, or concerns about the proposed rule and its implications, our Labor + Employment and Antitrust attorneys are available to guide you through these issues and evaluate the best strategy for your business.

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