



It's often said that if you don't like the weather in Kentucky, just wait a day and it will change. Sometimes we feel the same way about legislation.

Just this week we published a notice to advise employers that the [Federal Trade Commission's \(FTC\)](#) ban on non-compete agreements was to go into effect on September 4, 2024, and to start getting the required notices to employees ready. Thankfully, we also advised you to be ready but to wait, just in case there was a change – because there has been.

WHAT YOU NEED TO KNOW

Effective immediately, the FTC's Final Rule banning non-competes is dead on arrival nationwide. Employers can continue to rely on existing or future non-compete agreements to protect their valuable, proprietary, and confidential business information.

The FTC's ban has been ruled "arbitrary and capricious" by a Texas federal judge and non-compete agreements will remain enforceable nationwide. Employers do not need to send notices to employees to advise otherwise.

FTC NON-COMPETE BAN HISTORY

On April 23, 2024, the Federal Trade Commission ("FTC"), prompted by a 2021 Executive Order, concluded that non-compete agreements unlawfully stifle competition and depress wages, and that banning them would encourage competition, innovation, and increased wages. The Final Rule was to be effective September 4, 2024, but was subject to several legal challenges by several parties, including the US Chamber of Commerce.

CURRENT STATUS

Yesterday, August 20, 2024, a Texas federal judge concluded that the FTC exceeded its statutory authority when it issued the Final Rule banning non-compete agreements and that the Final Rule itself was arbitrary and capricious. Finding that the FTC lacked the authority to create substantive rules as opposed to "housekeeping" rules, the court concluded that the Final Rule was "an unlawful agency action." Citing to the Administrative Procedures Act, the court set aside the Final Rule in its entirety, as to all persons, meaning effective immediately, ***the decision has a nationwide effect in all judicial districts equally.***

NEXT STEPS

Employers can breathe a sigh of relief as their existing non-compete agreements will remain in force and effect and new non-compete agreements may be entered into moving forward. While the FTC has suggested it is considering an appeal, any such legal action would take months, if not longer. However, do remember that all the pre-existing challenges to non-competes still exist and they can and will continue to be individually challenged in court, so be sure to draft them carefully. When implementing non-competes, be sure to:



HR AFFILIATES

HR UPDATES

- 1) Keep the groups committed to them small and necessary. Maybe not every role in the organization needs to be restricted.
- 2) Make sure you provide consideration if non-competes are implemented any time other than initial hire.
- 3) Keep the restrictions reasonable and narrow, considering how things would truly impact your business (a nationwide twenty-year restriction is likely not reasonable.)
- 4) Be sure to acknowledge the different jurisdictions in which your organization works, and any state laws that may be in force.
- 5) Start with HR help, and finish with your legal team review. Non-competes are a contract with your employees – you'll want both teams to be sure to get them right.