September 23, 2024

FTC's Noncompete Rule: Status Update for Healthcare Industry Employers

Healthcare industry employers should stay informed concerning the Federal Trade Commission's (FTC) attempt to prohibit certain noncompete agreements. Although the rule was initially set to take effect on September 4, 2024, it was blocked on August 20 by U.S. District Judge Ada Brown of the Northern District of Texas, who issued a nationwide injunction.[1] As a result, employers are not currently required to comply with the noncompete rule. Nevertheless, this ruling is subject to appeal, and employers should remain up to date on the current status of the rule and consult with legal advisors if there are any new developments.

Background

On April 23, 2024, the FTC issued a comprehensive, nationwide ban on the use of noncompete clauses, or noncompetes. The rule defined a noncompete as

> a term or condition of employment that prohibits a worker from, penalizes a worker for, or functions to prevent a worker from (1) seeking or accepting work in the United States with a different person where such work would begin after the conclusion of the employment that includes the term or condition; or (2) operating a business in the United States after the conclusion of the employment that includes the term or condition.[2]

The rule provided that noncompete agreements are unfair methods of competition, and it attempted to prohibit employers from entering into such agreements with workers on or after the rule's proposed effective date. With respect to existing noncompetes, such agreements would become unenforceable after the effective date, with the exception of noncompetes with "senior executives." The rule defined a senior executive as an employee with a salary of more than $151,164 in a "policy-making position."[3] The rule defined policy-making position as the employer's president, CEO or equivalent, or other officer with policy-making authority.[4]

In response to the rule, Ryan LLC, a global tax services firm, sued the FTC in federal court in the Northern District of Texas. Ryan argued that the noncompete rule exceeded the FTC's authority and asked the court to set aside the rule. The court agreed and on August 20 issued a memorandum opinion and order stating that the FTC lacks statutory authority to create the noncompete rule and that the rule was unenforceable and would not take effect on September 4, 2024, or thereafter.[5]

The Noncompete Rule and the Healthcare Industry

The noncompete rule holds particular significance for the healthcare industry. While the FTC asserted its intent for the noncompete rule to apply to healthcare industry employers, the practical application of the rule would be more complicated. On the one hand, many physicians supported the rule, given that physicians are commonly subject to noncompetes. On the other hand, the FTC does not necessarily have jurisdiction over nonprofit organizations, and many healthcare organizations, including hospitals, are organized as nonprofits.[6] Indeed, in a hearing on the final rule, FTC Commissioner Rebecca Slaughter acknowledged, "I want to be transparent about the limitations in that jurisdiction[] and recognize that there are workers, especially healthcare workers, [who] are bound by anticompetitive and unfair noncompete clauses that our rule will struggle to reach."[7] The FTC stated that it intends to apply its noncompete rule to nonprofit healthcare organizations, emphasizing that tax-exempt status does not automatically exempt these organizations from FTC jurisdiction.[8] The FTC

estimated that the noncompete rule could lower healthcare costs by $74 billion, to $194 billion, over the next 10 years by decreasing spending on physician services. This estimate further explains the FTC's desire to encompass healthcare industry employers in the rule.[9]

Next Steps for Healthcare Industry Employers

Following the *Ryan* ruling, healthcare industry employers do not need to take any immediate action. Both existing and new noncompete agreements will be enforceable unless there are future changes in the law or the nationwide injunction is appealed and overturned. The FTC has until October 19, 2024, to appeal the decision to the U.S. Court of Appeals for the Fifth Circuit. To date, the FTC has only indicated that it is "seriously considering an appeal."[10]

The future of the rule could also be impacted by two other pending cases that have challenged the noncompete rule. In the U.S. District Court for the Eastern District of Pennsylvania, *TS Tree Services, LLC v. FTC*, No. 24-1743, the judge initially denied the plaintiff's request to stay the FTC rule, as to the plaintiff only, but the parties are now briefing their dispositive motions, which are due to be filed later this fall. In the U.S. District Court for the Middle District of Florida, *Properties of the Villages v. FTC*, No. 5:24-cv-316, the judge granted the FTC's request to suspend pleading deadlines in the wake of the Texas ruling, so this case is not currently moving forward. Notably, the FTC stated after the Texas ruling that the decision did not "prevent the FTC from addressing noncompetes through case-by-case enforcement actions."[11]

Overall, the future of the noncompete ban remains uncertain. Day Pitney attorneys have experience in this area and are available to assist healthcare industry employers that wish to discuss the noncompete rule.

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[1] *Ryan, LLC v. FTC*, No. 3:24-cv-00986 (N.D. Tex. Aug. 20, 2024); Mem. Op. & Order. at 23-24

[2] 89 Fed. Reg. 38,502

[3] 89 Fed. Reg. 38,413.

[4] 89 Fed. Reg. 38,418.

[5] *Ryan, LLC v. FTC*, No. 3:24-cv-00986, Mem. Op. & Order. at 27

[6] 15 U.S.C. § 44.

[7] "FTC votes 3-2 on final rule to ban noncompete agreements, but legal challenges expected," *Fierce Healthcare* (June 15, 2024), https://www.fiercehealthcare.com/regulatory/ftc-votes-3-2-issue-final-rule-banning-noncompetes.

[8] 89 Fed. Reg. 38357.

[9] *See id.*

[10] FTC's website, https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-rule-banning-noncompetes; Danielle Kaye, "Judge Blocks FTC's Noncompete Rule," *The New York Times* (Aug. 20, 2024), https://www.nytimes.com/2024/08/20/business/economy/noncompete-ban-ftc-texas.html.

[11] FTC's website, https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-rule-banning-noncompetes; Danielle Kaye, "*Judge Blocks FTC's Noncompete Rule*," *The New York Times* (Aug. 20, 2024), https://www.nytimes.com/2024/08/20/business/economy/noncompete-ban-ftc-texas.html.

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