COURT ENTERS ORDER BARRING ENFORCEMENT OF FTC RULE BANNING NON-COMPETE AGREEMENTS

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In April, the Federal Trade Commission issued an administrative Rule that generally prohibits most employment-based non-compete agreements. The Rule had an effective date of September 4, 2024.

Yesterday, a Texas federal judge entered an Order permanently setting aside the FTC's Rule and mandating that "the Rule shall not be enforced or otherwise take effect on its effective date … or thereafter." In doing so, Judge Brown noted that the FTC "exceeded its statutory authority" and the Rule itself was "arbitrary and capricious." Unlike a previous decision issued in the same case, this Order has nationwide effect.

The FTC will likely appeal this decision, but most experts have predicted that the Rule will ultimately be blocked by the Supreme Court. Therefore, as of now, the FTC Rule will not go into effect, and employers do not have to notify employees that their non-competes will not be enforced.

However, this ruling is not the end of Federal and State governments' efforts to limit the use of non-competes:

- There are a growing number of states that have placed significant restrictions on non-competes such as strict notice requirements.
- Further, in a much less publicized action, the General Counsel of the National Labor Relations Board (NLRB) has issued a Memorandum stating that non-compete agreements violate the National Labor Relations Act (NLRA), and at least one Administrative Law Judge has now banned a company from using non-competes for certain

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employees. Notably, however, this action is limited to rank-and-file employees and does not include "supervisors" within the meaning of the NLRA. The employer will likely appeal this decision.

- Finally, the FTC has already signaled that it will continue to pursue what it considers to be the overuse of non-competes through enforcement actions on a case-by-case basis. For example, even before enacting the Rule, the FTC filed against a security company that required its security guards to sign non-competes.

Therefore, employers should continue to monitor these developments on a state and federal level and should be intentional about their use of non-competes to ensure that they are narrowly tailored to protect their legitimate business interests.

Hill Ward Henderson will continue to monitor this litigation and issues surrounding non-compete agreements and restrictive covenants. Please do not hesitate to contact our attorneys if you have any questions relating to these issues.