

It's a Cruel Summer (for Employers Still Facing Uncertainty of Looming Federal Trade Commission Noncompete Rule)

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Summer 2024 may be remembered for its uncertainty. On top of the surprises in political campaigns and the [Supreme Court's overruling of decades-old precedents](#), employers nationwide still face uncertainty with the [FTC's looming rule](#) banning the vast majority of employee noncompetes across the United States. This uncertainty was underscored on Tuesday, July 23, 2024, when a federal judge in Pennsylvania declined to enjoin the FTC's Noncompete Rule (the "Rule") from taking effect September 4, 2024.

What will happen in September remains unclear, as the nation still awaits a final ruling next month from U.S. District Judge Ada Brown of the Northern District of Texas. On July 3, 2024, [Judge Brown temporarily enjoined the Rule, but only for the named plaintiffs — not nationwide](#).

One thing is certain: Without a nationwide vacatur of the Rule or an injunction against its enforcement, employers will face further uncertainty.

Back in the Northern District of Texas, Plaintiff Ryan LLC and Intervenor U.S. Chamber of Commerce filed briefs this week requesting that Judge Brown's injunction against the Rule be expanded nationwide. They argued that expanding the injunction nationally would "spare tens of thousands of American businesses the illegal burdens imposed by the rule," promptly conclude litigation, and avoid "a torrent of lawsuits."

The FTC's responsive brief in Texas is expected late next week, with a final ruling from Judge Brown expected on or before August 30, 2024.

What Should Employers Be Doing Now?

[Our advice from the July 5, 2024, article remains relevant — for now](#). We will continue monitoring developments in the courts and providing updates on best practices.

- Get ready to distribute the required notices informing employees that their noncompetes will

no longer be enforced. The Noncompete Rule requires notifying current and former employees that their noncompete agreements will not be — and cannot be — enforced going forward, with notice being provided at the employees' last known street address, email address, or phone number. For large employers, this could be a significant undertaking to prepare. Since no courts have stopped the FTC rule from taking effect on a nationwide basis, it would be prudent for employers to start gathering all the information they would need to comply with the notice requirement. That said, employers should still wait until after further action is taken by the courts, or in another one of the cases challenging the Rule, before sending the notices.

- Businesses should explore whether they might have other ways to accomplish some of the same goals as noncompetes, such as nondisclosure agreements or fixed-duration employment contracts.
- Businesses should review their other restrictive covenants, including non-solicitation and no-hire clauses, to ensure those clauses are narrowly tailored to protect their legitimate interests, thereby reducing the risk that they will be challenged as being within the Rule's catchall provision prohibiting terms that "function[] to prevent" a worker from working for a different company after employment.
- Businesses should have confidentiality agreements in place with employees and should prepare for a potential wave of trade secret litigation as employees are increasingly enticed to leave their employment to work for competitors. This means businesses will need to be prepared for increased costs of data and forensic work that are generally prevalent in trade secret and confidentiality litigation matters.
- It may be time for businesses potentially impacted by the Rule to substantively review their existing agreements and policies as described in the points above and get started on drafting replacement forms of agreements that will comply with the Rule — if it goes into effect.