

FTC's Noncompete Rule and DOL's Minimum Salary Rule: Timely Compliance Considerations for Employers



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AGENDA

- **DOL's Minimum Salary Rule and Compliance Deadlines**
- **SCOTUS Decision in *Loper Bright* and the End of Agency Deference**
- **FTC's Noncompete Rule and Implications Under Emerging Case Law**
- **Action Items**

DOL'S MINIMUM SALARY RULES



DOL RULE TO INCREASE MINIMUM SALARIES FOR FLSA EXEMPTION

Under the federal Fair Labor Standards Act:

All employees are entitled to the applicable minimum wage plus overtime unless an exemption is applicable and the employer decides to utilize the exemption.



DOL RULE TO INCREASE MINIMUM SALARIES FOR FLSA EXEMPTION

White Collar Exemptions Tests:

➤ Duties:

- Executive: primary duty of management; supervise 2 or more FTEs
- Administrative: primary duty of office/non-manual work directly related to management/operations of the business; and exercise of independent judgment/discretion over matters of significance to management/operations
- Professional: performance of work requiring advanced knowledge in a field of science/learning, obtained through a prolonged course of advanced, specialized intellectual instruction; consistent exercise of independent discretion/judgment
- Computer Employee: employed as analyst, programmer, engineer; primary duty of design, development, or systems analysis

➤ Paid on a Salary Basis

➤ Paid the DOL-Required Minimum Salary: which was \$684/wk prior to 7/1/24



DOL RULE TO INCREASE MINIMUM SALARIES FOR FLSA EXEMPTION

- Effective July 1, 2024, Increase minimum salary 54% to qualify for an executive, administrative, professional, or computer employee exemption from the current \$684/wk (\$35,568/yr) to \$844/wk (\$43,888 per year)
- Effective January 1, 2025, Increase minimum salary to \$1,128/wk (\$58,656/yr)
 - Employers may take a credit for up to 10% of the minimum salary required by paying non-discretionary bonuses, incentives, or commissions
 - Automatic adjustment every three years after that for wage inflation based on 35th percentile of average weekly salaries in the region of the country with the lowest wages (currently the South), published 150 days in advance of change taking effect, with authority for DOL to delay for unforeseen economic conditions
 - DOL press release: affects 3.4 million US workers, will “restore overtime protections to 3.6 million salaried workers” and projects an annual cost of \$6.6 billion to employers over the next 10 years
- No proposal to change the duties tests applicable to the FLSA exemptions



DOL RULE TO INCREASE MINIMUM SALARIES FOR FLSA EXEMPTION

Potential Consequences:

- Not likely to significantly increase wages
- Most employers look to budget neutral solutions
- Most likely to affect front line managers
- Evaluate the effect on staffing, policy, compensation, benefits, culture, morale, production, supervision, customer contracts, and budgets
- **Employers really should monitor all workers paid near the minimum salary threshold and require a tracking of hours**

DOL RULE TO INCREASE MINIMUM SALARIES FOR FLSA EXEMPTION

Compliance Tools:

- Increase salary
- Convert exempt salaried employee to hourly non-exempt
- Convert FT exempt salaried position into two PT non-exempt hourly positions
- Restructure jobs to move overtime related functions and responsibilities away from newly non-exempt employee to other employees/jobs that will remain exempt
- Outsource to a vendor, temp staffing firm, or independent contractor
- Fixed salary for a fluctuating workweek
- Salary plus overtime for newly non-exempt employees
- Grandfathering certain fringe benefit terms

DOL RULE TO INCREASE MINIMUM SALARIES FOR FLSA EXEMPTION

Court Challenges to the Rule were Expected:

- DOL made the rule without a Senate confirmed Secretary of Labor
- The rule is nearly identical to the Obama-era rule that was the subject of a nationwide injunction in 2016
- Justice Kavanaugh recently stated in *Helix Energy Solutions Group, Inc. v. Hewitt*, that the FLSA is focused on the employee's exempt duties, "not how much an employee is paid or how an employee is paid..." and that "it is questionable whether the Department's regulations—which look not only at an employee's duties but also at how much an employee is paid and how an employee is paid—will survive if and when the regulations are challenged as inconsistent with the Act."



SCOTUS ENDS FEDERAL AGENCY DEFERENCE

Loper Bright Enterprises v. Raimondo (June 28, 2024)

- For 40 years, SCOTUS precedent in *Chevron v. Natural Resources Defense Council*, resulted in the federal courts granting federal agencies broad discretion to interpret the statutes passed by Congress where those statutes gave authority to the agency to implement them
 - Vagueness and ambiguity in the statutes were viewed as **empowering agencies to act** so long as such action was not inconsistent with the statute
- *Loper Bright* marked **an end to Chevron Deference**, instead requiring that Courts hold a federal agency accountable for proving that it “**has acted within its statutory authority**” when implementing a regulation



DOL RULE ENJOINED

State of Texas v. U.S. Department of Labor

- Also last Friday, June 28, 2024, a federal court in Texas partially enjoined the DOL's new minimum salary rule
 - Court found that DOL's minimum salary rule was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” while citing *Loper Bright*
 - The Court said that under the FLSA, whether an employee is exempt “turns on an employee's functions and duties... and does not turn on compensation.”
- After providing the full rationale for its determination that the State of Texas was likely to prevail in showing the DOL's rule violates the law, the Court issued an injunction against DOL's rule...

BUT ONLY as to the employees employed by the State of Texas!



DOL RULE ENJOINED

- **The very same judge** who issued the ruling in the *State of Texas* case, **has another case brought by local, regional, and national business groups**, which have also moved for a nationwide injunction
 - **Plaintiffs in that case include:** the American Hotel and Lodging Association, the Associated Builders and Contractors, the National Association of Convenience Stores, the National Association of Home Builders, the National Retail Federation, the Plano Chamber of Commerce, and the Restaurant Law Center
 - **It seems likely** that the same rationale for a limited injunction in favor of the State of Texas **would support a nationwide injunction**
 - Briefing on the business groups' motion for injunction has closed and a ruling is expected **within the coming days**



DOL RULE ENJOINED

What are we to do?

- The rule's deadline to comply by July 1, 2024 has only **two material obligations**:
 - The duty of employers under the FLSA to **maintain accurate timekeeping records of hours worked by non-exempt employees**
 - The duty to **pay the new minimum salary or else minimum wage and applicable overtime** on the payroll that compensates employees for labor performed on July 1 and after
- Depending on your ordinary payroll cycles, **you may have until the end of your payroll period to decide** whether and how to comply with the new rule
- While the FLSA requires employers to pay employees on at least a **monthly basis**, **some state laws require more frequent payroll periods**
 - It's possible in some states to wait until the end of the month to decide whether and how to comply with the new rule
- **Stay tuned**



FTC'S NONCOMPETE PROHIBITION



FTC MOVES AGAINST NONCOMPETE AGREEMENTS

- On April 23, 2024, the **Federal Trade Commission** published a final regulation to **eliminate use of non-compete agreements**
- **FTC's prohibition on non-competes is targeted at agreements with employees that prohibit the employee from working for a competitor**
 - Includes agreements that both **prohibit** or **penalize** competition
- **Other contract clauses that are sometimes consider a “subset” of non-compete agreements (including non-solicitation, non-disparagement, or confidentiality agreements) remain enforceable and unaffected by the FTC rule so long as they do not have a direct restraint on employment mobility, i.e. they are not “functional non-competes”**



FTC MOVES AGAINST NONCOMPETE AGREEMENTS

Other Key Exceptions:

- **M&A**: Contracts in connection with the **sale of a business** (stock or asset) by which the seller of interest/ownership is obligated not to compete following the sale
- **Senior Executive Exception**: The final rule allows non-competes entered into prior to **September 6, 2024** with “**Senior Executives**” to remain in effect
 - To be a Senior Executive, the employee must **make policy-making decisions for all businesses** within the controlled group of companies and
 - Earn at least **\$151,164** in annual compensation
 - Senior Executive Exception is **inapplicable** to an agreement entered into on or after **September 6, 2024**



FTC MOVES AGAINST NONCOMPETE AGREEMENTS

Loper Bright Has Something to Say About the FTC Rule:

- Nothing in the statutes enforced by the FTC contains authority granted by Congress to make rules prohibiting non-compete agreements
- There is a 100-year history of the states legislating their own laws and restrictions on non-compete agreements (most states will enforce them)
- Multiple lawsuits have been filed alleging that FTC has exceeded its statutory authority
- After *Loper Bright*, the consensus view among legal practitioners is that those lawsuits will result in a federal court issuing an injunction against the FTC's rule



DOL RULE ENJOINED

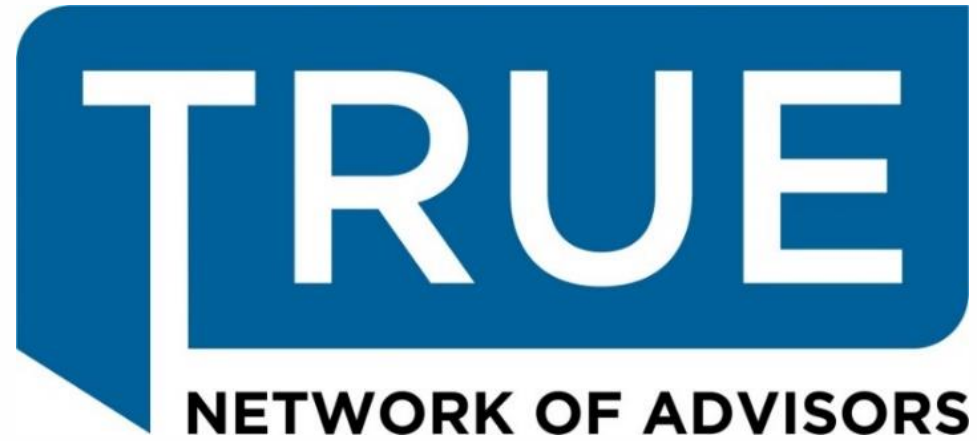
What are we to do?

- Take note of the **virtue signaling** from the Biden Administration
 - Publication of the FTC proposed rule and final rule has triggered **a wave of proposed legislation at the state and local level** to limit the application of non-competes
 - One trend that states seem to have embraced is the **limitation on enforceability of non-competes against lower wage earners** (those under a 6-figure threshold)
 - Consider whether **non-solicitation, confidentiality, and non-disparagement agreements** are a better means of achieving your goal of preventing unfair competition
- Stay tuned for both **federal court intervention** against the FTC rule and **local legislation**



Action Items

1. Monitor federal litigation against the DOL minimum salary rule and explore options for delaying your compliance until your obligations are clearer
2. Prepare a plan for compliance with the FTC rule, but delay any sweeping changes to do so until legal challenges have run their course
3. Consider revisiting your strategy for the use of non-competes and whether limiting their use or using alternative forms of agreement might better achieve your business goals
4. Note that other recent federal agency action is likely to be affected by the *Loper Bright* ruling, including EEOC regulations on the Pregnant Workers Fairness Act, recent DOL rules on expansion of the Davis-Bacon Act, and OSHA rules on indoor and outdoor climate safety



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