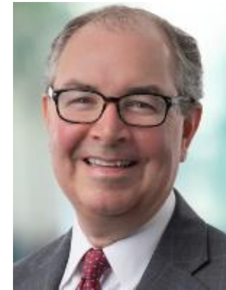
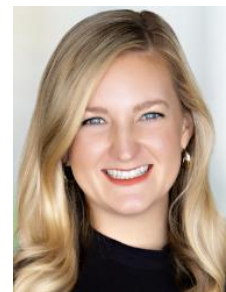
# What 2024's Noncompete Turmoil Means For Banks In 2025

By **Matthew Penfield and Meredith Taylor** (January 6, 2025)



Matthew Penfield



Meredith Taylor

Arguably among the most significant employment-related issues the banking and financial services industry faced in 2024 were legal challenges to the enforceability of various restrictive covenants in employment agreements. The banking and financial services industry is one of the top industries to utilize restrictive covenants such as noncompete and nonsolicitation agreements.[1]

These restrictive covenants are a critical tool for banks and other financial institutions to protect the considerable resources invested in recruiting and retaining talent and developing, maintaining and servicing customers. This article summarizes the most significant 2024 updates regarding the legality of these restrictive covenants and what to expect for 2025.

**FTC's Noncompete Rule Issued and Blocked**

On April 23, 2024, the Federal Trade Commission issued a final rule that would ban most noncompete agreements nationwide, subject to limited exceptions.[2]

Specifically, the FTC rule sought to prohibit employers from entering into or enforcing noncompete agreements — with only limited exceptions for existing agreements with senior executives in policymaking roles and in the sale of a business — and required employers to provide notice to those bound by existing noncompete agreements that their agreement is unenforceable. The final rule was set to take effect on Sept. 4.

Legal challenges to the FTC rule quickly followed the announcement. Courts analyzing the FTC's authority to promulgate the noncompete rule reached different conclusions.

For example, on July 23, in ATS Tree Services LLC v. FTC, U.S. District Judge Kelley B. Hodge of the U.S. District Court for the Eastern District of Pennsylvania denied ATS' request for a preliminary injunction and found the FTC rule was properly issued.[3]

In contrast, on Aug. 20, in Ryan LLC v. FTC, U.S. District Judge Ada E. Brown of the U.S. District Court for the Northern District of Texas struck down the FTC rule entirely, finding that the FTC did not have substantive rulemaking authority to prevent unfair methods of competition and that the final rule was arbitrary and capricious.[4]

A few days before, on Aug. 15, U.S. District Chief Judge Timothy J. Corrigan of the U.S. District Court for the Middle District of Florida similarly concluded that the final rule likely exceeded the FTC's authority based on the major questions doctrine and issued a preliminary injunction staying the effective date of the rule. However, that ruling was limited to the parties in that case — Properties of the Villages Inc. and the FTC.[5]

The FTC has appealed both the Ryan LLC and Properties of the Villages decisions. For now, the FTC rule remains enjoined pending the outcome of the appeal in Ryan LLC to the U.S. Court of Appeals for the Fifth Circuit.

Within the financial services context, and primarily for broker-dealers, the outcome of this litigation will have little impact on entities that are members of the Protocol for Broker Recruiting, which allows financial advisers transitioning firms to take certain client information with them when both the previous and new firm are members of the protocol.[6]

However, for entities and employees not subject to the Broker Protocol, the outcome of the FTC litigation will affect the availability of noncompete agreements as a tool to protect against former employees stealing trade secrets and undermining the firm's relationship with customers and employees.

**NLRB Efforts to Curtail Noncompete Agreements**

While the future of the FTC noncompete rule remains uncertain, another federal agency has ramped up efforts to curtail the use of restrictive covenants.

In May 2023, National Labor Relations Board General Counsel Jennifer Abruzzo issued "Memorandum GC 23-08," opining that noncompete agreements are unlawful as such agreements have a chilling effect on employees' exercise of their rights under Section 7 of the National Labor Relations Act, which protects employees' rights to take or participate in collective action to improve their working conditions.[7]

On June 13, 2024, an NLRB administrative law judge ruled in J.O. Mory Inc. v. Indiana State Pipe Trades Association that noncompete and nonsolicitation agreements at issue were unlawful for nonsupervisory and nonmanagerial employees as these provisions could chill employees from engaging in conduct protected under the NLRA.[8]

A few months prior to this decision, in February 2024, a settlement was reached in a separate NLRB case alleging an employer, Harper Holdings LLC, maintained employment agreements with unlawful noncompete and training repayment provisions that restricted employees' mobility.[9]

On Oct. 7, Abruzzo issued "Memorandum GC 25-01" expanding upon her May 2023 memorandum by outlining her view of appropriate remedies for unlawful noncompete agreements.[10]

This memo also announced Abruzzo's view that, like noncompete agreements, many "stay-or-pay" provisions also chill employees from exercising their Section 7 rights and are likely unlawful.

Stay-or-pay provisions are defined in the memo as "contract[s] under which an employee must pay their employer if they separate from employment, whether voluntarily or involuntarily, within a certain time frame" and include agreements such as "training repayment agreement provisions (sometimes referred to as TRAPs), educational repayment contracts, quit fees, damages clauses, sign-on bonuses or other types of cash payments tied to a mandatory stay period, and other contracts."[11]

The most recent memorandum additionally outlines Abruzzo's position that stay-or-pay provisions are presumptively unlawful unless the provision "advances a legitimate business interest" and is "narrowly tailored to minimize any infringement on Section 7 rights."[12]

An employer can establish the provision is narrowly tailored by showing the provision "(1) is

voluntarily entered into in exchange for a benefit; (2) has a reasonable and specific repayment amount; (3) has a reasonable 'stay' period; and (4) does not require repayment if the employee is terminated without cause."[13]

It is unclear how the extent to which these memoranda will be relied upon or implemented by the various NLRB regional offices and the board as cases progress through the system. But it is clear that there has been a coordinated effort at the federal level to restrict the use of noncompete agreements and other forms of restrictive covenants.

Given the regular use of stay-or-pay provisions by banks and financial services, the direction these federal agencies take could greatly affect compensation and employment agreements in the industry.

**Noncompete Restrictions at the State Level**

Historically, restrictive covenants in general, and noncompete agreements specifically, have been regulated by the states. While four states have banned the use of noncompete agreements entirely (California, Minnesota, North Dakota and Oklahoma), the trend among states has been to curb the enforceability of these agreements by imposing restrictions such as income-based limitations, geographical and temporal limitations, industry-specific bans, and limitations based on employee classifications.

In 2024, 29 bills were introduced across 18 states aimed at further restricting the use of noncompete agreements. Of the 29 introduced bills, seven were passed in Washington, Illinois, Maryland, Rhode Island, Louisiana and Iowa. A majority of the bills that were passed restrict noncompete agreements within specific industries, including healthcare and construction.

Noncompete agreements have also faced attacks from local governments. For example, in February 2024, a bill was introduced in the New York City Council aimed at prohibiting employers from entering into such agreements and requiring employers to rescind noncompete agreements that predate the bill's effective date.[14]

The bill was referred to a committee, but no further action has been taken. As many banks and financial services companies are based in New York, that bill could have a sweeping impact.

We will likely see an uptick in efforts to restrict noncompete agreements at the state level in 2025, particularly given the nationwide injunction barring the FTC final rule from going into effect and states wanting to protect employee mobility.

For example, New York State Sen. Sean Ryan has already announced his intention to renew efforts to impose broad restrictions on noncompete agreements after Gov. Kathy Hochul vetoed his previous bill in December 2023.[15]

**Forfeiture-for-Competition Agreements**

Another type of restrictive covenant commonly employed by financial entities is a forfeiture-for-competition agreement through which employees agree to refrain from engaging in competitive activities as a condition to receiving certain financial benefits. States have taken differing approaches as to whether to analyze forfeiture-for-competition agreements under the same standards that apply to traditional noncompetes.

On Jan. 29, 2024, in Cantor Fitzgerald LP v. Ainslie, the Delaware Supreme Court upheld the validity of forfeiture-for-competition provisions in a limited partnership agreement based on public policy and freedom of contract principles.

The Delaware Supreme Court reversed the lower court's decision that forfeiture-for-competition provisions restrain trade and are subject to reasonableness standards that apply to noncompete agreements.

Courts are divided on how to interpret Cantor Fitzgerald. For example, in W. R. Berkley Corp. v. Dunai, the U.S. Court of Appeals for the Third Circuit in February applied Cantor Fitzgerald to conclude that a stock clawback provision allowing the employer to demand return of stock benefits following a former employee's engagement in competitive activities was not subject to a reasonableness review and thus was enforceable.[16]

In contrast, in LKQ Corp. v. Rutledge, the U.S. Court of Appeals for the Seventh Circuit in March declined to rule on the breadth of Cantor Fitzgerald's application, instead opting to certify two questions to the Delaware Supreme Court regarding the implications of its reasoning in Cantor Fitzgerald.[17]

The Delaware Supreme Court held oral arguments on the questions certified by the Seventh Circuit in October. The Delaware Supreme Court has not issued an opinion on the matter. The court's decision on these questions will establish key precedent as to the enforceability of forfeiture-or-competition provisions under Delaware law while also influencing how other states assess the legality of such provisions.

**Conclusion**

On the federal level, a change of the current administration will likely affect future rules and decisions regarding the enforceability of restrictive covenants in employment agreements. President-elect Donald Trump has named Andrew Ferguson the new FTC chairperson and also named a new FTC commissioner.

It is also likely that we will see changes at the NLRB. Abruzzo's term does not expire until July 2025; however, we expect the Trump administration will attempt to replace her prior to that date. Those changes may result in decisions not to pursue or maintain the sweeping changes we have seen in the last year at the federal level.

Employers in banking and financial services should closely monitor changes in state and local laws, since that is where we expect the most developments related to the legality of restrictive covenants in 2025.

---

*Matthew I. Penfield is a shareholder and Meredith S. Taylor is an associate at Maynard Nexsen PC.*

*The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*

[1] Greyson Web, Non-Compete Agreements: Protecting Intellectual Property or Suppressing Labor Market Competition?, Univ. of Utah Merriner S. Eccles Instit. for Econs.

and Quantitative Analysis (May 2024), https://marriner.eccles.utah.edu/utahs-teen-triumph-the-states-enduring-high-teen-labor-force-participation-rate-cloned/#:~:text=Strikingly%2C%20these%20data%20also%20show,health%20professions%2C%20or%20office%20administrators.

[2] Press Release, FTC Announces Rule Banning Noncompetes, FTC (Apr. 23, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-rule-banning-noncompetes.

[3] ATS Tree Services, LLC v. FTC et al., Case No. 2:24-cv-01743 (E.D. Pa. Jul. 23, 2024).

[4] Ryan LLC v. FTC, Case No. 3:24-cv-986 (N.D. Tex. Aug. 20, 2024).

[5] Properties of the Villages, Inc. v. FTC, Case No. 5:24-cv-316 (M.D. Fla. Aug. 15, 2024).

[6] The Broker Protocol, J.S. Held, https://www.jsheld.com/markets-served/financial-services/broker-recruiting/the-broker-protocol (last visited Dec. 17, 2024).

[7] Press Release, NLRB General Counsel Issues Memo on Non-competes Violating the National Labor Relations Act, NLRB (May 30, 2024), https://www.nlrb.gov/news-outreach/news-story/nlrb-general-counsel-issues-memo-on-non-competes-violating-the-national.

[8] J.O. Mory, Inc., Case No. 25-CA-309577 (ALJ Dec. June 13, 2024), https://www.nlrb.gov/case/25-CA-309577.

[9] Press Release, Region 9-Cincinnati Secures Settlement Requiring Juvly Aesthetics to Rescind Unlawful Non-Compete and Training Repayment Agreement Provisions (TRAPs) and Pay Over $25,000 to Employees, NLRB (Feb. 4, 2024), https://www.nlrb.gov/news-outreach/region-09-cincinnati/region-9-cincinnati-secures-settlement-requiring-juvly.

[10] Press Release, General Counsel Abruzzo Issues Memo on Seeking Remedies for Non-Compete and Stay-or-Pay Provisions, NLRB (Oct. 7, 2024), https://www.nlrb.gov/news-outreach/news-story/general-counsel-abruzzo-issues-memo-on-seeking-remedies-for-non-compete.

[11] NLRB Off. of the Gen. Couns., Memorandum GC 25-01, pp. 5–6 (Oct. 7, 2024).

[12] Id. at 8.

[13] Id. at 8–9.

[14] New York City Council Legislative Research Center, https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=6557380&GUID=86B0DBB1-329A-46B9-9763-44062F71366C (last visited Dec. 10, 2024).

[15] Zach Williams, NY Lawmaker Resumes Noncompete Ban Push as Federal Efforts Stall, Bloomberg Gov. (Dec. 5, 2024), https://news.bloomberglaw.com/bloomberg-government-news/ny-lawmaker-resumes-noncompete-ban-push-as-federal-efforts-stall.

[16] W. R. Berkley Corp. v. Dunai, 2024 WL 511040, at *2–3 (3d Cir. Feb. 9, 2024).

[17] LKQ Corp. v. Rutledge, 96 F.4th 977, 986–87 (7th Cir. 2024).