THE EMPLOYER'S ADVISORY

A PERIODICAL HIGHLIGHTING
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"So, you don't like me, you really don't like me," says the noncompete agreement.

Nearly 40 years ago, Sally Field accepted the Oscar for Best Actress by cooing, "You like me. You really, really like me." Well, let's just say that if Sally Field was a noncompete agreement, she may be saying these days, "You don't like me. You really, really don't like me." After all, there have been both federal and state efforts to eliminate or greatly restrict non-compete agreements in the employment context.

For example, last week, the Federal Trade Commission announced its final Non-Compete Clause Rule. The Final Rule provides that it is an unfair method of competition for persons to, among other things, enter into non-compete clauses with workers on or after the final rule's effective date.

The Rule also identifies that this prohibition extends beyond just those agreements labeled as a "non-compete agreement." In essence, it covers any condition of employment that prohibits a worker from, penalizes a worker for, or functions to prevent a worker from either seeking or accepting work in the United States with a different company or operating a business in the United States. The new rule also covers non-solicitation, non-disclosure restrictions and training repayment agreements, as well as forfeiture for competition agreements.

With respect to existing non-competes—i.e., non-competes executed before the effective date—the final rule adopts a different approach for senior executives (i.e., those earning more than $151,164 annually and occupying a "policy-making position"). For senior executives, which the FTC estimates to be less than 1% of workers nationwide, non-competes can remain in force, while existing non-competes with other workers are not enforceable after the effective date. The rule is slated to become effective on, or about, August 21, 2024. By the rule's effective date, employers are required to notify workers who previously entered into non-competes that such agreements cannot and will not be enforced.

The FTC's rule also contains an exception if the noncompete agreement covers an individual who has more than 25% ownership in the sale of a business.

Perhaps not surprisingly, about four seconds after the FTC's announcement on the new rule (well, within 24 hours; but who is counting?), the US Chamber of Commerce and Business Roundtable filed a lawsuit against the FTC in federal court in the Eastern District of Texas. So, let's just say that this Rule is a long way from becoming effective.

At the same time, the Colorado legislature is debating a bill that would provide the Colorado Attorney General with broad rule-making authority over restrictive employment agreements, which includes noncompete agreements and education-reimbursement agreements. See HB24-1324. The Bill passed through the House on March 31, 2024, and is working its way through the Senate.

The Department of Labor modifies the salary basis test. Big time!!!

The year was 1938. Orson Welles's radio adaptation of "The War of the Worlds" was broadcast, which caused mass panic in the Eastern United States. Seabiscuit beat War Admiral in what was dubbed the "Match of the Century". Superman made his first appearance in Action Comics #1. And the U.S. Congress passed the Fair Labor Standards Act (the "FLSA"), which established minimum-wage requirements, overtime pay requirements, record keeping, and youth-employment standards.

When it passed, the FLSA required companies to pay all its workers overtime unless the company could establish that: (1) the worker was paid a sufficient salary, which was set at a whopping $30-per-week (known as the "salary-basis test"); and (2) the worker had to perform actual duties of an executive or administrator (known as the "duty-basis test").

Of course, over the years, there have been various changes to both the duty-basis test and the salary-basis test. For example, in 2004, the Bush administration raised the required salary to $23,660.00. Then, in 2016, the U.S. Department of Labor, under the Obama administration, published a rule to raise the overtime annual-salary-level threshold to $47,476. The rule was scheduled to take effect Dec. 1, 2016. Shortly thereafter, more than 20 states filed a motion in a Texas federal court to block the new threshold from becoming effective. Just 10 days before the implementation of the new salary test, a federal judge in Texas temporarily blocked it from taking effect. Thus, the threshold remained at $23,660.

Then, in September 2019, the DOL, under the Trump administration, raised the threshold to $35,568, where it has stayed ever since. But that all may be changing. That is, last week, the DOL identified that on July 1, 2024, it would increase the annual salary-level threshold to $844 per week ($43,888 per year), and, on January 1, 2025, the standard level will increase again to $1,128 per week ($58,656 per year).

Of course, in Colorado, that increase may not mean much, if anything, for many employers. After all, the Colorado Overtime and Minimum Pay Standards set the State's salary threshold for 2024 at $55,000. COMPS provides that, after 2024, the salary threshold will increase every January 1 consistent with the Consumer Price Index used to adjust the Colorado minimum wage. Accordingly, most Colorado employers covered by COMPS will face a salary threshold greater than that set by federal law.

But the increase in the FLSA's salary threshold will greatly impact those not covered by COMPS. COMPS specifically excludes from coverage "the state or its agencies or entities, counties, cities and counties, municipal corporations, quasi-municipal corporations, school districts, and irrigation, reservoir, or drainage conservation companies or districts organized and existing under the laws of Colorado." If the DOL's new salary threshold goes into effect, those employers will need to raise the salary of employees over that amount for the employees to be exempt from the minimum wage, overtime, and other requirements of the FLSA.

Now, much like the legal challenge to the FTC's noncompete rule mentioned in the above article, many expect that there will be a challenge to the DOL's effort to raise the salary threshold. In fact, it's also very likely to be filed in Eastern Texas, where the 2016 efforts by the DOL were challenged and overturned.

In short, stay tuned!!!!

2024 WCHRA SPRING HUMAN RESOURCES CONFERENCE: Back to the Future, Shaping the Future by Looking Back and Ahead

After the last four years of very active and sweeping Colorado HR legislation, employers may be wondering (or possibly worried) about what will happen in the 2024 legislative session. Rest assured, the legislature is engaged in creating new laws. However, the foreshadowed legislation appears to be less landscape-altering.

Just to recap, since 2020, we've seen the passage of the Healthy Families and Workplaces Act ("HFWA"), the Colorado Overtime and Minimum Pay Standards ("COMPS"), the Public Health Emergency Whistleblower law ("PHEW"), the Equal Pay for Equal Work Act ("EPA"), wage protection laws, termination notification requirements, FAMLI, and POWR. It's like an alphabet soup of HR/employment laws!!! And employers have had to work overtime just to figure out these new laws and how they apply to their workplace.

With the deluge of bills over the last four years, this year's smaller slate of bills at the Colorado legislature gives all organizations the opportunity to look back to take a step forward by ensuring that their compliance is up-to-date and providing the correct information to employees. It also gives employers the opportunity to look ahead to future changes in the human resources field, particularly with respect to artificial intelligence.

So, to meet this goal, the Western Colorado Human Resource Association is sponsoring a day-long seminar on human resources and employment issues. This seminar will take place on May 22, 2024, from 8:00 to 5:00 at Colorado Mesa University. The attorneys of Bechtel & Santo plan to present the following topics at the Conference:

- Legal and Legislative Update
- FAMLI/FMLA/Workers' Compensation
- Colorado's Healthy Families and Workplaces Act regarding providing employees sick leave
- Equal Pay Act/Job Application Fairness Act
- Updates regarding the Occupational Safety and Health Act, the National Labor Relations Board, and the Colorado Protected Health/Safety Expression and Whistleblowing law
- Fair Labor Standards Act/Colorado Overtime and Minimum Pay Standards
- Protecting Opportunities and Workers' Rights Act
- Artificial Intelligence and its impact on the Human Resources field
- Updates regarding the Americans with Disabilities Act.
- Hot Topics Roundtable.

Go to https://wchra.org/meetinginfo.php for more information. We hope to see you there!!!!!

EDITORS

Michael C. Santo, Esq.

Christina M. Harney, Esq.

Timothy R. Wolfe, Esq.