

The Saiber Construction Law Column: September 2024

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For years, many employment agreements contained non-compete provisions – terms in an employment contract that generally restrict the employee’s right to work after the employee’s employment ends to prevent the employee from competing with his/her employer. In New Jersey, there are no statutes or regulations governing non competes, but cases decided by courts have held that non-competes are enforceable when they are reasonable. Courts typically look at the facts of the matter before them and then decide if a particular non-compete provision’s restrictions as to time, geography and scope are reasonable.

But, all of the above may change soon! On April 23, 2024, the Federal Trade Commission announced its Final Non-Compete Rule, which bans certain post-employment non-compete clauses between employers and their workers. The FTC’s Rule is scheduled to take effect on September 4, 2024.

The Rule essentially declares it an unfair method of competition for parties to enter into non-compete clauses on or after the Rule’s effective date. With regard to non competes entered into prior to September 4, 2024, the FTC Rule allows non-competes with senior executives (workers in a policy-making position who received at least \$151,164 as total compensation in the preceding year) in the to remain in place but declares non-competes with other employees unenforceable. Employers are also required under the Rule to notify workers with existing non-competes that their non-competes are no longer enforceable after September 4, 2024. In addition, the Rule pre-empts any state laws that conflict with the FTC’s Final Rule.

Not surprisingly, the legality of the FTC’s non compete Rule has already been challenged. In *Ryan LLC v. FTC*, the plaintiff filed suit in federal court in Texas to enjoin the FTC from enforcing the Rule, arguing that the FTC lacked the authority to enforce the Rule and went beyond the scope of its authority to enact the Rule in the first place. On July 3, 2024, the judge preliminarily enjoined enforcement of the Rule, agreeing that plaintiff would likely succeed in demonstrating that the FTC exceeded its statutory authority to make the Rule. The judge also agreed that plaintiff would likely succeed in showing that the Rule was overbroad, arbitrary and capricious. However, the judge specifically limited the scope of her decision to only the parties to the Texas litigation.

Thereafter, on August 21, 2022, the Texas court issued an Opinion and Order granting summary judgment in favor of the plaintiffs and setting aside the FTC Rule banning non-compete agreements. The Court concluded that the FTC exceeded its statutory authority by issuing such a sweeping, substantive rule, and that the rule itself was arbitrary and capricious. This means that the FTC Rule will not be enforced and will not take effect on September 4, or thereafter. The

FTC has indicated that it is considering an appeal, and in a case pending in the Eastern District of Pennsylvania, that court has signaled that it may reach the opposite conclusion. Therefore, the viability of the FTC Rule could make its way to the Supreme Court, but it is not enforceable in the interim.

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Each issue's Saiber Construction Law Column will discuss a recent decision by New Jersey courts or, like here, courts from other states which may be of interest to people in the construction industry.

The information in each article is not intended to be legal advice and may not be used as legal advice. Legal advice must be tailored to the specific circumstances of each case. Every effort has been made to ensure this information is up-to-date. The article is not intended to be a full and exhaustive explanation of the law in any area, nor should it be used to replace the advice of your own legal counsel.