Insights

The FTC's Non-Compete Ban: What's Next?

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This summer, employers in all sectors planned for a seismic shift in the use of non-compete agreements to limit employees' competitive post-employment conduct. In January 2023, the Federal Trade Commission ("FTC") issued a proposed rule banning nearly all non-compete agreements as a violation of Section 5 of the FTC Act; the rule was scheduled to take effect on September 4, 2024. *See* FTC Issues Rule Banning Non-Compete Agreements. In the weeks and months leading up to that date, employers scrambled to evaluate which employees with existing non-compete agreements would be relieved of their non-compete obligations and which would fall within the "senior executive" exemption.

Not surprisingly, a bevy of lawsuits were filed challenging the FTC rule. On August 20, 2024, just a couple of weeks prior to the compliance date, the United States District Court for the Northern District of Texas in Ryan, LLC v. FTC entered an Order granting summary judgment in favor of plaintiffs and entering an injunction blocking implementation of the FTC rule nationwide. The injunction preserves status quo and stays implementation of the FTC rule pending appeal. But the story does not end there, as the FTC filed its appeal to the U.S. Court of Appeals for the Fifth Circuit in *Ryan* on October 18, 2024. The case will take several months to wind through the appellate process, potentially ending up before the U.S. Supreme Court.[1]

Although the immediate compliance obligation under the FTC rule has abated for now, employers should remain thoughtful about ways to protect their legitimate business interests with restrictive covenants, including non-competes. States take various approaches to regulating non-competition agreements, with some applying broad prohibitions and others implementing more targeted, industry-specific restrictions. *See, e.g.*, Economic Innovation Group's State Noncompete Law Tracker. For example, Indiana generally permits appropriately crafted non-competes but strictly regulates the use of non-competes for physicians. *See* Physician Non-Competes in Indiana – The Old, the New, and the Future.

Employers should keep in mind that there are effective strategies beyond non-competes they can employ to protect legitimate business interests. Non-solicitation agreements, if properly crafted, can restrict poaching of customers and employees. *See* It's Time to Consider Revising Your Employee Non-Solicitation Provisions. Employee confidentiality agreements, in conjunction with applicable intellectual property laws like the Defend Trade Secrets Act, provide enhanced protection for proprietary information. *See* Protect Your Company's Trade Secrets with a Trade Secret Audit. And garden leave may be a viable option as well. *See* Non-Compete a Non-Option? Consider Garden Leave.

The Krieg DeVault LLP Labor & Employment team has broad expertise in helping employers develop strategies to manage competitive risk within the employment relationship, including the use of restrictive covenants. Please contact Shelley M. Jackson, Chloe N. Craft, or another member of our Labor and Employment Practice. The authors gratefully acknowledge the contributions of April L. Aldridge, MBA, IRP,

RP™ in preparing this alert.

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[1]The upcoming change in presidential administrations is certain to usher in a dramatically different policy perspective on business regulation; however, it is not yet known whether the FTC ultimately will choose to shift its course in this litigation.