

# FTC Bans Non-Compete Agreements; Federal Department of Labor Issues New Overtime Exemption Rules

## New Federal Agency Rules Present Significant Changes to Basic Employment Law Standards

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In recent days, the **Federal Trade Commission** (the “FTC,” the federal agency charged with enforcing civil anti-trust and consumer protection laws) and the **Department of Labor** (the “DOL,” the federal executive department charged with administering federal wage and hour laws) have issued wide-ranging rules that stand to fundamentally change the way that employers interact with their employees. These new administrative rules, which relate to the enforcement of non-competes and overtime pay laws, are summarized below:

## FTC ISSUES NATION-WIDE BAN ON NON-COMPETE AGREEMENTS

On April 23, 2024, the FTC approved a **Final Rule** that bans employment-related non-competes, on a nation-wide basis. Specifically, the Final Rule:

- Bans new non-competes for all workers (including non-competes that apply to employees and independent contractors), after the Final Rule’s effective date.
- Retroactively invalidates all current non-competes, *except* for existing non-competes that apply to “Senior Executives” – which will remain enforceable after the effective date of the Final Rule. *Under the Final Rule, the term “Senior Executive” is defined narrowly to refer to workers who earn more than \$151,164 annually, and who are assigned to “policy-making positions.”*
- Requires that employers notify all current and **former** non-Senior Executive workers that existing non-competes are no longer enforceable. *Such notices must be issued according to a prescribed form, on or before the Final Rule’s effective date.*

The Final Rule adopts a broad definition of “non-compete,” which includes any contractual provision that “*has the effect of prohibiting the worker from seeking or accepting employment.*” This expanded definition of non-competes, in theory, extends to non-solicitation covenants that have the effect of preventing employees from accepting employment with alternative employers.

The Final Rule does **not**, however, apply to non-compete clauses that are “*entered into by a person pursuant to a bona fide sale of a business entity, of the person’s ownership interest in a business entity, or of all or substantially all of a business entity’s operating assets.*” In addition, because the FTC’s authority only extends to for-profit businesses, the rule will not affect employment agreements entered into by workers employed by nonprofit organizations.

**The Final Rule is set to take effect 120 days after its formal publication in the *Federal Register* – which could result in an effective date as soon as September 1, 2024.**

The Final Rule is likely to face legal challenges that could delay, or ultimately preclude, its enforcement – with many legal commentators opining that the regulation of non-competes is a uniquely state-law matter, and that the FTC has overstepped its authority. Based on this commentary, it is our general assessment that the Final Rule will not survive judicial challenge, and we believe it unlikely that a broad nation-wide ban on non-competes is a realistic near-term outcome. That said, we do expect that the issuance of the Final Rule may influence various state legislatures to consider restrictions or outright bans on non-competes – which has been a trend among east coast and west coast states in recent years. As such, regardless of the Final Rule's outcome, we believe it prudent for employers to examine their existing non-compete agreements, and to plan for future legal limits on their enforcement.

## **DOL INCREASES SALARY THRESHOLD FOR FLSA WHITE-COLLAR EXEMPTIONS**

On April 23, 2024, the DOL issued a **Final Overtime Rule** that relates to overtime exemptions under the Fair Labor Standards Act ("FLSA").

The FLSA requires that most employees be paid overtime pay at time and one-half the regular rate of pay for all hours worked over 40 hours in a workweek. However, Section 13(a)(1) of the FLSA provides an exemption from overtime pay for employees employed as *bona fide* executive, administrative, and professional employees. FLSA regulations also provide a special overtime exemption for so-called "highly-compensated employees." Collectively, these exceptions to federal overtime laws are referred to as the "White-Collar Exemptions."

To qualify for a White-Collar Exemption, employees must generally meet certain tests regarding their job duties and be paid on a salary basis at a "**Salary Level Threshold**" of not less than a standard established by DOL regulations. Since 2020: the Salary Level Threshold for executive, administrative, and professional employees has been \$684 per week (or \$35,568 annually); The Salary Level Threshold for highly-compensated workers has been \$107,432, annually.

The Final Overtime Rule **increases** the Salary Level Thresholds that apply to the White-Collar Exemptions, in two phases:

- on **July 1, 2024**:
  - the Salary Level Threshold for executive, administrative, and professional employees will rise to **\$844 per week** (or **\$43,888 annually**);
  - the Salary Level Threshold for highly-compensated employees will rise to **\$132,964 per year**.
- on **January 1, 2025**:
  - the Salary Level Threshold for executive, administrative, and professional employees will rise further to **\$1,128 per week** (or **\$58,656 annually**);
  - the Salary Level Threshold for highly-compensated employees will rise to **\$151,164 per year**.

These Salary Level Thresholds will then automatically adjust every three years based on salary data from the U.S. Bureau of Labor Statistics.

The DOL estimates that the new Salary Level Thresholds will require the re-classification of over 4 million workers from "exempt" employees to overtime eligible "non-exempt" employees. As such, it is recommended that all employers **immediately** assess their current compensation

structures to ensure that, going forward, workers are properly classified for overtime purposes.

The Morse **Employment Law** team is following the latest legal developments that affect employment, and will continue to report as appropriate. Please contact the team with any questions.