Legal Matters®

Business
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FTC considers restrictions on noncompetes

The Federal Trade Commission is considering new regulations to restrict companies' use of noncompete clauses.

Last year, President Joe Biden asked the FTC to consider limiting these clauses. Recently, the FTC has been issuing subpoenas to businesses they believe are requiring workers to sign noncompete clauses unnecessarily. In 2021, the U.S. Chamber of Commerce contended that the FTC doesn't have statutory authority to regulate noncompetes.

In a letter to the agency, the Chamber argued that "the FTC should combat potentially anticompetitive non-compete clauses through its traditional tools, such as competition advocacy and case-by-case litigation, rather than through a rule for two principal reasons: First, the FTC lacks legal authority to promulgate a rule that would ban non-compete clauses. Second, and in any event, such a rule would harm consumers by banning the many pro-competitive aspects of non-competes."

Critics have stated concerns that noncompetes make it hard for workers with lower wages to grow their wages by moving on to other companies.

Over the past year, the FTC has been split equally, with two Democrats and two Republicans. There is now a third Democrat, who took office in May.

FTC Chairwoman Lina Khan and others have stated concerns that noncompetes, especially when used for employees with lower wages, make it hard for those workers to grow their wages by moving on to other companies.

Others contend that noncompete clauses make it unfairly difficult for higher-wage executives to move on to start their own ventures or work with start-up companies.

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Business groups fighting expected DOL overtime regs

Under a new overtime rule that is expected soon, the U.S. Department of Labor is likely to propose higher white-collar salary level thresholds, which means that more workers would become eligible for overtime pay under the federal Fair Labor Standards Act (FLSA).

Experts believe the DOL will proposed an increase to the limit for an overtime exemption from the current minimum salary amount of $684/week.

Business groups are already fighting the impending rulemaking. The Partnership to Protect Workplace Opportunity, along with 93 business groups, has sent a letter to Secretary of Labor Marty Walsh, asking the DOL to "abandon or at least postpone issuance of its announced proposed rulemaking altering the overtime regulations under the Fair Labor Standards Act."

The letter goes on to say that "[d]ue to significant concerns with supply chain disruptions, workforce shortages, inflationary pressures, and the shifting dynamics of the American workforce following the COVID-19 pandemic, any rule change now would be ill-advised."

The rules

Under the FLSA, overtime pay of at least one and one-half times an employee's regular rate of pay is required for work that exceeds 40 hours per week. Section 13(a)(1) of the FLSA includes a so-called "white collar exemption" from this rule for workers employed as bona fide executive, administrative and professional employees that are paid on a "salary basis" at a level of $684 or more per week.

In 2016, the Obama administration sought to increase the salary threshold for the exemption from $455 to $921 per week.

At the time, the U.S. District Court for the Eastern District of Texas barred the change from going into effect. The court found that Congress intended the decision around the issue to be related in part to "job duties" and not to create a "de facto salary-only test."

Back then, the DOL concluded that a $921 per week threshold would require overtime pay for more than 4.2 million more workers. While the court's decision was pending on appeal, the Trump administration overturned the rule and increased the salary threshold for overtime to the $684 per week standard that is now in place.

What exactly the DOL will propose in its rulemaking, and whether the new threshold will be indexed to a cost-of-living measure, is unknown.

Advocates for workers argue that the DOL should match if not exceed the 2016 proposal with a threshold of $921 per week. An increase to that extent is likely to lead to a fight in federal court. Others expect a middle-of-the-road increase in the ballpark of $800 per week.

Businesses should be aware that the rule is coming, though there will likely be several months of lead time to prepare for implementation.

OSHA starts new COVID-19 enforcement program

OSHA has announced that COVID-19 enforcement is the agency's top priority for 2022.

The program will involve inspection of "high hazard" businesses, and further inspection of health care employers who have received COVID-19 complaints in the past.

To open an inspection, OSHA must have a complaint, injury/illness report, or other "neutral" basis for conducting the inspection.

Starting in July 2021, OSHA began inspections under its National Emphasis Program for COVID-19, focusing on certain "high hazard" industries, including health care, nursing care, warehousing, meat processing and manufacturing.

According to some reports, at least 15% of each OSHA office's enforcement resources are focused on COVID-19 inspections.

Memo for health care employers

Earlier this year, OSHA released a supplement to its program: COVID-19 Focused Inspection Initiative in Healthcare.

The memo lays out instructions for federal OSHA area offices to engage in a focused, short-term inspection initiatives for hospitals and skilled nursing care facilities that treat COVID-19 patients.

In the memo, OSHA says that its goal is to mitigate the spread of COVID-19 and future variants and protect the health and safety of health care workers. The initiative involves evaluating employer compliance efforts and abilities to handle any future surges of the virus.

OSHA has created a list of all health care and nursing entities that have been sent an OSHA complaint letter related to COVID-19 since March 2020. The agency is now randomly selecting employers from the list to open inspections following the old complaints.

Businesses have the option to require OSHA to obtain a search warrant before an inspection and enforce the warrant in federal court. That said, there is limited case law on the issue.

Health care employers should expect ongoing OSHA inspections related to COVID-19 and be prepared to defend themselves against any allegations.

To prepare, they should review all record-keeping rules and confirm compliance with them, including OSHA Form 300 logs and COVID-19 logs.

If an inspection takes place, employers should assign someone at the worksite to welcome inspectors when they arrive, engage the compliance officer and determine the scope of the inspection. Also, be sure to confirm that OSHA has a neutral, lawful reason for the inspection.

When to use an outside investigator

Eventually, most organizations will face a complaint of wrongdoing involving a worker, or worse, a company leader.

When such complaints arise, the company should respond with a prompt, thorough, and fair investigation. Typically, it's not a question of whether the company should investigate, but who should conduct it.

Investigators are often responsible for interviewing witnesses, making findings, and recommending the appropriate response, including potential disciplinary action. However, juries may distrust internal investigations, particularly if the investigation seems incomplete or biased.

When issues of workplace misconduct arise, companies should be careful to provide a thorough and impartial investigation. While trained and experienced internal investigators can meet the company's needs in many circumstances, companies should evaluate each situation on a case-by-case basis.

Conflict of interest: Consider whether undue influence, or simply the appearance thereof, could play a role in an internal investigation. That can be an issue when a CEO, board member, or other senior leader is the subject of a complaint by a worker.

If an employee is conducting the investigation, that person could be subject (or appear to be subject) to certain power dynamics, such as those involving compensation or advancement within the organization.

Potential for litigation: Consider an outside investigator if the worker has a lawyer, has filed a complaint with a state or federal agency, or seems likely to pursue litigation.

Statutory investigations: Allegations of sexual harassment as well as discrimination based on race, disability, gender, pregnancy, age and other protected classes can result in substantial legal liability. Involving legal counsel early on may help reduce exposure and mitigate future costs.

Multiple complaints: If the company has received multiple complaints, including those involving different functions and/or an extended time period, it could suggest that larger, systemic issues are at play.

Sensitivity: If the nature of the concern involves sexual assault or workplace violence, consider hiring an outside investigator specialized in trauma situations.

Skills or workload: Consider hiring an outside investigator when the internal HR team has little experience conducting workplace investigations or simply does not have the capacity to conduct a prompt and thorough inquiry.

Company brand: Sometimes the reason to hire an outside investigator is simply one of morale and perception. Bringing in third-party support gives the appearance that the organization takes employee complaints seriously. When a worker perceives that their complaint is being handled fairly, they're less likely to pursue litigation. In addition, their peers may feel a greater sense of safety and overall respect for the organization.

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The FTC has been acting on its plan to fight noncompetes on a case-by-case basis. The agency has issued subpoenas to businesses it believes have unfairly required workers to sign noncompete agreements.

It is unlikely that the Republicans on the FTC would vote in favor of a regulation that banned noncompetes.

Republican FTC Commissioner Noah Phillips has reportedly stated that the agency doesn't have the legal authority to issue rules on competition, but that it can question the use of noncompetes in specific cases. Last year, GOP Commissioner Christine Wilson said it was "premature" to institute a federal rule on the issue because many states have banned the use of the clauses.

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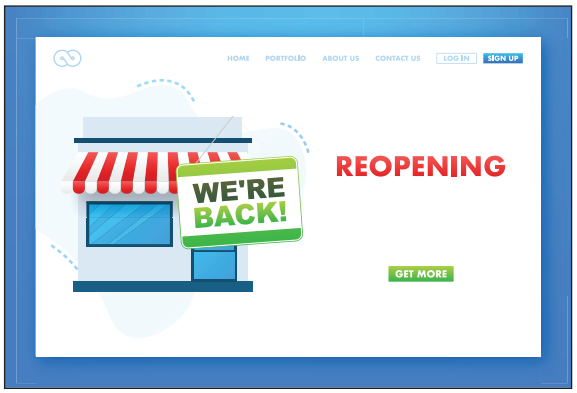
NLRB adjusts required timing of electronic notice for workplaces

The National Labor Relations Board has modified the timing of its electronic notice-posting requirement when a company has not yet reopened its facility due to COVID-19, or a substantial number of workers have not yet returned to work on site, and communication is electronic.



Previously, the NLRB said that both physical and electronic notice posting could be deferred to within 14 days of the facility's reopening and staffing by a substantial number of workers.

But in a June 2022 decision, a board majority held that any required electronic notice posting must occur within 14 days after service by the regional office.

The Board decided that moving up the timing of the electronic notice posting in order to more quickly notify employees of unfair labor practices — and the steps that would be taken to remedy those violations — is more aligned with the intentions of the federal National Labor Relations Act.

"As our country continues recover from the pandemic, it is important that the Board's remedies remain relevant to the realities of the workforce," said Chairman Lauren McFerran. "This prompt posting of the notice by electronic means will best effectuate the purposes of the National Labor Relations Act by providing workers with timely notice of unfair labor practices and the steps that will be taken to remedy them."