page 2
DHS announces process improvements for labor enforcement investigations

Wave of pay transparency laws growing across the country

page 3
Connecticut contractor's failure to address hazards leads to $375K in OSHA fines

page 4
1st Circuit: Federal Arbitration Act applies to delivery drivers

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FTC proposes blocking noncompetes

Businesses could no longer require their workers to sign noncompete agreements under a rule proposed by the Federal Trade Commission (FTC).

The proposal, which is being regarded as a historic regulatory move, comes more than a year after President Joe Biden issued an executive order that encouraged the FTC to limit or ban noncompetes in employment.

The proposed rule states that noncompetes suppress labor mobility, negatively impact competition, and reduce wages — including for categories of workers who are not required to sign a noncompete agreement.

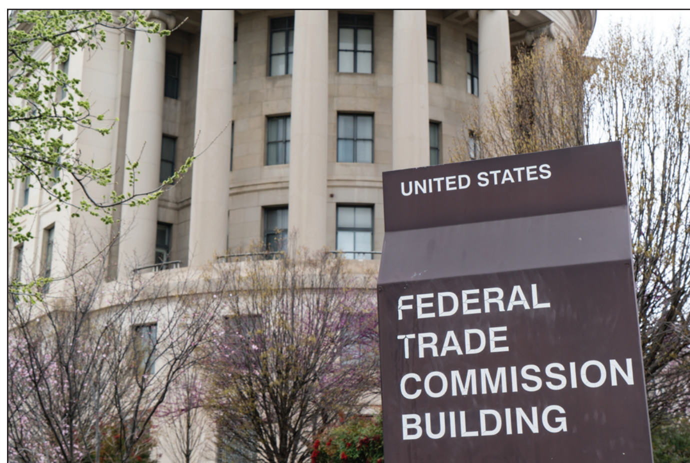
Under the rule, businesses would have to retract all existing noncompete clauses and provide notices to employees to indicate that they no longer apply. A "limited exception" for noncompete clauses between the seller and buyer of a business is included in the proposal.

The rule would not apply to nondisclosure agreements or nonsolicitation agreements with clients or customers.

Increased earnings for workers

The FTC estimated that banning noncompetes might increase workers' earnings across the country in the range of $250 billion to $296 billion a year.

"Noncompetes block workers from freely switching jobs, depriving them of higher wages and better working conditions, and depriving businesses of a talent pool that they need to build and expand," FTC Chair Lina Khan said in a statement. "By ending this practice, the FTC's proposed rule would promote greater dynamism, innovation and healthy competition."



Under the proposal, noncompete agreements are defined as "contractual terms between an employer and a worker that prevents the worker from seeking or accepting employment with a person, or operating a business, after the conclusion of the worker's employment with the employer."

The FTC would employ a "functional test" to decide whether a clause or contract falls under the rule's definition of "noncompete."

The agency noted that broad nondisclosure agreements could essentially amount to de facto noncompetes, in which case they, too, would be barred.

The proposed rule doesn't include any exception for senior executives, highly skilled workers, or high-income employees.

continued on page 3

Mahdavi Bacon Halfhill & Young, PLLC
11350 Random Hills Road, Suite 700 | Fairfax, VA 22030
(703) 352-1300 | admin@mbhylaw.com | www.mbhylaw.com

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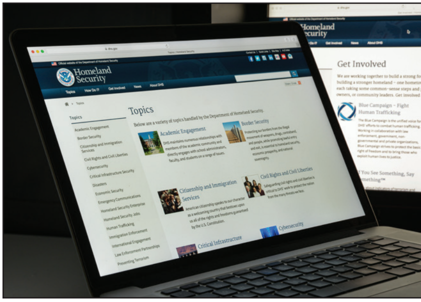

The U.S. Department of Homeland Security (DHS) has announced that noncitizen workers who claim that their rights as employees have been violated can now use a streamlined and expedited deferred action request process.

Deferred action is intended to protect such workers from threats of immigration-related retaliation from employers.

Workers will now be able to visit DHS.gov for additional information in English and Spanish and to submit their requests. According to DHS, the changes are part of advancing the Biden-Harris administration's commitment to empowering workers and improving workplace conditions by enabling all workers, including noncitizens, to assert their legal rights.

According to DHS, workers are often afraid to report legal violations by their employers or to cooperate in investigations because they are worried about removal or other immigration-related retaliation. Agencies tasked with enforcing labor and employment laws depend on the cooperation of these workers in their investigations, DHS said in a statement about the new process.

DHS commented that its practice of offering discretionary protection on a case-by-case basis to noncitizen workers who claim rights violations will facilitate the ability of labor and employment agencies to investigate worksite violations more fully.

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Wave of pay transparency laws growing across the country

A national wave of pay transparency laws is rising. And businesses with workforces spread over multiple states are trying to figure out how to contend with a patchwork of similar — but not identical — laws.

The latest effort to close systemic pay gaps based on gender or race, transparency laws typically require businesses to include salary ranges on job postings, and to disclose pay ranges to applicants and current workers on demand, or both. But some laws go even further, requiring businesses also to detail the job duties or full panoply of benefits that come with a particular position.

Colorado's first-in-the-nation pay transparency law took effect two years ago, while laws in California, Washington and Rhode Island were implemented on Jan. 1, 2023.

Meanwhile, New York City's pay transparency law went into effect on Nov. 1 of last year, while a statewide law in New York will arrive in September.

Managing compliance

When Colorado first passed its pay transparency law, some businesses thought they could avoid it by not hiring workers who live there. But that response led to a backlash when a website was launched targeting companies that were not complying with the Colorado law.

The issue of compliance with laws in other states is especially important in a world with so many remote workers, and businesses must remain aware that new pay transparency laws are passing in various jurisdictions regularly.

Here are some recommendations on handling compliance:

• ***The strictest law:*** Legal experts advise that businesses develop job postings in a way that meets as many state and local laws as possible. Often that means a posting that would comply with the strictest law. Also, consider including a statement that explains that a worker's salary may vary based on location, experience and performance.

• ***Pay audits:*** Pay audits are becoming even more important in view of the patchwork of laws. They can help companies regularly review how and what workers are paid and why. A thorough audit evaluates statistical analyses to effectively compare salaries across jobs and consider discrepancies.

• ***Job descriptions:*** Businesses should also review their processes for creating job descriptions and matching them with salary amounts.

• ***Copious documentation:*** Businesses should be careful to document all reasoning behind pay ranges and any decisions to deviate from them.

For some states' pay transparency laws, experts are awaiting further detailed regulations on implementation.

California and New York intend to monitor whether posted salary ranges have indeed been made "in good faith" by requiring businesses to report actual pay ranges at regular intervals.

In some states, a private right of action allows businesses to be sued if they aren't transparent about salaries. Such suits have been brought as class actions based on searches of online job sites such as Indeed.com.

Connecticut contractor's failure to address hazards leads to $375K in OSHA fines

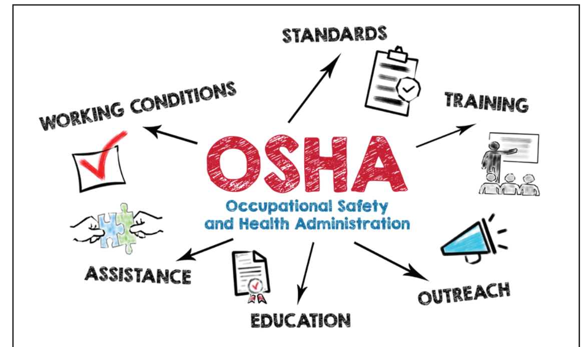
A federal investigation has found that the failure of a contractor in Manchester, Connecticut, to provide legally required safeguards and make sure they were in place to prevent trench collapses contributed to the 2022 death of an employee buried when an 8-foot-deep trench caved in.

Investigators with the Occupational Safety and Health Administration (OSHA) determined that Botticello Inc. exposed its worker to deadly hazards as he connected drainage piping at a residential development construction site in Vernon. Previously, in November 2015, OSHA inspectors had identified four serious violations related to trenching work by Botticello at a Stafford worksite.

"This deadly cave-in and the worker's death should never have happened," said OSHA Area Director Dale Varney in Hartford, Connecticut. "After a previous OSHA inspection, Botticello Inc. knew of the dangers of working in an unprotected trench and the need to inspect the trench and ensure required effective cave-in protection was in place before any employee entered the trench. The company, however, still chose to ignore these required safeguards and now a worker's family, friends and co-workers are left to grieve."

Specifically, OSHA found that Botticello failed to:

- provide the trench with a protective system to prevent it from collapsing and caving in on workers;
- have a competent person conduct inspections before and during the work to identify and correct any hazardous conditions before employees entered the trench; and
- ensure the 135-foot-long trench contained sufficient means of egress to allow employees to safely exit.



As a result of the violations and the employer's prior knowledge, OSHA cited Botticello for three willful violations and proposed $375,021 in penalties.

Federal trenching safety standards require protective systems for trenches deeper than 5 feet, and that soil and other materials be kept at least 2 feet from the trench's edge. Trenches must also be inspected by a knowledgeable person, be free of standing water and atmospheric hazards, and have a safe means of entry and exit before a worker may enter.

"By most estimates, one cubic yard of soil can weigh as much as 3,000 pounds — about the weight of a subcompact car — and trench collapses happen in seconds, which helps explain why they are among the construction industry's most fatal hazards," Varney explained. "OSHA has a National Emphasis Program in place to alert employers and workers of the dangers and to hold violators accountable. We encourage anyone who sees workers in an unsafe trench to help us save lives by reporting the hazardous situation to OSHA."

Family-owned Botticello provides construction contracting services including site work, rock crushing, stump grinding and demolition.

The company has 15 business days from receipt of citation and penalties to comply, request an informal conference with OSHA's area director, or contest the findings before the independent Occupational Safety and Health Review Commission.

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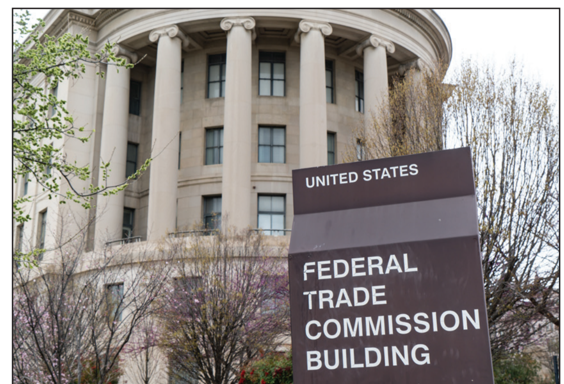
continued from page 1

However, the FTC does request public comment as to whether the rule should be applied differently to different categories of workers.

The proposal's limited exception for noncompete clauses between the seller and buyer of a business would apply only for individuals who have a 25 percent or greater ownership interest in the business being sold. And any noncompete signed in connection with such a sale would remain subject to other federal antitrust and state laws that already bar overly expansive noncompetes.

The proposed rule preempts any inconsistent state laws or regulations unless the state measure gives employees' greater protection.



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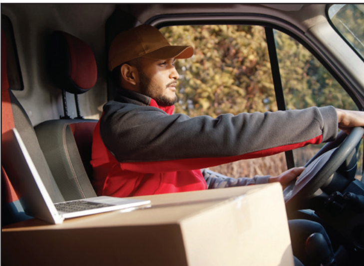
MAHDAVI
BACON
HALFHILL &
YOUNG, PLLC
ATTORNEYS AT LAW

11350 Random Hills Road, Suite 700 | Fairfax, VA 22030
(703) 352-1300 | admin@mbhylaw.com | www.mbhylaw.com

1st Circuit: Federal Arbitration Act applies to delivery drivers



Couriers who handle local, intrastate deliveries are not exempt from the Federal Arbitration Act (FAA) and can be required to arbitrate disputes because they are not engaged in foreign or interstate commerce, the 1st U.S. Circuit Court of Appeals has ruled.

The decision is a significant win for businesses that use delivery drivers to conduct business.

In *Immediato v. Postmates, Inc.*, a group of Postmates meal delivery drivers in the greater Boston area sued in Massachusetts state court.

Postmates drivers are required to sign the company's "Fleet Agreement." That agreement classifies couriers as independent contractors and includes a mutual arbitration provision that states that all disputes must be resolved through final and binding arbitration.

The drivers claimed that they were misclassified as independent contractors and, as a result, that they were entitled to additional benefits and protections under Massachusetts law, such as sick leave, minimum wage, and reimbursement of business expenses.

Postmates then removed the case to U.S. District Court and moved to compel arbitration.

The couriers claimed that, as transportation workers, they were exempt from the FAA.

The District Court ruled that the couriers were not exempt and granted Postmates' motion to compel arbitration, and the couriers appealed.

The 1st U.S. Circuit Court of Appeals affirmed.

Citing U.S. Supreme Court precedent, the 1st Circuit said that the so-called transportation worker exemption applies only to workers who are actively engaged in moving goods across borders through channels of foreign or interstate commerce.

It added that workers must play a necessary role in the free flow of goods across state or international borders in order to be exempt from the arbitration requirement.

However, in this case, the court said that the couriers were not engaged in foreign and interstate commerce because almost all orders they handled were in state.

The 1st Circuit went on to explain that while the items the couriers delivered might have traveled across state lines at some point, their movement in interstate commerce ended when they were received by the restaurants or stores from which the couriers picked them up.

At that point, the meals or other products became part of an intrastate transaction, the court said.

It noted that this example is different from a situation in which an online retailer ships a package across state lines and the final leg of the delivery is completed by a local courier. The court said in such an example, the local driver engages in interstate commerce because he or she played a direct role in the broader interstate transit of the goods.