

**BLOGS**

Contracts &amp; Agreements; Employment Law Updates

## The FTC Noncompete Clause Rule Scheduled to Take Effect on September 4, 2024

On April 23, 2024, the U.S. Federal Trade Commission (“FTC”) announced the issuance of a final Noncompete Clause Rule that would, if it goes into effect, ban future employment noncompete agreements and render most existing noncompete agreements void and unenforceable throughout the country. Our firm previously issued a number of alerts discussing the Noncompete Clause Rule.

When the Noncompete Clause Rule was announced, the rule was set to be effective 120 days after its publication in the Federal Register. On May 7, 2024, the rule was published in the Federal Register, which means it is now scheduled, subject to the impact of pending legal actions, to take effect on **September 4, 2024**.

Since the FTC issued the final rule, three separate lawsuits have been filed challenging it: *Ryan, LLC v. Federal Trade Commission*, No. 3:24-cv-986-E (N.D. Tex., Apr. 23, 2024), *Chamber of Commerce v. Federal Trade Commission*, No. 6:24-cv-00148 (E.D. Tex., Apr. 24, 2024), and *ATS Tree Services, LLC v. Federal Trade Commission*, No. 2:24-cv-1743 (E.D. Pa., Apr. 25, 2024). Because the *Ryan* lawsuit was filed in Texas federal district court one day before the *Chamber of Commerce* lawsuit was filed in a neighboring Texas federal district court and because the lawsuits raise similar legal theories, the *Chamber of Commerce* lawsuit was stayed under the first-to-file rule. The plaintiffs in the *Chamber of Commerce* lawsuit, which include the U.S. Chamber of Commerce and a number of business groups, then successfully moved to intervene in the *Ryan* lawsuit. The *ATS Tree Services* case, which is pending in Pennsylvania federal district court, has not been stayed.

The lawsuits raise a number of arguments for invalidating the final Noncompete Clause Rule, including:

- The Noncompete Clause Rule exceeds the FTC’s authority because the FTC’s authority under the Federal Trade Commission Act allows the FTC to promulgate procedural—not substantive—rules. The lawsuits argue that the Noncompete Clause Rule is substantive in nature.
- Even if Congress had granted the FTC authority to promulgate substantive rules, that grant is an unconstitutional delegation of legislative power.
- The Federal Trade Commission Act’s restriction on the President’s ability to remove FTC Commissioners is unconstitutional. Because the FTC exercises executive power under the FTC Act, the Noncompete Clause Rule is the product of an unconstitutional exercise of power.
- The FTC does not have the authority to issue retroactive rules, and retroactive rules violate due process and the Takings Clause of the Fifth Amendment of the U.S. Constitution.
- The Noncompete Clause Rule is based on flawed analysis and therefore is arbitrary and capricious.



- The FTC failed to meaningfully engage over alternatives to the rule.
- The FTC failed to sufficiently consider the lost prior expectations of employers and workers who are parties to existing noncompete agreements.

The plaintiffs challenging the Noncompete Clause Rule in the above-mentioned lawsuits are seeking an order vacating and setting aside the rule, an injunction against the FTC from enforcing the rule, and a declaratory judgment that the rule is unlawful.

The pending legal challenges to the Noncompete Clause Rule therefore could impact its enforceability and the timing of any enforcement. It is possible that one or more of the courts deciding the lawsuits could enjoin enforcement of the rule, pending their consideration of the plaintiffs' arguments, which would delay the September 4, 2024 effective date. That said, businesses should take steps to prepare to comply with the rule in case it goes into effect as scheduled. These steps include (1) identifying workers with existing noncompete agreements who will need to be notified that their noncompete agreements are no longer enforceable, and (2) reviewing template agreements to determine whether any updates need to be made.

Businesses should stay tuned for further developments regarding the Noncompete Clause Rule. Our firm will continue to monitor developments and provide updates.

If you have any questions about the Noncompete Clause Rule, please contact the author listed below or your regular Lathrop GPM attorney.