

# Client Alert

Global Human Capital and Compliance

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For more information, contact:

Amanda A. Sonneborn  
+1 312 764 6940  
[asonneborn@kslaw.com](mailto:asonneborn@kslaw.com)

Peter J. Wozniak  
+1 312 764 6948  
[pwozniak@kslaw.com](mailto:pwozniak@kslaw.com)

Andrew Cockroft  
+1 312 764 6917  
[acockroft@kslaw.com](mailto:acockroft@kslaw.com)

King & Spalding

Chicago  
110 N Wacker Drive  
Suite 3800  
Chicago, Illinois 60606  
Tel. +1 312 995 6333

## FTC Final Rule on Non-Competes: Texas District Court Stops Short of a Nationwide Injunction and Creates Uncertainty on the Implementation of the Final Rule

On Wednesday, July 3, the U.S. District Court for the Northern District of Texas in *Ryan, LLC v. Federal Trade Commission* granted a limited stay of the effective date for the Federal Trade Commission's (FTC) final rule on non-competes (the "Rule"). Though the court held that the FTC likely does not have the authority to issue the Rule and that the Rule was arbitrary and capricious, the court's order rejected a nationwide stay of the Rule's effective date. Instead, the court stayed the Rule's effective date only as to the plaintiff and the plaintiff-intervenors themselves. Thus, the effective date of the Rule is stayed, but only as the *Ryan* parties: Ryan LLC, the Chamber of Commerce of the United States of America; the Business Roundtable; the Texas Association of Business; and the Longview Chamber of Commerce.

The key takeaway from the court's decision is that for now, the Rule remains scheduled to go into effect on September 4, 2024, at which point will apply to virtually every business in the United States.

### THE COURT'S OPINION AND ORDER

Despite the court's narrow stay, its decision cast substantial doubt on the FTC's authority to issue the Rule and the Rule itself. Specifically, the court explained: (1) the FTC exceeded its statutory authority in promulgating the Rule; and (2) the Rule did not comply with the Administrative Procedure Act (APA) because it is arbitrary and capricious, particularly because the FTC did not provide reasoning for the broad



sweep of the rule and because the FTC insufficiently addressed alternatives.

Following the court's ruling on the motion to stay and preliminary injunction, the court will now move to a decision on the merits. By July 9, the parties are expected to provide a schedule for the remaining issues in the case including merits briefing. The court stated that it expects to rule on the merits by August 30.

It is possible that one of the plaintiff or plaintiff-intervenors will ask the court to reconsider its decision, or potentially pursue other avenues (such as a request to the Fifth Circuit Court of Appeals), to secure broader relief. In the meantime, whether or to what extent the court will revisit the potential for a nationwide injunction remains uncertain.

### OTHER PENDING CHALLENGES

The *Ryan LLC* matter is not the only court challenge to the Rule. In *ATS Tree Services, LLC v. Federal Trade Commission*, pending in the United States District Court for the Eastern District of Pennsylvania, the parties have fully briefed the plaintiff's request for a nationwide preliminary injunction, and a hearing is scheduled for July 10. The court there is scheduled to rule on the plaintiff's request by July 23.

### NEXT STEPS FOR EMPLOYERS

As King & Spalding advised [previously](#), we recommend that employers develop an immediate plan for compliance, particularly given the new uncertainty concerning the Rule and its pending effective date.

Such compliance steps include:

- identifying current and former workers subject to non-compete agreements (or similar post-employment restrictive covenants);
- reviewing existing agreements and policies for compliance with the Rule; preparing appropriate notice language and developing a distribution plan to provide individual written notice to current and former workers, as applicable;
- developing a plan for compliance going forward, including assessing and revising existing agreements/templates to eliminate non-compete clauses and *de facto* non-compete clauses; and
- assessing additional steps, short of non-compete clauses or *de facto* non-compete clauses, to protect their legitimate interests in trade secrets and confidential information.



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