FTC Non-Compete Clause Rule:
Overview and Status Update

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I. Spoiler alert: The rule is not currently a rule.

II. Overview of the Federal Trade Commission (FTC)'s rule banning non-compete clauses.

a. History

i. An initial proposed rule was issued in January of 2023. Based upon thousands of comments received within the 90-day public comment period, a final proposed rule was drafted, which was issued on April 23, 2024, set to go into effect on September 4, 2024.
ii. The rule is intended to ensure fair competition in labor markets. The FTC has determined that non-compete agreements are unfair methods of competition which restrain trade and harm workers and consumers.
iii. The FTC estimated that the rule would lead to more than 8,500 new businesses forming each year and increase earnings for the average worker by $524 per year. FTC.gov.

b. Basic Provisions

(*for text of the Rule and FTC's explanation, see 16 CFR §§ 910-912, published in the Federal Register, Volume 89, pages 38342-38506; actual Rule text begins on page 38502*)

i. It is an unfair method of competition for any **person**[1] to:
1. Enter into, or attempt to enter into, a **non-compete clause**. 16 C.F.R. § 910.2(a)(1)(i).
2. Enforce, or attempt to enforce, a non-compete clause. 16 C.F.R. § 910.2(a)(1)(ii).
3. Represent that a **worker** is subject to a non-compete clause. 16 C.F.R. § 910.2(a)(1)(iii).

[1] Bold terms are defined; see next section of outline.

ii. For any existing non-compete clauses, workers must be given notice, by the effective date of the rule, that their non-compete clause cannot and will not be legally enforced. 16 C.F.R. § 910.2(b)(1).
iii. The FTC has provided a model notice for the notice requirement. 16 C.F.R. § 910.2(4). If the model notice is used, the notice requirement is satisfied. 16 C.F.R. § 910.2(5). (See attached excerpt for model notice)

c. Definitions

i. The FTC has given broad definitions for all relevant terms, so the rule covers a wide range of relationships.
ii. "**Non-compete clause**" is defined as any term or condition of **employment** that prohibits, penalizes, or functions to prevent a worker from:
    1. Seeking or accepting work with a different person after the conclusion of their employment, or
    2. Operating a business after the conclusion of their employment. 16 C.F.R. § 910.1.
iii. "**Employment**" simply means work for a person. 16 C.F.R. § 910.1. This is intentionally broad, such that an employment relationship exists for the purposes of this rule regardless of whether an employment relationship exists under any other law. 89 Fed. Reg. 38,360 (May 7, 2024).
iv. "**Person**" means any natural person, partnership, corporation, association, or other legal entity within the FTC's jurisdiction. 16 C.F.R. § 910.1.
v. "**Worker**" means a natural person who works or previously worked for a person, regardless of pay, title, or legal status. It includes sole proprietors who provide services to a person. It does not include franchisees. 16 C.F.R. § 910.1.

d. Exceptions

i. Senior executives may still be bound by existing non-compete clauses, but may not enter into new non-compete clauses after the effective date of the rule. 16 C.F.R. § 910.2(a)(2).
    1. "**Senior executive**" means a worker who has policy-making authority and received total annual compensation of at least $151,164 in the preceding year (annualized if the worker was employed during only part of the year). 16 C.F.R. § 910.1.
ii. Persons may still enter into non-compete clauses pursuant to a bona fide sale of a business entity, their ownership interest in a business entity, or all or substantially all of a business entity's operating assets. 16 C.F.R. § 910.3(a).
iii. Existing causes of action relating to non-compete clauses are not affected. 16 C.F.R. § 910.3(b).

iv. A good faith exception exists for persons who enforce or make representations about a non-compete clause, where they have a good-faith basis to believe the rule is inapplicable. 16 C.F.R. § 910.3(c).

e. Effect on Other Agreements

i. The rule does not explicitly ban any other type of agreement. However, any agreement which functions to prevent a worker from seeking or accepting work or operating a business could fall under the rule's definition of a non-compete clause. 16 C.F.R. § 910.1.
ii. No-hire agreements, non-solicitation agreements, non-disclosure agreements, or training repayment agreements, among others, could be affected depending on their specific language and the circumstances surrounding the agreement. The FTC contemplated these types of agreements falling under the rule, if they met the definition of a non-compete clause after fact-specific inquiry. 89 Fed. Reg. 38,365 (May 7, 2024).
iii. The specific application to other agreements is unclear, and will likely require further litigation to clarify, assuming the rule eventually takes effect.

f. Enforcement

i. Prior to this rule, the FTC prevented unfair methods of competition through administrative proceedings, held on a case-by-case basis. 15 U.S.C. § 45(b). Once a determination was reached, a final cease-and-desist order would be issued to the violating party. Id. If the party violated that cease-and-desist order, the FTC could initiate a civil action to impose monetary penalties. Id.
ii. Enforcement procedure under this rule is unclear, but it would likely follow the example of trade regulation rule enforcement, currently limited to unfair or deceptive acts or practices rather than unfair methods of competition. The FTC "may commence a civil action…against any person, partnership, or corporation which violates any rule under this subchapter respecting unfair or deceptive acts or practices…with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair pr deceptive and is prohibited by such rule." 15 U.S.C. § 45(m)(1)(A).
iii. Under this procedure, a violating party "shall be liable for a civil penalty of not more than $10,000 for each violation." Id.

III. Status of Rule/Current Litigation

a. Ryan, LLC v. Fed. Trade Comm'n, No. 3:24-CV-00986-E (N.D. Tex. Aug. 20, 2024)

i. On May 1, 2024, Ryan, LLC filed motions to stay the effective date of the non-compete rule and preliminarily enjoin the FTC from enforcing the rule, arguing that the FTC had exceeded its statutory authority (*more on this below*), that the rule was an unconstitutional exercise of power, and that the issuance of the rule was arbitrary and capricious.
ii. On July 3, 2024, the court granted the motion to stay the effective date of the rule and issued a preliminary injunction preventing implementation or enforcement of the rule. Both decisions applied only to enforcement against Ryan, LLC.
iii. In July and August, 2024, Ryan, LLC and the FTC filed competing motions for summary judgment and fully briefed the matter.
iv. On August 20, 2024, the court granted summary judgment in favor of Ryan, LLC, holding that the FTC had exceeded its statutory authority and that the rule was arbitrary and capricious.
    1. Relying on the recent Supreme Court decision in Loper Bright Enterprises, the court looked to the legislative intent underpinning the FTC Act and determined that Section 6(g) is a housekeeping statute, authorizing the FTC to promulgate rules governing agency organization, procedure, and practice. It does not grant substantive rulemaking authority.
    2. The court held that the rule was arbitrary and capricious based on criticisms of the FTC's factual support for the rule. It determined that the rule was based on inconsistent and flawed empirical evidence, and that the FTC failed to consider less disruptive alternatives. Under the Administrative Procedure Act ("APA") a court must hold unlawful and set aside agency actions found to be arbitrary or capricious. 5 U.S.C. § 706(2)(A).
v. The FTC, as a government agency, has 60 days to appeal the decision. Fed. R. App. P. 4(a)(1)(B)(ii). This sets a deadline of October 19, 2024.

b. ATS Tree Servs., LLC v. Fed. Trade Comm'n, No. CV 24-1743 (E.D. Pa. July 23, 2024)

i. Similar to Ryan, LLC, ATS Tree Services, LLC filed a motion to stay the effective date of the rule and preliminarily enjoin the FTC from enforcing the rule. ATS similarly argued that the FTC had exceeded their statutory rulemaking authority.
ii. The court denied ATS's motions, holding that they had failed to establish irreparable harm as required to obtain preliminary injunctive relief. ATS primarily cited high costs associated with adhering to the rule's notice

requirements and adjusting its future business strategy, but the court found this to be speculative.

iii. The court also found that ATS did not demonstrate a likelihood of success on the merits. Reading Section 6(g) of the FTC Act, the court determined that the FTC is empowered to make procedural and substantive rules regarding unfair methods of competition. Further, Section 5 of the FTC act empowers the FTC to "prevent" unfair methods of competition, which inherently contemplates substantive rulemaking authority.

iv. Litigation is still ongoing, with motions for summary judgment expected to be filed by October 4, 2024.

c. Properties of the Villages, Inc. v. Fed. Trade Comm'n, No. 5:24-CV-316 (M.D. Fla. Aug. 15, 2024)

i. On August 15, 2024, the district court granted this plaintiff's motion to stay the effective date of the rule and preliminarily enjoin enforcement of the rule. Both decisions only apply to this plaintiff.

ii. Unlike Ryan, LLC, this court determined that plaintiff was unlikely to succeed on the merits of their argument regarding statutory rulemaking authority. However, the court held that plaintiff was likely to succeed on the merits of their challenge under the major questions doctrine. Though there is a reasonable likelihood that Section 6(g) of the FTC Act grants substantive rulemaking authority, the court was skeptical that congress could delegate the authority to issue a rule of such economic and political significance.

IV. The FTC's Authority

a. Section 5 of the FTC Act gives the FTC power "to prevent persons, partnerships, or corporations…from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(2). The FTC is granted enforcement power through administrative proceedings, leading to cease-and-desist orders on a case-by-case basis and penalties if those orders are violated.[2] 15 U.S.C. §§ 45(b) and (l).

b. Section 6(g) of the FTC Act gives the FTC power to "[f]rom time to time classify corporations and (except as provided in section 57a(a)(2) of this title [regarding

[2] "Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition… and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing… If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this subchapter, it shall make a report in writing…and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition…" 15 U.S.C.§ 45(b). "Any person, partnership, or corporation who violates an order of the Commission…shall forfeit and pay to the United States a civil penalty of not more than $10,000 for each violation, which shall accrue to the United States and may be recovered in a civil action…" 15 U.S.C. § 45(l).

unfair or deceptive acts or practices]) to make rules and regulations for the purpose of carrying out the provisions of this subchapter." 15 U.S.C. § 46(g).

c. In Ryan, LLC the FTC argued that this includes substantive rules governing unfair methods of competition. Ryan argued, and the court agreed, that it only includes procedural rulemaking.
d. The FTC has historically asserted that the plain language of Section 6(g) supports their authority to issue substantive rules. A U.S. Circuit Court of Appeals has previously agreed in Nat'l Petroleum Refiners Ass'n v. F.T.C., 482 F.2d 672 (D.C. Cir. 1973), but the question has largely remained untouched since.
e. The FTC has also cited a 1980 amendment to the FTC Act, which in part defined the term "rule" to mean "any rule promulgated by the Commission under section 46…except that such term does not include interpretive rules, rules involving Commission management or personnel, general statements of policy, or rules relating to Commission organization, procedure, or practice." 15 U.S.C. § 57b-3(a)(1). This language implies that the 1980 Congress understood the FTC to have rulemaking authority beyond merely interpretive or procedural rules.
f. Critics argue that Section 6(g) simply authorizes promulgation of procedural rules relating to the administrative procedures described in Section 5 of the FTC Act. In Ryan, LLC, the district court agreed with this argument. Further, Section 6 of the FTC Act contains no penalties for violation of rules promulgated under that section, which historically implies a lack of substantive force.
g. Congressional amendments to the FTC Act also offer support to this side of the argument. Congress has amended the Act to expressly allow substantive rulemaking on specific subjects. See 15 U.S.C. § 1193. This implies that Congress understood that the FTC lacks substantive rulemaking authority absent an explicit grant.
h. Critics have also raised challenges to the rule under the major questions doctrine, which could impact the rule regardless of the FTC's substantive rulemaking authority. Under this doctrine, the FTC's claim of authority could be rejected because it concerns an issue of vast economic and political significance that Congress has not clearly empowered it to address. Util. Air Regul. Grp. v. E.P.A., 573 U.S. 302, 324 (2014).
i. The major questions argument focuses broadly on constitutional separation of powers and delegation of congressional power, rather than the narrow question of rulemaking authority under the APA. While somewhat related, the two arguments are distinct. In Properties of the Villages, Inc., the district court determined that even though the FTC likely has substantive rulemaking authority based on the language of Section 6(g) of the FTC Act, prohibiting non-compete agreements is such a significant decision that the rule likely violated the major questions doctrine.

V. Nationwide applicability

a. When the district court in Ryan, LLC issued its final decision staying the rule, that decision took effect nationwide rather than applying only to Ryan.

b. Under the APA, courts must hold unlawful and set aside agency actions found to be arbitrary or capricious. 5 U.S.C. § 706(2)(A). Courts, including the Fifth Circuit, have held that setting aside such agency actions has a nationwide effect, in all judicial districts equally. See Braidwood Mgmt., Inc. v. Becerra, 104 F.4th 930, 951 (5th Cir. 2024).
c. It's not clear whether this interpretation is correct. Recently, Justices Gorsuch, Thomas, and Barrett have expressed skepticism that the APA empowers courts to entirely vacate federal agency actions, indicating that the law directs courts to disregard unlawful agency actions only as applied to the case at hand. United States v. Texas, 599 U.S. 670, 695-96 (2023).
d. As nationwide injunctions become more common, it appears increasingly likely that the Supreme Court will have to resolve this question. "I am skeptical that district courts have the authority to enter universal injunctions…If their popularity continues, this Court must address their legality." Trump v. Hawaii, 585 U.S. 667, 713 (2018) (J. Thomas, concurring).

VI. Non-Compete Agreements in Wisconsin, Meanwhile…

a. While the decision in Ryan, LLC stands, Wisconsin non-compete agreements continue to be governed by state law, requiring that non-compete agreements be limited to a specified time and territory and be reasonably necessary for the protection of an employer. Wis. Stat. § 103.465.
b. Full text of 103.465:

> *Restrictive covenants in employment contracts. A covenant by an assistant, servant or agent not to compete with his or her employer or principal during the term of the employment or agency, or after the termination of that employment or agency, within a specified territory and during a specified time is lawful and enforceable only if the restrictions imposed are reasonably necessary for the protection of the employer or principal. Any covenant, described in this section, imposing an unreasonable restraint is illegal, void and unenforceable even as to any part of the covenant or performance that would be a reasonable restraint.*

c. Non-compete agreements are also governed by common law requirements, even after the enactment of Wis. Stat. § 103.465. These agreements must be necessary to protect the employer, provide a reasonable time and territorial limit, not be harsh or oppressive to the employee, and not be contrary to public policy. Lakeside Oil Co. v. Slutsky, 8 Wis. 2d 157, 162–63, 98 N.W.2d 415 (1959).
d. An agreement is not necessary simply because it protects an employer from ordinary competition. Id. Typically, a non-compete agreement will be recognized as necessary in two scenarios.
e. First, non-compete agreements can be necessary when the employee is a customer-facing representative that has built goodwill with the employer's customers. See Star Direct, Inc. v. Dal Pra, 2009 WI 76, 319 Wis. 2d 274, 767 N.W.2d 898.

f. Second, non-compete agreements can be necessary when addressing an employee's access to confidential information with competitive significance. Rollins Burdick Hunter of Wisconsin, Inc. v. Hamilton, 101 Wis. 2d 460, 468-69, 304 N.W.2d 752 (1981).