



**CELEBRATE KANSAS CITY**

**2024 FBA Annual Meeting and Convention**

**Non-Competes:  
The Rocky Landscape and a  
Path Forward**

**#FBACon24**

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# Non-Competes: The Rocky Landscape and a Path Forward

Moderator: Nico Stillwell

Panelists: Russell Beck, Anthony Durone, and Stacey Gilman

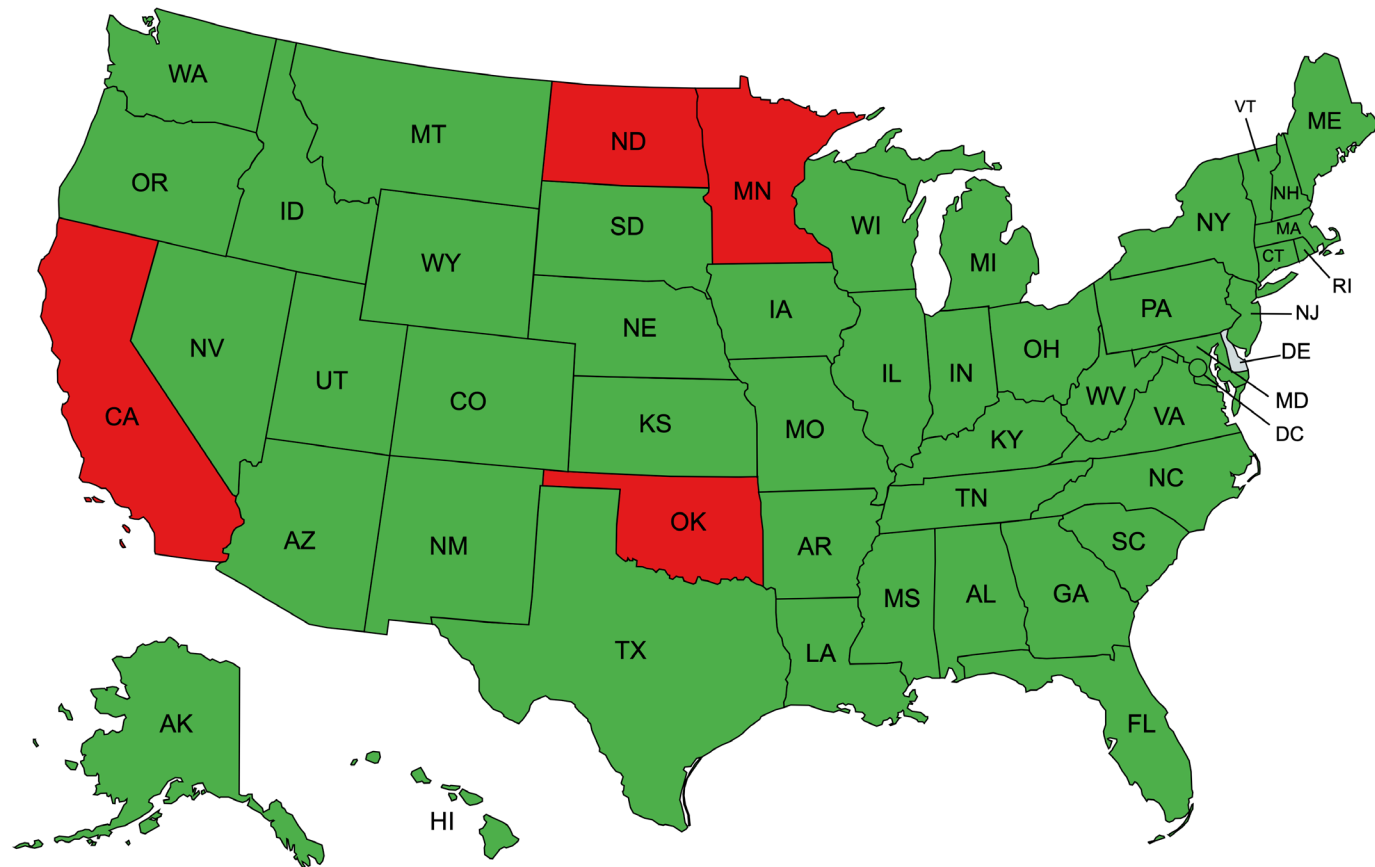


# Agenda

- State of noncompete law
- Background to regulation of noncompetes
- The FTC rule
- Legal challenges to the FTC rule and what they mean
- What next?

50 States – 50 Laws (and DC)

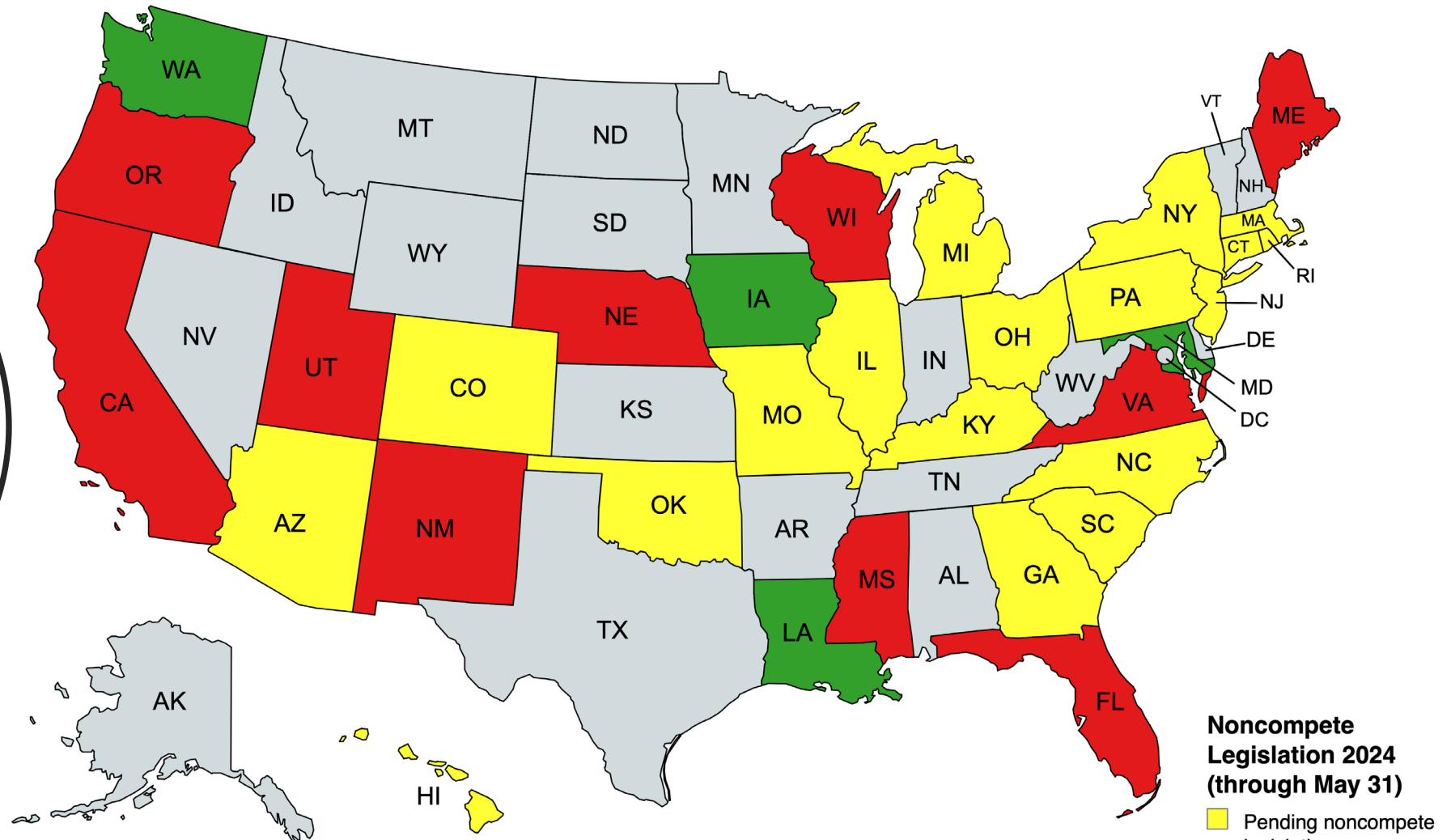
# States that Ban



Touchstone: Reasonableness



2024 Bills:  
73 bills in  
32 states,  
15 dead,  
4 enacted



**Noncomplete Legislation 2024 (through May 31)**

- Yellow: Pending noncomplete legislation
- Green: Passed noncomplete law
- Red: All noncomplete bills dead

# Federal Regulatory Activity



2016: Obama Administration

- Treasury Report
- White House Report
- Call to Action

2018: FTC

- Opens door to changes re noncompetes; pushed by some members of Congress

2020: Biden Administration

- Platform includes CNCs

2021: Biden Administration: Executive Order

2021: FTC

- Draft Strategic Plan
- Second Workshop (w/DOJ)

2022: FTC

- Issues CIDs
- MOU with NLRB

2023: FTC

- Enforcement Actions
- Proposed Ban

2023: NLRB GC

- Memo
- Enforcement Actions

2024:

- FTC issued the final noncompete rule
- N.D. Tex vacated the rule



# FTC Sources of Authority

The FTC claims authority primarily through two sources:

Section 5 of the FTC Act (15 U.S.C. § 45(a)(2)):

“The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations . . . From using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.”

Section 6 (15 U.S.C. § 46(g)) grants the FTC the power “to make rules and regulations for the purpose of carrying out the provisions of this subchapter.”



# FTC Rule

Unfair methods of competition. With respect to a worker, it is an unfair method of competition for a person:

- (i) To enter into or attempt to enter into a noncompete clause;
- (ii) To enforce or attempt to enforce a noncompete clause; or
- (iii) To represent that the worker is subject to a noncompete clause.

In the rule, noncompetes are broadly defined and include any agreement that “prohibits, penalizes a worker for, or functions to prevent” working for a different person or operating a business after the conclusion of employment.



# Exceptions to the Noncompete Rule

Existing Senior Executive Noncompetes

Bona Fide Sale of Business

Noncompetes Under Pending Litigation

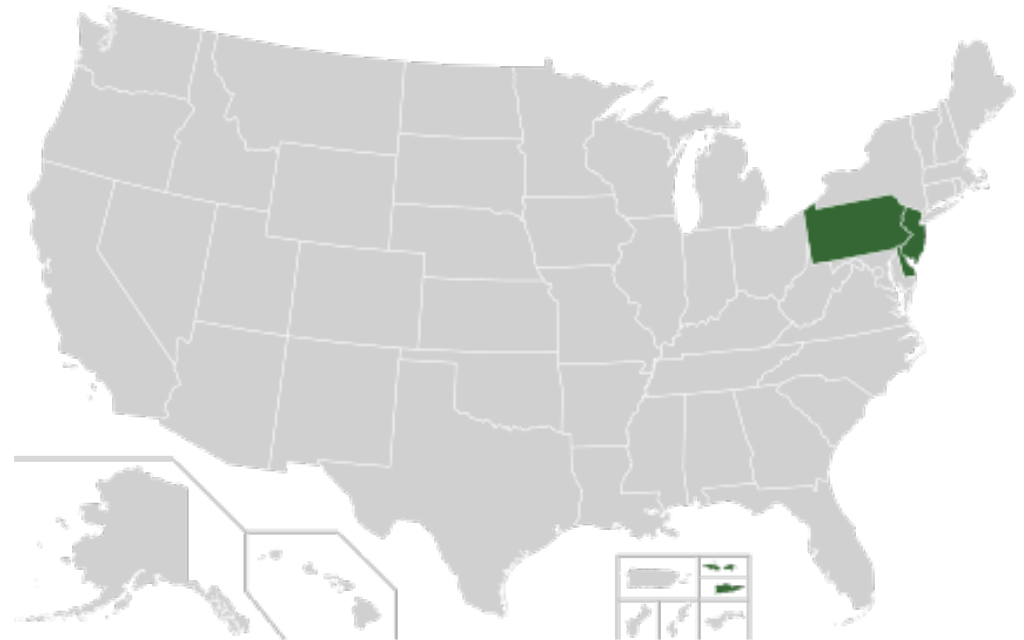
Good-faith Basis to Believe the Final Rule Is Inapplicable



Legal  
Challenges

## **ATS Tree Services, LLC v. FTC**

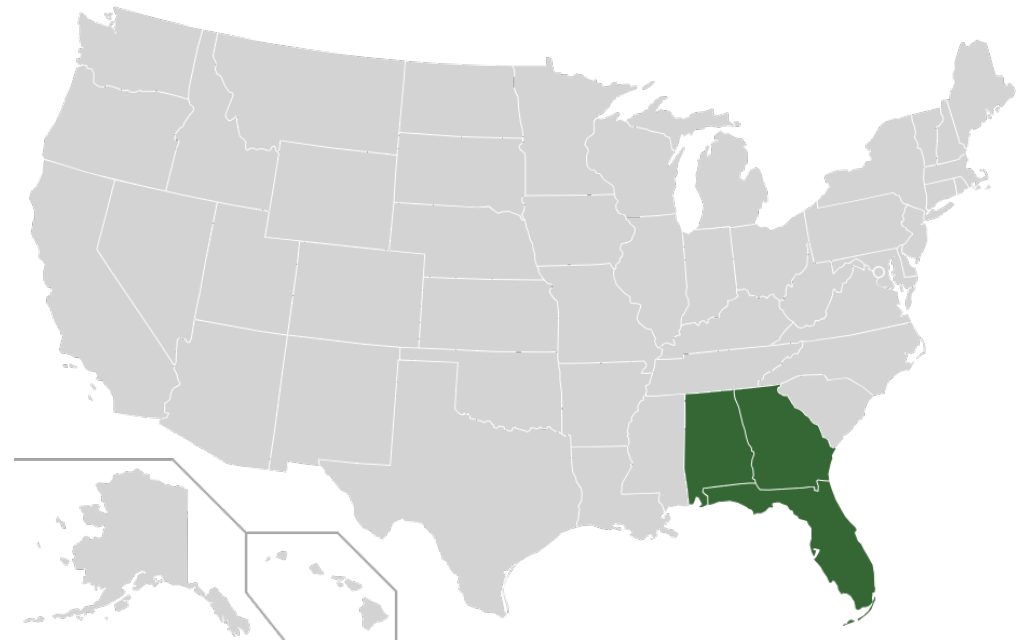
- Pending in the United States District Court for the Eastern District of Pennsylvania
- 7/23/24: Denied preliminary injunction
- Right of appeal to Third Circuit



Legal  
Challenges

***Properties of the Villages, Inc. v. FTC***

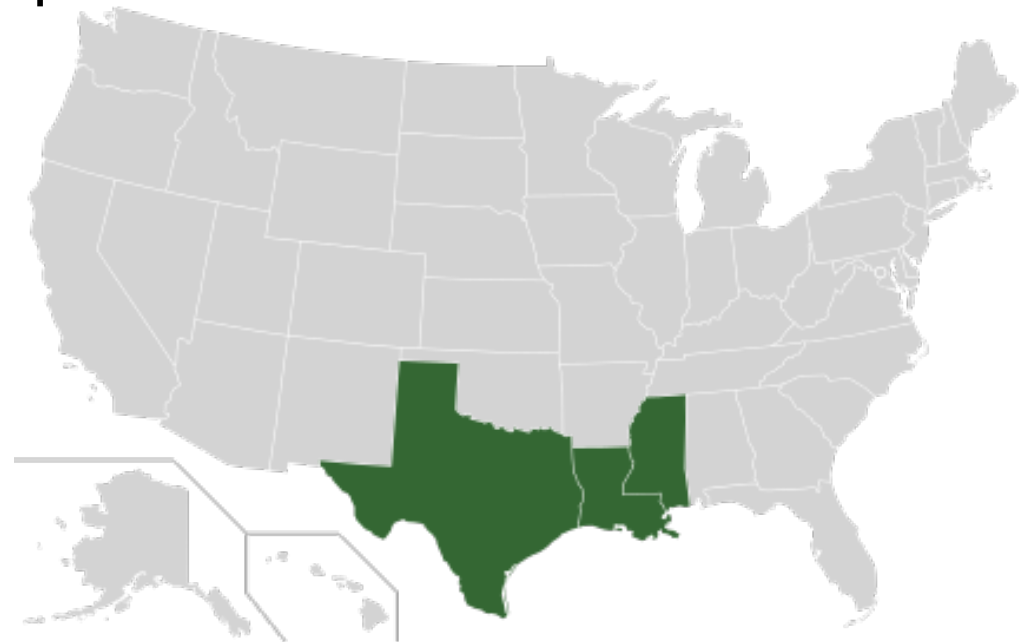
- Pending in the United States District Court for the Middle District of Florida
- 8/14/24: Injunction granted as to Plaintiff
- Right of appeal to the Eleventh Circuit



Legal  
Challenges

## *Ryan, LLC v. FTC*

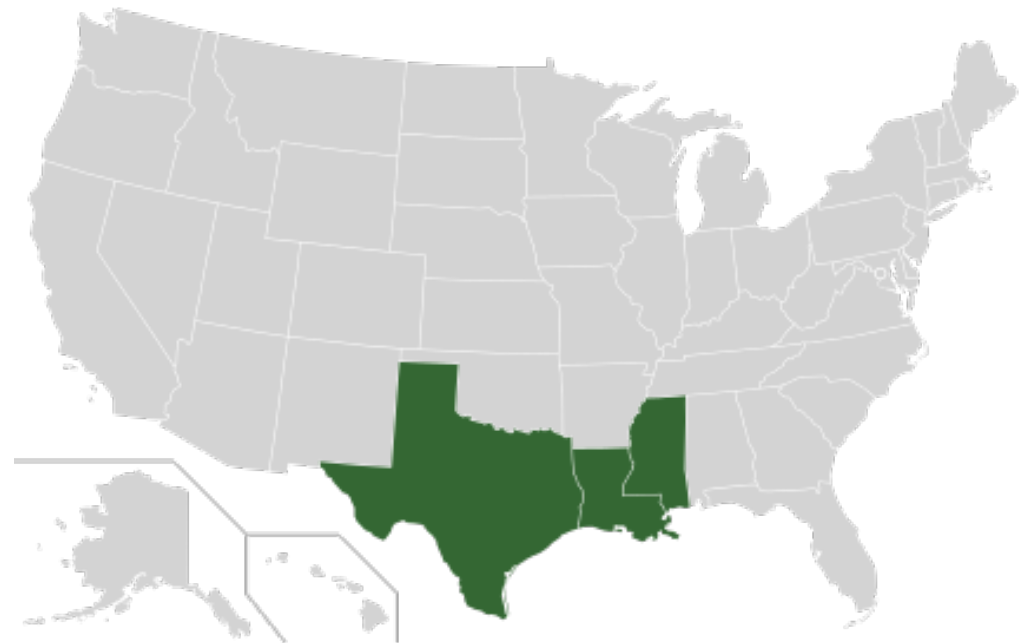
- Pending in the United States District Court for the Northern District of Texas
- U.S. Chamber of Commerce (*et al.*) intervened
- 7/3/24: Granted preliminary injunction as to the plaintiffs and plaintiff-intervenors



Legal  
Challenges

**Ryan, LLC v. FTC (cont.)**

- 8/20/24: Granted summary judgment for plaintiffs
- “Set aside” FTC rule (nationwide bar)
- Right of appeal to Fifth Circuit



# What next?

- FTC officials: “seriously considering a potential appeal” of *Ryan*
- → Fifth Circuit → Supreme Court
- November elections





# Steps to Take

- Follow state law and monitor developments
- Protection of confidential information and trade secrets
- Careful evaluation of any restrictive covenants

# Presenter Contact Information

Russell Beck

Beck Reed Riden LLP  
155 Federal Street, Suite 1302  
Boston, Massachusetts 02110  
(617) 500-8670  
rbeck@beckreed.com  
www.beckreedriden.com

Anthony J. Durone

Berkowitz Oliver LLP  
2600 Grand Blvd. Suite 1200  
Kansas City, MO 64108  
816.627.0217  
adurone@berkowitzoliver.com  
www.berkowitzoliver.com

Stacey R. Gilman

Berkowitz Oliver LLP  
2600 Grand Blvd. Suite 1200  
Kansas City, MO 64108  
816.627.0216  
sgilman@berkowitzoliver.com  
www.berkowitzoliver.com

Nico Stillwell

Edelman, Liesen & Myers L.L.P.  
208 W. Linwood Blvd.  
Kansas City MO, 64111  
816-533-4976  
nstillwell@elmlawkc.com  
www.elmlawkc.com

