Human Resources in a Changing Labor Market

Presented on April 12, 2023
for International Supply Chain Protection Organization (ISCPO)

SpencerFane

Human Resources Outlook

Human Resources Horizon for 2022

What were the most pressing external factors amongst Human Resources professionals and executives?

1. Inflation, inflation, inflation
2. Labor Shortages: finding more staff and better quality staff
3. Diversity, equity and inclusion (DE&I) concerns: translation, how does your company culture appeal to the majority of your workforce

Source: 2022-2023 SHRM State of the Workplace Report

Talent Outlook for 2022

As it relates to *Talent*, what did HR professionals and executives care the most about? The consensus included:

1. Lack of qualified candidates
2. Uncompetitive compensation
3. Limited workplace flexibility
4. Lack of paths to career advancement

Source: 2022-2023 SHRM State of the Workplace Report

Human Resources Horizon for 2023

How does 2023 compare to 2022 when it comes to the external factors faced by HR professionals and executives?

1. Lack of budget: increasing work load and productivity work with less available capacity or capital
2. Limited time or dedicated personnel: better known as more cross-training or cross department employees
3. Limiting or limiting technologies: do you have the right software/hardware mix for your company
4. Senior leadership support or buy-in

Source: 2022-2023 SHRM State of the Workplace Report

Talent Outlook for 2023

As it relates to *Talent*, what did HR professionals and executives care the most about? The consensus included:

1. Retaining top talent
2. Maintaining employee morale and engagement
3. Performing fair and competitive compensation evaluations and adjustments
4. Finding and recruiting talent with the necessary skills

Source: 2022-2023 SHRM State of the Workplace Report

Legal Outlook

EEOC Strategic Enforcement Plan

On January 10, 2023, the EEOC announced a draft of its Strategic Enforcement Plan (SEP) for Fiscal Years 2023-2027. The public comment period has ended, and a formal vote of the full commission is expected soon. Top of the agency's list is a focus on artificial intelligence; pay equity; pregnancy discrimination; protection of vulnerable workers; hiring and recruiting decisions; confidentiality, non-disparagement, settlement and arbitration agreements; and systemic harassment. The SEP will be effective the day following approval by the Commission and will remain in effect until superseded, modified or withdrawn by vote of a majority of members of the Commission.

SEP – Primary Focus

- **Enforcing Pay Equality:** use of salary history; pay inquiries, pay secrecy policies, retaliation; not just through individual charges, but Commissioner's charges to investigate pay differences.
- **Preserving Access to Legal Systems:** settlement, confidentiality, non-disparagement and arbitration agreements; improperly restricts access to the legal system; Speak Out Act – prohibits pre-dispute non-disclosure and non-disparagement clauses re sexual assault/harassment.
- **Eliminating Pregnancy Discrimination:** pregnancy, childbirth, and related medical conditions under the PDA, ADA, and the newly enacted PWFA.
- **Eliminating Barriers in Recruiting & Hiring:** artificial intelligence – discriminatory automated and electronic screening tools; liable for vendor technology; "validation" may not be sufficient with respect to individuals with disabilities; also isolating and separating workers in certain jobs or job duties based on membership in a protected class; denying opportunities to move from temporary to permanent roles.

SEP – Primary Focus (cont'd)

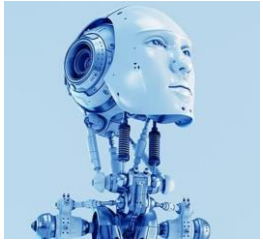
- **Addressing Emerging & Developing Issues:** discrimination based on race, religion, national origin and gender as backlash in response to current events; includes African Americans, Arab/Middle East/Asian descent, Jews, Muslims and Sikhs.
- **Protecting Vulnerable Workers:** LGBTQ, low-wage workers, older workers, Native Americans, individuals with developmental or intellectual disabilities, individuals with limited literacy or English proficiency, immigrants, migrants/refugees, educationally/economically disadvantaged, racial/ethnic minorities; individuals with arrest/conviction records.
- **Focusing on Targeted Industries:** that lack diversity, such as construction and technology; industries that benefit from substantial federal investment are also areas of particular concern.
- **Preventing Systemic Harassment:** continued enforcement; pregnancy, gender identity, sexual orientation
- **Preventing COVID-related Discrimination:** pandemic-related discrimination or harassment, accommodations, vaccine accommodations and pandemic-related stereotyping; unlawful medical inquiries, improper direct threat determinations, or other discrimination related to disabilities that arose during or were exacerbated by the pandemic.

Enforcement has begun…

- **Artificial Intelligence**
  - In May 2022, the EEOC sued three integrated companies providing English-language tutoring services to students in China under the "iTutorGroup" brand, alleging that they programmed their online software to automatically reject more than 200 older applicants.
- **Construction Industry**
  - In September 2022, just days before its fiscal year ended, the EEOC filed three suits involving the construction industry:
    - ***EEOC v. Alto Construction Co.,*** asphalt paving construction in Tampa; the EEOC's lawsuit alleges that management regularly used a racial epithet in front of Black employees, and when an employee complained, he was humiliated and assaulted by a white manager, then fired.
    - ***EEOC v. J.A. Croson, LLC,*** a plumbing and HVAC contracting company in Orlando; the EEOC's lawsuit alleges that company management routinely used derogatory slurs in reference to non-white employees, referred to them as "non-essential" and "useless," and assigned them the least desirable work tasks. The suit also alleges that when non-white employees complained of the racial discrimination, they were terminated.
    - ***EEOC v. Goodsell/Wilkins Construction Co,*** against a construction company for harassment of and retaliation against Latino employees based on their national origin, as well as claims for racial discrimination and sexual harassment. The allegations include abusive and derogatory language toward Latino workers, anti-Latino graffiti with offensive imagery on the job sites, threats of sexual assaults toward Latino employees, and termination of those employees when they complained. The lawsuit is still ongoing.
    - ***EEOC v. American Piping Inspection*** in Houston; filed a lawsuit against a construction company for discrimination and retaliation against a Black employee. The employee's supervisor allegedly used derogatory language and made racist "jokes." The company failed to act even after the employee reported the discrimination. In December 2022, a three-year consent decree was entered that requires the company to pay $250,000, revise its anti-discrimination policies and properly distribute them to employees, provide its employees with training about workplace discrimination, and post discrimination notices around jobsites.

Path Forward – General

- The EEOC will likely be more aggressive in pursuing enforcement actions around these priorities than what we have seen from the agency in recent years.
- Ensure all employment policies and practices are job-related and consistent with business necessity, contain sufficient flexibility to comply with the ADA and other prohibitions against discrimination, and do not adversely affect members of a protected class.
- Conduct statistical analyses on the impact of employment policies and practices to determine if there are barriers to equal employment opportunities; use outside counsel to ensure such analyses are protected by the attorney-client privilege.
- Examine responses to individual charges of discrimination and avoid defenses that may result in heightened scrutiny of the impact of policies on large segments of the workforce.
- Train managers to make decisions on an individualized basis and take the facts specific to the situation into consideration.
- Employers should fully understand the factors used by AI tools in recruiting and ensure they do not inadvertently screen for impermissible medical or disability-related information from candidates or disproportionately impact certain protected characteristics; make accommodation process transparent; give notice before performing AI assessment; confirm vendor compliance.
- If you receive a request for information from the EEOC, consult experienced employment counsel who can assist in preventing the Agency from overreaching.



Artificial Intelligence

It is estimated that approximately 80% of employers use some form of automated tools, i.e. artificial intelligence (“AI”), to screen candidates. As part of its 2023 strategic enforcement plan for the next several years, the EEOC plans to analyze AI systems and their use. Some of the AI tools include resume scanners that prioritize applications using certain keywords; “virtual assistants” or “chatbots” that ask job candidates about their qualifications and reject those who do not meet pre-defined requirements; video interviewing software that evaluates candidates based on their facial expressions and speech patterns; and testing software that provides “job fit” scores.

Practical Tips: Artificial Intelligence

- Employers should recognize that on-line/interactive tools may not be easily accessed or used by those with visual, auditory or other impairment; unless there is undue hardship, provide alternatives to use or apply the tools.
- Be sensitive to how an algorithmic decision tool might screen out a qualified applicant with a disability; has the algorithm been assessed to determine whether it disadvantages individuals with disabilities?
- Be careful about screening software's use of data sets against which to compare employment applicants; the data sets themselves may contain improper biases.
- Ensure the software has been validated to avoid biases; note that employers may be liable for vendor software.

Criminal Background Discrimination

Nearly two-thirds of states have “ban-the-box” laws, which prohibit initial job applications from inquiring into an applicants’ criminal background, and many other states prohibit consideration of convictions that have been sealed or expunged, juvenile records, and arrests. Additionally. California, Colorado, Hawaii, Illinois, New York, Pennsylvania, Washington D.C., and Wisconsin all have laws that restrict the ability for private employers to make employment decisions based solely on criminal convictions. Employers should review their policies and procedures related to employment determinations to ensure that criminal history is considered only where an offense may be related to the responsibilities of a job and is consistent with business necessity.

Individualized Assessment

Nature and gravity of the offense

Time that has passed since the offense or completion of sentence

Nature of the job sought

1. Accuracy of criminal record
2. Facts and circumstances surrounding the offense
3. Number of offenses for which the individual was convicted
4. Age at time of conviction or release from prison
5. Evidence that the individual performed the same type of work, post-conviction, with the same or a different employer, without incidents of criminal conduct
6. Length and consistency of employment history
7. Rehabilitation
8. Employment or character references and other information regarding fitness for the position
9. Whether the individual is bonded

Practical Tips: Criminal Background Discrimination

- Adhering to state law prohibiting employers from employing applicants or employees with convictions for certain crimes do not protect employers from federal claims.
- Therefore, conducting an individualized assessment in all instances is the best practice.
- Document the reason for the adverse employment action or any exceptions to employ or retain individuals with criminal convictions.
- Obtain a criminal background authorization that covers upon hire and during employment.
- Consider implementing a policy requiring employees to disclose to inform human resources when convicted of a crime.

Marijuana in the Workplace

To date, 37 states have legalized medical marijuana while 21 states have legalized it for recreational purposes. Additionally, some states provide protections for marijuana users. While the federal and state governments continually oppose each other's marijuana usage laws, employers face continual challenges in crafting HR policies and procedures, including employee drug testing and recruiting to address this trend. Employers must have a strategy for dealing with the issue, especially if they have workers spread out over several locations across the country or remote workers

Practical Tips: Marijuana

- Employers can generally still test for marijuana and are not restricted from complying with federal (i.e., DOT) testing requirements. Most state laws legalizing marijuana have carve-outs for safety sensitive positions, and all the current state laws continue to prohibit marijuana use on company property and employees working under the influence.
- Become familiar with states that prohibit marijuana discrimination; some states prohibit a failure to hire an applicant or terminate an employee based solely on a positive THC drug test.
- Current drug testing methods, although accurate, will not establish whether an employee was under the influence of marijuana during work hours. A greater focus on reasonable suspicion testing (and reasonable suspicion training for managers) is needed.
- A blanket random drug testing policy may not be appropriate for companies operating in several states or employing a wide variety of employees as THC can build up in the body overtime and some legal CBD products may inadvertently contain THC.
- Employers should consider a “job” specific drug testing policy for employees whose jobs involve certain safety concerns or significant responsibility for company finances.
- Employers may have to make reasonable accommodations under the ADA if an employee holds a medical marijuana card for treatment of a protected condition. Common conditions include autism, epilepsy, cancer and multiple sclerosis. Such reasonable accommodations should take into consideration the method the employee may use marijuana in the workplace to not interfere with the working environment of other employees.

Pay Equity & Transparency

In 2023, we expect to see a renewed focus on pay equity and transparency, with several states expanding existing regulations to require salary ranges in job postings. In 2023, California, Washington and New York have pay transparency laws. Massachusetts and South Carolina already have pending pay transparency legislation. Now is a good time for all employers to add salary ranges to job postings and conduct pay equity analyses.

Practical Tips: Pay Equity & Transparency

- Review the requirements of the Equal Pay Act and Title VII. For instance, if a pay disparity exists, make sure it falls under one of the four exceptions under the Equal Pay Act: (1) a seniority system, (2) a merit system, (3) a system which measures earnings by quantity or quality of production, or a (4) differential based on any factor other than sex.
- Keep abreast of state laws on pay transparency; many jurisdictions require pay transparency in job postings.
- If state law requires pay transparency, update your current internal salary transparency policies by providing existing employees the same access to the pay data as new hires or applicants.
- Conduct salary market research to support a company's compensation model.
- Conduct internal pay audits annually or every few years to examine critical components of pay across the workforce and the criteria used to make pay determinations. If necessary, implement pay increases/adjustments. Determine to conduct such audits under attorney-client privilege.
- In some states, employers are not allowed to ask applicants about pay history; consider deleting this question from interviews and ask about pay expectations instead.

Pregnant Workers Fairness Act

The Pregnant Workers Fairness Act (PWFA) is a new law that requires employers with fifteen or more employees to provide “reasonable accommodations” to a worker’s known limitations related to pregnancy, childbirth, or related medical conditions, unless the accommodation will cause the employer an “undue hardship.” The PWFA applies only to accommodations. Other existing laws make it illegal to fire or otherwise discriminate against workers on the basis of pregnancy, childbirth, or related medical conditions.

Practical Tips: PWFA

- Update and train HR personnel and supervisors to recognize that pregnancy-related accommodations are now going to be required and be familiar with the Americans with Disabilities Act requirements and framework to assist in engaging in the interactive process.
- Pay attention to a drop in engagement and job satisfaction for employees as it may indicate an accommodation may be needed. There are no magic words that an employee must use to begin the process of seeking pregnancy accommodations.
- If an employee is obviously pregnant and having performance difficulties, an employer can generally ask, is there anything we can do to help you to perform the essential functions of the job?
- Remember that in addition to the PWFA, there are additional federal, state, and local pregnancy discrimination laws regarding pregnancy, nursing, and pregnancy related issues that may apply.

Restrictive Covenants

Many state and local governments continue to impose limits on the use of restrictive covenants, specifically noncompetition provisions. To ring in 2023, the FTC proposed a new rule which, if promulgated, would prohibit non-compete agreements between employers and employees (in addition to independent contractors and unpaid interns), as well as related agreements that function as “de facto” non-compete clauses, such as overbroad non-solicitation and non-disclosure provisions. Further, in February 2023, the NLRB ruled that severance agreements with overly broad non-disparagement and confidentiality provisions violate the National Labor Relations Act; the NLRB ruling is retroactive.

Practical Tips: Restrictive Covenants

- Monitor developments on the FTC's issuance of a final rule on non-compete covenants.
- Be aware that several states now tie the enforceability of non-compete covenants to threshold compensation levels, and those compensation thresholds differ widely.
- If you have employees in different states, be aware of which state's law is going to govern the enforceability of non-compete agreements.
- There is no prohibition for requiring non-disclosure agreements to protect trade secrets and a company's confidential information.
- The NLRB decision applies to employees covered by the NLRA, which generally means that it does not apply to managers and supervisors.

Sexual Harassment & Sexual Assault Update

In September 2021, a new Texas law expanded the definition of sexual harassment, heightened the standard of an employer's response to complaints, increased the time an employee can file a claim, and placed responsibility on individuals, rather than just companies, for failing to address sexual harassment. Additionally, under the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, individuals bringing sexual assault and sexual harassment claims who entered into pre-dispute arbitration agreements or pre-dispute class- or collective-action waivers now have the option to reject those agreements and waivers and instead bring those claims in court or to bring such claims via a class or collective action. Further, in December 2022, President Biden signed into law the Speak Out Act, which prohibits pre-dispute nondisclosure and non-disparagement agreements that seek to prevent disclosure of sexual harassment or sexual assault allegations.

Practical Tips: Sexual Harassment

- Understand you can no longer enforce non-disclosure and non-disparagement clauses in agreements signed before a claim of sexual harassment or sexual assault occurs. However, these clauses can be included in settlement and severance agreements.
- Arbitration clauses are no longer enforceable for claims of sexual harassment or sexual assault.
- Texas has expanded the definition of sexual harassment to now include any sexual physical or verbal act that “has the purpose or effect of creating an intimidating, hostile or offensive working environment.” Update your policies to reflect the expanded definition of sexual harassment. Train employees on these changes and document the training, including materials used and attendance records.
- Liability attaches if sexual harassment has taken place and the employer or the employer’s agents or supervisors:
  - (1) know or should have known that the conduct constituting sexual harassment was occurring; and
  - (2) fail to take immediate and remedial corrective action.
- In Texas, directors, managers, supervisors, and others can now be held liable in their individual capacity.
- Ensure you take immediate and remedial corrective action when there is a complaint of sexual harassment.

New Federal Legislation

Speak Out Act

- Effective December 7, 2022
- Prohibits ***predispute*** non-disclosure and non-disparagement clauses in employment or severance agreements extending to claims or allegations of sexual assault or sexual harassment.
- Non-disclosure and non-disparagement clauses still allowed in agreements that *resolve* claims of sexual assault or harassment.

Speak Out Act/Tax Deductions

- Section 162(q) of IRC prohibits businesses deducting payments (including attorneys' fees) for sexual harassment or sexual abuse settlements IF the settlement is subject to a non-disclosure requirement.

Speak Out Act Takeaways

- Check and revise, if needed, current employment agreements
  - Pay attention to severability clauses
- For ordinary severance agreements with non-disclosure or non-disparagement clauses, include representation that employee has not been subjected to sexual harassment or assault in the workplace
- If employee says they have been (but that's not what is prompting the agreement) include carve-outs to any non-disclosure or non-disparagement clause for sexual harassment or assault
- Consider state laws
- At-will employees? Think about it now, not later…

Pregnant Workers Fairness Act

- Effective December 29, 2022
- *Young v. UPS* (SCOTUS 2015): Employers must provide reasonable accommodations to pregnant workers to the extent they provided similar accommodations to non-pregnant workers

Pregnant Workers Fairness Act

- PWFA codifies Young, but also (for covered employers (more than 15 employees)):
  - Requires reasonable accommodations using the ADA process (but also carries forward undue hardship defense)
  - Prohibits employer from denying employment opportunities to pregnant women based on their need for reasonable accommodations
  - Prohibits employer from forcing employee to take paid or unpaid leave during pregnancy if another reasonable accommodation (such as light duty) can be provided

PUMP Act

- Effective December 29, 2022
- Background: ACA amended FLSA to require employers to provide nursing mothers reasonable break time to express breast milk after the birth of her child. But:
  - Applied only to non-exempt employees
  - Applied to all employers (except that employers with less than 50 employees could raise an undue hardship defense)
  - Provided protection for up to 1 year following birth of the child

PUMP Act

- Providing Urgent Maternal Protections for Nursing Mothers Act:
  - Applies to nearly all exempt and non-exempt employees (airlines mostly exempt)
  - Expands protection for up to 2 years following birth of the child
  - If employer provides paid breaks, employee who uses break time to pump breast milk must be compensated in the same way as other employees are during those breaks
- PUMP Act continues requirement that the employer provide a place (other than a bathroom) that is shielded from view and free from intrusion from coworkers and the public that can be used to express breast milk.
  - Adds safe harbor: Employee must give employer 10 days' advance notice of non-compliance; employer who complies within 10 days is not liable

Ending Forced Arbitrations of Sexual Assault and Sexual Harassment Act

- Effective March 3, 2022
- Plaintiffs asserting sexual harassment and/or sexual assault claims can opt out of previously signed arbitration agreements.
- Court decides arbitrability even if arbitration agreement gives that power to arbitrator.
- Unclear whether an opt-out would apply to only the sexual harassment and/or assault claims in a case

New Federal Regulations & Agency Priorities

FTC: Proposed Ban on Non-Competes

- Announced January 5, 2023
- Who: - Nearly all employers regardless of size
  - Most workers covered (employees + independent contractors)
- What: Proposed rule prohibiting use of non-competes
- When: To be determined
- Where: Nationwide
- Why: Depressed wages, competition, freedom of movement in labor markets
- How: Federal Trade Commission Act

FTC Non-Compete Ban: Why (per the FTC)

- 1 in 5 workers (30 million people) bound by non-competes
- Prevent workers from leaving jobs
- Decrease competition for workers
- Lower wages
- Prevent new business formation
- Stifle entrepreneurship and innovation
- FTC estimates earnings will increase between $250-296 billion/year

FTC Non-Compete Ban: How

- FTC Act – Section 5:
  - Over 100 years old
  - Prohibits “unfair or deceptive acts or practices in or affecting commerce”
- Section 5 never before used to regulate use of non-competes
- Only enforceable by the FTC; no private cause of action

FTC Non-Compete Ban: Who

- "Employer": Any ***person*** that hires or contracts with a ***worker*** to work for the person.
- "Person": Any natural person, partnership, corporation, association, or other legal entity, including any person acting under color or authority of State law.
- "Worker": A **natural** person who works, when paid or unpaid, for an employer. Includes:
  - Employees
  - Independent contractors
  - Interns, externs
  - Volunteers
  - Sole Proprietors providing services to clients and customers

FTC Non-Compete Ban: Who (continued)

- "Employer": May not include certain industries not covered by Section 5 of the FTC Act, including:
  - Banks, savings and loan institutions, and federal credit institutions
  - Common carriers and air carriers
  - Most entities subject to the Packers and Stockyards Act (meat and poultry industries)
  - Non-profits?

FTC Non-Compete Ban: Who (continued)

- “Worker”: Does not include:
  - Legal entities other than sole proprietorships (e.g., business-to-business*)
  - Franchisees in the context of a franchisee-franchisor relationship
- * Be wary of separate laws restricting certain types of business-to-business non-competes.
  - Antitrust laws
  - DOJ/FTC focus on “no poach” agreements

FTC Non-Compete Ban: What's Covered

- Prohibits ***non-compete clauses*** for new and existing workers.
- "Non-compete clause": A contractual term between an employer and a worker that prevents the worker from seeking or accepting employment with a person, or operating a business, ***after*** the conclusion of the worker's employment with the employer.

  – Examples: "You agree not to provide medical services anywhere within 15 miles of our clinic for two years after your employment ends."

  "You agree not to work for a company that sells any competing products for 18 months following your separation."

FTC Non-Compete Ban: What's Not Covered

- ***Non-disclosure & non-solicitation clauses*** still permitted unless written so broadly to effectively preclude the worker from working in the same field after the conclusion of the relationship (a "***de facto***" non-compete)**.**
  - Examples: Don't use or disclose our confidential information.

    Don't solicit or service our existing customers for 18 months.
  - But what about: Don't solicit any of our **prospective** customers for 18 months?

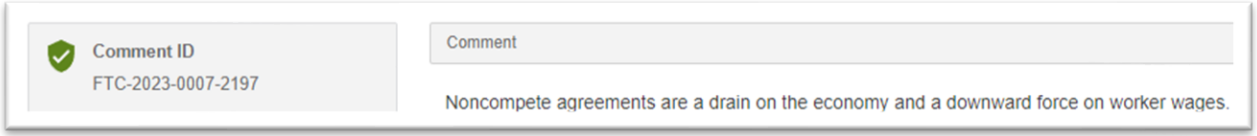
FTC Non-Compete Ban: What's Not Covered (cont.)

- ***Non-competes in connection with sale of business or ownership interest*** if the individual subject to the non-compete is a ***substantial owner*** at the time the person enters into the non-compete.
- "Substantial owner": Owner, member, or partner holding at least a 25% interest.

FTC Non-Compete Ban: When

- 60-day public comment period on proposed rule ends March 20, 2023.
- Stakeholders have requested this period be extended.
- Approximately 11,000 comments received to date.

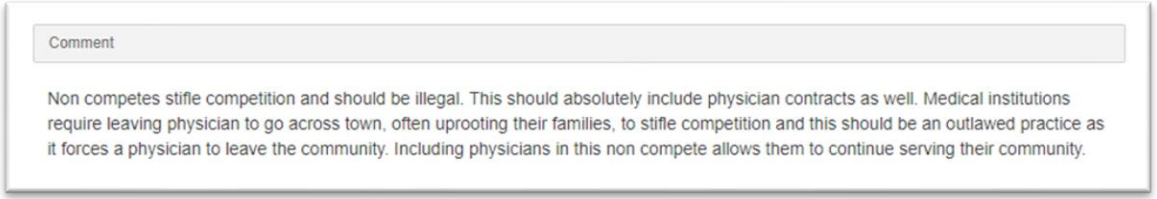
FTC Non-Compete Ban: When (continued)



Comment ID
FTC-2023-0007-2197

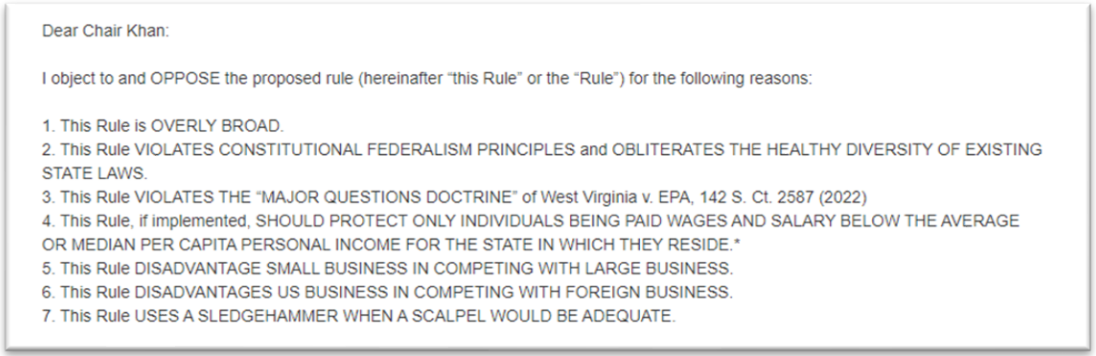
Comment

Noncompete agreements are a drain on the economy and a downward force on worker wages.



Comment

Non competes stifle competition and should be illegal. This should absolutely include physician contracts as well. Medical institutions require leaving physician to go across town, often uprooting their families, to stifle competition and this should be an outlawed practice as it forces a physician to leave the community. Including physicians in this non compete allows them to continue serving their community.



Dear Chair Khan:

I object to and OPPOSE the proposed rule (hereinafter "this Rule" or the "Rule") for the following reasons:

1. This Rule is OVERLY BROAD.
2. This Rule VIOLATES CONSTITUTIONAL FEDERALISM PRINCIPLES and OBLITERATES THE HEALTHY DIVERSITY OF EXISTING STATE LAWS.
3. This Rule VIOLATES THE "MAJOR QUESTIONS DOCTRINE" of West Virginia v. EPA, 142 S. Ct. 2587 (2022)
4. This Rule, if implemented, SHOULD PROTECT ONLY INDIVIDUALS BEING PAID WAGES AND SALARY BELOW THE AVERAGE OR MEDIAN PER CAPITA PERSONAL INCOME FOR THE STATE IN WHICH THEY RESIDE.*
5. This Rule DISADVANTAGE SMALL BUSINESS IN COMPETING WITH LARGE BUSINESS.
6. This Rule DISADVANTAGES US BUSINESS IN COMPETING WITH FOREIGN BUSINESS.
7. This Rule USES A SLEDGEHAMMER WHEN A SCALPEL WOULD BE ADEQUATE.

FTC Non-Compete Ban: When

- FTC may revise the proposed rule based on public comments.
- FTC will then issue a “Final Rule” addressing comments.
- Effective Date (unless FTC modifies): **60 days** after Final Rule issued.
- Compliance Date (same): **180 days** after Final Rule issued

FTC Non-Compete Ban: When

- What does compliance look like?
- **Future non-competes clauses:** Don't require them.
- **Existing non-competes clauses:** Must be rescinded by no later than the compliance date with notice to the worker.
- **Notice requirement:**
  - Individualized communication
  - Written (printed, e-mail, or text message ok)
  - Within 45 days of rescission
  - Current and former workers if contact information "readily available"
  - Proposed Rule includes model language.

FTC Non-Compete Ban: When

But… let's be real:

The FTC's Final Rule **will** be subject to legal challenge.

One or more courts **are likely** to postpone its enforcement pending resolution.

The rule **probably** lands before the U.S. Supreme Court.

FTC Non-Compete Ban: When

- What steps should employers utilizing restrictive covenants take now?
- Option 1: Sit tight but consider what happens if the ban goes into effect.
  - Even if prohibited clauses are rescinded, broader agreements may remain in effect.
  - Employment and severance agreements, confidentiality agreements, etc.
- Option 2: Carefully review existing covenants
  - Do they meet the Proposed Rule's definition of "non-compete clause"?
  - Do they effectively prevent a worker from competing, if not explicitly, then implicitly?
- Option 3: Start considering alternatives
  - Non-solicitation clauses
  - Non-disclosure clauses

DOL: Independent Contractor Rule

- Proposed Rule issued in October 2022
- DOL “seeks to return to longstanding judicial precedent”
- Economic realities test
- Replaces two-factor test adopted under Trump administration
- Comment Deadline Passed – 55,000 comments received

Economic Realities Test

- Opportunity for profit or loss depending on managerial skill
  - Can the worker determine or negotiate the charge for the work provided?
  - Can the worker accept or decline jobs?
  - Can the worker choose the time for the job?
  - Does the worker engage in marketing or advertising?
- Relative investments by the company and the worker in materials and equipment
- Degree of permanency of the work

Economic Realities Test

- Nature and degree of control over the performance of the work
  - How is the schedule set?
  - Is there a limit on the ability of the worker to work for others?
  - How is the work supervised?
  - Is there a disciplinary process?
- Whether the worker's service is integral part of the company's business
- Degree of skill and initiative required

DOL: Telework Guidance for FLSA/FMLA

- Field Assistance Bulletin issued February 9, 2023.
- 20-minute break rule applies to remote workers.
- Same for “bona fide” meal and other breaks lasting 30 or more minutes if completely relieved from duty.
  - Example: Teleworker works from 8-9, then pauses to take kids to school from 9-10, then resumes work.
- Break time and privacy to pump.
- FMLA Eligibility: Hours worked remotely count toward 1,250 threshold; personal residence is not a worksite.

DOL: FMLA Limited Workday

- Opinion letter issued February 9, 2023
- Hypothetical: Employee requests workday capped at 8 hours for medically-related serious health condition
- Permissible under the FMLA? Yes.
- No “reasonable accommodation” analysis permitted.
- Capped workday can continue for as long as employee remains eligible and has not exhausted FMLA leave entitlement.

NLRB: Electronic Monitoring

- General Counsel Memo issued October 31, 2022.
- “Vigorous” enforcement of NLRB position restricting surveillance practices related to organizing activity.
- “Presumptive violations” for use of surveillance devices (tracking devices, dash cams, computer monitoring).
- Employer burden to show it’s monitoring practice is narrowly tailored to address a legitimate business need.
- “Balancing Test”
- Mandatory disclosure of monitoring practices to workforce.

Thank You

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