# The FTC's Non-Compete Ban: What Lies Ahead?

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In April 2024, the Federal Trade Commission (FTC) issued a nationwide rule banning non-compete agreements between employers and workers.[1] The FTC found that non-compete agreements are an unfair method of competition and therefore in violation of Section 5 of the FTC Act. The anticipated enforcement of this rule on September 4, 2024, and the recent decisions by the US District Courts for the Northern District of Texas on July 3, 2024, and the Eastern District of Pennsylvania on July 23, 2024, raise questions about the ban's implementation and enforcement, as well as the potential short- and long-term impact on workers across different industries and wage levels.

To explore the implications of the ban, the Joint Conduct Committee and Distribution and Franchising Committee of the ABA Antitrust Law Section cosponsored a webinar on May 7, 2024 (which occurred after the FTC issued its ban but prior to the more recent decisions), titled "The FTC's Non-Compete Ban: What Lies Ahead?" The program was moderated by Clay Everett (Morgan Lewis) and included panelists Jee-Yeon Lehmann (Analysis Group), Cari Jeffries (California Department of Justice), Heather Burke (White & Case), and Koren Wong-Ervin (Jones Day).

The panel analyzed the potential economic and legal implications of a non-compete agreement ban through the lenses of workers, firms, and governments. The panel discussed several topics about the future of a national ban on non-compete agreements,

including the FTC's authority to institute a ban, the interaction between a federal ban and existing state restrictions, empirical evidence from existing state-level bans, and practical takeaways for advising employers navigating the ban.

## The FTC's Authority to Institute a Federal Non-Compete Agreement Ban

The enforceability of the FTC's ban on non-compete agreements remains in question, as three lawsuits challenging the FTC's authority to institute the ban were filed immediately following the release of the rule. Ms. Burke observed that the FTC is relying on Section 6(g) of the FTC Act as the statutory authority for the ban, which occasionally empowers the FTC to make rules and regulations to address unfair business practices and protect competition. Ms. Burke further noted that the FTC's authority to implement rules and regulations was upheld in 1973 when the US Court of Appeals for the District of Columbia Circuit found in *National Petroleum Refiners Association v. FTC* that the FTC has broad rulemaking authority for the purpose of prohibiting unfair methods of competition.

Ms. Wong-Ervin reviewed opinions from recent lawsuits filed in opposition to the FTC's authority to implement the ban. She focused on two of the three initial lawsuits: *Ryan LLC v. FTC* and *Chamber of Commerce v. FTC*, both filed in Texas federal courts. Ms. Wong-Ervin explained that these challenges argue that the FTC does not have authority under Section 6(g) of the FTC Act. Furthermore, the plaintiffs in these cases assert that even if the FTC did have the authority to implement the ban under the FTC Act, the ban is "arbitrary and capricious" under the Administrative Procedure Act.

Ms. Wong-Ervin also provided a procedural update on these challenges. While Judge Barker – who recently struck down the National Labor Relations Board's new rule on joint employers on the ground that the rule failed to establish a clear standard for employers to follow – ruled to stay *Chamber of Commerce v. FTC*, Ms. Wong-Ervin noted that the Chamber of Commerce could intervene in the *Ryan* case and predicted the eventual preliminary injunction in *Ryan LLC v. FTC* that came on July 3.

## The Interaction Between the FTC Ban and State-Level Non-Compete Agreements

Ms. Jeffries provided a comparison of the FTC's ban to existing state non-compete laws. She first compared the FTC's ban to longstanding restrictions on non-compete agreements in California under Section 16600 of the California Business and Professions Code that are broader and more restrictive than the FTC's ban. Just last year, California enacted two bills to reiterate and strengthen California's restrictions by reinforcing the statute, enabling new remedies, and establishing a notice requirement.

Ms. Jeffries also noted that these bans can vary in terms of who has enforcement power. In addition to the state attorneys general, there exists a private right of action under many state laws, which the FTC Act does not provide. State laws also provide a wide range of options for available remedies, including injunctive relief, statutory penalties, and damages.

With respect to the effect of the FTC's ban on other state laws, Ms. Burke noted that the proposed FTC rule would preempt all state and local rules inconsistent with its provisions but would not preempt any state laws that would provide greater regulation and protection under the existing state ban.

## Empirical Evidence and Existing Statutes Addressing Non-Compete Agreements

Dr. Lehmann shared her economic perspective on the short- and long-run impacts of the proposed ban based on available empirical evidence. She noted that the FTC relied on two primary categories of evidence to arrive at the rule: available academic literature on non-compete agreements and public comments submitted to the FTC.

Dr. Lehmann commented that the FTC's rule to ban non-compete agreements cites several empirical studies from the economic literature. The FTC drew two conclusions about the effects of non-compete agreements from this literature: first, that non-compete agreements harm competition in labor markets, and, second, that non-compete agreements harm downstream products or services in the form of decreased innovation.

Dr. Lehmann noted that empirical evidence on the impact of non-compete agreements on competition is highly dependent on context, including the type of worker, the industry of the employer, and worker awareness of the non-compete agreement. While the FTC correctly notes that the empirical evidence on the impact of non-compete agreements indicates that they disproportionately affect lower-wage workers, Dr. Lehmann shared that studies of higher-wage or high-skill workers demonstrate mixed results. For example, some studies find that non-compete agreements generate higher wages for workers such as physicians, but have negative effects on other workers such as those in technology.

With respect to the impact of non-compete agreements on innovation, Dr. Lehmann observed that there were fewer studies to support the FTC's conclusion that non-compete agreements harm innovation. Ms. Wong-Ervin raised concerns not only about the volume of these studies but the quality of the literature. She emphasized the need for studies to rely on natural experiments resulting from changes in state law to determine the causal impact of non-competes on innovation, though many of the studies upon which the FTC relied do not incorporate time periods in which states made significant changes to non-compete laws. Instead, Ms. Wong-Ervin noted, many of these studies rely on cross-sectional data that are not appropriate for assessing causal impact.

Dr. Lehmann noted that, as a result of the limitations of the literature on the impact of non-competes on innovation, the FTC appeared to weigh primarily qualitative evidence generated by comments from the public. Following the FTC's proposal of the ban in early 2023, the FTC invited the public to submit comments on the proposed ban. After receiving nearly 27,000 comments from the public, the FTC reported that over 90% of the comments expressed support for the proposal to implement a ban on non-compete agreements.

Dr. Lehmann cautioned that the views of those who decided to submit comments on the proposed ban may not represent the views of the broader population of employers and employees that the ban would affect. Because of this, she concluded, it might be difficult to draw general conclusions about the views of employers and workers from the results of the public comment process.

Ms. Wong-Ervin underscored Dr. Lehmann's concern that the sample submitted to the FTC may not be representative of the opinions of all employers and workers. Ms. Wong-Ervin indicated that the volume and source of comments were atypical, given that comments are typically sourced from academics rather than the general public. Ms. Wong-Ervin contrasted the volume of comments responding to the FTC's proposed non-compete ban with approximately 70 comments that were submitted in response to the FTC's proposal for updated vertical merger guidelines.

Ms. Jeffries additionally noted that one of the comments in support of the ban on non-competes was from a group of 18 state attorneys general – including both states that do and that do not have existing state legislation regarding non-competes – offering support for a uniform national rule. Ms. Jeffries said that this comment emphasized that empirical evidence has demonstrated that non-compete agreements have a unique impact on health care.

## The Exception to the FTC Ban on Non-Compete Agreements in Mergers and Acquisitions

Ms. Wong-Ervin expanded on an exception to the FTC's ban on non-competes in the context of mergers and acquisitions. She noted that the FTC's ban permits non-compete agreements entered into pursuant to a "bona fide sale of a business entity, of the person's ownership interest in a business entity, or of all or substantially all of a business entity's operating assets."[2] The FTC allows for this exception where a non-compete is necessary to protect the value of the business being sold.

Ms. Wong-Ervin commented that while this exception may be welcome by some, there are often non-shareholder employees that may contribute substantially to the value a buyer derives from a deal. In the absence of exceptions to non-compete agreements for these non-shareholder employees, she noted that buyers and sellers may want to consider alternative deal provisions such as long-term vesting of equity interests to protect deal value.

## Advising Employers on a Future Without Non-Compete Agreements

Ms. Burke commented that, looking ahead, there are two possible routes for employers to navigate the FTC's ban. As one option, some employers may wait until the ban has been found to be constitutional and statutorily approved before adjusting their approach to agreements with employees. As another option, employers may choose to evaluate current employment agreements to determine where non-compete agreements exist and assess alternate provisions to achieve the same goal, including through trade secret agreements, non-disclosure agreements, or employee incentives for staying with employers.

Ms. Wong-Ervin advised that employers understand the universe of existing non-compete agreements in place, notify relevant parties of recision of the existing agreement, and consider alternative provisions. She cautioned, however, that employers must ensure alternative provisions do not constitute de facto non-compete agreements. Ms. Wong-Ervin noted that other restrictive covenants may also be captured by the rule, including employee and customer non-solicitations, though the latter is less clear. The ambiguity of the practical implications of the ban, Ms. Wong-Ervin concluded, creates work for employers to understand their existing provisions and encourages them to prepare alternatives.

## Endnotes

1 The ban covers new non-competes for all workers, including senior executives. Existing non-compete agreements with senior executives are exempted.

2 FTC Non-Compete Clause Rule, 16 C.F.R. 910 (2024).