Podcast

# Workplace Law After ‘Loper’: Are Non-Competes Dead?

By Erik J. Winton & Clifford R. Atlas

October 3, 2024

## Meet the Authors


### Erik J. Winton

Principal
(617) 367-0025
Erik.Winton@jacksonlewis.com



### Clifford R. Atlas

(He/Him)
Principal
(212) 545-4017
Clifford.Atlas@jacksonlewis.com


## Related Services

Employment Litigation
Restrictive Covenants, Trade Secrets and Unfair Competition
Workplace Law After ‘Loper’
Workplace Law After ‘Loper’ Audio Guide

## Details

October 3, 2024

**The recent SCOTUS *Loper Bright* decision, the FTC's final rule banning non-competes, and ongoing litigation may present significant challenges for employers enforcing non-compete agreements.**

Listen on Spotify
YouTube
Listen on Apple Podcasts

## Transcript

INTRO

*The United States Supreme Court’s recent decision to end the Chevron doctrine in the Loper Bright case exposed a governmental fault line, which may have far-reaching implications for many entrenched U.S. federal agency regulations that have existed for decades and, consequently, for employers.*

*In this episode of our podcast series, Workplace Law After Loper, we focus on the FTC's proposed final rule banning non-competes, status of the final rule and ongoing litigation that continue to present significant challenges for employers enforcing pre-existing and currently valid non-compete agreements.*

*Today's hosts are Cliff Atlas and Erik Winton, principals and leaders of the Restrictive Covenants, Trade Secrets and Unfair Competition Group.*

*Cliff and Erik, the questions on everyone’s mind today are: What is the intersection of the proposed Final Rule and the U.S. Supreme Court’s decision in Loper Bright? What will the impact be on the future of non-competes for employers, and how does this impact my business?*

CONTENT

**Erik J. Winton**

*Principal and Restrictive Covenants, Trade Secrets and Unfair Competition Co-Leader*

Hello, everyone. I'm Erik Winton, a principal in Jackson Lewis's Boston office and co - lead of our Restrictive Covenant Trade Secret and Unfair Competition practice group. With me today . . .

**Clifford R. Atlas**
*Principal and Restrictive Covenants, Trade Secrets and Unfair Competition Co-Leader*

I'm Cliff Atlas, co-leader of the Restrictive Covenants practice group in the New York City office of Jackson Lewis.

**Winton**

Nice to be here together in person in New York, Cliff. We haven't recorded a podcast together in a while, not for lack of content, certainly. We've written a few articles for the Jackson Lewis website on the FTC ban and other issues related to our practice group. We thought it might make sense to sit down for a conversation — for those in the audience who like to get their updates in their ears and not just their eyes.

We're going to talk about the impact, if any, the Supreme Court's *Loper* decision may have on our practice group, and specifically the FTC's proposed non-compete ban. We will also talk about the status of the FTC's non-compete ban, which as Miracle Max said in *The Princess Bride* is "mostly dead."

**Atlas**

Mostly dead for the moment, anyway. Let's talk about *Loper*, Eric. As we know from many articles that we've all read, the Supreme Court decision in *Loper-Bright v. Raimondo* ended what was known as *Chevron* deference. Under *Chevron*, courts were required to give deference to federal agency regulations interpreting ambiguous statutes, as long as the agency's interpretation was reasonable — even if there might have been another, perhaps better interpretation. In the *Loper-Bright* case, the Court ended that analysis. The Supreme Court held that federal courts may not defer to the agency's interpretation just because the statute is ambiguous. Rather, the court needs to make that interpretation itself.

**Winton**

So, *Chevron* is actually dead?

**Atlas**

Yes, *Chevron* is. But the courts will still look to agency interpretations. Ultimately, though, the court needs to make the decision itself. I think that's the upshot of what *Lope*r says.

Now, we've been asked the question many times: What is the impact of *Loper* and *Chevron* deference on the FTC's final rule?

Let's just dial back for a minute and recount what the FTC has been up to.

**Winton**

And just to jump in there, when *Loper* came out, we didn't have any decisions yet on the FTC.

**Atlas**

Right.

**Winton**

And we thought, “Hey, this is an only help” in the battle against the FTC's non-compete ban, right?

**Atlas**

It could only help if only it were germane — and it's not, but I get ahead of myself here.

The FTC in January of 2023 issued a notice of proposed rulemaking that proposed to ban broadly all non-competes. The FTC took comments, the FTC held workshops . . . and in April of 2024, I guess that's 15 months or so later, the FTC issued its final rule.

**Winton**

Fifteen months and 26,000 comments or thereabouts?

**Atlas**

Yes, something like that. The FTC's final rule broadly banned all true non-compete clauses. And it banned those contractual provisions that:

- prohibited a worker from,
- penalized a worker for, or
- functioned to prevent a worker from either seeking or accepting work after the conclusion of employment or operating business after the conclusion of employment.

There were many concerns about this broad sweeping rule. There was an exception for the sale of business. But there was no exception for, on a going forward basis, even the most senior of executives. And, very problematically, for many large employers, there was no exception for forfeiture for competition provisions that are baked into so many stock plans and incentive compensation plans. The rule was scheduled to take effect on September 4 [2024], absent some court intervention.

**Winton**

And Cliff, not that we're here to give the FTC any credit, but they did make a few changes between the January 2023 notice and the final rule in April of 2024.

**Atlas**

They did. Not enough.

**Winton**

They allowed for the grandfathering in of certain high-level executives, and those agreements survived or were to survive [for] a very small subset of executives. Whereas the proposed rule in January ‘23 did not allow for that. It didn't have any grandfathering in.

**Atlas**

You're talking about the senior executive exception, which itself turned out to be so painfully narrow that it wasn't especially helpful to many employers.

**Winton**

Narrow and unclear — from the FTC's own documents. And then we also had a change in the sale business. It used to be, in January '23, you needed to have at least 25 percent ownership. And they took that out because that was just an arbitrary number. But for the most part, it was a full-on ban and nothing that we really had ever seen. Even at a state level or a federal level, those had not been retroactive.

That was a big deal. If you believe their statistics, which could be a whole other podcast, they think there are 30 million people out there bound by non-competes. And this rule would have invalidated all 30 million of those contracts.

**Atlas**

There were very many problems with the FTC's proposed rule, the FTC's final rule, and that there was immediate litigation following the issuance of the final rule is unsurprising. Do want to pick it up from there?

**Winton**

Yes. We knew there was going to be immediate litigation even before it was filed because the U.S. Chamber of Commerce and others were giving the preview that, as soon as this thing comes out, we're going to file suit. And that's exactly what happened.

So, on the same day, the first lawsuit was filed for challenging it. And that was the *Ryan* LLC matter filed in the Northern District of Texas. Ryan was a tax preparation company. The next day, the US Chamber and several other employer agencies filed suit. But because they were second in line, that case was stayed and those parties then joined in the *Ryan* litigation in the Northern District of Texas. The U.S. Chamber of Commerce had filed in the Eastern District of Texas.

On the heels of that, another case was filed in the Eastern District of Pennsylvania, ATS Tree Service, which many thought was sort of an odd test case for trying to address the non-compete ban because ATS Tree Service is an eight-employee company, I believe, with not a whole ton of confidential information or trade secrets.

**Atlas**

They may have 12 employees.

**Winton**

Twelve, sorry. They don't have a lot of confidential information or trade secrets in that industry. It was more about their training, I guess, as the protectable interest. In any event, bringing it in Pennsylvania in the Third Circuit, which is maybe not as business friendly as the Northern District of Texas or the Fifth Circuit, was also something that was looked at by many in this area to be somewhat puzzling. And then even after that, a third lawsuit was brought by the property of the villages in the Middle District of Florida. All of these, essentially the same type of lawsuit aimed to challenge the FTC's

authority to promulgate the ban.

What happened next is that there were preliminary injunction motions filed in all three matters on July 3 [2024], right, for the holiday. Judge Brown in the *Ryan* matter ruled for preliminary injunction but limited it just to the name plaintiffs in that case and not to the association members of the U.S. Chamber of Commerce and the other employer associations, which was a bit odd in the time because it's not like the U.S. Chamber of Commerce themselves uses non-competes. They were bringing that suit in order to help their association members. And the court did allow for the fact that there'd be more briefing and a final decision would be issued on the merits by August 30 [2024].

Around the same time or a few days later, the*ATS Tree Service* decision came out. The judge in that case denied the preliminary injunction for ATS Tree Service based on a lack of irreparable harm. But also, the court went out of its way to say that it believed the FTC did have the authority to do what it was trying to do — so, sort of an opposite result of what we saw in the *Ryan* matter. And then the Middle District of Florida held similarly to the *Ryan* case, gave the property to the villagers their injunction, again, limiting the scope of the order to just the named plaintiff. So, at that point, there was no nationwide order and we were waiting until Judge Brown would have a decision by August 30th with a pending rule by September 4th. And that's when I'm going to hand it back to you.

**Atlas**

Yes. So, in the absence of a nationwide injunction, which I think many people really did expect to happen — that there would be a nationwide injunction, but there wasn't. As a result, employers this summer were scurrying to figure out how would they comply with an FTC rule slated to take effect on September 4 [2024]. How would they prepare themselves to comply with that rule? And while they waited for Judge Brown to issue her decision on August 30 [2024] — there are only five days between August 30 and September 4 [2024] when the rule was supposed to take effect; that's not enough time to get your stuff together — there was a lot of planning and we've had many conversations with many clients about how they would go about doing that, how they would issue the required notices under the FTC rule, et cetera.

**Winton**

Basically, there were three things that employers had to think about at time: Get the notice out, don't enforce the agreements and don't have people sign new agreements.

**Atlas**

At the same time, there were some employers who were saying, “Well, what if I do any of those things? I still want to use my non-competes, what's the worst that's going to happen?”— which led to a different analysis, which is the subject of a different discussion on the FTC's actual limited authority to do anything about that.

But while the employers were waiting for an August 30 [2024] decision, Judge Brown surprised everyone and issued a decision 10 days earlier. And so, on August 20 [2024], Judge Brown issued her decision on the merits in the *Ryan* case. She found that the FTC Act did not grant the FTC authority to promulgate substantive rules

regarding unfair methods of competition. And the court found explicitly that the FTC exceeded its authority in issuing the final rule. The court also found that the final rule was arbitrary and capricious, essentially because the FTC failed to consider lesser alternatives to the nearly complete ban it had articulated in the final rule.

As remedy, the court, and this is important words, “set aside” the final rule as required by the Administrative Procedures Act. Per Fifth Circuit precedent, the setting aside of a final rule has nationwide effect and is not party restricted. Rather, it affects all persons in all districts equally.

**Winton**

The language in that order couldn't be any more clear.

**Atlas**

It couldn't be any more clear. And I would direct everyone to the very last section, Section Four, Roman numeral IV of Judge Brown's decision, all the way at the end of the decision. It's only a few paragraphs, but it contains what employers immediately needed to know, which was you don't have to worry about this FTC rule taking effect on September 4 [2024] and we can continue on at least for now.

**Winton**

The court didn't need to find that the final rule was arbitrary and capricious, right? Because they had already found before then that they didn't have the authority to do it, right?

**Atlas**

I think that that's right, but they went ahead and doubled down on it. I can't disagree with the decision that the rule was arbitrary and capricious and did not take into consideration the very many lesser alternatives that exist.

**Winton**

Yes. And this goes back to something that you and I wrote way back when the notice of the rules were first put out in January ’23; about the FTC's own workshop that I attended back in early 2020, just before COVID, where they invited a whole bunch of experts in a whole-day seminar workshop.

The first half of the day was economic experts. The question was, do we have enough data to do something about what is a problem here? And the answer by the end of the first half of the day was probably not. We need more studies.

Then the second half of the day was administrative law experts and law professors. And the question was: If we have enough data and we're supposed to do something, do we have the authority legally to do something? And the answer there was also “Probably not. It's going to face a lot of challenges.”

This is the FTC's own workshop, and they didn't listen to the people they invited to speak. Not surprisingly, three, four years later, when they went ahead and did it anyway, they faced. some pretty steep challenges that they were not able to overcome.

**Atlas**

So, we have the ruling from Judge Brown on August 20 [2024]. The question for us today is, what does all this have to do with *Loper*?

My answer is not very much. And here's why. While Judge Brown mentioned the *Loper* decision four times in 27 pages, the references to *Loper* were really just in passing. What Judge Brown did, simply put, is set aside the final rule, not because it was a federal agency's interpretation of an ambiguous statute. Rather, as mentioned, Judge Brown found that the FTC was without authority to issue the final rule in the first place.

So, it's an interesting issue. I mean, certainly when *Loper* was handed down by the Supreme Court, as you said earlier, Eric, we thought, well, this isn't going to hurt the effort to strike down the final rule issued by the FTC. But ultimately, it wasn't necessary and it really didn't figure into the decision because the FTC, Judge Brown found, didn't have the authority in the first place.

**Winton**

So, we never really had to get to the *Loper* analysis.

**Atlas**

I think that's right. Yes.

**Winton**

So, the FTC lost that battle, they're losing that battle. I'm not sure they're going to go quietly into the night, and we'll talk about that a bit. But maybe they've won the war or they're going to win the war because now it's on everyone's mind, right?

Non-competes have been subject of news reports for over 10 years now when certain sandwich shops and other small employers, summer camps, were using non -competes when they probably shouldn't have been, right? For the most part, Cliff and I, we've talked about this week, the clients that we have that use them, for the most part use them correctly for higher-level employees, not hourly employees or people who are doing things that don't involve trade secrets or customer goodwill.

But there are some employers out there who were abusing the contracts, so it made the news, it's been making the news. State legislation has been on the uptick now for a decade and different states have been passing laws. Some of them outright bans — very few, outright bans — but others limiting the ability to use non -competes. There's been federal legislation proposed again and again. Nothing's ever really gained traction.

All of that led to sort of the crescendo of the FTC and the most draconian of all measures against non-competes or attempt to do so. It didn't go as they would have liked, but it doesn't mean that the war is over. I think at this point there's enough feeling, bipartisan support in Congress to limit non-competes. It wouldn't be surprising to either of us and others who practice in this area for federal legislation to get a little more wind behind it.

Also the states: We've had one more state in the last few years, Minnesota, added to the list of states that ban non-competes completely. Other states have considered it only to have it vetoed by governors, like New York and others. It's out there. The fight is still out there and we don't think it's stopping anytime soon.

That's the big picture in terms of where we are in the litigation over the FTC ban that we mentioned earlier. You know, the *Ryan* case should apply nationwide to every employer, but you've got this *ATS* case that's still going forward for some reason.

**Atlas**

It's pretty remarkable. The FTC has not yet appealed the decision in the *Ryan* case. The FTC has until, I think, October 19 [2024] to file a notice of appeal because they're in the federal government, they get 60 days. So, it's going to be some time, even if they do appeal, before that's ever going to happen.

In the interim, in the *ATS Tree Service* case, the court denied ATS Tree Services' motion for a preliminary injunction. Following the issuance of the decision in the *Ryan* case, the plaintiff in ATS Tree Service did not seek to dismiss its case. Rather, it sought to stay the dates of the case. The FTC has opposed that motion to stay, and it remains to be seen exactly what the Eastern District is going to do. Because, you know, the decision in *Ryan*

I don't think it's binding on the Eastern District of Pennsylvania. I do think it's binding on the FTC. And I'm not sure if the FTC can proceed with the ATS Tree Service case without being in contempt of Judge Brown's order in the *Ryan* case.

**Winton**

I think they can proceed with the litigation. The litigation is one thing. If they try to *enforce*, that might be where they'd be in contempt of that order. Just proceeding with the litigation, I don't think that's *per se*, contempt.

**Atlas**

I think you might be right. It's going to be interesting to see how it all plays out. We could wind up with greater confusion in the short term than we would really want.

**Winton**

Yes. You were saying, and you're correct, does the *Ryan* decision have authority in some way over the court in Pennsylvania? No. But that really doesn't matter because *Ryan* covers the plaintiff in ATS. That plaintiff has received relief as every other employer in the country has from *Ryan*. So then that begs the question, why is ATS going forward with their litigation if they've already received what they wanted from another court?

**Atlas**

In other words, you would think that ATS Tree Service would take the win and go home. I don't know. As I said, it's going to be interesting to see what comes of all of this and whether we do wind up having a circuit split and whether we do wind up seeing all of this ultimately go before the U.S. Supreme Court.

**Winton**

Yes. And what we've been saying all along, and many others who practice in this area, is: Whether it's Judge Brown, who we sort of all thought was going to strike down the FTC's ban, which she eventually did, or it goes up to the Fifth Circuit, a business-friendly court, which we believe would also uphold striking down the ban, or if it gets to the U.S. Supreme Court, again, business-friendly, likely to strike down the attempt at a ban, we all think eventually this will be closed and the non-compete ban proposed by the FTC as it's currently constituted will never become the law of the land.

It just might take some time for the finality of that — and for an FTC who, as they've shown, doesn't really read the room very well and is willing to push some theories that may be a stretch.

In the meantime, though, the good news is the status quo. The rule is not in effect, so you don't have to worry about the rule. But the FTC maintains its ability, on a case-by-case basis, to make enforcement actions, as they did before the rule.

**Atlas**

That's right, and they did so and announced one of their enforcement actions, or an order result from one of their enforcement actions, the day before they issued the notice of proposed rulemaking.

What's important for employers to remember now is that even though the FTC's final rule has been set aside and even if the FTC's final rule may never ultimately become the law of the land, as you said, Eric, employers still need to be judicious about how they use non-competes. [They] should focus their use of non-competes on appropriate circumstances where it's designed to protect the legitimate business interests. And, employers continue to need to comply with the laws in some 52 different jurisdictions across the United States. That's no easy task, but we're here to help.

**Winton**

We are. And clients should know that even with the FTC ban mostly dead, keep an eye out for what's coming down the pike, whether it be state or federal legislation. And we're happy to speak more about this in the future and hope everybody has a great day.

**Atlas**

Thank you. Until next time.

OUTRO

*Thank you for joining us on We get work™. Please tune into our next program where we will continue to tell you not only what's legal, but what is effective. We get work™ is available to stream and subscribe to on Apple Podcasts, Libsyn, SoundCloud, Spotify and YouTube. For more information on today's topic, our presenters and other Jackson Lewis resources, visit jacksonlewis.com.*

*As a reminder, this material is provided for informational purposes only. It is not intended to constitute legal advice, nor does it create a client-lawyer relationship*

*between Jackson Lewis and any recipient.*



**Focused on employment and labor law since 1958, Jackson Lewis P.C.'s 1,000+ attorneys located in major cities nationwide consistently identify and respond to new ways workplace law intersects business. We help employers develop proactive strategies, strong policies and business-oriented solutions to cultivate high-functioning workforces that are engaged and stable, and share our clients' goals to emphasize belonging and respect for the contributions of every employee. For more information, visit https://www.jacksonlewis.com.**