

Non-competes: The Debate Continues

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Like many of our friends in human resources, September 4, 2024 was on our mind. The Federal Trade Commission's (FTC) ban on non-competes (agreements that contain restrictive covenants prohibiting an employee from competing against their employer, usually for a specified period after employment ends) was set to go into effect. The rule, if enacted, would have banned all new non-compete agreements, invalidated most existing non-compete agreements (except those involving senior executives) and required notification to employees that their existing non-competes were unenforceable.



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Although many of us expected the FTC's rule to be blocked at some level, it wasn't until August 20, 2024 when a Texas federal court ruled that the FTC's rule would not go into effect nationwide as scheduled, holding that the FTC exceeded its statutory authority in issuing the final rule. *Ryan, LLC v. FTC*, No. 3:24-CV-00986-E, 2024 WL 3879954 (N.D. Tex. Aug. 20, 2024). The FTC has not yet appealed the decision to the 5th Circuit, but is expected to do so. Challenges to the FTC's rule in other district courts have resulted in their own appeals, possibly leading to U.S. Supreme Court review.

The wait-and-see approach was nothing new to us in New York State. In December 2023, Governor Kathy Hochul vetoed the New York legislature's proposed ban on non-competes. This proposed ban, if successful, would have been sweeping and did not provide exceptions for highly compensated employees. Although not signed into law, Governor Hochul signaled that she is open to a non-compete ban that protects middle-class and low-wage earners. New York State Senator Sean Ryan, one of the vetoed bill's sponsors, vowed to reintroduce new legislation in 2024.

While we wait to see what that new legislation will look like, New York certainly isn't alone in the debate about how far to restrict non-competes. Some states, like Pennsylvania and Illinois, limit non-competes based on profession or income thresholds, respectively. Other states — like California, Minnesota, North Carolina and Oklahoma — have total bans on these kinds of agreements. Total bans on non-competes were rejected in Maine and Rhode Island, while several other states — Michigan, Connecticut, Kentucky and Missouri — have pending legislation seeking to restrict non-competes.

In addition to the growing wave of state restrictions, federal legislation restricting non-competes is currently pending, such as the Workforce Mobility Act and the Freedom to Compete Act; however, neither bill has gained much traction since being introduced

to Congress in 2023. And, of course, there is the National Labor Relations Board General Counsel Jennifer A. Abruzzo's May 2023 memo, which challenged the legality of non-compete agreements, arguing such agreements violate the National Labor Relations Act except in limited circumstances. In line with this memo, General Counsel Abruzzo issued a memo on October 7, 2024, which expands on her prior statements regarding non-competes and indicates her intent to prosecute employers who require employees to sign non-competes

or certain "stay-or-pay" provisions (such as repayment of sign-on bonuses or educational expenses).

Staying informed about changes to the current patchwork of regulations is imperative for those of us operating in multiple states, including with remote workers. Phillips Lytle attorneys will continue to monitor legal developments and are here to assist with your legal needs.

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