



## RECENT DEVELOPMENTS IN LABOR & EMPLOYMENT LAW

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RESPONSIBLE ATTORNEY: Brian J. Moore 6/12/24

# OVERVIEW OF PRESENTATION

- DOL's Rule on Overtime Exemptions
- DOL's Rule on Independent Contractors
- FTC's Rule Banning Most Non-Compete Agreements



# DOL'S Final Rule on Overtime Exemptions



- On April 23, 2024, the DOL published its final rule increasing salary threshold amounts required for certain employees to be exempt from FLSA overtime requirements.
- **The rule will take effect on July 1, 2024.**

# DOL'S Final Rule on Overtime Exemptions

- The rule will expand overtime protection to cover more than 4 million additional workers within the first year.
- For the full announcement regarding the rule, please visit:  
<https://www.dol.gov/agencies/whd/overtime/rulemaking>

## Context of the Rule: Fair Labor Standards Act

The Fair Labor Standards Act (“FLSA”) establishes minimum wage, overtime pay, and record-keeping standards affecting employees in the private sector and in Federal, State, and local governments. Covered non-exempt workers are entitled to a minimum wage and overtime at a rate of one and one-half times the regular rate of pay for hours over 40 in a workweek.



# Purpose of the FLSA

- Overtime Protections were established to protect workers from exploitation and to benefit workers.
- According to the DOL, strong overtime protections help build America's middle class and ensure workers are not overworked and underpaid.



# Exemptions from FLSA'S Minimum Wage & Overtime Protections

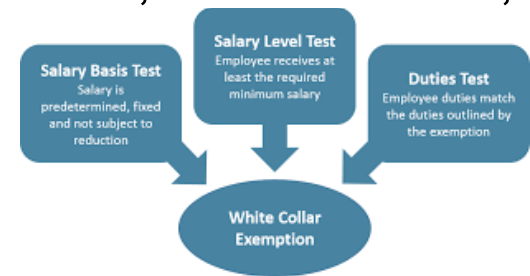
- There are several categories exempt from the overtime requirement of the FLSA.
- To qualify, an employee must
  - Perform certain job duties;
  - Be paid on a pre-determined fixed salary not subject to reduction due to work quality or quantity; and
  - Earn a salary above a DOL determined threshold.





# Exemptions from FLSA'S Protections Continued

- Bona Fide executive, administrative or professional employees are specifically exempt under Section 13(a)(1) of the FLSA.
- Collectively referred to as the “EAP” exemptions.
- Applies when:
  - An employee is paid a salary;
  - The salary is not less than a minimum salary threshold amount; and
  - The employee primarily performs executive, administrative, or professional duties.



## Executive Exemption

(1) Primary duty is the management of the enterprise in which the employee is employed, or of a customarily recognized department or subdivision of the enterprise; AND (2) who customarily and regularly directs the work of two or more other employees; AND (3) who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change to the status of other employees are given particular weight.

## Administrative Exemption

- (1) Primary duty is performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers AND
- (2) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

## Professional Exemption

Primary duty is the performance of work (1) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; or (2) requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor.

# Highly-Compensated Employee Test

- The DOL created this test for certain highly compensated employees.
- Must meet one of the duties of the EAP exemptions.
- In 2019, the DOL set the threshold for highly-compensated employees at \$107,432 per year.



# Non-Exempt Employee Requirements

- Employees must be paid minimum wage and receive overtime pay for anything over 40 hours per workweek.



# The New Rule

- Revises and increases the salary threshold for certain exemptions (EAP and computer) under the FLSA. Note: outside sales does not have a salary test.
- The new threshold will increase from \$684 per week or \$35,568 per year to \$844 per week or \$43,888 per year on July 1, 2024.
- The next increase will be on January 1, 2025 to \$1,128 per week or \$58,656 per year.

## The New Rule Continued

- The salary threshold for highly compensated employees whose primary duty includes office or non-manual work, and who customarily and regularly perform at least one of the exempt duties or responsibilities of an exempt executive, administrative, or professional employee will also increase.
- The exemption will increase from \$107,432 per year to \$132,964 on July 1, 2024.
- On January 1, 2025 there will be another increase to \$151,164.
- The DOL plans to update the thresholds every three years to maintain consistency and keep pace with inflation.



# The New Rule Continued

- Employers can continue to use non-discretionary bonuses and incentive payments, including commissions, to satisfy up to 10% of the standard or special salary level for the exemptions.



## Best Practices

- Review current classifications to determine who may be impacted by the proposed increases.
- A legal challenge has been filed – keep up to date on it.
- Assess the impact of re-classifying employees as non-exempt or increase the employee's salary to raise the employee to the new salary threshold.
- Know that some state laws, like California, impose minimum salary threshold for exemptions that already exceed the new FLSA requirements.

# DOL'S Final Rule on Employee or Independent Contractor Classification



- On January 9, 2024, the DOL announced the final rule regarding when employers can classify workers as independent contractors under federal labor law.
- **The rule took effect on March 11, 2024.**

# DOL'S Final Rule on Employee or Independent Contractor Classification

- The DOL first proposed the rule in October of 2022.
- For the full announcement regarding the rule, please visit:

<https://www.dol.gov/agencies/whd/flsa/misclassification/rulemaking>.

# Defined Terms Under the Fair Labor Standards Act

- The FLSA does not define the term “independent contractor.”
- The FLSA defines “employer” as “any person acting directly or indirectly in the interest of an employer in relation to an employee.”
- “Employee” is defined as “any individual employed by an employer.”
- “Employ” means “to suffer or permit to work.”
- The Department of Labor and Courts have interpreted the “suffer or permit” standard to require an evaluation of the extent of the worker’s economic dependence on the potential employer.

## The 2021 Rule

- On January 7, 2021, the DOL published a rule titled “Independent Contractor Status Under the Fair Labor Standards Act.”
- The 2021 rule departed from the consistent, longstanding adoption and application of the economic reality test to determine whether a worker is an employee or independent contractor under the FLSA.
- The DOL explained the purpose was to establish a streamlined economic reality test.
- Under the 2021 rule, there were five economic reality factors to guide the inquiry.

# The Five Factors of the 2021 Rule

- The amount of skill required for the work;
- The degree of permanence of the working relationship between the worker and the potential employer;
- Whether the work is part of an integrated unit of production;
- Nature and degree of control over the work
- Worker's opportunity for profit or loss.



# The Core Factors of the 2021 Rule

- Two of the five factors were identified as “core factors.”
  - Nature and degree of control over the work
  - Worker’s opportunity for profit or loss
- The 2021 rule stated that if these two core factors pointed towards the same classification, there was a substantial likelihood that it was the accurate classification.
- The rule indicated that it was highly unlikely that the three non-core factors could outweigh the combined probative value of the two core factors.





## The 2021 Rule Continued

- The rule never went into effect.
- The DOL explained that it believed retaining the 2021 rule would have a confusing and disruptive effect on workers and businesses due to the departure from case law and application of the multifactor economic reality test.
- The DOL feared that because of the departure from legal precedent, it was unclear whether courts would adopt the analysis which would result in more uncertainty, ultimately negatively affecting workers and businesses.



# The DOL's Final Rule

- This rule is a return to a totality-of-the-circumstances analysis.
- Economic reality factors are not assigned a predetermined weight.
- Each factor is given full consideration.



## The Rule's Six Factor Test

1. Worker's opportunity for profit or loss;
2. Investments made by the worker and the potential employer;
3. The degree of permanence of the work relationship;
4. The degree of control an employer has over the work;
5. The extent to which work performed is integral to the employer's business; and
6. The use of a worker's skill and initiative.



## DOL's intended goals (according to the DOL)

- Consistency with FLSA.
- Reduces risk of misclassification.
- Provides consistent approach for businesses that engage with individuals who are in business for themselves.

## Commentary and the DOL's Response

- Comments regarding the 2021 rule being better suited to the modern economy.
- The DOL believes that modern work arrangements utilizing technology are best addressed under the totality-of-the-circumstances test by offering a flexible, comprehensive, and appropriately nuanced approach.
- The DOL indicates that the Final rule accounts for continued social changes by not presuming which aspects of the working relationship are most probative.

## Practical Effects of the New Rule

- The DOL rule is generally more favorable to employees.
- The DOL's Rule makes it more difficult for businesses to classify workers as independent contractors by emphasizing whether a worker is economically dependent on the potential employer for work or in business for him or herself.
- Employers who misclassify workers can be liable for lost wage damages, unpaid leave, attorneys' fees and costs, and other damages.
- The DOL rule has no impact on federal, state, or local laws that have distinct criteria for worker classification.

# Challenges to the DOL's Rule



- *Coalition for Workforce Innovation, et al. v. Walsh, et al.*, No. 1:21-cv-00130 (E.D. Tex. Mar. 26, 2021), No. 22-40316 (5th Cir. May 16, 2022).
  - Originally filed in 2021 challenging the Biden administration's promulgated rule that withdrew a Trump administration rule. TX federal court temporarily reinstated the Trump Rule. That ruling was stayed pending the DOL's appeal to the Fifth Circuit. Now, the coalition has tried to lift the stay rather than initiating a new challenge.

# Challenges to the DOL's Rule

- *Warren, et al. v. U.S. Dep't of Labor, et al.*, No. 2:24-cv-00007 (N.D. Ga. Jan. 16, 2024).



- Freelance writers allege that the new rule forces them to alter their business practices and incur more costs to remain independent. They claim it could cause them to lose business because of uncertainty and risk of liability for would-be employers.



## Other Independent Contractor Tests

Just because you satisfy the DOL test does not get you off the hook under other laws.

- ABC Test
- IRS Test



# ABC Test Factors

- (1) The extent of the employer's control over the work;
- (2) Whether the work performed is outside of the usual course of the employer's business; and
- (3) Whether the worker customarily engages in this type of work.



## IRS Independent Contractor Test

In determining whether the person providing service is an employee or an independent contractor, all information that provides evidence of the degree of control and independence must be considered.



## IRS Independent Contractor Test Cont'd.

- (1) Behavioral: Does the company control or have the right to control what the worker does and how the worker does his or her job?
- (2) Financial: Are the business aspects of the worker's job controlled by the payer? (these include things like how worker is paid, whether expenses are reimbursed, who provides tools/supplies, etc.)
- (3) Type of relationships: Are there written contracts or employee type benefits (that is, pension plan, insurance, vacation pay, etc.)? Will the relationship continue and is the work performed a key aspect of the business?

## IRS Independent Contractor Test Cont'd.

Businesses must weigh all these factors when determining whether a worker is an employee or an independent contractor. Some factors may indicate that the worker is an employee, while other factors indicate that the worker is an independent contractor. There is no “magic” or set number of factors that “makes” the worker an employee or an independent contractor and no one factor stands alone in making this determination. Also, factors which are relevant in one situation may not be relevant in another. ***The keys are to look at the entire relationship and consider the extent of the right to direct and control the worker.*** [Document the way you made the determination.]

# Best Practices

- Contractor has a business license;
- A “business” is the contractor, not an individual (e.g., “Friendly Nursing, LLC”);
- Degree of control;
- Opportunity for individual to make profit or loss;
- Contractor holds their services out to the public;
- Contractor is not beholden to one employer;

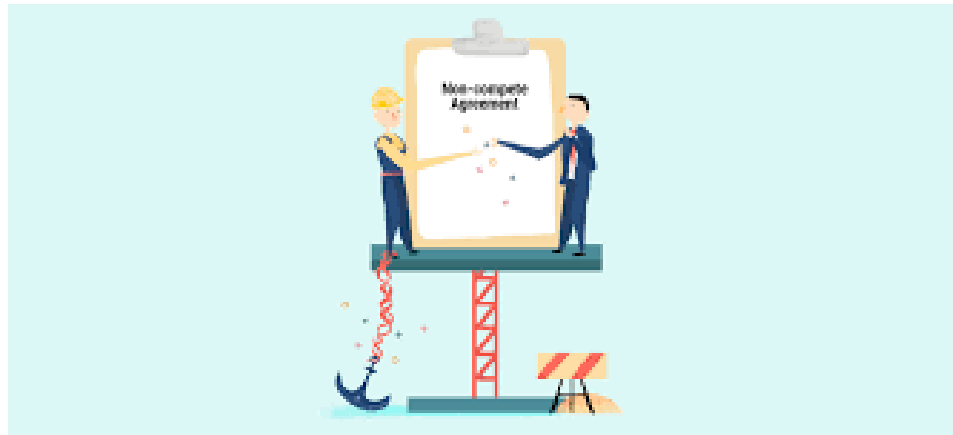
# FTC'S RULE BANNING MOST NON-COMPETE AGREEMENTS



- On April 23, 2024, the FTC held a public hearing where members voted 3-2 to adopt a final rule effectively banning employers from enforcing non-compete clauses.
- **The new rule will go into effect on September 4, 2024.**

# What is a Non-Compete?

- A term or condition of employment that prohibits a worker from, penalizes a worker for, or functions to prevent a worker from either seeking or accepting work after the conclusion of employment or operating a business after the conclusion of employment. See Section 910.1





# The New Rule

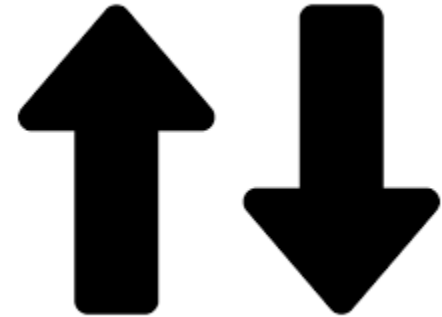
- The rule is similar to the proposed rule first announced in January 2023.
- It imposes a comprehensive ban of non-competes for all employees, regardless of title or income level.
- The rule is mostly, but not completely, retroactive.
  - Non-competes executed before the effective date will be unenforceable as applied to all workers other than “senior executives.” In this context, “senior executives” are workers earning more than \$151,165 in total compensation who are in a policy-making position.

## The New Rule Continued

- The rule will apply to all employees of for-profit companies. As a note, the FTC's jurisdiction does not expand to employees of nonprofit corporations.
- The rule does not prohibit the use of other restrictive covenants such as non-solicitation agreements or agreements to protect confidential information.
- There is an exception for non-compete agreements entered into as a part of the bona fide sale of a business.
- The rule will not apply where a cause of action related to a non-compete clause had accrued prior to the effective date.

# FTC's intended goals (according to the FTC)

- New business formation
- Rise in innovation
- Reduced health care costs
- Higher worker earnings



# Challenges to the FTC's Rule



- *Ryan, LLC v. FTC*
  - Ryan, LLC filed a lawsuit in the U.S. District Court for the Northern District of Texas seeking to vacate the rule because (1) the FTC does not have the authority to issue the rule and (2) the rule is unconstitutional.
  - The Court entered an Order on May 2, 2024 requiring the FTC to respond to Plaintiff's emergency motion for an expedited briefing schedule.

# Challenges to the FTC's Rule



- *Chamber of Commerce v. FTC*
  - On April 24, 2024, the Chamber filed its lawsuit in the U.S. District of Texas, Tyler Division, seeking injunctive relief from the FTC's enforcement.
  - On May 3, 2024, the Court entered an Order staying the proceedings by granting the FTC's motion to apply the first-to-file doctrine based on the filing of *Ryan, LLC v. FTC*

## Best Practices

- Look closely at existing restrictive covenant agreements with employees.
- Determine if senior executive exception for existing agreements applies.
- Give notice to non-executive workers who entered into a non-compete clause that the non-compete provisions are unenforceable. This notice must be on paper, delivered by hand, mail, email, or text message.

# TAKEAWAYS

- Three Key Changes
- Importance of Keeping Up to Date
- Dinsmore Continues to Monitor Developments



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