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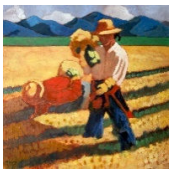

Employment Law Note

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The Judiciary Strikes Back: FTC's Noncompete Rule Blocked

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In April of this year, the Federal Trade Commission ("FTC") announced that its new rule banning noncompete agreements would be formally effective on September 4, 2024. In late August, however, a federal district court issued a nationwide order setting aside the rule and blocking its enforcement. This note provides an overview of this recent spate of litigation and the implications for Washington employers going forward.

FTC's Noncompete Rule

In April 2024, the FTC issued its final "Noncompete Rule" comprehensively banning new noncompete agreements with all workers, including senior executives. The Noncompete Rule also rendered all preexisting noncompetes unenforceable, excepting only "senior executives." A "senior executive" must earn over $151,164 annually and hold a policy-making position. Fewer than one percent of the American workforce qualifies for the "senior executive" exemption.

The FTC posited that the Noncompete Rule was a reasonable interpretation of Section 5 of the FTC Act, which generally bans unfair methods of competition. The Noncompete Rule was set to go into effect on September 4, 2024. The FTC promised the Noncompete Rule would increase competition – and therefore wages – for millions of Americans.

Chevron's Overruling

In June 2024, in its decision in *Loper Bright Enterprises v. Raimondo*, the U.S. Supreme Court overturned its landmark *Chevron v. NRDC* decision, which held that federal courts must defer to agencies' reasonable interpretations of unclear statutes when promulgating rules and regulations. In practice, *Chevron* had made it virtually impossible to challenge agency decisions in federal court. By overturning *Chevron*, the *Loper* decision removed the power to interpret ambiguous statutes from regulators and conferred it to the judiciary. Unsurprisingly, since *Loper*, a number of cases have been filed to challenge administrative rules and regulations including FTC's Noncompete Rule.

Ryan LLC v. Federal Trade Commission

On August 20, 2024, the U.S. District Court for the Northern District of Texas indefinitely halted the FTC from implementing its Noncompete Rule nationwide. In a case entitled *Ryan LLC v. Federal Trade Commission*, the court held that the FTC exceeded its authority in implementing the Noncompete Rule and that the Noncompete Rule is an arbitrary and capricious interpretation of the FTC Act. The court reasoned, among other things, that the FTC Act only authorizes the FTC to create substantive rules regarding unfair or deceptive acts or practices in commerce and the Act is silent on "unfair methods of competition" and noncompete agreements. For these

reasons, the court held that the FTC impermissibly exceeded the scope of its authority in issuing such a sweeping and uncompromising ban.

Consequences and Considerations

Notwithstanding *Ryan LLC v. FTC*, pursuant to Revised Code of Washington ("RCW") 49.62, Washington employers are still subject to state-law restrictions on noncompete agreements. Under Washington law, only employees earning more than the minimum statutory threshold amount can be held to their noncompete agreements. The threshold amount is adjusted annually. For 2024, noncompetes cannot be enforced against employees earning less than $120,559.99.

Had the FTC's Noncompete Rule gone into effect, it would have banned *all* new noncompetes in Washington, even for employees earning more than Washington's compensation threshold. And, for preexisting noncompetes, the FTC Noncompete Rule would have effectively raised the salary threshold amount to $151,164 (*i.e.*, the "senior executive" exception). In short, the Noncompete Rule was set to drastically expand the already considerable protections against noncompetes for Washington employees.

This past summer, many Washington employers may have refrained from including otherwise-valid noncompete clauses in employment agreements in anticipation of the federal rule's effect. Now that there is no Noncompete Rule in effect, employers may want to revisit those employment agreements to assess whether it is in their best interests to execute noncompete clauses for eligible employees. Any such modification should be drafted narrowly to protect those interests and supported by adequate, independent consideration.

In addition, employers should:

1. Take measures to protect trade secret, confidential, and proprietary information from improper use or disclosure beyond noncompete agreements, including distributing such information on a need-to-know basis, password protecting the information, or otherwise restricting access;
2. Draft thorough and precise non-disclosure and non-solicitation clauses consistent with Washington law; and
3. Consult with an attorney about reviewing their hiring and employment practices for compliance with state and federal law.

Employers with questions about reviewing hiring and employment practices are encouraged to contact Sebris Busto James.

For more information about this month's Employment Law Note
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