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NEWSLETTER

May 2024

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Noncompete Agreements To Be Outlawed — Maybe

On April 23, 2024, the Federal Trade Commission issued a final rule banning virtually all noncompete agreements. It takes effect 120 days after publication in the Federal Register, which probably means an effective date sometime around the end of August.

The rule prohibits employers from enforcing noncompetes with workers other than senior executives as of the effective date. A "senior executive" is a worker in a "policy-making position" earning more than $151,164 per year. The FTC estimates that fewer than 1% of workers fall into this category. Further, the FTC emphasizes that even that exemption applies only to current noncompetes. Once the rule takes effect, companies cannot enter into new noncompetes with any employees, even senior executives.

The FTC will continue to allow noncompetes between the seller and buyer of a business. Also exempted are nonprofits, although some experts believe the ban will apply if an organization generates revenue for members of a for-profit entity. The final rule is over 500 pages, and lawyers are still poring over the details while companies await further guidance.

There's already a lawsuit

The FTC has defended its decision, noting that "noncompetes restrict workers' fundamental freedom to leave for a better job or to start their own business" and that they "prevent workers from starting their own firms and block new businesses from hiring qualified workers." The FTC says that about one in five Americans, totaling nearly 30 million people, are subject to noncompetes.

However, not everyone agrees. The U.S. Chamber of Commerce issued a statement saying, "The Federal Trade Commission's decision to ban employer noncompete agreements across the economy is not only unlawful but also a blatant power grab that will undermine American businesses' ability to remain competitive." The organization is planning to sue the FTC.

So although it's unclear what will happen, prudent companies will use the next few months to review their own noncompete policies, working closely with legal and HR professionals. The FTC is recommending the use of nondisclosure agreements, which it believes will be sufficient to protect proprietary information.

Meanwhile, interested parties can read the FTC's statement and download the fact sheet. Those with the patience to read it can also download the complete rule.

Major Overtime Change Will deeply Affect Employers

According to a Department of Labor release, a newly issued rule increases the salary threshold required to exempt a salaried bona fide executive, administrative or professional employee from federal overtime pay requirements.

The release states, "Effective July 1, 2024, the salary threshold will increase to the equivalent of an annual salary of $43,888 and increase to $58,656 on Jan. 1, 2025." The present annual salary threshold is $35,568. "Starting July 1, 2027, salary thresholds will update every three years by applying up-to-date wage data to determine new salary levels," the release says.

What does this mean?

In an explanation of the new rule, the DOL gives background on overtime regulation. In brief, the venerable Fair Labor Standards Act of 1938 set rules for minimum wages and additional payment for overtime. However, certain groups have been exempt from the overtime provisions, particularly those falling into the so-called EAP group (executive, administrative and professional employees).

An employer can't simply decide employees fall into the EAP group, however. Employees must meet the following three criteria:

1. They must be paid a salary, meaning that they are paid a predetermined and fixed amount that is not subject to reduction because of variations in the quality or quantity of work performed.
2. They must be paid at least a specified weekly salary level.
3. They must perform primarily executive, administrative or professional duties, as provided in the DOL's regulations.

The new rule ups the figure for criterion No. 2. As of July 1, that weekly pay is $844, equivalent to the $43,888 annual figure noted above. The big takeaway for employers is that employees who do NOT meet the new salary levels are entitled to overtime after 40 hours/week. This is true even if they meet criteria No. 1 and No. 3. In short, it is now harder for employers to classify workers as belonging to the EAP group.

Just the beginning

So is that all you need to know? Actually, no. There are additional provisions and exceptions, as well as changes to the important "highly compensated employee" limits. The rules have always been complicated, and these changes do not simplify anything. Indeed, the new published rule runs more than 300 pages — more words than Charles Dickens' "A Tale of Two Cities." Also, your state may have additional overtime rules. For now, the two takeaways are:

1. Open your payroll files because there's a good chance you'll have to make changes.
2. Call your payroll advisers to go over your situation.

If and when the DOL publishes more guidance, we'll certainly follow up.

When an Employee Leaves

There are many reasons why employees quit:

- They feel their salary is too low.
- They don't see a clear career track or professional development opportunities.
- They want more flexibility at work and in their personal lives.
- They don't feel valued or appreciated for their efforts and skills.

How you respond when someone quits makes a big difference to company morale and to your ability to prevent similar resignations in the future.

Have a clarifying conversation with the employee. This is not a time for anger. Instead, be curious and respond to the news in a calm, affirming way. As part of this conversation, be sure you understand the reason they're exiting. Consider how you'd like to respond: Should you make a counteroffer? Will you change how you do things going forward?

Review schedules and responsibilities for the time left until the employee departs. Who will take over open projects and daily tasks? Do coworkers need to be trained? Take time to gather client contacts and project statuses. You may want to extend employee training periods for the remaining staff to build their confidence.

Schedule an exit interview. This may be conducted by a neutral party, like another team's manager. Exit interviews should be at least 30 minutes long and include time to discuss overall work experience. They should also give the exiting employee time to suggest how to improve your workplace culture.

Other departments' responsibilities

Inform HR that the employee is leaving, so that they can create a **formal resignation letter**. This includes an official notice of resignation signed and dated by both you and the employee that shares the reason for leaving along with the employee's final day of work. Many states and contracts require two weeks' notice. If the employee cannot work that long or if you do not want them to work that long, pick another departure date.

HR should also confirm the employee's **personal information**, including mailing address, personal email address, phone number and emergency contact information. Your company may require that a nondisclosure agreement be signed by the exiting employee. HR should also organize the final paycheck and benefits information. Many states have laws regarding when final pay must be delivered. The final pay will include all accrued wages and may include unused sick days, accrued paid time off, commissions and bonuses. A third party, like an accountant, should double-check the math.

It is also essential that HR provide required legal notices about benefits. These include:

- Health insurance, including COBRA.
- The 401(k) plan.
- Unemployment eligibility.
- Any other benefits offered by your company.

HR, IT and other departments will be responsible for last-day activities like reclaiming the employee's company laptop, cellphone, equipment or tools, uniforms, building keys, ID badges, and employee manuals. It is also essential to change the employee's passwords to email or work accounts and remove the employee's access to internal digital systems.

Company morale

When someone plans to leave your company, part of your responsibility is to the people who are not leaving.

Be sure to notify other staff about the departure. You can tell key business partners or managers individually, but it is fine to send a general email to everyone else. In the email, keep the message simple and positive. Be sure to thank the departing employee for their work and add good wishes for their future. You do not need to include the exact reason for their departure.

Reassign responsibilities and/or shifts. Set up one-on-one meetings with specific employees to determine if deadlines and project dates need to be adjusted and if some workers will need to be trained to take over tasks. You may want to hire an independent contractor temporarily. Be sure to offer motivational talks to keep morale up.

As early as possible, formulate a process to replace the departing employee. Starting the process early will minimize lost revenue. Among the steps in this process:

- Deciding whether you will promote a current employee or hire someone new.
- Reviewing your budget; how much can you afford to pay for the position?
- Writing an accurate job description.
- Creating and distribute job ads.
- Deciding if you'd like to outsource some tasks or responsibilities to an independent contractor.
- Temporarily or permanently redistributing work among current employees. This supports continuity.
    - Reviewing employee performance reviews and workflows to see what's feasible.
    - If you are asking someone to increase their responsibilities, be sure you're providing additional compensation.

On the employee's last day, it is essential to say goodbye on a positive note. This maintains a strong relationship with the departing employee and sets an example for your other employees. Many companies offer handwritten cards, restaurant gift cards, flowers or edible treats as a goodbye gift. It is equally important that you take the time to walk the employee out and thank them for their time.

By understanding why an employee is leaving and thanking them for their quality work, you can provide an avenue for top talent to return in the future.

Head's Up: Mandatory EEOC Report Due Soon

Being a business owner often means filling out forms, and the IRS and Department of Labor aren't the only government entities you have to work with. The Equal Employment Opportunity Commission wants information too — from companies with more than 100 employees. (Lower thresholds may apply to government contractors.) Businesses must provide details about the gender and race/ethnicity of their workforce. Although the individual business data is kept private, the aggregate results are available to the public.

This EEO-1 Component 1 report is mandatory and requires a range of demographic data, including by job category and sex, race or ethnicity.

The data collected is used for enforcement, self-assessment by employers and research. The 2023 EEO-1 Component Data Collection, which is the employer information report, opens on April 30 with a deadline to file by June 4.

How to get started

A filer help desk, the EEO-1 Component 1 online Filer Support Message Center, also opens on April 30, to assist filers who have questions regarding the data collection. There's an instruction booklet, the 2023 EEO-1 Component 1 Instruction Booklet, and specifications for uploading data files, the 2023 EEO-1 Component 1 Data File Upload Specifications, that are now available on the EEOC's dedicated EEO-1 Component 1 website.

Effective Employee Performance Reviews

Performance reviews often feel like a one-way, top-down process in which you, the boss, are judge and jury. But if reviews are instead a two-way street, employees feel significantly less defensive. How do you create this two-way process? Let's look at some ideas.

First, you might ask the employee to **write a self-evaluation** prior to the review. How well did the employee meet their goals over the past year? How did they feel about their work? What did they do well? Where do they need more support? Ask them to open the meeting by sharing these thoughts. Letting them speak first helps diminish the sense of judgment by indicating that you are open to dialogue.

An additional step is to ask for **employee peer reviews**. Gathering additional observations, perspectives and comments about the employee's job performance dilutes the sense that you alone are judging the work.

For the evaluation itself, do not use arbitrary numerical grades, especially without substantiating what they mean. Instead, **focus on the job performance**. How well did the person meet the goals set last year (or in their job description)? If you are going to use numbers, make sure they assess results (like "increased accuracy by 29%").

"Meeting the goals set last year" (or in the job description) should be the focus of the review. Evaluate not the person but rather how well the person gets the job done. **Shift to a results-oriented review** rather than a personality-oriented one and set this focus both when you open the meeting and throughout the discussion. What actions (or attitudes) did the employee engage in that showed good work? What were the results those actions/attitudes achieved?

The discussion should be well-documented. Include any feedback you provide along with a record of the goals. Make sure each goal includes a time frame and a method of measuring whether the goal was attained. Both you and the employee can then determine whether they've succeeded in meeting or failed to meet the goal. Encourage the employee to keep a similar written record that they can use the following year in their self-evaluation.

If there's a gap between your view of the employee's work and their own, do not insist on your perspective. Instead, **listen and talk through issues** to try to determine what's underlying job performance problems. At the end of the discussion, you and the employee should be on the same page.

Do not end the review until you **have a plan**: What will the employee do in the next year? What will they improve on in the next months? What support do they need to achieve those goals? As above, these plans should be results oriented rather than personality driven. The plan should also outline any training or coaching the employee needs, along with what the employer will do (in terms of money, time or personnel) to support the employee.

And always provide employees with a copy of the completed evaluation form.

Additional details

It's important to separate a performance review from compensation discussions. Instead, conduct a salary review close to the time when raises are announced. If you conduct performance and salary reviews in the same discussion, the

employee is likely to pay attention only to the money and miss the benefits of any coaching you offer.

The person who conducts the interview should be the supervisor or manager who has the most contact with the employee. They are in the best position to accurately assess day-to-day results. They should observe the process outlined above.

Provide notice of the performance review and let employees know that it is not a "judgment day." Create a thoughtful schedule and publicize it to the company.

If you design and follow a meaningful system of coaching conversations that employees welcome, find useful and see as valuable, you will motivated employees to thrive in their careers. You get better quality work by correcting problems, supporting quality work and laying the groundwork for advancement in the company.

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