

## Update: FTC's Noncompete Rule Set Aside

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Direct sellers can breathe easy for the time being. On August 20th, Judge Ada Brown for the United States District Court for the Northern District of Texas set aside the Federal Trade Commission's (FTC) rule imposing a national ban on noncompete agreements, preventing the rule from taking effect across the country.

In a 27-page opinion, Judge Brown held in *Ryan LLC v. Federal Trade Commission* that the FTC lacks the authority to adopt such broad rules as a nationwide ban on noncompete agreements to ban practices it deems unfair methods of competition. Judge Brown went on to hold that even if the FTC had the power to adopt its rule, the agency did not have a justifiable reason "to impose such a sweeping prohibition—that prohibits entering or enforcing virtually all noncompetes—instead of targeting specific, harmful noncompetes." In other words, the rule was "arbitrary and capricious" and therefore invalid.

Importantly, Judge Brown rejected the FTC's request that the decision be limited to the named plaintiffs in the case, clarifying that her ruling has "nationwide effect." This is because, as her cited authority provides, her ruling does not simply prevent the FTC from enforcing its rule; it set aside the rule altogether, meaning that the rule itself is now nullified and revoked as an unlawful FTC action. Though the FTC has stated that it is "seriously considering a potential appeal," the FTC does not appear to challenge the nationwide effect of the ruling. Instead, the FTC responded that the "decision does not prevent the FTC from addressing noncompetes through case-by-case enforcement actions"—something that the FTC could do before it promulgated the rule.

We have been monitoring other challenges to the FTC's noncompete rule, such as *ATS Tree Services, LLC v. Federal Trade Commission* in the Eastern District of Pennsylvania, and *Properties of the Villages, Inc. v. Federal Trade Commission* in the Middle District of Florida. As neither of those courts has reached a decision on the merits, we expect that those cases will be stayed in light of Judge Brown's ruling. Of course, those courts might reject the notion that Judge Brown's ruling has nationwide effect, which could set up a potential circuit split.

If the FTC decides to appeal Judge Brown's ruling, it faces an uphill challenge in the Fifth Circuit and the Supreme Court, which has expressed concerns about the scope of regulatory authority in recent decisions.

For now, direct sellers can and should continue to protect themselves with reasonably tailored noncompete and non-solicitation agreements. We will continue to monitor the evolving legal situation and keep our readers abreast of

the same. We specialize in legal and regulatory issues affecting direct sellers and, as always, are available if you would like to discuss.

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