An update on FTC Non-Compete ruling and follow on litigation.

On July 3, 2024, U.S. District Court Judge Ada Brown, Northern District of Texas temporarily blocked the Federal Trade Commission ("FTC") from enforcing its recent rule banning virtually all employee non-compete agreements in the United States. The court ruled the plaintiffs are likely to succeed on the merits of their claims that the FTC lacks statutory authority to issue its non-compete ban via rulemaking and that the FTC's decision to ban non-competes broadly was arbitrary and capricious. However, in a surprise twist, the court declined to grant nationwide preliminary relief, opting instead to limit its injunction to the specific plaintiffs in the action. It appears the court will issue a final ruling by August 30, 2024— before the non-compete ban is scheduled to take effect on September 4.

Although the court limited the preliminary injunction to the specific plaintiffs, the decision is a significant first win for opponents of the FTC's ban.

The *Ryan* Decision

Ryan LLC v. Federal Trade Commission was filed only hours after the FTC's final approval of its rule banning non-compete agreements. Given the breadth of the FTC's proposed rule, it was expected the rule would be challenged on constitutional and other legal grounds.

In preliminary injunction proceedings, courts must consider the likelihood of success on the merits of the plaintiffs' claim, the irreparable harm that would ensue unless enjoined, and the balance of the equities and public interest. In *Ryan*, the court held that the plaintiffs satisfied all three requirements. With respect to the first requirement, the court found that the plaintiffs established a likelihood of success on the merits in two of their key arguments challenging the ban: (1) that the FTC lacks the statutory authority to issue rules defining unfair methods of competition, and (2) that the FTC's action was "arbitrary and capricious" under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551–559.

To assess the scope of the FTC's statutory authority, the court reviewed the Federal Trade Commission Act ("FTC Act"). The court considered the FTC's argument that Sections 5 and 6(g) of the FTC Act empowered it to promulgate rules that prevent unfair methods of competition. While acknowledging that Section 5 gives the agency authority to prevent unfair methods of competition, the court agreed with the plaintiffs that Section 6(g) does not authorize the FTC to engage in "substantive rulemaking," but only gives the Commission the power to issue "housekeeping rules" to carry out its mandate to prevent unfair methods of competition. The court said "Congress did not explicitly give the [FTC] substantive rulemaking authority" relating to unfair methods of competition under the FTC Act. The court pointed to the FTC's history, including that (1) for nearly 50 years from its formation, the FTC had explicitly disclaimed having such substantive rulemaking authority, and (2) that until April 2024, the agency had not promulgated substantive rulemaking under FTC Act 6(g) since 1978. Accordingly, the plaintiffs established that the FTC's nationwide ban likely exceeds the agency's "housekeeping" authority under Section 6(g).

The court further concluded that the FTC's actions were not authorized by the APA, because there was a substantial likelihood that the ban is arbitrary and capricious due to its overbreadth. The court explained that the FTC's rulemaking record did not support the decision to adopt a "one-size-

fits-all approach with no end date," while discounting a whole slew of alternatives to the near-total ban on non-compete agreements. Because the court found that the agency had overstepped its statutory authority and that its rulemaking was arbitrary and capricious, it declined to consider the plaintiffs' additional argument that the ban is an unconstitutional exercise of administrative power.

The court found that the plaintiffs would suffer immediate financial injury and nonrecoverable costs if the ban were to take effect, including having to invalidate non-competes with current employees, face "increase risk that departing workers may take intellectual property and proprietary methods to its competitors," and signal to competitors that it is "open season of poaching clients and workers." Tthe named plaintiffs would be unable to recover costs of compliance from the FTC, because federal agencies typically have sovereign immunity for monetary damages.

Finally, the court balanced the equities in plaintiffs' favor. The court held that an injunction would serve the public interest in maintaining the status quo and preventing substantial an adverse economic impact. The court also held that the FTC would suffer no harm.

It appears the plaintiffs demonstrated that the FTC lacked statutory authority to issue substantive rulemaking and that the ban was arbitrary and capricious. Judge Brown acknowledged that nationwide relief may be appropriate in these circumstances, but such relief was not necessary to provide the plaintiffs complete relief "at this preliminary stage."

Ongoing Challenges

The U.S. Chamber of Commerce and other business associations sued the FTC in the U.S. District Court for the Eastern District of Texas challenging the ban, but later joined the first-filed *Ryan* action. *ATS Tree Services, LLC v. Federal Trade Commission*, was filed in U.S. District Court for the Eastern District of Pennsylvania challenging the FTC's non-compete ban and moving for a preliminary injunction against its enforcement pending consideration of the merits. Oral arguments on that injunction motion are scheduled for July 10, 2024. The judge presiding over that case has indicated that a decision will be issued by July 23, 2024.