

FTC Withdraws Non-Compete Appeal, Previews a More Focused Approach

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Recent activity from the Federal Trade Commission (FTC or Commission) indicates yet another shift in the Commission's view on non-compete agreements, the latest in a turbulent 16-month period for this topic that began with the FTC's May 2024 publication of a final rule banning most non-competes throughout the country.

The rule was set to take effect 120 days later, on September 4, 2024, and it would have banned the vast majority of new non-competes with employees, independent contractors, and volunteers nationwide, with the exception of those entered into pursuant to certain business sales. The ban was published based on the view of the Commission, which was controlled by a Democratic majority at the time, that non-competes are an unfair method of competition and therefore a violation of Section 5 of the FTC Act. In addition to the ban, the rule would have required employers to notify impacted workers of their agreements' unenforceability.

Two weeks before its effective date, on August 20, 2024, the U.S. District Court for the Northern District of Texas invalidated the ban with its opinion in *Ryan LLC, et al. v. Federal Trade Commission*. The court ruled that the ban exceeded the FTC's statutory authority. In doing so, it held that the creation of substantive rules stretched beyond the FTC's power, and that the ban was unreasonably overbroad. The FTC appealed the court's ruling to the U.S. Court of Appeals for the Fifth Circuit. The FTC filed its appellate brief in January 2025 but then sought a stay of the appeal in March 2025.

On September 5, 2025, one year and one day after the ban was originally set to take effect, the FTC formally withdrew its appeal of the *Ryan* decision as well as a similar appeal pending in the 11th Circuit. By withdrawing the appeal, the Commission (which is now entirely comprised of Republican appointees) essentially accepted the position of the Texas federal court in *Ryan*, which limits the FTC's authority to creating rules of agency procedure rather than substantive rules regarding unfair methods of competition.

Although the FTC's appeal withdrawal appears to be the final nail in the coffin of the non-compete ban, the day *before* it withdrew the appeal, the FTC issued a press release announcing an enforcement action to protect American workers from "harmful labor practices" by ordering Gateway Services, Inc., the nation's largest pet cremation business, to stop enforcing restrictive covenants against nearly all of its workers. The FTC claimed that Gateway required almost every one of its 1,800 employees, regardless of their position or responsibilities (and regardless of the existence of a protectable interest), to sign a non-compete agreement that prohibited employees from working in the pet cremation service industry for one year after the end of their employment with Gateway. The FTC claimed that these agreements, which were even entered into with hourly employees and laborers, "unfairly alter the bargaining power" between Gateway and its employees, and they suppress competition by impeding the entry or expansion of similar businesses.

To resolve the matter, the FTC accepted a consent agreement containing a proposed consent order that, if finalized after a 30-day public comment period, would:

1. Prohibit Gateway from entering into, maintaining, or enforcing non-competes except in the context of the sale of a business by a person with pre-existing equity, or a non-compete of a director, officer, or senior employee signed in exchange for some kind of equity award;
2. Require Gateway to notify its employees that they are no longer subject to their non-compete; and
3. Prohibit Gateway from preventing employees from soliciting customers, except for those customers with whom the employee had direct contact during the last 12 months of their employment.

Though a final decision and order in this case would only be legally binding on Gateway, the case provides guidance on what circumstances might make a particular non-compete practice unlawful under Section 5 of the FTC Act in the Commission's current view. It also raises the question of whether the FTC remains interested in challenging non-competes generally, or only in circumstances involving egregious violations like the case it alleged against Gateway. Either way, employers should continue to monitor the latest developments involving non-compete agreements.

If you have any questions about non-compete agreements or any developments concerning the FTC's position on non-compete agreements, please contact Stephen A. Antonelli at 412-394-5668 or santonelli@babstcalland.com or Alexandra G. Farone at (412) 394-6521 or afarone@babstcalland.com.

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