

# WHAT EMPLOYERS SHOULD DO REGARDING THE LOOMING EFFECTIVE DATE OF THE FTC'S NON-COMPETE BAN

As discussed previously, the Federal Trade Commission published a rule banning “non-compete clauses” in almost all cases involving employees, independent contractors, externs, interns, volunteers, apprentices, and sole proprietors who provide services to a person.

The rule is currently scheduled to go into effect on September 4, 2024. If the rule goes into effect, the majority of employers would not be permitted to enter into new non-compete clauses with any employees and will need to notify non-senior executives with existing non-competes that such agreements will not be enforced.

As expected, the FTC rule has faced legal challenges. On July 3, 2024, in *Ryan, LLC v. FTC*, a federal district court in Texas issued a preliminary injunction staying the FTC’s implementation of its rule but *only* for the plaintiff and four plaintiff-intervenors in the case. The *Ryan* court intends to rule on the merits of the case by August 30, 2024, at which point the court could do one of three things: (i) allow the rule to go into effect; (ii) issue a nationwide injunction; or (iii) take some middle-ground approach. Another federal district court in Pennsylvania earlier denied a motion for a nationwide preliminary injunction against the FTC regarding its noncompete ban. The Pennsylvania federal district court’s decision, however, has no precedential effect on the pending case before the federal district court in Texas.

Unfortunately, this leaves employers in a difficult spot—should they provide written notice regarding the unenforceability of their non-compete as required by the new FTC rule or should they do nothing and wait until all the legal challenges have played out? For now, employers should wait until at least August 30 when the federal district court in Texas is expected to rule. In the meantime, employers should compile a list of all current and former employees who have non-compete agreements still within their restricted periods and have the required written notices ready to go for such individuals in case a nationwide ban is not ordered by the federal district court in Texas.

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.

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# KELLY SPOTT ELECTED PRACTICE GROUP LEADER FOR THE TRUST, ESTATES AND SUCCESSION PLANNING GROUP

O'Neil Cannon proudly announces the election of Kelly Spott as the practice group leader for the Trust, Estates and Succession Planning Group, effective July 1, 2024.

*"I am honored to have been elected as the new practice group leader for the Trust, Estates and Succession Planning Group," said Spott. "I look forward to leveraging my experience and passion for assisting families to further strengthen our services in estate planning and tax matters."*

Spott has been a vital part of the O'Neil Cannon team since 2017, specializing in estate planning, succession planning, probate administration, trust administration, and inheritance litigation. She is licensed to practice in Wisconsin and Florida.

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## NAVIGATING TRUST LITIGATION: INSIGHTS FROM THE TONY BENNETT CASE

Nearly one year after Tony Bennett's death, his children are embroiled in a trust dispute. While Tony Bennett's fame and prominence are unique, the nature of this dispute is common. In the filing, Tony Bennett's two daughters accused their brother, Danny—who served as Tony's manager and also serves as the trustee of the Family Trust—of managing their father's trust for Danny's own benefit and that of his company. The action seeks an order for a full accounting and inventory of all property and assets so that they can be distributed in accordance with the terms of the Family Trust.

While much trust litigation revolves around the terms of a trust or its amendments, there are many situations that can lead to legal proceedings even when no one disputes the trust's terms. For example, a beneficiary may question why certain assets were not included in the trust or removed from the trust before a loved one's death. In addition, a beneficiary may question the actions taken by a trustee during their loved one's life and after their death. This is particularly relevant in high-profile cases like Tony Bennett's, where the management of substantial assets and legacy can be contentious.

In general, a trustee has a legal and fiduciary duty to uphold the terms and intentions of a

trust. Under Wisconsin's Trust Code, a trustee has a duty to keep "current beneficiaries and presumptive remainder beneficiaries who so request, reasonably informed about the administration of the trust." Wis. Stat. § 701.0813(1). Such information may include copies of trust documents, details about the trustee, and a list of the trust's assets, liabilities, receipts, disbursements, and the trustee's compensation. If you are a trustee seeking to uphold or administer a trust, or a beneficiary concerned about a trustee's actions, consulting with a knowledgeable attorney to evaluate your options is advisable.

Trevor C. Lippman is a shareholder at O'Neil Cannon and assists clients with all matters related to inheritance disputes, including questions about the creation and administration of trusts and wills. Lippman has assisted hundreds of clients navigate the difficult waters involved in elderly financial abuse allegations and inheritance litigation. To schedule an initial consultation with Lippman, call 414.276.5000 or email him at [trevor.lippman@wilaw.com](mailto:trevor.lippman@wilaw.com).

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## THE WILAW QUARTERLY NEWSLETTER

### Newsletter Article Highlights:

- A Beginner's Guide to Trademarks: Part One—Trademark Basics
- Wisconsin Expands Child and Dependent Care Tax Credit
- FTC Bans Employee Non-Competes, but Legal Challenges Expected

### Firm News:

- Attorney Emily Behn Has Joined O'Neil Cannon
- O'Neil Cannon Serves as Legal Advisor to Engendren Corporation in its Sale to Cummins Inc.
- O'Neil Cannon Ranked in 2024 "Best Law Firms"

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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.

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

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.

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## **A BEGINNER'S GUIDE TO TRADEMARKS: PART ONE—TRADEMARK BASICS**

### **What is a Trademark?**

A trademark can be any mark representing words, phrases, symbols, designs, or a combination of these that identifies your goods or services. In practice, the most common trademarks are business names and logos. Trademarks accomplish several objectives. They (1) identify the source of your goods or services; (2) provide additional legal protection for your brand; and (3) help to guard against counterfeiting and fraud. Creative and unique trademarks are the most effective in accomplishing these objectives and are easier to protect in the long run.

### **How Are Trademark Rights Obtained?**

A common misconception is that the registration of a trademark with a state or the federal government is a requirement for any trademark rights. However, you establish some trademark rights as soon as you start using a specific trademark (*e.g.*, your business name or logo) in connection with the marketing and sale of your goods or services. But these rights established solely via trademark use are limited and generally only apply to the specific geographic area in which you're providing your goods or services with the accompanying trademark.

### **Why Register a Trademark with the United States Patent and Trademark Office?**

Registering your trademark with the United States Patent and Trademark Office will provide you stronger, nationwide trademark rights in comparison to trademark use alone or state trademark registrations. Moreover, registering your trademark with the USPTO will allow you to protect your trademark and enforce your trademark rights both at the federal level in the United States and in foreign countries. Other benefits of registering your trademark with the USPTO include having your trademark listed in USPTO's database to provide notice to the

public when searching for or considering registration of an identical or similar trademark and the use of the federal trademark registration symbol (®) to deter others from using your trademark.

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

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.

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## **O'NEIL CANNON SERVES AS LEGAL ADVISOR TO ENGENDREN CORPORATION IN ITS SALE TO CUMMINS INC.**

O'Neil Cannon advised Engendren Corporation in its recent sale to Cummins Inc., a global powertrain manufacturer. Over the past couple of years, Engendren has experienced tremendous growth, and it looks forward to continued advancement and expansion as Cummins invests in improving Engendren's capabilities. This support will further enable Engendren to provide world class cooling solutions for all its customers. Engendren is part of the Cummins Power Systems Business but will continue to operate independently.

The O'Neil Cannon deal team was led by Chad Richter with assistance provided by Pete Faust, Britany Morrison, Sam Nelson, Erica Reib, Nick Chmurski, and Kelly Kuglitsch.

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# WISCONSIN EXPANDS CHILD AND DEPENDENT CARE TAX CREDIT

Wisconsin families received a significant boost with the recent signing of [Assembly Bill 1023](#). The bill was signed into law by Governor Tony Evers on Monday, March 4, 2024. This groundbreaking legislation, effective immediately for the 2024 tax year, expands the state's child and dependent care tax credit from 50% to 100% of the federal credit, potentially providing substantial relief to families grappling with childcare expenses.

The amended law not only doubles the benefit percentage, but it also raises the cap on allowable childcare expenses, allowing taxpayers to claim up to \$10,000 for one dependent and \$20,000 for two or more dependents. Governor Evers emphasizes that this change will result in a maximum credit ranging from \$2,000 to \$3,500 for one dependent and \$4,000 to \$7,000 for two or more dependents, offering tangible financial support to Wisconsin families.

Following the rejection of the remaining components of a Republican-backed tax cut package, the political terrain surrounding tax cuts and credits has garnered significant attention. Last week, Governor Evers rejected three tax-cutting proposals: [AB 1020](#), aimed at expanding the state's second-lowest income tax bracket; [AB 1021](#), which sought to increase the retirement income exclusion to \$75,000 for individuals; and [AB 1022](#), which proposed raising the maximum income tax credit for married couples from \$480 to \$870.

Despite being the sole tax bill signed by Governor Evers among several sent by the Republican-led legislature, the impact of this legislation is far-reaching. The changes will affect more than 110,000 taxpayers, with an average benefit of over \$656, according to the governor's office.

For questions or further information relating to the Wisconsin Child and Dependent Care Tax Credit, please contact Attorney [Britany E. Morrison](#).