

FTC NON-COMPETE BAN ENJOINED NATIONWIDE

On Tuesday, August 20, 2024, a Texas federal judge issued a nationwide injunction prohibiting the Federal Trade Commission from enforcing its rule banning non-compete clauses. The ruling states that the agency “lacks statutory authority” to enact the rule and that the rule is “unreasonably overbroad without a reasonable explanation.” The FTC has the option of appealing the decision to the Fifth Circuit Court of Appeals. We will continue to monitor developments on this matter.

So, at least for now, employers can continue to enter into and enforce non-competes that comply with state law. Moreover, employers do not need to send out any notices about the enforceability of their current non-competes. 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.

ERICA REIB NAMED ONE OF WISCONSIN LAW JOURNAL’S POWER 30 EMPLOYMENT LAWYERS

Erica Reib leads O’Neil Cannon’s Labor and Employment Practice Group. She represents businesses in state and federal courts, administrative agencies, arbitrations, and mediations; assists clients with drafting, enforcing, and defending employment agreements, restrictive covenants, and employee handbooks; provides clients with day-to-day advice, counseling, and training on labor and employment matters; and supports clients with the labor and employment aspects of transactions.

THE
POWERLIST
WISCONSIN LAW JOURNAL



ERICA REIB
O'NEIL CANNON HOLLMAN
DEJONG & LAING

Erica Reib is the head of the Labor and Employment Practice Group with Milwaukee-based O'Neil Cannon Hollman DeJong & Laing.

Reib works on a broad range of labor and employment issues for companies, including employment discrimination litigation and employment policy.

According to Reib, her law practice has been very fulfilling.

"I enjoy helping companies solve problems to try to find solutions to employment law issues," Reib said.

Reib received her undergraduate degree from West Virginia University and graduated from Marquette University Law School.

She is admitted to practice with the State Bar of Wisconsin, Eastern District of Wisconsin, Western District of Wisconsin, 7th Circuit Court of Appeals, and the Northern District of Illinois.

Reib is no stranger to award recognition and has received awards for: Joseph E. O'Neill Prize for Student Writing, 2011; Martin J. Greenberg Award, 2011; Joseph E. Tierney Jr. Award, 2011; Editor-in-Chief of the Marquette Sports Law Review, 2010-2011; CALI Award, Employee Benefits, 2010; CALI Award, Professional Sports Law, 2010; CALI Award, Amateur Sports Law Workshop, 2010; and the Posner Pro Bono Society, Sports Law Certificate.

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.

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.

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.

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.

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, Brittany Morrison, Sam Nelson, Erica Reib, Nick Chmurski, and Kelly Kuglitsch.

O'NEIL CANNON SERVES AS LEGAL ADVISOR TO GUETZKE AND ASSOCIATES IN ITS SALE TO RYAN FIREPROTECTION, INC.

O'Neil Cannon advised Guetzke and Associates in its recent sale to Ryan Fireprotection, Inc. Established in 1977, Guetzke and Associates is the premier provider of fire alarm and detection systems in Southeast Wisconsin. Its services include engineering, design, installation, service, inspections, and monitoring. Ryan Fireprotection is one of the largest fire protection companies in the Midwest providing a full range of high-quality, custom fire protection systems. As Ryan Fireprotection stated, "We can't wait to combine our efforts to Protect. Prevent. Preserve!"

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

SUPER LAWYERS RECOGNIZES 28 O'NEIL CANNON ATTORNEYS

Each year, *Super Lawyers* surveys the State of Wisconsin's 15,000 attorneys and judges, seeking the State's top attorneys. Recently, *Super Lawyers* published its lists for 2023, which include the Top 10 Attorneys in Wisconsin, Top 50 Attorneys in Wisconsin, Top 25 Attorneys in Milwaukee, Super Lawyers (consisting of the top 5% of attorneys in Wisconsin), and Rising Stars (consisting of attorneys who are 40 years old or younger or who have been in practice for 10 years or less).

Twenty-nine of our attorneys were recognized by *Super Lawyers*, which has referred to the firm as "the Milwaukee mid-sized powerhouse." Those attorneys are the following:

- Nick Chmurski:
 - Rising Star
- Doug Dehler:
 - Super Lawyer
- Jim DeJong:
 - Super Lawyer
- Seth Dizard:

- Top 50 Attorneys in Wisconsin
- Top 25 Attorneys in Milwaukee
- Super Lawyer
- Pete Faust:
 - Super Lawyer
- John Gehringer:
 - Super Lawyer
- Joseph Gumina:
 - Super Lawyer
- Jessica Haskell:
 - Rising Star
- Mike Kennedy:
 - Rising Star
- Grant Killoran:
 - Super Lawyer
- Dean Laing:
 - Top 10 Attorneys in Wisconsin
 - Top 50 Attorneys in Wisconsin
 - Top 25 Attorneys in Milwaukee
 - Super Lawyer
- Trevor Lippman:
 - Rising Star
- Greg Lyons:
 - Super Lawyer
- Patrick McBride:
 - Super Lawyer
- Britany Morrison:
 - Rising Star
- Joe Newbold:
 - Super Lawyer
- Erica Reib:
 - Rising Star
- Chad Richter:
 - Super Lawyer
- Ryan Riebe
 - Rising Star
- John Schreiber:
 - Super Lawyer
- Jason Scoby:
 - Super Lawyer
- Steve Slawinski:
 - Super Lawyer
- Kelly Spott:
 - Rising Star
- Christa Wittenberg:
 - Rising Star

Super Lawyers is a national rating service that rates attorneys in all 50 states. The selection process utilized by *Super Lawyers* is multi-phased and includes independent research, peer nominations, and peer evaluations. One court recently had this to say about *Super Lawyers*:

“[T]he selection procedures employed by [*Super Lawyers*] are very sophisticated, comprehensive and complex. It is abundantly clear . . . that [*Super Lawyers* does] not permit a lawyer to buy one’s way onto the list, nor is there any requirement for the purchase of any product for inclusion in the lists or any quid pro quo of any kind or nature associated with the evaluation and listing of an attorney or in the subsequent advertising of one’s inclusion in the lists.”

We are proud to be one of the few firms in Wisconsin that had more than 50% of its attorneys receive recognition by *Super Lawyers*.

EMPLOYMENT LAWSCENE ALERT: DUST OFF THOSE HANDBOOKS-THE NLRB HAS CHANGED ITS RULES (AGAIN)

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.