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Recent Developments That Every Employer Needs to Know

June 6, 2024

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2014: Jimmy Johns

2016: Obama Administration

- Treasury Report
- White House Report
- Call to Action

2018: FTC

- Opens door to changes re: noncompetes
- Pushed by members of Congress

2020: FTC Workshop on Noncompetes

2020: Biden Administration

- Platform includes noncompete reform

2021: Biden Administration: Executive Order

2021: FTC Workshop on Noncompetes with DOJ

2022: FTC

- Issues CIDs
- MOU with NLRB
- Strategic Plan

2023

- FTC utilizes enforcement actions against noncompetes
- FTC reveals proposed rule banning noncompetes

2024 FTC Issues Final Rule

How We Got Here

FTC's Perspective on Noncompetes

According to the FTC, noncompetes:

- Reduce workers' wages
- Stifle innovation and development of new businesses
- Exploit workers and burden economic liberty
- Are not the only means of protecting employers' interests and confidentiality

Enforcement Actions

- Section 5 of the FTC Act allows the FTC to take enforcement actions against unfair methods of competition
- Recent Enforcement Actions against noncompetes:
 - *Anchor, Lynx Finance GP, LLC and Lynx Finance L.P.*
 - *Prudential Security, Inc. and Prudential Command Inc.*
 - *O-I Glass, Inc*
 - *Ardagh Group S.A.*
- The enforcements banned these companies from enforcing, threatening to enforce or imposing noncompetes on employees

What Does the FTC Rule Do?



What Does the FTC's Final Rule Do?

- Provides that noncompetes are an unfair method of competition
 - “[N]on-competes are facially unfair because they are restrictive and exclusionary, and because they are exploitative and coercive.” 16 CFR § 910.2(a)(1)
- Bans post-employment noncompetes
- Employers must provide notice to all employees with existing noncompetes that they will not be enforceable starting September 4, 2024

Senior Executive Exception

- Existing noncompetes with senior executives can remain in force
- After the rule goes into effect cannot enter into new clauses
- A senior executive is a worker in a policy-making position and who received from their employment at least \$151,164 in total compensation annually
 - A policy-making position is a business president, CEO, or any other officer who has the authority to make decisions that control significant aspects of a business
 - Total compensation may include salary, commissions, bonuses and any other nondiscretionary compensation

Sale of Business Exception

- § 910.3(a)
 - “The requirements of this part shall not apply to a non-compete clause that is entered into by a person pursuant to a bona fide sale of a business entity, of the person's ownership interest in a business entity, or of all or substantially all of a business entity's operating assets.”
- The sale must be bona fide
- Do not have to be a “substantial” owner of the business being sold to fall under the exception

Who is not affected by the Final Rule

- Banks, savings and loan institutions
- Federal Credit Unions
- Common Carriers who regulate commerce, domestic and foreign air carriers
- Persons, partnerships and corporations who are subject to the Packers and Stockyards Act
 - Packers, Swine Contractors, Live Poultry Dealers, Stockyard Owners, Market Agencies, and Dealer
- Non-profits
 - If a non-profit is making a profit, then may fall under FTC's authority

- Ryan LLC v. FTC
 - The rule is inflicting financial hardship by having to identify and notify all former and current employees who are subject to noncompetes
 - Major Questions Doctrine
 - Non-Delegation Doctrine
- ATS Tree Services LLC v. FTC
 - The final rule is unconstitutionally expanding the FTC's regulatory authority
- FTC's Reasoning
 - It has been given the authority by Congress to regulate "unfair methods of competition" and therefore regulating noncompetes is within its power.

Current Litigation Challenging the Rule

State-Level Developments

- Wage threshold

- At least 10 states utilize a wage threshold to determine who can be bound by a noncompete

State	Not bound if making
Colorado	\$101,250 or \$865.38 weekly
D.C.	Under \$150,000
Illinois	Under \$75,000
Maine	400% of poverty level
Maryland	Below 150% of state minimum wage*
Massachusetts	Nonexempt under FLSA
Nevada	Hourly wage

State	Not bound if making
New Hampshire	\$14.50/hour (excluding tip-based employees)
Oregon	\$100,533 or under
Rhode Island	250% of poverty level <i>or</i> nonexempt under FLSA
Virginia	Under the average weekly wage in Virginia
Washington	\$100,000 for employees; \$250,000 for independent contracts

**per current legislation advanced to amend the present wage threshold of \$15/hour or \$31,200/year*

State-Level Developments

- Enforceability triggered by cause of termination
 - Several states will not enforce a noncompete against an employee terminated without cause, or enforceability depends in part on termination
- Notice requirements
 - Employers are required to provide *advance* notice of noncompete provisions to new hires and to current employees before the provision takes effect
 - Can require express notice/advice to seek an attorney to review the non-compete
 - Can be enforced with fines and/or voiding the noncompete
- Limited effect of forum selection clauses/choice of law provisions to find favorable noncompete law

State-Level Developments

Takeaway:

Employers with employees in multiple jurisdictions must stay apprised of ongoing changes.

- Physicians and healthcare providers
 - A couple of states have put limitations on non-competes for physicians and other healthcare providers
- Broadening the definition of “noncompetition covenant”
 - Washington broadened its definition to include “agreements that directly or indirectly prohibit the acceptance or transaction of business with a customer”
- Limitations on “no-poach” agreements between service providers and their customers

What now?



Next Steps

- Review agreements to make sure they are narrowly tailored.
- Evaluate if your company is using noncompetes appropriately with its employees, and avoid using noncompetes with low-wage workers.
 - Regardless of the outcome of the Rule, the FTC is treating noncompetes as anticompetitive and initiating enforcement actions.
- Reevaluate the wording of the nondisclosure covenants your company uses.

Next Steps

- Evaluate the enforceability of other restrictive covenants (including customer nonsolicits) under applicable state law.
- Review steps being taken to protect trade secrets and other sensitive and confidential information.
- Be cognizant of who has access to highly sensitive information given the looming FTC rule.
- Be mindful of the impact of the looming rule on various contracts and transactions.
- Consider starting to compile lists of employees who will need to be notified if enforcement of the rule is not enjoined.

FLSA Exemption/Overtime Summary

- Federal Minimum Wage: \$7.25/hour
- Overtime must be paid at 1 ½ times the regular rate of pay for all hours over 40 hours in a work week.
- Section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for employees who are employed in a bona fide:
 - Executive;
 - Administrative;
 - Professional; or
 - Outside Sales capacity

EAP Exemption/Overtime Summary

Three Exemption Requirements:

1. Paid on **salary basis**

- predetermined amount of comp that cannot be reduced because of variations in the quality or quantity of the employee's work.

2. **Salary level** (currently at least \$684/week).

3. **Duties** must meet requirements of specific EAP exemptions

- *Helix Energy Solutions Group, Inc. (2/22/23)*

Highly Compensated Employee Exemption

HCE Exemption requirements:

1. Total annual compensation of \$107,432 or more (includes \$684/per week min);
2. Primary Duty includes office or non-manual work;
3. Duties test – customarily and regularly performs at least one of the exempt EAP duties (lower standard)

What Does the DOL's Final Rule Do?

- Determines who is eligible for overtime.
- Increases the salary threshold for EAP and HCE exemptions in phases
- The salary thresholds will automatically update every three years thereafter, based on the methodology set forth in the rule.
- Rule does **NOT** change duties tests
- Rule does **NOT** change state laws that may differ:
 - Higher salary levels and/or varying duties test
 - No HCE exemption recognized
 - California, Colorado, New York, Washington

Why? Anticipated Impact?

- 2019 DOL updated salary threshold was too low.
- Threshold created has not kept up with inflation.
- Believed that new thresholds will correct this.
- New rule will benefit 4.3 million workers
- Increased productivity (?)

EAP Salary Increases and Phases

- Increases the salary threshold for exemptions as follows:
- Effective July 1, 2024, the salary threshold will be raised to **\$844 per week** (equivalent of \$43,888 per year).
- Effective January 1, 2025, the salary threshold will be raised to **\$1,128 per week** (equivalent of \$58,656 per year).
- Increases the salary threshold for HCE's to **\$132,964** (July 1, 2024) and **\$151,164** (January 1, 2025)
- *The salary thresholds will automatically update every three years thereafter, based on the methodology set forth in the rule.

EAP Salary Level Changes

Date	Salary Threshold
Current	\$684/week (\$35,568/year)
July 1, 2024	\$844/week (\$43,888/year)
January 1, 2025	\$1,128/week(\$58,656)

HCE Salary Level Changes

Date	Salary Threshold
Current	\$107,432
July 1, 2024	\$132,964
January 1, 2025	\$151,164

- The required total **annual compensation**, which includes at least \$684 per week paid on a salary or fee basis, may otherwise consist of commissions, nondiscretionary bonuses and other nondiscretionary compensation earned during a 52-week period.
- The weekly salary amount of \$684 must be paid in its entirety.
- Employers may not use nondiscretionary bonuses and incentive payments (including commissions) to satisfy any portion of the weekly standard salary level for HCEs.

- Pending lawsuits in federal district courts by State of Texas; Business Groups and Private Company.
- Claims:
 - DOL lacks authority to set salary threshold; DOL is limited to defining job duties – “capacity”
 - References Justices Kavanaugh and Alito dissenting opinion in *Helix* (focus on duties not \$)
 - Salary increases/level are too high
 - Automatic 3- year increases are beyond DOL’s authority and too high
- Similar challenges to increases were successful in 2016

Current Litigation Challenging the Rule

Next Steps

- Audit workforce and identify exempt employees impacted
- Analyze current compliance with classifications and pay practices
- Determine whether to change to non-exempt or increase comp
- Consider impact on comp structure for supervisors/pay gaps
- Consider impact on morale and operations
- If change to non-exempt - ensure compliance with wage and hour rules
- Prepare employee notices and communication strategy
- Train managers/employees on timekeeping policies (ex: emails after hours)
- Remember state law compliance may differ

Questions?

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