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FTC noncompete ban suffers setback in first of several court challenges



Image: Marilyn Nieves

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GETTY IMAGES (MARILYN NIEVES)



By [Andy Medici](#) – Senior Reporter, The Playbook, The Business Journals
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The Federal Trade Commission’s broad noncompete ban suffered a legal setback after a federal judge in Texas ruled against the agency on July 3.

U.S. District Judge Ada E. Brown of the Northern District of Texas, said in a ruling that the agency “lacks substantive rulemaking authority” on the matter and granted a preliminary injunction on the controversial rule that could affect employers in a broad range of industries.

Brown’s ruling only applies at this point to the actual plaintiffs, a coalition of business groups, and not nationally or for a specific region. As we’ve noted, the rule is opposed by a host of business groups that say a ban will stifle investments in innovation.

The ruling pushes out the effective date of the rule indefinitely while stating it will render a more final decision on or before Aug. 30, 2024.

Amy Pearl, attorney at law firm Archer & Greiner, said in a statement the ruling highlighted the “many and serious flaws” that were part of the FTC noncompete rule.

“As we wait for the court’s final merits decision, businesses should be discerning in their use of restrictive covenants and take great care to ensure their contracts are narrowly tailored to cover only their most sensitive trade secrets,” Pearl said.

The FTC challenge seems far more likely to be successful after the recent [Supreme Court decision in Loper Bright Enters. v. Raimondo \(The Department of Commerce\)](#) which [overturned four decades of judicial deference](#) to federal agency interpretation of legislation. Under the so-called Chevron framework, federal agencies were given wide latitude on interpreting any ambiguity in laws without explicit guidance from Congress.

Attorneys say the decision could have a seismic effect on businesses – at a time when federal agencies have issued a [sweeping array of rules that have changed the dynamic between employees and employers](#).

Instead, the courts will now have more power to determine a final interpretation for legislation that agencies would then be locked into following – removing the ability for new administrations to offer up new regulations on existing law and severely curtailing much federal agency action.

“The FTC will face an uphill battle in proving that it had the authority to enact its ban,” said Thomas Muccifori, who chairs Archer’s Trade Secret Protection and Restrictive Covenants Group at Archer and Greiner. “As this plays out in the courts, business should continue to look to the controlling and ever-changing, state law in determining the scope and enforceability of noncompete agreements and other restrictive covenants such as non-solicitation agreements and non-disclosure agreements.”

Another court in Pennsylvania is set to issue its own order related to the FTC noncompete ban in the coming days, possibly setting up conflicting rulings that would take the case to the Supreme Court.

Noncompetes are on the retreat

According to Littler Mendelson PC's [12th annual employer survey](#), many executives already are dialing back their use of noncompete agreements. The survey tracked responses from 400 lawyers, C-suite executives and human-resources professionals.

Littler found 31% of respondents said they are moderately less likely to use noncompetes going forward, while 34% said they were slightly less likely to use them in the future, and 18% said the recent climate has stopped them from using them “to a large extent.”

The balance of respondents said recent events didn’t matter to them for their potential use of noncompetes.

Separate from the federal rule, many states were already taking matters into their own hands.

In 2023, [Minnesota banned the enforcement of new noncompetes, joining California, North Dakota and Oklahoma.](#)

Colorado, Illinois, Maine, Maryland, New Hampshire, Oregon, Rhode Island, Virginia, Washington and Washington, D.C., all have income-based restrictions on noncompete agreements for lower-wage workers.

A noncompete ban [failed in New York](#) because Gov. Kathy Hochul sought an income cap on the ban.

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