EMPLOYMENT LAWSCENE ALERT: FTC BANS EMPLOYEE NON-COMPETES, BUT LEGAL CHALLENGES EXPECTED

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The administrative agencies are having a busy week! In addition to the DOL issuing an updated rule on the salary basis to be overtime exempt, on Tuesday, April 23, 2024, the Federal Trade Commission voted 3-2 on its long-awaited non-compete ban, which was initially issued as a proposed rule in January 2023. The FTC estimates that this rule will affect 2,301,874 employees in Wisconsin and increase wages of each of those employees by $524 annually.

Under the FTC's rule, which is scheduled to go into effect 120 days from publication in the federal register, "non-compete clauses" are banned in almost all cases involving employees, which is broadly defined as including employees, independent contractors, externs, interns, volunteers, apprentices, and sole proprietors who provide services to a person. Non-compete clauses are defined as "a term or condition of employment that prohibits a worker from, penalizes a worker for, or functions to prevent a worker from (1) seeking or accepting work in the United States with a different person where such work would begin after the conclusion of the employment that includes the term or condition; or (2) operating a business in the United States after the conclusion of the employment that includes the term or condition." These limits do not apply to restrictions *during* employment, only post-employment restrictions.

Non-competes are still allowed in certain, very specific circumstances. For example, the rule states that it does not apply to non-competes entered into pursuant to a bona fide sale of a business. Additionally, *existing* non-competes with "senior executives" who made at least $151,164 in the preceding year and have policy-making authority at the business are not banned. Otherwise, *new* non-competes cannot be entered into with employees (whether or not they are senior executives), and employers will need to notify non-senior executives with existing non-competes that such agreements will not be enforced. The FTC has provided model language for such notice. The rule also does not cover not-for-profit organizations, such as non-profit hospitals, or non-competes in franchise agreements, although non-competes between franchisors or franchisees and their employees would still be subject to the rule.

The FTC non-compete ban does not necessarily ban non-solicitation or non-disclosure

agreements. However, such agreements *could* be banned under the FTC rule if they "function to prevent a worker from seeking or accepting other work or starting a business after their employment ends." Non-solicitation and non-disclosure agreements are also subject to the FTC's section 5 prohibition against unfair methods of competition, irrespective of whether they are covered by the final rule.

The FTC's rule will soon be (or already is depending on when you're reading this) challenged in court by groups such as the U.S. Chamber of Commerce, asserting that the rule oversteps the FTC's authority. Regardless of the ultimate implementation of the FTC's rule, employers will remain bound by Wisconsin's restrictive covenant statute, Wis. Stat. § 103.465, for all restrictive covenants with their employees and independent contractors that are not banned by the FTC. As always, O'Neil Cannon is here for you. We encourage you to reach out with any questions, concerns, or legal issues you may have regarding your labor and employment policies and practices, including discussion and review of your existing or future restrictive covenants.

EMPLOYMENT LAWSCENE ALERT: DOL ISSUES FINAL OVERTIME RULE WITH SIGNIFICANT SALARY THRESHOLD INCREASE

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Under the Fair Labor Standards Act, non-exempt employees are entitled to overtime pay at 1.5 times their regular rate for all hours worked in a workweek in excess of 40. In order to be considered exempt, an employee must be paid a salary in excess of a certain amount and must perform certain job duties, generally of a bona fide executive, administrative, or professional. Currently, the salary basis is $35,568 per year ($684 per week), which was most recently updated in 2019.

On Tuesday, April 23, 2024, the Department of Labor announced its final rule, entitled *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Executives*, which significantly increases the salary thresholds below which employees are entitled to overtime compensation. This final rule is based on the proposed rule that was issued in September 2023 and the more than 33,000 comments the DOL received about that proposed rule.

Under the final rule, set to be effective July 1, 2024, the salary necessary to qualify as exempt from overtime compensation will increase to $43,888 annually ($844 weekly) on July 1, 2024, with an additional increase to $58,656 annually ($1,129 weekly) on January 1, 2025. Then, beginning July 1, 2027, the salary threshold will automatically update every three years. In addition, the salary threshold for highly compensated employees will be raised from its current level of $107,432 annually to $132,964 on July 1, 2024 and to $151,164 on January 1, 2025. The final rule does not change the job duties test, which will still need to be met in addition to the salary basis test in order for an employee to be considered exempt.

If this final rule goes into effect, it is estimated that more than 3 million workers will be affected. However, it is likely that the final rule will be challenged in court, just as other updates to the salary basis test have been challenged (and sometimes struck down) in the past. Given the short timeline before the initial increase, employers should begin preparing now to evaluate what they will need to do if the final rule does go into effect on July 1, 2024. As always, O'Neil Cannon is here for you. We encourage you to reach out with any questions, concerns, or legal issues you may have regarding your labor and employment policies and practices.

EMPLOYMENT LAWSCENE ALERT: BIDEN PROPOSED BUDGET HAS LABOR AND EMPLOYMENT SIGNALS

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On March 11, 2024, President Biden released the Budget of the U.S. Government for Fiscal Year 2025. Although this proposed budget is only a proposal and unlikely to pass either the House or the Senate as currently drafted, it does provide insight into the Biden Administration's priorities and contains a number of important labor and employment components.

First, the proposed budget contains a 2.3% increase to the Department of Labor's discretionary budget and a 7% increase to the National Labor Relations Board's budget. These increases are intended to support, among other things, DOL's worker protection agencies, which focus on workers' wages and benefits, child labor, misclassification of workers as independent contractors, and workplace health and safety, and the NLRB's

“capacity to enforce workers’ rights to organize and collectively bargain for better wages and working conditions.”

Additionally, the proposed budget seeks to establish a national comprehensive paid family and medical leave program, administered by the Social Security Administration, that would significantly expand upon the current federal Family Medical Leave Act. The new proposed plan would (1) entitle eligible workers to up to 12 weeks of partially paid leave to bond with a new child; care for a seriously ill loved one; heal from their own serious illness; address circumstances arising from a loved one’s military deployment; or find safety from domestic violence, dating violence, sexual assault, or stalking; and (2) entitle workers to three days to grieve the death of a loved one. Furthermore, President Biden called on Congress to require employers to provide seven days of job-protected sick leave each year to all workers and to ensure that employers cannot penalize workers for taking time off to address their health needs, the health needs of family members, or to find safety from domestic violence, dating violence, sexual assault, or stalking. The proposed budget also notes the Administration’s proposed rule that would extend overtime pay to an estimated additional 3.6 million workers by raising the salary basis from the current level of $35,568 per year ($684 per week) to $55,068 per year ($1,059 per week). This proposed rule was issued in September 2023 and is expected to be finalized in April 2024. If not challenged, this means that the required increase could go into effect as early as June 2024.

The proposed budget also significantly increases penalties for employers who violate laws overseen by the DOL, the Equal Employment Opportunity Commission, and the National Labor Relations Board. This would include penalties for laws related to workplace safety and health, wages and hours, child labor, equal opportunity, and labor organizing. The proposed budget also specifically provides the EEOC with resources to implement and enforce the Pregnant Workers Fairness Act; continue to monitor pay equity through collection and analysis of pay data; and combat discrimination that may arise out of automated employment systems, including AI.

Even if this proposed budget is not enacted as written, it is a strong signal of what the current Administration believes is important and what its agencies will focus on from an enforcement standpoint. As always, O’Neil Cannon is here for you. We encourage you to reach out with any questions, concerns, or legal issues you may have regarding your labor and employment policies and practices.

EMPLOYMENT LAWSCENE ALERT: DUST OFF

THOSE HANDBOOKS–THE NLRB HAS CHANGED ITS RULES (AGAIN)

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Because the incumbent President appoints members of the National Labor Relations Board (NLRB), the NLRB's decisions often reflect the policy choices of that President's political party. Generally, when a Democrat holds office, the NLRB's decisions are more employee and union-friendly, and when a Republican holds office, the NLRB's decisions are more management-friendly. An issue that the NLRB has consistently gone back and forth on, depending on the incumbent President, is the standard for evaluating employee handbooks and establishing what rules and policies are acceptable under Section 7 of the National Labor Relations Act (NLRA). Under Section 7 of the NLRA, employees have rights of organization and collective bargaining, including the right to discuss wages, hours, and other terms and conditions of employment.

From 2004 to 2017, under the *Lutheran Heritage* standard, the NLRB took the position that, if an employee could reasonably construe a rule or policy to prohibit activities protected by Section 7, that the rule or policy violated Section 7. This guidance emphasized that employer's rules and policies needed to be narrowly tailored to avoid violating Section 7. Then, in 2017, the NLRB decided *Boeing*, which held that a facially neutral work policy was lawful when the potential adverse impact on an employee's exercise of protected rights was outweighed by justifications associated with the policy.

Now, the NLRB has changed the standard back to something that "builds on and revises" the *Lutheran Heritage* standard. On August 2, the NLRB set an employee and union-friendly standard for rules and policies in its *Stericycle Inc.* ruling. Under the new standard, a workplace rule or policy is presumptively unlawful if an employee would reasonably interpret the rule "to chill employees from exercising their Section 7 rights." These rights include discussing wages and terms of employment with coworkers, appealing to the public about working conditions, organizing to improve working conditions, and supporting or forming a union. That presumption of unlawfulness may be rebutted by the employer "by proving that the rule advances a legitimate and substantial business interest and that the employer is unable to advance that interest with a more narrowly tailored rule." However, this is likely to be a high burden for employers to meet.

Rules and policies most at risk of being interpreted as chilling an employee's ability to exercise his or her Section 7 rights include those regarding the following issues: social media,

audio and video recording, cell phone use, personal conduct, conflicts of interest, and confidentiality of harassment complaints and investigations. It is important to note that facially neutral rules may be found unlawful and that the employer's intent in creating the rule is immaterial; all rules are viewed through the employees' lens and what they could reasonably interpret.

Another important aspect of the new standard is that the NLRB decided that it is to be applied retroactively, meaning it not only applies to workplace policies going forward but also workplace policies already in existence. Therefore, it is crucial that employers reevaluate their current employee handbooks and other workplace rules and policies to ensure that they do not violate the standard set forth in *Stericycle*. Because the NLRA applies to non-union companies, all employers should be aware of the new standard and ensure that their handbooks and policies comply with the *Stericycle* decision. As always, O'Neil Cannon is here for you. We encourage you to reach out with any questions, concerns, or legal issues you may have.

EMPLOYMENT LAWSCENE ALERT: PREGNANT AND NURSING EMPLOYEES HAVE NEWLY EXPANDED RIGHTS

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On December 29, 2022, President Biden signed the Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP Act) and the Pregnant Workers Fairness Act (PWFA) into law. Both expand the protections for pregnant, postpartum, and nursing employees, who may also have protections under the Pregnancy Discrimination Act, the Americans with Disabilities Act, and the FMLA.

The PUMP Act expands the 2010 amendment to the FLSA that required employers to provide a nursing mother reasonable break time to express breast milk for up to one year after childbirth and to provide a place other than a bathroom for the employee to express breast milk, shielded from view and free from intrusion from coworkers and the public.

Although significant, the 2010 amendment only entitled non-exempt workers to protection because it only covered those workers who were entitled to overtime pay under the FLSA.

The PUMP Act expands the protections of break time to nurse and a private place to pump to all exempt and non-exempt employees, which is estimated to cover an additional nearly nine million workers. In addition to expanded coverage, under the PUMP Act, employees have a private right of action to bring suit against employers that do not comply with the Act.

The PUMP Act applies to all employers covered under the FLSA; however, if an employer with fewer than fifty employees can demonstrate that compliance with the break time requirement would impose an undue hardship, the employer may be exempt. Undue hardship is determined by looking at the difficulty or expense of compliance for a specific employer in comparison to the size, financial resources, nature, or structure of the employer's business.

The required break time for pumping under the PUMP Act does not have to be paid unless either (1) the employer provides compensated breaks for other employees during similar break times, (2) the employee is not completely relieved from duty during the break, or (3) the break is otherwise required by law to be paid. However, exempt employees may not have their salaries reduced due to breaks covered by the PUMP Act. The PUMP Act requires the pumping space to not necessarily be permanent but does require that the space be available "each time such employee has a need to express the milk." If an employer does not currently have any eligible employees, the employer does not have an obligation to provide a space, but employers should consider where they will make space if an employee becomes eligible. It is crucial that the space to express breast milk not be a bathroom.

The PWFA requires employers with fifteen or more employees to engage in an interactive process with pregnant and postpartum applicants and employees and to make reasonable accommodations for any limitations related to pregnancy, childbirth, or related medications, unless such accommodation would pose an undue hardship to the employer. Additionally, employers may not deny employment to, take adverse action against, or retaliate against applicants or employees who request a reasonable accommodation or engage in other protected activity under the PWFA. Much like the ADA, employers and employees must engage in an interactive process to determine what accommodations are necessary for the individual employee; employers cannot unilaterally decide what accommodations are appropriate.

Prior to the end of 2023, the EEOC will issue final regulations related to PWFA. The EEOC has already provided examples of potential accommodations that may be appropriate under the PWFA, including longer and more flexible breaks to eat, drink, and use the restroom; schedule flexibility, including to deal with morning sickness; exemption from strenuous activities; leave for medical appointments and to recover from childbirth; and closer parking. On June 27, 2023, the EEOC began accepting complaints under the PWFA, which also has a private right of action.

In addition to becoming familiar with the new requirements under the PUMP Act and PWFA, employers should review their policies in order to make sure that they comply with the expanded requirements of the laws. As always, O'Neil Cannon is here for you. We encourage you to reach out with any questions, concerns, or legal issues you may have.

EMPLOYMENT LAWSCENE ALERT: RELIGIOUS ACCOMMODATION IN EMPLOYMENT WILL HAVE ITS DAY AT THE HIGH COURT

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In recent years, the U.S. Supreme Court has made major employment law headlines with its *Bostock* decision (holding sexual orientation and gender identity are protected classes under Title VII) and *Epic Systems* decision (holding class-action waivers are enforceable against employees), among others. It looks like 2023 will be no different. In addition to taking up the rights of employers to sue unions for damages incurred during strikes and asking the Solicitor General to weigh in on what actions can be the basis for a discrimination suit under Title VII, the Supreme Court is also poised to reshape the landscape of religious accommodations.

Under Title VII, employers are prohibited from discriminating against individuals because of their religion in hiring, firing, and other terms and conditions of employment. In addition, employers must reasonably accommodate the religious practices of an employee or a potential employee, unless doing so would pose an "undue hardship" to the employer. Such accommodations may include flexible scheduling, voluntary substitutes or swaps, job reassignments, lateral transfers, changes to dress and grooming codes, and protection of workplace religious expression. Currently, under the 1977 Supreme Court decision *Trans World Airlines, Inv. v. Hardison*, an "undue burden" is defined as "more than *de minimis* cost" or a minor burden. This definition stands in fairly stark contrast to the Americans with Disability Act definition of "undue burden," which is "significant difficulty or expense."

Because employers have had fairly significant leeway when it comes to religious accommodation, this area of law has not seen significant litigation, as religious discrimination claims account for only 3.4% of all EEOC charges in fiscal year 2021. However, the tides may be turning, particularly if *Hardison* is overruled. In January, the Supreme Court agreed to hear oral arguments in a case that could be poised to change the "undue burden standard" for

religious accommodation. In *Groff v. DeJoy*, a Christian letter carrier objected to delivering packages for Amazon on Sundays and asked for an accommodation that he never be required to work on Sundays due to his religious beliefs. The U.S. Postal Service rejected this request, stating that granting it would be an undue burden because it would cause tension among other employees who would be required to work on Sundays. The U.S. Postal Service did offer to let the employee switch shifts with other employees, if any of them were willing to do so. The District Court and the Court of Appeals for the Third Circuit ruled in favor of the U.S. Postal Service, citing *Hardison* and the minimal burden the employer needed to show to reject the request for accommodation. Although conventional wisdom would typically indicate that the conservative super-majority on the high court is likely to rule in favor of the corporation, given this Supreme Court's openness to arguments of religious discrimination in other contexts and both Justice Alito's and Justice Gorsuch's prior criticism of *Hardison*, the current definition of what is a "de minimis" burden in religious accommodation cases is likely to change in favor of the employee. Whether that change brings the religious accommodation definition of "undue burden" closer to the ADA's definition or creates some newly defined test remains to be seen.

Employers should stay tuned for the outcome of *Groff* and should, in the meantime, carefully consider any requests for religious accommodation with an eye toward a potentially increased burden on the employer to show that the requested accommodation creates an undue burden. As always, O'Neil Cannon is here for you. We encourage you to reach out with any questions, concerns, or legal issues you may have.

EMPLOYMENT LAWSCENE ALERT: VOTE! AND REMEMBER THAT YOUR EMPLOYEES ARE ENTITLED TO TIME OFF TO VOTE!

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Tuesday, November 8, 2022, is Election Day. Although early voting is underway, many people will want to vote in-person on Election Day. All Wisconsin employers, regardless of size, are required to provide employees who are eligible to vote up to three consecutive hours of unpaid leave to vote while the polls are open (from 7 a.m. until 8 p.m.). Employees must request the time off prior to Election Day. Employers cannot deny voting leave on the basis that employees would have time outside of their scheduled work hours to vote while the

polls are open, but employers can specify which three hours an employee may utilize (e.g., the beginning or end of the workday). Employers may not penalize employees for using voting leave. Although voting leave is unpaid, employers should remember that, under the FLSA, they may not deduct from an exempt employee's salary for partial day absences.

Additionally, all Wisconsin employers are required to grant 24 hours of unpaid leave to an employee who is appointed to serve as an election official. This election official leave is for the Election Day on which the employee serves in his or her official capacity. Employers may not penalize employees for using election official leave. Employees must provide their employers with notice of their need for this leave at least seven days prior to Election Day.

Finally, Wisconsin employers are not permitted to make threats that are intended to influence the political opinions or actions of their employees. Specifically, employers cannot distribute printed materials to employees that threaten to shut down the business, in whole or in part, or to reduce the salaries or wages of employees if a certain party or candidate is elected or if any referendum is adopted or rejected.

As always, O'Neil, Cannon, Hollman, DeJong & Laing is here for you. We encourage you to reach out with any questions, concerns, or legal issues you may have.

EMPLOYMENT LAWSCENE ALERT: UNION ORGANIZATION IS ON THE RISE

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Recently, it seems like the stars have aligned in favor of unions. When President Biden was elected in 2020, a part of his workplace initiatives included the promotion of collective bargaining and the protection of employees' rights to join and form unions. Then, a global pandemic struck, which made many employees reconsider and question their relationships with their workplaces and employers. In February 2022, the White House Task Force on Worker Organization and Empowerment released a report promoting the Biden Administration's support for worker organization and collective bargaining by recommending, among other things, that the federal government use its "authority to support worker empowerment by providing information, improving transparency, and making sure existing pro-worker services are delivered in a timely and helpful manner." Earlier this month, the

National Labor Relations Board (NLRB) announced that union representation petitions filed with the Board between October 1, 2021 and March 31, 2022, had increased 57% over the prior six-month period. Additionally, unions have made major headlines recently with successful union elections at an Amazon fulfillment center on Long Island and multiple Starbucks locations.

And more changes are likely on the horizon. For example, on April 7, the NLRB General Counsel issued a memo challenging employers' well-established free speech rights, which are protected pursuant to Section 8(c) of the National Labor Relations Act (NLRA). The General Counsel's memo announced that she will ask the Board to find that mandatory employee meetings, held by employers to express their opinions on union organizing, violate employees' Section 7 rights under the NLRA. If the Board takes this position, it would be a huge blow to employers' ability to effectively and freely communicate with their employees and would also be contrary to U.S. Supreme Court precedent recognizing employers' free speech rights in the workplace.

So, what's an employer to do? Employers cannot threaten employees, cannot interrogate them about their support of a union, cannot promise things to influence the union vote, and cannot surveil employees. However, to lawfully counter a union's organizational activities, employers can help ensure that employees are accurately informed about the effects of unionization to allow employees to make free and clear decisions without coercion about their rights under Section 7. To do so, employers should make sure that their supervisors are properly trained on how to recognize the signs of union organizing activities and how to lawfully respond to employees' questions and concerns about unionization.

As always, the labor and employment law team at O'Neil, Cannon, Hollman, DeJong & Laing S.C. is here for employers to answer questions and address labor and employment law concerns. We encourage you to reach out with any questions, concerns, or legal issues you may have.

EMPLOYMENT LAWSCENE ALERT: OSHA ISSUES DETAILS OF VACCINE MANDATE

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Today, the U.S. Department of Labor's Occupational Safety and Health Administration ("OSHA") released the Emergency Temporary Standard regarding COVID-19 Vaccination and Testing, which has commonly been referred to as the Vaccine Mandate. It will officially be published on November 5, 2021. Announced by President Biden in September, the Vaccine Mandate requires all employers with more than 100 employees to either require that employees be fully vaccinated or require unvaccinated employees to submit to weekly COVID-19 tests, both of which are subject to reasonable accommodations for disabilities and sincerely held religious beliefs. The Vaccine Mandate does not apply to individual employees who do not report to a workplace where other individuals such as coworkers or customers are present, employees while they are working from home, or employees who work exclusively outdoors. Although the majority of the Vaccine Mandate officially goes into effect on January 4, 2022, employers need to start preparing immediately in order to be in full compliance by that date, including establishing and implementing the required written policies. Certain provisions, including the fact that employers must offer paid time-off for employees to receive the COVID-19 vaccinations and recover from any side-effects and must require unvaccinated employees to wear masks, go into effect on December 5, 2021.

For employees who opt to utilize the testing requirement, employers must keep records of each test unvaccinated employees take. If an employee is not vaccinated and does not receive a weekly test or if the employee tests positive for COVID-19, the employer must remove that employee from the workplace. A covered employer may require employees to pay for their own COVID-19 testing.

In order to assess whether or not an employer has 100 employees, employers are required to count all full-time and part-time employees at all of their locations, whether or not they work at the company's facility or remotely. Employers are not required to count independent contractors or leased employees, such as those from staffing agencies. Additionally, franchisees may count their employees separately from the franchisor and from other franchisees. Here are some examples provided in the ETS:

- If an employer has 75 part-time employees and 25 full-time employees, the employer would be within the scope of this ETS because it has 100 employees.
- If an employer has 102 employees and only 3 ever report to an office location, that employer would be covered.
- If a single corporation has 50 small locations (e.g., kiosks, concession stands) with at least 100 total employees in its combined locations, that employer would be covered even if some of the locations have no more than one or two employees assigned to work there.
- If a host employer has 80 permanent employees and 30 temporary employees supplied by a staffing agency, the host employer would not count the staffing agency employees for coverage purposes and therefore would not be covered. (So long as the staffing agency has at least 100 employees, however, the staffing agency would be responsible for ensuring compliance with the ETS for the jointly employed workers.)

- Generally, in a traditional franchisor-franchisee relationship, if the franchisor has more than 100 employees but each individual franchisee has fewer than 100 employees, the franchisor would be covered by this ETS but the individual franchises would not be covered.

The Centers for Medicare and Medicaid Services issued its own emergency rule requiring healthcare workers at hospitals, nursing homes, and other facilities that participate in Medicare and Medicaid to be fully vaccinated by January 4, 2022, but its rule does not allow for a weekly testing option. In the event of an overlap between the CMS rule and the OSHA rule, the CMS rule will govern. Additionally, in any overlap between the OSHA rule and the requirement that federal contractors be vaccinated, the federal requirement will govern.

The Vaccine Mandate, which has already received significant pushback from certain lawmakers, attorneys general, and business groups, is likely to be challenged in court, and it could be enjoined prior to its effective date. However, employers should not rely on that possibility and should begin preparing now. As always, O'Neil, Cannon, Hollman, DeJong & Laing S.C. is here for you and will keep you updated on developments on the Vaccine Mandate as they happen. We encourage you to reach out to our labor and employment law team with any questions, concerns, or legal issues you may have, including those regarding COVID-19 and related issues.

EMPLOYMENT LAWSCENE ALERT: WHAT DOES PRESIDENT BIDEN'S EXECUTIVE ORDER ON NON-COMPETES MEAN FOR WISCONSIN EMPLOYERS?

O'NEILCANNON
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On Friday, July 9, 2021, President Biden signed an Executive Order that, among other things, instructed the Federal Trade Commission ("FTC") to ban or limit non-compete agreements and other clauses or agreements that "unfairly limit worker mobility." This is not a federal ban on non-compete agreements and does not change any current law. It is important to note, however, that the FTC and the U.S. Department of Justice Antitrust Division, through civil and criminal enforcement actions, have already been looking at no-poach agreements between employers and other competitive restrictions through the lens of antitrust and

consumer protection laws and have begun to indict those employers who have entered into anti-competitive agreements that adversely affect America's labor market. To comply with President Biden's Executive Order, the FTC will likely go through a notice and comment period and eventually issue regulations governing the enforceability of restrictive covenants. Although a full federal ban on restrictive covenants is unlikely and any FTC rule would be subject to legal challenges, there may be limitations for certain workers (e.g., those in lower wage positions) or those in certain industries (e.g., retail, hospitality). Therefore, employers will need to stay informed on the progress of these regulations.

This is also a good reminder for Wisconsin employers to review their employee restrictive covenants, including non-disclosure, non-solicitation, and non-compete agreements. Regardless of any potential updates to federal law, Wisconsin has its own state statute regulating restrictive covenants – Wis. Stat. § 103.465. Wisconsin's statute imposes certain requirements for a restrictive covenant to be valid, including reasonable time and geographic limitations. Given the new focus on non-competes by the federal government, it is worthwhile for employers to have their restrictive covenants reviewed to evaluate enforceability and ensure that they're being appropriately used to protect those legitimate business interests recognized by law. As always, O'Neil, Cannon, Hollman, DeJong & Laing S.C. is here for you. We encourage you to reach out to our labor and employment law team with any questions, concerns, or legal issues you may have, including those regarding restrictive covenants and related issues.