

# LITIGATION

## INFORMATION MEMO

JULY 29, 2024

### District Court Approves FTC Non-Compete Ban: A Growing Divide That May Sow Confusion

On July 23, 2024, the United States District Court for the Eastern District of Pennsylvania (Hon. Kelley B. Hodge, U.S.D.J.) issued a Memorandum Opinion and Order (the Order) in the matter of *ATS Tree Services, LLC v. Federal Trade Commission*, 2024 WL 3511630, 24-1743, denying plaintiff's motion seeking a preliminary injunction enjoining enforcement of the FTC's Non-Compete Rule. Following a detailed history of the FTC Act and a brief discussion of the FTC's Non-Compete Rule, the Court first held that the plaintiff ATS Tree Services, LLC failed to meet its burden of demonstrating irreparable harm, inasmuch as the costs expended in complying with federal regulations cannot constitute sufficient harm to support a preliminary injunction and the speculative risk that employees may leave the company without noncompete agreements was unsupported.

More importantly, the District Court held that even if the plaintiff could establish irreparable harm, the plaintiff could not establish they were likely to succeed on the merits of the case. Specifically, the District Court rejected the plaintiff's contention that the FTC was authorized to make procedural rules but not substantive rules under the FTC Act. In doing so, the District Court expressly held that the FTC Act authorized the FTC to make substantive rules impacting business. In other words, the FTC was not required to only be reactive but could be proactive as well. Moreover, the District Court held that the FTC's Non-Compete Rule clearly fell within the FTC's directive to prevent "unfair methods of competition." Finally, the District Court rejected the plaintiff's arguments that the FTC was precluded from regulating noncompete agreements because they are "traditionally regulated by state law."

In sum, the District Court held that the FTC was authorized to issue the Non-Compete Rule and that the FTC's promulgation of the Non-Compete Rule was constitutional.

The District Court's Order is clearly at odds with the July 3, 2024 order of the Northern District of Texas in *Ryan LLC v. Federal Trade Commission*, 2024 WL 3297524, 24-cv-986, discussed [here](#),<sup>1</sup> which held that the FTC overstepped its authority in issuing the Non-Compete Rule and enjoined enforcement of the Non-Compete Rule as against the parties to that lawsuit. This emerging split may continue through the appellate courts, requiring resolution in the United States Supreme Court.

However, as it stands, the current effective date of the FTC non-compete ban is Sept. 4, 2024. Given the future of the FTC's Non-Compete Rule remains up in the air, businesses need to take appropriate steps to prepare for the possibility that the FTC Non-Compete Rule goes into effect. Such steps should include identifying any "workers," both current and former, who may be subject to non-competes and preparing, but not sending, the notices required by the FTC Non-Compete

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<sup>1</sup> <https://www.bsk.com/news-events-videos/district-court-enjoins-ftc-non-compete-ban-but-with-a-catch>

Rule. We will continue to closely monitor the situation and provide updates as they become available.

For any questions about this issue, please feel free to contact [Bradley A. Hoppe](#), [Kevin G. Cope](#) or any attorney in Bond's [Litigation](#) or [Labor and Employment](#) practices or the attorney at the firm with whom you are regularly in contact.

