

# Texas Court Postpones FTC Noncompete Ban

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## OVERVIEW

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### WHAT HAPPENED

On July 3, 2024, the US District Court for the Northern District of Texas stayed the September 4, 2024, implementation date (the effective date) of the Federal Trade Commission's (FTC) Final Rule that bans all new noncompete agreements nationwide and renders existing noncompete agreements binding most workers unenforceable. The court preliminarily enjoined the FTC from enforcing the Final Rule against the parties to a lawsuit filed by Ryan LLC, a private tax services firm. The court will make its final injunction decision on August 30, 2024.

### IN DEPTH

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#### THE PRELIMINARY INJUNCTION IS NOT NATIONAL – IT NARROWLY APPLIES TO THE PARTIES IN THE LAWSUIT

The court did not issue a nationwide injunction or extend relief to the members of the US Chamber of Commerce (the Chamber). Because the parties challenging the Final Rule did not brief “associational standing” or say why “nationwide injunctive relief is necessary to provide complete relief to Plaintiffs”

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at the preliminary stage, the court limited the scope of the injunctive relief to the named parties challenging the Final Rule in the lawsuit, including the Chamber (but not to its members), the Business Roundtable, the Texas Association of Business and the Longview Chamber of Commerce.

## **THE COURT'S PRELIMINARY FINDINGS AS TO THE PLAINTIFFS' LIKELIHOOD OF SUCCESS ON THE MERITS**

The court found that the plaintiffs would likely be successful in arguing that:

1. The FTC lacked the authority to impose the Final Rule under Section 6(g) the Federal Trade Commission Act, a "housekeeping statute" that does not confer "substantive rulemaking power."
2. The Final Rule is "arbitrary and capricious" under the Administrative Procedure Act, the federal law governing agency "rulemaking," because it is "unreasonably overbroad without a reasonable explanation" and "imposes a one-size-fits-all approach with no end date."

## **NEXT STEPS AND ANTICIPATED LITIGATION STRATEGIES**

1. We anticipate that the FTC will seek to challenge the court's reasoning in the preliminary injunction opinion. More importantly, the Chamber will likely seek to (1) brief the issue of "associational standing" and (2) perhaps file an amended preliminary injunction motion to establish "associational standing" to seek relief on behalf of all its members with the goal of expanding the scope of the final injunction.
2. We think the Chamber may challenge the scope of the injunction at the US Court of Appeals for the Fifth Circuit and (likely) the US Supreme Court should the judge decline to extend the injunction in her final injunction decision.
3. Presently, the court's reasoning in the preliminary injunction opinion is merely a preview of what it may or may not decide in its August 30, 2024, final injunction decision. We do not anticipate that the court will radically depart from its reasoning in the preliminary injunction hearing. However, the FTC will have the opportunity to offer additional administrative records that may undermine some of the court's preliminary findings.
4. If the final decision provides that the Final Rule is unlawful and the injunctive relief remains limited to the *Ryan LLC* parties, the Final Rule will not be enforced against the *Ryan LLC* parties. In the absence of injunctive relief stemming from other litigation, the Final Rule will go into effect for non-*Ryan LLC* parties. However, companies will likely rely on the *Ryan LLC* decision to challenge the Final Rule in other courts.

Companies should stay informed about any updates or changes related to this case and the Final Rule's effective date. In the meantime, they should continue to consult with counsel to assess their existing use of noncompetes and other restrictive covenants to prepare for the Final Rule's pending effective date. For any questions about the Final Rule, please contact your regular McDermott lawyer or one of the authors of this article.

## **OTHER LITIGATION ON OUR RADAR**

We're watching *ATS Tree Services, LLC v. FTC* in the US District Court for the Eastern District of Pennsylvania. Judge Kelley Brisbon Hodge (a Biden appointee) is slated to issue her decision on the preliminary injunction on July 23, 2024.

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