



Texas Federal Court Strikes Down FTC Ban on Non-Compete Agreements

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On Tuesday, federal district court judge Ada Brown struck down the Federal Trade Commission (FTC) ban on non-compete agreements in the Northern District of Texas. Judge Brown had preliminarily enjoined the rule's enforcement as to the plaintiffs in that particular case, but stated that Tuesday's ruling is effective nationwide.

In rejecting the FTC's attempt to seize rulemaking authority that Congress has not affirmatively granted to it and finding that the Commission exceeded its statutory authority in issuing the non-compete ban, the court's latest decision held that the FTC "lacks the authority to create substantive rules" and is vested only with "the power to prevent unfair methods of competition." Judge Brown added that "[t]he role of an administrative agency is to do as told by Congress, not to do what the agency thinks it should do." The court also concluded that the rule itself is "arbitrary and capricious because it is unreasonably overbroad without a reasonable explanation." According to Judge Brown's opinion, the rule is the product of the FTC's comparison of different states' approaches to enforcing non-competes based on specific factual situations; and yet, the Commission chose to impose a sweeping, categorical ban instead of targeting specific, harmful non-competes, offering no explanation for the inconsistency. Moreover, the court found that the FTC failed to consider less disruptive alternatives to the rule. For these reasons, Judge Brown held the issuance of the ban by the FTC "an unlawful agency action."

The decision bars the FTC from enforcing the rule (which was slated to take effect on September 4, 2024) and is likely to be appealed. Alternatively, the FTC may choose to rework the rule in response to Judge Brown's critique in hopes that the revised rule will pass judicial

review. Meanwhile, two additional challenges are still pending in federal court: One in Florida district court, which has also ruled, preliminarily, that the non-compete ban is unenforceable against the parties in that case; and another in Pennsylvania district court, which upheld the ban in July when it denied the plaintiff's request for a preliminary injunction. As the Florida and Pennsylvania cases move forward, it is uncertain what the judges in those cases will ultimately decide, not being bound to follow the Texas court's decision. Should the courts remain split as the challenges proceed through the judicial system, the U.S. Supreme Court may have to step in to determine the fate of the non-compete ban, and possibly, the future of federal agencies' rulemaking authority.

For now, the principal responsibility for regulating non-compete agreements falls on the states, many of them having enacted legislation restricting the use of non-competes over the past decade. But the FTC still has the power to bring individual enforcement actions to challenge particular non-compete agreements as being unfair methods of competition. Accordingly, employers should take care to narrowly tailor any non-compete agreements to ensure they comply with any present and future state laws, and utilize other means of protecting sensitive data and client bases, such as confidentiality and non-solicitation agreements.

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