Vol. 3, Issue 7

Monday, August 26, 2024

Court Invalidates FTC Non-compete Ban

Ban was "based on inconsistent and flawed empirical evidence"

The Federal Trade Commission's (FTC) pending final rule that would broadly prohibit non-compete provisions in employer contracts was struck down by a federal judge in the Northern District of Texas on Aug. 20. The Court's ruling and remedy was nationwide in scope. As a result, nationwide, the final rule will not go into effect as stated in the rule on Sept. 4, 2024.

In the opinion and order, the court found that the FTC rule exceeded its statutory authority and was unconstitutionally arbitrary and capricious. The Court concluded the prohibition on non-competes was "based on inconsistent and flawed empirical evidence, fails to consider the positive benefits of non-compete agreements, and disregards the substantial body of evidence supporting these agreements."

Hall Render, PC, wrote in its Aug. 21 article, Texas Court Sets Aside FTC's Non-Compete Rule – Relief is Nationwide in Scope: "For now, the key takeaways from Ryan, LLC are as follows: i) the FTC exceeded its statutory authority in issuing the Final Rule; ii) the Final Rule is arbitrary and capricious; iii) the proper remedy was for the Court to 'hold unlawful' and 'set aside' the Final Rule; and iv) the set aside remedy has 'nationwide effect[,]' as opposed to being party-specific."

Quarles and Brady, LLP also wrote about the decision in an Aug. 21 article: Texas Federal Judge Strikes Down FTC Non-Compete Ban.

In April 2023, WHA joined the American Hospital Association (AHA), U.S. Chamber of Commerce and numerous other organizations across the U.S. expressing significant concerns with and opposition to the FTC's then-proposed blanket rule.

In WHA's April 2023 comment letter to the FTC, WHA wrote, "A blanket declaration that all non-compete related terms are unreasonable and illegal not only substitutes the will of the consenting, contracting parties and their assessment of the reasonableness and adequacy of the entirety of the bargain between each other, but also replaces our state and federal courts' appropriate approach to determining what is an unreasonable and illegal restraint of trade through an individualized examination of the context of the consenting parties to the contract, the benefits of the agreement flowing to both contracting parties, and the breadth or narrowness of an alleged unreasonable non-compete related term."

WHA's comment letter referenced Wisconsin's existing non-compete statute, s. 103.465, Wis. Stats., and its accompanying case law, as an appropriate and balanced approach to non-compete clauses that would be usurped by the FTC rule.

"The [rule] also substitutes Wisconsin's policy choice to allow some, but not all, non-compete clauses. Like many other states, Wisconsin's Legislature has enacted a statute that renders non-compete agreements 'illegal, void and unenforceable' unless the restriction is 'reasonably necessary for the protection of the employer or principle,'" wrote WHA. "Wisconsin's legislative choice has further been interpreted, clarified, and supported by substantial case law in both state and federal courts."

The Court's order on Aug. 20 is a final judgement that may be appealed by the FTC to the 5th Circuit Court of Appeals within 30 days. Generally, the 5th Circuit Court of Appeals is viewed as a more conservative court of appeals.

WHA will continue to follow and inform members as actionable developments in this federal litigation occur.

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