

Court Direction on FTC's Noncompete Ban Expected This Summer

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The U.S. District Court for the Eastern District of Texas has issued an aggressive scheduling order that “should allow prompt resolution of” one of the initial challenges to the FTC’s noncompete ban “with sufficient time, before the rule’s effective date, for ... appellate review.” Briefing under the court’s schedule will be completed by June 19, 2024. The court will presumably rule on the request to enjoin the rule shortly after that to allow for appellate review before the rule’s effective date, which will likely be in September 2024 (120 days after the ban is published in the *Federal Register*).

The FTC’s Noncompete Rule The rule is very broad and bans almost all noncompetes in for-profit businesses, subject to limited exceptions such as an exception for noncompetes between franchisors and franchisees and noncompetes executed in conjunction with the sale of certain businesses. The rule does not apply to nonprofit organizations, over which the FTC does not have jurisdiction. The ban on noncompetes applies to senior executives, which the rule defines as workers earning more than \$151,164 annually who are in policymaking roles. However, the rule allows existing noncompetes for senior executives to remain in force. Noncompetes covered by the rule, including existing noncompetes for non-senior executives, will become unenforceable unless the rule is enjoined or stayed before then and employers with noncompetes covered by the ban will be required to notify affected employees that their noncompetes are no longer enforceable. The FTC’s rule comes amid a wave of pro-employee policymaking by federal regulatory bodies. The National Labor Relations Board, for example, recently issued an enforcement memorandum asserting that many noncompete agreements violate the National Labor Relations Act. The NLRB’s position may spell trouble for employers even if the FTC’s rule is stayed or enjoined. The NLRB also held that the NLRA prohibits many confidentiality and non-disparagement provisions in severance agreements.

Lawsuits Seeking to Enjoin the Rule Several lawsuits to enjoin the ban have been filed. One of the most high-profile suits was filed by the Chamber of Commerce and two other organizations and is pending in the Eastern District of Texas. The plaintiffs argue that the rule violates the Administrative Procedure Act for various reasons, including that it exceeds the FTC’s rulemaking authority, is “premised on a legally erroneous understanding of unfair methods of competition,” and is

impermissibly retroactive. The plaintiffs have moved for a preliminary injunction prohibiting the FTC from enforcing the rule and postponing the rule's effective date during the pendency of the case. The court overseeing the Chamber of Commerce case has consolidated a trial on the merits, if necessary, with a hearing on the motion for a preliminary injunction. The court has also indicated that the parties may move for summary judgment in advance of that trial/hearing. Briefing on the motion for a preliminary injunction and motions for summary judgment will be completed by June 19, 2024. As noted above, the court has indicated that it will resolve the case expeditiously, with enough time for appellate review before the rule goes into effect (120 days after it is officially published, which corresponds to an effective date in September). A decision could come as soon as late June or early July but is likely before early August, at the latest, unless the court's schedule changes. A decision could enjoin the entire rule or only part of it (for example, there is a specific challenge to the retroactive nature of the rule — a ruling in the plaintiff's favor on that issue but not other issues would seemingly mean that the rule goes into effect but does not apply to current noncompetes). **What to Do** Employers should prepare as though the rule will go into effect in or around September 2024 but should stay tuned for updates as a decision on whether the rule will be allowed to go into effect (and a decision on an appeal from that decision) are expected before then.

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