Published on *The National Law Review* https://natlawreview.com

Federal Court Grants Temporary Stay of FTC Noncompete Rule but Limits Scope (for Now) to Named Parties

Article By:

Daniel R. Levy

Carolyn O. Boucek

Peter A. Steinmeyer

Katherine G. Rigby

A. Millie Warner

On the heels of the U.S. Supreme Court's decision in *Loper Bright Enters. v. Raimondo*, which struck down decades of deference to administrative agencies known as "*Chevron* deference," on July 3, 2024, the U.S. District Court for the Northern District of Texas in *Ryan LLC v. Federal Trade Comm'n*, Case No. 3:24-cv-00986-E, issued a preliminary injunction staying the Federal Trade Commission's (FTC's) final rule banning post-employment noncompetes (the "Noncompete Rule").

Importantly, however, the court in *Ryan* limited—for now—the scope of the ruling to only those parties in the case. As detailed further below, the *Ryan* court intends to issue a merits disposition by August 30, 2024, a few days before the FTC's Noncompete Rule is scheduled to go into effect.

What Employers Should Do Now

Although we believe that there will ultimately be a nationwide injunction that bars the Noncompete Rule from going into effect, employers may want to take the following steps now:

- Identify the senior executives[1] for whom noncompetes will remain in effect if the Noncompete Rule is not enjoined.
- If not already a member of the U.S. Chamber of Commerce or one of the other intervenor organizations, consider immediately joining the organization to benefit from any rulings that will apply to its members by virtue of associational standing, given that the *Ryan* court intends to consider associational standing of the U.S. Chamber of Commerce's and the other intervenor organizations' members in its merits disposition.
- Consider making appropriate preparations if the Noncompete Rule is not enjoined with respect to new hires and workers whose noncompete agreements will be invalidated.

- Evaluate adopting and bolstering alternatives to noncompetes, such as “garden leave” provisions, enhanced confidentiality provisions, non-solicitation provisions, etc.

The Limited Preliminary Injunction

The *Ryan* case has garnered national attention as one of three federal lawsuits challenging the FTC’s Noncompete Rule. The other two suits are *Chamber of Comm. of the U.S.A. v. Federal Trade Comm’n*, Case No. 6:24-cv-00148 in the U.S. District Court for the Eastern District of Texas and *ATS Tree Servs., LLC v. Federal Trade Comm’n*, Case No. 2:24-cv-01743-KBH in the U.S. District Court for the Eastern District of Pennsylvania. The two cases in Texas have effectively been consolidated, with the plaintiffs in the *U.S. Chamber* case intervening in the *Ryan* case.

On July 3, 2024, the Northern District of Texas granted a limited preliminary injunction that stayed the effective date of the FTC’s Noncompete Rule as to the plaintiff, Ryan LLC, and the plaintiff-intervenors: Chamber of Commerce of the United States of America, Business Roundtable, Texas Association of Business, and Longview Chamber of Commerce (collectively, the “Plaintiffs”). In granting the stay/preliminary injunction, the *Ryan* court found that (i) the Plaintiffs are likely to succeed on the merits, (ii) irreparable harm will result without the issuance of injunctive relief, and (iii) the balance of harms and public interest weigh in favor of granting injunctive relief.

Likelihood of Success on the Merits

The *Ryan* court engaged in *post-Chevron*, de novo review of Sections 5 and 6 of the FTC Act (the former vests the FTC with authority to prevent unfair methods of competition, whereas the latter vests the FTC with authority to craft “rules and regulations for the purposes of carrying out the provisions of this subchapter”). The court ultimately ruled that while the FTC has “*some* authority to promulgate rules to preclude unfair methods of competition” (emphasis added), Section 6 does not give the FTC authority to promulgate substantive rules, such as the Noncompete Rule, and, therefore, the FTC exceeded its authority when it issued the Noncompete Rule.

The court also found that the FTC’s actions in promulgating the Noncompete Rule were arbitrary and capricious because they were “unreasonably overbroad without a reasonable explanation.” The court held that the FTC “insufficiently addressed alternatives to issuing the [Noncompete] Rule.” Thus, the court determined that the Plaintiffs were likely to succeed on the merits and that the FTC did not have the authority to promulgate the Noncompete Rule. Indeed, the court effectively adopted arguments made by Epstein Becker Green in an amicus brief filed on behalf of 11 national industry organizations in the *Ryan* case (and subsequently in the *ATS Tree* case).

Irreparable Harm

With respect to irreparable harm, the *Ryan* court, seemingly wanting to stress this point again, reiterated that the “Plaintiffs are likely to succeed on the merits that the [Noncompete] Rule is invalid.” The court explained that complying with an agency order “almost *always*” produces irreparable harm. In finding that the Plaintiffs established irreparable harm, the court noted the FTC’s inability to make a responsive argument on the irreparable harm factor.

Balance of the Equities/Public Interest

The court held that if the injunctive relief is not granted, “the injury to both Plaintiffs and the public

interest would be great." In finding that both factors weighed in favor of the Plaintiffs, the court recognized that enforcing the Noncompete Rule would have made unenforceable long-standing contractual agreements that have been long recognized as lawful and beneficial to the public interest. As discussed below, this finding will likely be highlighted by the U.S. Chamber of Commerce and other plaintiffs in future briefing as they seek a nationwide injunction.

Scope of Relief

The Plaintiffs sought to enjoin the Noncompete Rule on a "nationwide" basis. However, the court refused to issue a nationwide preliminary injunction at this stage of the case, stating that it "decline[d] to view the circumstances of this proceeding as an 'appropriate circumstance' that would merit nationwide relief." The court added that the "Plaintiffs have offered no briefing as to how or why nationwide injunctive relief is necessary to provide complete relief to Plaintiffs, at this preliminary stage." Thus, the preliminary injunctive relief staying enforcement of the Noncompete Rule applies to the named parties in the case *only*; it neither applies to all companies nor to members of the U.S. Chamber of Commerce or the other intervenor organizations.

The *Ryan* court further noted that the plaintiff-intervenors (including the U.S. Chamber of Commerce), which sought standing on behalf of their respective member entities, did not brief associational standing. The court stated, "Without such developed briefing, the Court declines to extend injunctive relief to members of [the U.S. Chamber of Commerce and other intervenor organizations]." This seems to keep open this issue for subsequent briefing on associational standing, and, as detailed below, the U.S. Chamber of Commerce and other intervenor organizations are likely to argue strongly associational standing on behalf of its members.

Next Steps

A Joint Status Report was to be filed with the *Ryan* court by July 9, 2024, and more importantly, "the court intends to enter a merits disposition on this action on or before **August 30, 2024**" (a mere five days before the Noncompete Rule is scheduled to go into effect). We anticipate that the issue of associational standing of the members of the U.S. Chamber of Commerce and the other intervenor organizations and the request for nationwide injunctive relief will be the center point of the Plaintiffs' further briefing in this action.

Under the doctrine of associational standing, "an organization may sue to redress its members' injuries, even without a showing of injury to the association itself[.]"[2] To establish associational standing, "'[t]he association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit.'"[3] An association has standing to bring suit on behalf of its members when (i) its members would otherwise have standing to sue in their own right, (ii) the interests the association seeks to protect are germane to the organization's purpose, and (iii) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.[4]

We believe that the U.S. Chamber of Commerce and the other intervenor organizations will likely be able to establish standing on behalf of their respective members. If the *Ryan* court approves associational standing, then its ruling would presumably apply to all members of the U.S. Chamber of Commerce and the other intervenor organizations, potentially necessitating nationwide relief.

Even though the preliminary injunction was limited in scope, the FTC has the ability to appeal, as a

matter of right, the *Ryan* court's issuance of the injunction. We will keep a close eye on whether the FTC appeals the preliminary injunction to the U.S. Court of Appeals for the Fifth Circuit.

For now, focus is likely to shift to the *ATS Tree* case pending in the Eastern District of Pennsylvania. The court there has promised a ruling on the plaintiffs' motion for preliminary injunction to stay the Noncompete Rule by July 23, 2024. Whether the Eastern District of Pennsylvania will follow the Northern District of Texas or follow its own path is anyone's guess, made more speculative by the *ATS Tree* court's new-found freedom to engage in judicial review free from *Chevron* deference. Time will tell.

Uncertainty Grows for Employers as Noncompete Rule's Effective Date Nears

As the September 4, 2024, effective date of the Noncompete Rule looms larger as the summer days dwindle, the *Ryan* court's July 3 ruling creates additional uncertainty for employers. While the Texas court's decision highlights the uphill battle for the FTC's Noncompete Rule, the limited scope of the ruling did not provide assurances for companies with noncompete agreements. While the anticipated merits disposition in the *Ryan* case is expected by August 30, if the ruling is again limited to the named parties only, it would provide employers with a mere few days' notice that any ban of the Noncompete Rule does not apply to all employers. The result of the court's July 3 ruling in *Ryan* may lead to other employers filing lawsuits throughout the country seeking to enjoin the Noncompete Rule.

ENDNOTES

[1] A "senior executive" is someone who earns more than $151,164 per year and is in a "policy-making position," i.e., they have final authority to make policy decisions regarding significant aspects of a business entity or common enterprise.

[2] *Food and Comm. Workers v. Brown Grp., Inc.*, 517 U.S. 544, 552 (1996).

[3] *Id.* (quoting *Warth v. Seldin*, 422 U.S. 490, 511 (1975)).

[4] *Ass'n of Amer. Physicians & Surgeons, Inc. v. Texas Med. Bd.*, 627 F. 3d 547, 550 (5th Cir. 2010) (quoting *Hunt v. Wash. St. Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)). *See also All. for Hippocratic Med. v. FDA*, 78 F. 4th 210, 233 (5th Cir. 2023) (holding that the plaintiff, an association of doctors and similar organizations, had established associational standing to challenge an agency's actions as unlawful under the Administrative Procedure Act because the members faced a substantial risk of future injury).

National Law Review, Volume XIV, Number 192