

# Federal Court Strikes Down FTC Non-Compete Rule

## The Bottom Line

- A federal court in Texas has struck down the FTC's Rule banning non-competes.
- An appeal of this decision to the Fifth Circuit is likely, and there is also a competing case in Pennsylvania that appears primed to come out in favor of the Rule, setting up a potential review by the Supreme Court.
- The FTC has already come out to say that while mulling its next steps with respect to the Rule, it will also consider whether to address non-competes through case-by-case enforcement as well.

We have previously issued alerts concerning the Federal Trade Commission's (FTC) rule banning most employee and independent contractor non-competes (the Rule) ([May 6, 2024](#), [January 26, 2023](#)) and come to you now with a major update.

On August 20, 2024, the federal court in Texas presiding over tax services company Ryan LLC's challenge to the Rule delivered on its promise to issue a merits decision before the Rule's September 4, 2024 effective date. Judge Ada E. Brown of the Northern District of Texas [struck down the Rule](#), finding that the FTC overstepped its statutory authority in issuing the Rule and that the Rule is arbitrary and capricious. Unlike the court's July preliminary injunction ruling, which only granted relief to the plaintiffs in the case, this decision, on its face, applies to all businesses across the country that otherwise would have been subject to the Rule. The court determined that, in light of its findings regarding the Rule, the proper remedy under the Administrative Procedure Act (APA) is to hold the Rule unlawful in its entirety and set it aside. Pursuant to the court's ruling, **"the Rule shall not be enforced or otherwise take effect on its effective date of September 4, 2024, or thereafter."**

## Competing Litigation May Lead to the US Supreme Court Deciding the Ultimate Fate of the Rule

While this decision is a meaningful win for opponents of the Rule, it does not spell the end of the story. As an initial matter, the FTC has already stated that it is considering an appeal of the ruling to the Fifth Circuit. Additionally, there is a competing litigation in the Eastern District of Pennsylvania (*ATS Tree Services v. FTC*), wherein the district judge came out on the opposite side of the analysis and issued a preliminary injunction ruling in support of the FTC's authority and the Rule's validity. A merits decision is expected in that case before year's end and indications are that the judge will double down and issue another ruling in favor of the FTC, standing in direct opposition to the Texas court's recent ruling in *Ryan*. Such a ruling, whichever way it comes out, is also likely to be appealed to the Third Circuit, which covers the federal courts of Pennsylvania. Ultimately, there may be a "circuit split," resulting from contradicting rulings out of the Third and Fifth Circuits, and the Rule's fate may be determined by the Supreme Court of the United States.

Notwithstanding this potential for a forthcoming ruling coming out the other way than *Ryan*, there is uncertainty as to what impact such a ruling would have. Even if the Pennsylvania court and/or the Third Circuit issue rulings in support of the Rule, the FTC would still be subject to the Texas court's *Ryan* ruling. In other words, unless/until the Fifth Circuit or Supreme Court directly overrule the *Ryan* decision – notwithstanding any ruling in support of the Rule – there would still be a ruling by a federal court ordering the FTC not to enforce the Rule because of a finding that it is unlawful. The FTC may stand down entirely and give the *Ryan* ruling the universal application that the language of Judge Brown's opinion conveys. On the other hand, the FTC, if it ends up backed by a supportive ruling from another court, may take the position that *Ryan* (and, perhaps, a Fifth Circuit ruling affirming *Ryan*) are binding precedent *within the Fifth Circuit*, but not more broadly. We expect the FTC to make its position on this issue known within the coming weeks.

## FTC Case-By-Case Enforcement Remains a Risk

In the meantime, the FTC is not completely neutralized on the non-compete front, even without the Rule. In response to the ruling, a FTC spokeswoman signaled that the FTC would consider continuing to address non-competes through case-by-case enforcement.

**Labor + Employment**

While such enforcement activity is incapable of having the broad impact the FTC sought to achieve through the generally applicable Rule, it remains a risk for individual companies across the country. In an effort to stay off the FTC's case-by-case radar, companies would be wise to review their non-compete practices to ensure that they are narrowly tailored and should consider exercising discretion with regard to which workers receive true non-competes, as opposed to less restrictive alternatives like customer non-solicitation covenants.

---

**For More Information**

Please contact the attorneys listed below or the Davis+Gilbert attorney with whom you have regular contact.

**Shira Franco****Partner**

212 468 4839

[sfranco@dglaw.com](mailto:sfranco@dglaw.com)**Gregg A. Gilman****Partner/Co-Chair**

212 468 4840

[ggilman@dglaw.com](mailto:ggilman@dglaw.com)**Daniel R. Friel****Associate**

212 237 1509

[dfriel@dglaw.com](mailto:dfriel@dglaw.com)