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Regulatory Roundup





SMALL BUSINESS  
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# THE FUTRE OF NON-COMPETES AND OTHER EMPLOYMENT LAW UPDATES

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# Presentation Overview

- Federal and State Action on Non-Competes
- DOL Independent Contractor Classification Rules
- DOL White Collar Overtime Exemptions
- General Employment Law Trends and Predictions
- Q&A

# Non-Competes: What is a Restrictive Covenant

- A restrictive covenant is a type of agreement, or clause included in a larger agreement that limits what a worker can and cannot do during his or her employment/engagement and, in certain circumstances, after his or her employment/engagement
- Non-competes, customer or client non-solicit, employee non-solicit (aka anti-rating) and non-disclosure provisions are all examples of restrictive covenants

# Non-Competes: Historical Treatment

- Traditionally, the enforceability of restrictive covenants has been a matter of state law
- Common law tests typically focus on whether the agreement is appropriate given the individual's position and narrowly tailored to protect a legitimate business interest while not unnecessarily restricting the individual's ability to work

# Non-Competes: Evolving State Law

- An increasing number of states now have statutes limiting the use of restrictive covenants
- Most (though not all) are focused on non-competes
- Some extend to independent contractors as well as employees
- Some are industry specific
- Some impose penalties simply for having a worker sign a prohibited agreement

# Non-Competes: Common Types of Restrictions

- Total bans
- Limits on the types of employees that can be subject to a non-compete or non-solicit
- Limits on the maximum duration of a non-compete or non-solicit



# Non-Competes: FTC Proposed Rules

- Rules proposed by Federal Trade Commission on Jan. 5, 2023.
  - Comment deadline closed April 19, 2023
- Proposed rule would apply to all employers and to all workers – including employees and contractors
- If enacted as proposed – the rule would prohibit new non-competes (with limited exceptions) and require the rescission of previously entered into non-competes

# Non-Competes: FTC Proposed Rules, cont.

- The proposed rule broadly defines a non-compete clause as “a contractual term between an employer and a worker that prevents the worker from seeking or accepting employment with a person, or operating a business, after the conclusion of the worker’s employment with the employer”
- The prohibition would extend to “*de facto* non-compete clauses”

# Non-Competes: FTC Proposed Rules, cont.

- The proposed rule states that it would supersede inconsistent state law
- No private right of action, FTC enforcement authority may be limited
- **IMPORTANT NOTE** – these are currently proposed rules, the final rule may be narrower
- Likely legal challenges

# Non-Competes: Workforce mobility act of 2023

- Bi-partisan bill, previously introduced and not passed in 2019 and 2021
- Would ban non-competes except in the sale of a business or dissolution of a partnership

# DOL Independent Contractor Rule

- In assessing contractor classifications, the Department of Labor (DOL) has historically used the “economic realities test” which focuses on five factors: (1) the nature and degree of the worker’s control over the work; (2) the worker’s opportunity for profit or loss; (3) the amount of skill required for the work; (4) the degree of permanence of the working relationship; and (5) whether the work is part of an integrated unit of the business.

# DOL Independent Contractor Rule, cont.

- During the Obama Administration, the DOL took steps to clarify and strengthen the application of the economic realities test.
- During the Trump Administration, the DOL issued new rules emphasizing the first two factors of the economic realities test.
  - Withdrawn by the Biden Administration on March 11, 2021 before they went into effect. Lawsuit challenging the decision to delay and withdraw the rule.
- On October 11, 2022, the DOL issued new proposed rules to reinstate (and clarify) the pre-Trump era economic realities test.
  - Comments closed and final rule expected soon.

# DOL White Collar Overtime Exemptions

- No proposed rules at this time but on the DOL's list of anticipated action items
- Establishing test for which employees are exempt from federal minimum wage and overtime laws
- Currently a two-part test under which the employee must (1) perform certain duties and (2) be paid on a salary basis at a designated minimum weekly salary (currently \$684 per week or \$35,568 per year)

# The Protecting the Right to Organize (PRO) Act

- Reintroduced in February 2023
- Prior versions passed the House in 2020 and 2021 but never brought to the Senate Floor
- Includes a number of pro-union provisions including enhancing strike protections, overriding state right to work laws, banning employers from holding “captive audience” meetings, increasing penalties and limiting which employees are exempt from NLRB protections
- Very unlikely to get sufficient support to pass the Senate this session



# Other Hot Employment Law Issues to Watch/Be Aware Of

- Cannabis Laws
- Wage Transparency and Pay Equity
- Family Leave and Pregnancy Discrimination and Accommodations

QUESTIONS?

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