

PBS PRESENTS: RECENT UPDATES TO FLSA AND NONCOMPETE POLICIES



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Trip Umbach

Partner at Starnes Davis Florie, LLP

ARE NON-COMPETE AGREEMENTS
EXTINCT AND ARE EMPLOYERS GOING TO HAVE TO
PAY MORE OVERTIME?

What you need to know about recent rules
issued by the FTC and DOL



Arnold W. Umbach III
tumbach@starneslaw.com
(205) 868-6072

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WHAT DID THE FTC JUST DO?

- Final Rule April 23, 2024.
- Prohibits employers from entering into a non-compete agreement with a worker or representing to a worker he or she is subject to a non-compete agreement.
- Goes into effect September 4, 2024.

Why Did The FTC Do This?

- It believes non-compete agreements unlawfully stifle competition and depress wages.
- It believes banning such agreements will encourage competition, innovation and increase wages.
- The Federal Trade Commission Act empowers the FTC to investigate and prevent unfair methods of competition.

What Is A Non-Compete Agreement?

- “Non-compete clause” is defined as “a term or condition of employment that *prohibits* a worker from, *penalizes* a worker for, or *functions to prevent* a worker from (1) seeking or accepting work in the United States with a different person where such work would begin *after* the conclusion of the employment that includes the term or condition; or (2) operating a business in the United States *after* the conclusion of the employment that includes the term or condition.”

“Worker”

- Employees and independent contractors.
- Owners?

“Functions to Prevent”

- Non-solicitation agreements.
- Non-disclosure agreements.
- Training repayment agreements.
- Not a non-compete agreement unless “functions to prevent.”

Senior Executives

- Existing agreements are enforceable if . . .
- \$151,164.
- “Policy-making authority.”

Other Exceptions

- Non-competes entered into in connection with the bona-fide sale of a business.
- Cause of action accrued before the rule's effective date.
- Good Faith.

Are All Industries Covered?

- No, it does not apply to the following:
- Non-profits.
- Banks, savings and loan institutions, federal credit unions.
- Common carriers, air carriers, foreign air carriers.
- Persons and businesses subject to the Packers and Stockyards Act.

Is The Ban Retroactive?

- Yes
- It applies to existing agreements (unless the employee is a “senior executive”).

Notice Of Non-Enforcement

- Clear and conspicuous notice to workers subject to a prohibited non-compete.
- In an individualized communication.
- That the worker's non-compete clause will not be and cannot be legally enforced.
- By hand-delivery, mail to worker's last known address, by email, or text message.
- By the final rule's effective date.

What Impact Does This Rule Have On State Law?

- Only supersedes state laws that conflict.
- More restrictive state laws still apply.

Consequences of Violation

- Unfair or deceptive act in violation of section 5 of the FTC Act
 - Injunction
 - Civil penalties of up to \$51,744 per violation

Is This Really Going To Happen?

- Pending lawsuits to enjoin.
- New administration?

What Should We Do Now?

- Compile a list of impacted current and former employees with contact information.
- Determine whether any of the impacted employees are “senior executives.”
- Decide whether any “senior executives” should sign non-competes before the effective date.
- Draft a notice.
- Review existing non-solicitation, confidentiality, payback agreements.
- Wait and see what happens in court.

What Did The DOL Just Do?

- Increased the salary an employee must receive to be exempt from overtime.
- Provided for future increases.

New Thresholds

| Exemptions | Current Amount | Minimum Salary Amount Beginning July 1, 2024 | Minimum Salary Amount Beginning January 1, 2025 |
|-----------------------------------------|-------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------|
| Executive, Administrative, Professional | \$684 per week (equivalent to a \$35,568 annual salary) | \$844 per week (equivalent to a \$43,888 annual salary) | \$1,128 per week (equivalent to a \$58,656 annual salary) |
| Highly Compensated Employees (HCEs) | \$107,432 per year; including at least \$684 per week paid on a salary or fee basis | \$132,964 per year, including at least \$844 per week paid on a salary or fee basis | \$151,164 per year, including at least \$1,128 per week paid on a salary or fee basis |
| Computer Employees | \$27.63 per hour | \$27.63 per hour | \$27.63 per hour |
| Outside Sales | N/A | N/A | N/A |

What Did The DOL Not Do?

- Change what it means to be paid on a salary basis.
- Change the duties required to be exempt.

Most Common Exemptions

- Executive
- Professional
- Administrative
- Computer Professional
- Outside Sales
- Highly Compensated Employee

Salary Basis Test

- Same pre-determined amount each pay period → Not reduced by quantity or quality of work
- Must be paid for the **entire** week if employee works **any** part of the week

Executive Exemption

- Primary Duty: Manage the enterprise or a customarily recognized department or subdivision.
- ***Customarily and regularly*** direct the work of ***two*** or more full-time employees.
- Authority to ***hire and fire*** other employees or give suggestions/recommendations that are given particular weight.

Professional Exemption

. Primary Duty: Work requiring ***advanced knowledge*** (predominantly intellectual in character; exercise of discretion and judgment)

 In field of science or learning

 Customarily acquired by a prolonged course of ***specialized intellectual instruction***

Administrative Exemption

- Primary Duty: Performance of *office* or *non-manual work* directly related to management or general business operations.
- Primary Duty: Exercise of *discretion and independent judgment* with respect to matters of significance.

Computer Professional Exemption

Primary Duty:

- Application of systems analysis techniques and procedures **OR**
- Design, development, documentation, analysis, creation, testing, or modification of computer systems/programs **OR**
- Design, documentation, testing, creation or modification of computer programs related to machine operating systems **OR**
- A combination of the above which requires same level of skills.

Outside Sales Exemption

Primary Duty:

- Making sales or obtaining orders or contracts for services or for the use of facilities for which consideration will be paid by client/customer.
- ***Customarily and regularly*** engaged away from the employer's place of business.

Highly Compensated Employee

- \$151,164 (1/1/25)
- Primary duty includes performing office or non-manual work.
- Customarily and regularly performs at least one of the exempt duties of an exempt executive, administrative, or professional employee.

QUESTIONS?

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