

The Courts Have Spoken on the FTC Noncompete Ban, and We Have a New Incoming Administration: Now What?

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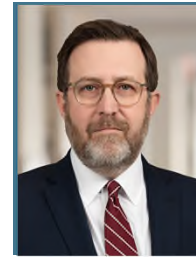
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Agenda



1. Where We Are and Where We're Going

- The FTC Rule: Dead on Arrival
- The Action Remains in the States
- The Feds Still Want in on the Action

2. New Administration: Now What?

- Forthcoming Agency Leadership Changes
- Noncompetes are not a Partisan Issue

3. Complex Issues Facing Employers in the New Environment

- Practical strategies for when and how to make changes to existing agreements and policies
- Dealing with internal disagreement about noncompete strategy and enforcement
- Contending with personalities, emotions, and nuance in the law
- Explaining to business leaders that noncompetes are not like other contracts
- Communicating with employees and candidates post-FTC Rule
- Addressing multi-state workforces and remote workers without national uniformity
- Getting buy-in to implement or update other protective measures
- What other issues is your company facing?

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Where We Are and Where We're Going

Where We Are and Where We're Going

The FTC Noncompete Rule: Dead on Arrival

The Basics:

- **FTC voted 3-2 on party lines to issue the final rule on April 23, 2024**
- **Would have banned virtually all post-employment noncompetes nationwide**
 - Only exception was for *existing* noncompetes with “senior executives”
 - Required written notice to all affected employees on or before the effective date
- **Would not have covered:**
 - Noncompetes entered into with sellers in connection with *bona fide* sale of a business
 - Causes of action accrued prior to the effective date
 - Non-solicits, NDAs, training cost repayment requirements, garden leave provisions
 - *But . . . it could cover these things if they are too broad
 - Certain industries the FTC does not have authority over: nonprofits, banks, etc.
 - *But . . . the FTC may challenge nonprofit status
 - Good faith (but failed) attempts to comply are not unfair business practices



Where We Are and Where We're Going

The FTC Noncompete Rule: Dead on Arrival



Legal Challenges:

- ***Ryan, LLC v. Federal Trade Commission*, C.A. No. 3:24-cv-986 (N.D. Tex.)**
 - Filed on April 23, 2024
 - Injunction granted on July 3, 2024 (limited to named plaintiffs; no associational standing)
 - Final merits ruling issued on August 20, 2024 (nationwide)
 - On appeal in the 5th Circuit
 - ***Chamber of Commerce of the United States of America, et al. v. Federal Trade Commission and Lina Khan*, C.A. No. 6:24-cv-00148 (E.D. Tex.)**
 - Filed on April 24, 2024
- Consolidated in N.D. Tex.
- ***ATS Tree Services, LLC v. Federal Trade Commission, Lina Khan, Rebecca Slaughter, Alvaro Bedoya, Andrew Ferguson, and Melissa Holyoak*, C. A. No. 2:24-cv-1743 (E.D. Pa.)**
 - Filed on April 25, 2024
 - Injunction denied on July 23, 2024
 - Case voluntarily dismissed on October 4, 2024
 - ***Properties of the Villages, Inc. v. Federal Trade Commission*, C.A. No. 5:24-cv-316 (M.D. Fla.)**
 - Filed on June 21, 2024
 - Injunction granted on August 16, 2024 (limited to named plaintiff; all that was requested)
 - On appeal in the 11th Circuit

Where We Are and Where We're Going

The FTC Noncompete Rule: Dead on Arrival

▪ *Ryan, LLC, et al. v. FTC* (N.D. Tex.) (Final Merits Ruling)

- **Substantive Rulemaking Authority:** “By a plain reading, Section 6(g) of the [FTC] Act does not expressly grant the FTC authority to promulgate substantive rules regarding unfair methods of competition.”
- **Arbitrary and Capricious:** “In sum, the Rule is based on inconsistent and flawed empirical evidence, fails to consider the positive benefits of noncompete agreements, and disregards the substantial body of evidence supporting these agreements.”
- **Remedy:** “Having concluded that (i) the FTC promulgated the Non-Compete Rule in excess of its statutory authority, and (ii) the Rule is arbitrary and capricious, the Court must ‘hold unlawful’ and ‘set aside’ the FTC’s Rule as required under § 706(2). . . As the Fifth Circuit put it in a couple of recent cases, setting aside agency action under § 706 has nationwide effect, is not party-restricted, and affects persons in all judicial districts equally. . . The Rule shall not be enforced or otherwise take effect on its effective date of September 4, 2024, or thereafter.” (Cleaned up, citations omitted).

Case 3:24-cv-00986-E Document 49-1 Filed 05/14/24 Page 1 of 32 PageID 1002

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

RYAN, LLC, *et al.*,
v.
FEDERAL TRADE COMMISSION,
Defendant.

Civil Action No. 3:24-cv-986-E

BRIEF OF AMICI CURIAE NATIONAL RETAIL FEDERATION,
NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL
BUSINESS LEGAL CENTER, INC., INTERNATIONAL FRANCHISE
ASSOCIATION, ASSOCIATED BUILDERS AND CONTRACTORS, INC.,
AMERICAN HOTEL & LODGING ASSOCIATION, NATIONAL
ASSOCIATION OF WHOLESALE-DISTRIBUTORS, INDEPENDENT
ELECTRICAL CONTRACTORS, CONSUMER TECHNOLOGY
ASSOCIATION, UNITED STATES COUNCIL FOR INTERNATIONAL
BUSINESS, THE HOME CARE ASSOCIATION OF AMERICA, AND THE
RESTAURANT LAW CENTER (THE “AMICI”) IN SUPPORT
OF PLAINTIFFS’ MOTIONS TO STAY EFFECTIVE DATE AND
PRELIMINARY INJUNCTION (THE “MOTIONS”), ECF NOS. 23 & 46

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Where We Are and Where We're Going

The Action Remains in the States

2024: At least 73 noncompete bills introduced in 33 states

- 29 targeted healthcare workers
- 13 addressed notice requirements
- Only 10 proposed bans

2023: 98 noncompete bills introduced in 35 states

- 15 bills (in 10 states) proposed complete bans
 - One enacted (**Minnesota**)
- 10 bills (in 10 states) proposed compensation thresholds
- 32 bills (in 21 states) proposed changes to noncompetes in the healthcare industry
- Two bills in **California** that expanded and exported its existing ban
- In total, 12 noncompete laws were enacted in 10 states in 2023

TRADE SECRETS AND EMPLOYEE MOBILITY

50 State Noncompete Survey

STATE	Employee Noncompetes Permissible?	General Noncompete Statute?	Industry-Specific Statutes or Rules?	Other Excluded Employees?	Continued Employment: Sufficient Consideration?	Notice Requirements	Other Unique Requirements	Customer and Employee Non-Solicits Permissible?	Enforceable Against Terminated Employees?	Judicial Modification Permitted? (Blue Pencil or Reformation)	Tolling Permissible?
ALABAMA	Yes	Ala Code § 6-1-190-191 (effective January 1, 2018)	Lawyers (Ala R Prof C S 65) Physicians (Ala Code of Ethics for Physicians Stat 1)	N/A	Yes	N/A	Must be reduced to writing and signed by all parties	Yes	Unreached	Yes	Yes
ALASKA	Yes	No	Lawyers (AS R Prof C 5.5)	N/A	Unreached	N/A	N/A	Yes	Unreached	Yes	Unreached
ARIZONA	Yes	No	Broadcasting Industry (Labor 12-101) Lawyers (AZ R Prof C 5.5)	N/A	Yes	N/A	N/A	Yes	Unreached	Yes	Unreached
ARKANSAS	Yes	Ark Code § 4-75-101	Licensed medical professionals (Arkansas Code Title 17 Subtitle 13 Lawyers (AR R Prof C 5.5)	N/A	Yes	N/A	N/A	Yes	Probably not	Yes	Unreached
CALIFORNIA	No, with narrow exceptions in the sale of a business context or dissolution or dissociation relating to a partnership or LLC	Cal. Bus. & Prof. Code § 16600 et seq.	Entertainment Industry (CAL Labor Code § 2895) Lawyers (Cal. R Prof C 5.5)	N/A	N/A	N/A	N/A	No, with narrow exceptions in the sale of a business context or dissolution or dissociation relating to a partnership or LLC	No	N/A	Probably not
COLORADO	Yes	C.R.S. § 8-2-102 (amendments effective August 10, 2022)	Physicians (C.R.S. § 13-13) Lawyers (Col. R Prof C 5.5)	Minimum income thresholds for agreements entered into on or after August 10, 2022	Yes	For agreements entered into on or after August 10, 2022, written acceptance of an offer of employment for one or prospective workers at least 30 days before the effective date of restrictions for existing workers. Must provide separate written notice in other cases.	Penalties and potential criminal liability for violations of restrictive covenants; workers may seek injunctive relief and attorneys' fees, court and state division of labor and venue provisions are unenforceable.	Yes, subject to minimum income thresholds for agreements entered into on or after August 10, 2022	Unreached	Yes	No
CONNECTICUT	Yes	No	Security Guards (Conn. Gen. Stat. Sec. § 29-36a) Broadcasters (Conn. Gen. Stat. Sec. § 31-36a) Physicians (Conn. Gen. Stat. Sec. § 20-11a) Health Care Corporation, or Independent Service Workers (Conn. Gen. Stat. Sec. § 30-40) Lawyers (Conn. R Prof C 5.5)	N/A	Generally no, but extended to at-will employees	N/A	N/A	Yes	Yes	Yes, but only if agreement clauses that terms are severable	No
DELAWARE	Yes	No	Physicians (Del. Code Ann. tit. 16, § 3, § 2701) Lawyers (Del. R Prof C 5.4)	N/A	Yes	N/A	N/A	Yes	Yes	Yes	Yes

<https://www.ebglaw.com/50-State-Noncompete-Survey>

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Where We Are and Where We're Going

The Feds Still Want in on the Action

- FTC Enforcement Actions
- NLRB Enforcement Actions
- Six Bills Introduced in Congress in 2024



However . . .



New Incoming Administration: What Does it Mean?

New Incoming Administration

What Does It Mean?

■ Forthcoming Agency Leadership Changes

- **Federal Trade Commission (FTC)**
 - Chair: Andrew Ferguson
 - Commissioner: Mark Meador
- **National Labor Relations Board (NLRB)**
 - TBD
- **Department of Labor (DOL)**
 - Lori Chavez-DeRemer
- **Department of Justice (DOJ) Antitrust Division**
 - Gail Slater

■ Noncompetes are *not* a Partisan Issue

- Bans in both **RED** and **BLUE** states
- Typically compromises, even in the most employee-friendly states
- Populists v. Traditionalists
- Fmr. Rep. Gaetz Amicus Brief





Complex Issues Facing Employers Post-FTC Rule

Complex Issues Facing Employers Post-FTC Rule

Last time we covered the basics . . .

Other than contractual restrictions, what else can my company do to protect its legitimate business interests?

- Create and maintain a culture of compliance
 - Help employees understand the “why” not just the “what” and “how”

- Policies and procedures

- Onboarding

- Of

- Of

- Train

- Enhance

- Use

- Re

- Ec

- Ha

Can (and should) my company still use noncompetes?

- Can you use noncompetes? **Yes, in most states with many different types of employees.**

- The FTC Rule has not yet gone into effect, and may never do so
- 46 states permit noncompetes; only 4 ban them (CA, OK, ND, MN)
- Several states have compensation thresholds and notice requirements, but generally permit noncompetes
- Drafting multi-state (including 50-state) agreements is more difficult now, but certainly not impossible.

- Should you use noncompetes? **It depends.**

- Company culture
- Competitive landscape
- What are you trying to protect?
- With whom are you utilizing them?
- Are they necessary to protect your legitimate business interests?
- Will other, narrower, restrictions suffice?



What other contractual options are available for protecting my company’s business interests?

- Garden Leave / Mandatory Paid Notice Period

- During or post-employment

- Non-Solicit

- Customer
- Collabora

- Forfeiture-for-Competition Provisions

- Employee choice

- Term Contracts

What steps should my company take now in light of all these changes?

- Nondisclosure Stay the course and focus on compliance with evolving state laws and trends . . .

- Compensation thresholds
- Notice requirements

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... but take a holistic review of your restrictive covenant strategy and practices.

- Take an inventory of your current restrictions – which roles, agreement/scope variations, state, etc.
- Consider overall use of restrictive covenants – who, what, when, where, why?
- Are non-solicits and confidentiality provisions sufficient for some groups / levels?
- Are other types of contractual restrictions appropriate?
- Review onboarding and offboarding policies and procedures
- What improvements / changes can be made?

Focus on trade secret protection and securing customer relationships

- Consider a trade secret audit
- Good old fashioned in-person meetings



Recording available at: <https://event.on24.com/wcc/r/4567626/C042C7D06176E291B1879E4083E4CE42>

Complex Issues Facing Employers in the New Environment

This time we're digging deeper . . .

- Practical strategies for when and how to make changes to existing agreements and policies
- Dealing with internal disagreement about noncompete strategy and enforcement
- Contending with personalities, emotions, and nuance in the law
- Explaining to business leaders that noncompetes are not like other contracts
- Communicating with employees and candidates post-FTC Rule
- Addressing multi-state workforces and remote workers without national uniformity
- Getting buy-in to implement or update other protective measures

What Other Issues Is Your Company Facing?

Stay Up To Date



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Podcasts, Overcast, Spotify, Stitcher)



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<https://www.tradesecretsandemployeemobility.com/>

Krista Green Pratt

Chief Employment Counsel
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After more than a decade in private practice focusing on complex employment litigation and serving as advisor to national and global companies across a variety of industries, Krista transitioned to an in-house role at Biogen supporting a global Human Resources organization in the fast-paced and innovative pharma/biotech industry. As an experienced in house leader and Chief Employment Counsel, Krista provides business-focused legal and strategic advice to clients in 40 countries covering nearly 10,000 employees. Krista advises on all phases of the employment cycle, from hire to offboarding. This includes managing employment litigation, establishing effective HR compliance practices and policies, directing workplace investigations, advising on performance management, discipline and terminations, fostering effective diversity, equity and inclusion programs, mitigating risk in connection with contingent labor engagement, supporting workforce reorganizations, and implementing and enforcing restrictive covenants. Krista provides strategic support for business development transactions as well as geographical expansion into new markets. She plays a key role in executive compensation and corporate governance, forming effective partnerships with stakeholders including the C-suite and board. Krista places a high value on providing practical and actionable legal advice, proactively managing risk, and finding creative and compliant solutions to drive business objectives and innovation.



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Joseph Lazazzero is a seasoned attorney specializing in litigation, financial services, and employment law, representing and advising clients across a range of complex litigation issues, including discrimination, commercial disputes, regulatory compliance, and restrictive covenants cases. His practice focuses on providing strategic counsel to in-house legal teams and human resources professionals, ensuring compliance with Investment Advisors Act, Title VII, state anti-discrimination laws, and federal and state financial regulations.



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Companies of all sizes and in various industries call upon attorney Erik Weibust for his practical and thoughtful advice—and his aggressive representation in high-stakes trade secret, non-compete, and commercial litigation.

Many of the world's leading pharmaceutical, biotech, medical device, technology, financial services, staffing, and insurance companies look to Erik for thoughtful and practical advice concerning how best to protect their trade secrets and customer relationships from misappropriation by former employees, ex-business partners, competitors, and hostile actors in the United States and abroad, and to avoid liability when hiring from competitors. When necessary, clients rely on Erik for aggressive representation in litigation, where he has won substantial victories in court and at the negotiating table, including broad-reaching injunctive relief and multimillion-dollar payouts, in trade secret misappropriation, unfair competition, and breach of restrictive covenant cases.

Erik's national litigation practice provides him with particular insight into how courts and arbitrators in a variety of jurisdictions analyze relevant issues, keeping him abreast of cutting-edge legal arguments, industry trends, and litigation strategies that he brings to bear in all of his representations. In addition to serving as the immediate past Chair of the American Intellectual Property Law Association (AIPLA) Trade Secret Committee, Erik regularly publishes articles and speaks locally and nationally about trade secret and restrictive covenant law, and he has been quoted on these topics in publications such as *The Washington Post*, *Bloomberg*, *Law360*, *Business Insurance*, and *Financial Times*.

Erik serves as Co-Chair of Epstein Beker Green's Trade Secret & Employee Mobility Practice Group and as a member of the firm's national Litigation Department Steering Committee.

