April 24, 2024

The Federal Trade Commission Bans Non-Compete Agreements

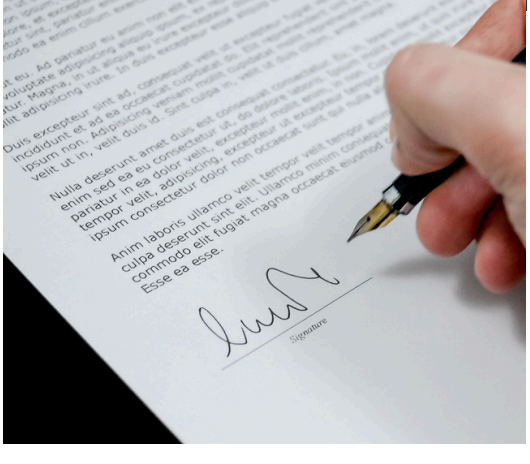
By Jeffrey D. Enquist

On April 23, 2024, the Federal Trade Commission issued a final rule barring most non-compete agreements with workers, while allowing existing non-compete agreements for "senior executives" to remain in force. Unless enjoined, the new rule is set to take effect on or around August 21, 2024.

Under the new rule, the FTC now considers it to be an unfair method of competition for an employer: (1) to enter into or attempt to enter into a non-compete clause; (2) to enforce or attempt to enforce a non-compete clause; or (3) to represent that a worker is subject to a non-compete clause. The rule also defines "worker" broadly to mean natural persons who performed either paid or unpaid work regardless of their title, and includes employees, independent contractors, externs, interns, volunteers, apprentices, sole proprietors, or a person that works for a franchisee or franchisor.

Employers should be mindful that once the rule becomes effective, they are required to notify each worker that the worker's non-compete clause will not be, and cannot legally be, enforced against the worker. This notice must identify the parties to the non-compete clause, be in writing, and be delivered to the worker by certain means. The new rule contains model language and a safe harbor provision if the employer uses the model language.

IN THIS UPDATE



The new rule also contains four notable exceptions. **First,** the rule does not apply to non-compete clauses entered into pursuant to a bona fide sale of a business entity, a person's ownership interest in a business entity, or all or substantially all of a business entity's operating assets. **Second,** existing non-compete clauses for senior executives can remain in force, but covered employers are banned from entering into or attempting to enforce any new non-competes, even if they involve senior executives. **Third,** the rule does not apply where a cause of action related to a non-compete clause accrued prior to the effective date of the rule. **Fourth,** it is not considered unfair competition to enforce or attempt to enforce a non-compete clause or make representations about a non-compete clause where a person has a good faith basis to believe the rule is inapplicable.

The new rule defines senior executives as workers who are or were (1) in a policy-making position and (2) received total annual compensation of at least $151,164 in the preceding year. The calculation of total annual compensation includes both (1) total compensation of at least $151,164 when annualized if the worker was employed during only part of the preceding year, or (2) when annualized in the preceding year prior to the worker's departure if the worker departed from employment prior to the preceding year and was subject to a non-compete clause. Total compensation also includes salary, commissions, nondiscretionary bonuses, and other nondiscretionary compensation. Total annual compensation does not include medical insurance, payment of life insurance premiums, contributions to retirement plans, or the cost of other fringe benefits.

Despite the broad elimination of non-compete clauses, all is not lost when looking to protect an employer's business and its investments. Tools such as trade secret protections and non-disclosure agreements can provide employers with protection of proprietary information. Moreover, the FTC's new rule against non-competes is already the subject of litigation, so stay tuned for any additional updates regarding the implementation of this rule. Regardless, Fabian VanCott's experienced attorneys can assist you with navigating the new rule, reviewing past non-compete agreements, and making use of additional tools to protect your business, trade secrets, and proprietary information.

ADDITIONAL UPDATES

U.S. Supreme Court Changes Standard for Discrimination Cases

By Tanner J. Bean

On April 17, 2024, the U.S. Supreme Court issued a unanimous decision in the case of *Muldrow v. City of St. Louis* regarding how courts decide discrimination claims brought by employees.

Before the Supreme Court's *Muldrow* decision, lower courts throughout the country disagreed on whether a forced job transfer could be an action amounting to discrimination under the federal nondiscrimination statute, Title VII. Some courts found that forcing an employee to transfer amounted to a change in their terms and conditions of employment, and that if the transfer was motivated by the employee's race, color, religion, sex, or other protected characteristic, then the transfer could amount to discrimination. Other courts did not regard job transfers to amount to an actionable change in terms or conditions of employment, as long as the transfer did not result in lower pay, loss of opportunities, or the like.

The Supreme Court settled the disagreements between lower courts in *Muldrow*. In the decision, the Supreme Court found that a female police officer who was forced to transfer to a different department, retained her same level of compensation and title, but experienced changed schedules, benefits, and responsibilities, and who was replaced by a male police officer, could bring a discrimination claim against her employer. In deciding this case in favor of the police officer, the Court said that employees are not required to demonstrate "significant harm" to the terms and conditions of their employment, just "some harm."

For many jurisdictions, the change from the significant-harm requirement to the some-harm requirement is a substantial shift, opening the gates for additional claims from employees that would otherwise be resolved at earlier stages of litigation. Employers should be cognizant of this shift in the Title VII discrimination standard, both in cases involving job transfers, as well as for its application in other discrimination cases.

Fabian VanCott's attorneys are ready to assist you and your company navigate nondiscrimination policies, discrimination prevention, and litigation.

ADDITIONAL UPDATES

The Department of Labor Adopts New Rule to Expand Overtime Pay to Employees

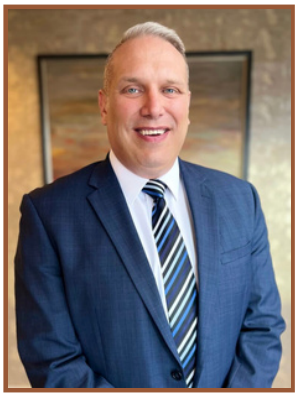
by Abigail Gates

On April 23, 2024, the Department of Labor announced a new rule impacting what has become known as the "Overtime Rule" under the Fair Labor Standards Act. The FLSA requires employers to pay their employees 1.5x their regular hourly rate for hours worked beyond forty hours per week. However, the FLSA exempts certain employees from this requirement.

For the FLSA's "white-collar" exemption, an employee must meet two criteria to be exempt from overtime pay: (1) the employee must be paid a salary equal to at least the threshold amount and (2) the employee must primarily perform executive, administrative, or professional duties.

The rule also raises the threshold amount for so called "highly compensated employees," who must meet both the threshold requirement and a separate minimum duties test to be exempt. Although previously set at $107,432/year, the threshold amount will increase to $132,964/year beginning on July 1, 2024, and to $151,164/year beginning on January 1, 2025. As with the white-collar exemption, the threshold will increase again every three years thereafter based on earnings data.

This new rule will extend overtime pay rights to many salaried workers who were previously exempt from such compensation. Employers should begin preparing now for these changes by deciding whether they want to either (1) raise employees' salaries moving forward to meet the new threshold amounts and the duties test, or (2) convert employees to non-exempt status and begin paying them overtime pay. Fabian VanCott also encourages employers to review their current policies related to employee classification, incentive and bonus pay, vacation and sick leave, and meal and rest breaks, assess the need for new timekeeping processes or technologies, and prepare for potential impacts on employee morale. Regardless of an employer's chosen approach, Fabian VanCott's attorneys are prepared to assist you navigate this change.



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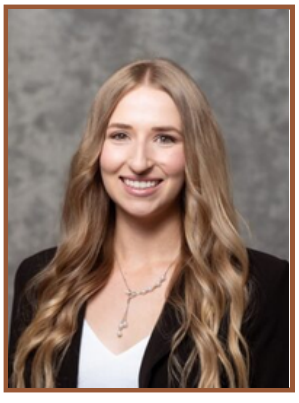

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