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

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.