

## Non-competes in the U.S. are business as usual after FTC rule stricken

By **Jodyann Galvin**

Law360 Canada (September 13, 2024, 2:07 PM EDT) -- Sept. 4 has come and gone. The non-compete ban adopted by the United States Federal Trade Commission (FTC) never took effect after a fast-paced legal challenge by Ryan LLC, a tax services firm and the United States Chamber of Commerce in a Texas federal court. In the United States, it's business as usual when enforcing non-competes, and the law remains state by state and employee by employee.

For Canadian employers with employees in the United States, each attempt at enforcement must be analyzed independently against specific facts and case law. This parallels Canadian law, where non-compete enforceability relies on the law of provinces instead of the nation. Ontario, for example, has a complete ban on non-competes — as do the U.S. states of California, Minnesota, Oklahoma and North Dakota. In the United States, some states that permit non-competes have restricted the employees to whom they can apply, either by income or duties. But the FTC rule process has certainly heightened awareness of the restrictions in both the United States and Canada as the non-compete ban was covered widely in the general media.



Jodyann Galvin



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The FTC rule would have prohibited any person or business in the United States from entering into or enforcing non-compete clauses in employment agreements with limited exceptions. But the court in the Northern District of Texas held that the FTC lacked the statutory authority to broadly ban practices it considers to be “unfair methods of competition” by adopting substantive rules. The court also held that even if the FTC had the power to adopt the rule, the Commission had not justified banning virtually all non-compete agreements: “The Commission’s lack of evidence as to why they chose to impose such a sweeping prohibition — that prohibits entering or enforcing virtually all non-competes — instead of targeting specific, harmful non-competes, renders the Rule arbitrary and capricious.”

In addition to the Texas court decision tossing out the FTC rule, two other federal courts also heard challenges to the FTC rule with inconsistent results. The Eastern District of Pennsylvania upheld the rule. The Middle District of Florida held the FTC lacked authority to issue the rule but granted relief only to the named plaintiff. Both of those cases decided preliminary injunction motions while the Texas court made a decision on the merits.

The FTC approved the ban on non-compete agreements in a 3-2 vote in May 2024 after a lengthy period of public comment and review. The FTC published a lengthy report addressing its reasoning and marshalling public comment. About 30 million people in the United States, or 20 per cent of U.S. workers, have signed non-competes, according to the FTC.

The FTC has not sought review of the decision to date, despite saying it was "seriously considering an appeal." The FTC has stated that "[t]he decision does not prevent the FTC from addressing non[-]competes through case-by-case enforcement actions," signalling a potential uptick in scrutiny of individual employers.

*Jodyann Galvin is a U.S. attorney with Hodgson Russ in Buffalo, NY, and leads the Intellectual Property Litigation practice. Her practice is focused on complex business disputes, and she has represented clients in both federal and state courts in New York and across the country. Galvin advises clients on the protection of their intellectual property, including claims related to employee restrictive covenants and unfair competition. She was recently recognized in the Top 25 Women Upstate New York Super Lawyers for Business Litigation.*

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