

FTC's Noncompete Rule and DOL's Minimum Salary Rule: Timely Compliance Considerations for Employers

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FTC Moves Against Non-Compete Agreements

- ▼ January 5, 2023, **Federal Trade Commission** proposed a rule to **eliminate use of non-compete agreements** (including any subset like non-solicitation, non-disparagement or confidentiality agreements that have a similar substantial restraint on employment mobility)
- ▼ Rule would **apply to employees**, independent contractors, consultants, paid and unpaid interns/volunteers, and **virtually any other worker**
- ▼ Upon the rule becoming final, **business would have to affirmatively notify** individuals subject to such an agreement that it is no longer in effect
- ▼ As proposed, the rule would **not apply in the context of a sale of assets** as applied to the seller (or substantial partner in the sale) of those assets
- ▼ Public comment period is open until early March 2023
- ▼ **Hot Take:** if this becomes a final rule, look for a similar outcome to the OSHA COVID-19 Vaccine Mandate rule
- ▼ Public comment period has ended; **waiting on final rule**

DOL Rule To Increase Minimum Salaries for FLSA Exemption (Again)

WHITE COLLAR EXEMPTIONS TODAY

- ▼ **Executive**: \$684 per week; primary duty of management; supervise 2 or more FTEs
- ▼ **Administrative**: \$684 per week; primary duty of office/non-manual work directly related to management/operations of the business; and exercise of independent judgment/discretion over matters of significance to management/operations
- ▼ **Professional**: \$684 per week; performance of work requiring advance knowledge in a field of science/learning, obtained through a prolonged course of advanced, specialized intellectual instruction; consistent exercise of independent discretion/judgment
- ▼ **Computer Employee**: \$684 per week; employed as analyst, programmer, engineer; primary duty of design, development, or systems analysis
- ▼ **Outside Sales**: \$0 minimum salary; primary duty is to make sales away from the employer's workplace

DOL Rule To Increase Minimum Salaries for FLSA Exemption (Again)

- ▼ **Increase minimum salary 54%** to qualify for an executive, administrative, professional, or computer employee exemption from the current **\$684/wk** (**\$35,568/yr**) to **\$1,059/wk** (**\$55,068 per year**)
 - ▼ Automatic adjustment every three years for wage inflation based on 35th percentile of average weekly salaries in the region of the country with the lowest wages (currently the South), **published 150 days in advance** of change taking effect, with **authority for DOL to delay** for unforeseen economic conditions
 - ▼ DOL press release: affects **3.4 million** US workers, will “**restore overtime protections to 3.6 million salaried workers**” and projects an annual cost of **\$6.6 billion** to employers over the next 10 years
- ▼ **No proposal to change the duties tests applicable to the FLSA exemptions**

DOL Rule To Increase Minimum Salaries for FLSA Exemption (Again)

Potential Consequences:

- ▼ Not likely to significantly increase wages
- ▼ Most employers will look to budget neutral solutions
- ▼ Most likely to affect front line managers
- ▼ Evaluate the effect on staffing, policy, compensation, benefits, culture, morale, production, supervision, customer contracts, and budgets
- ▼ **Get potentially affected employees to start tracking hours worked now**

DOL Rule To Increase Minimum Salaries for FLSA Exemption (Again)

Compliance Tools (same as 2016):

- ▼ Increase salary to \$1,059/wk
- ▼ Convert exempt salaried employee to hourly non-exempt
- ▼ Convert FT exempt salaried position into two PT non-exempt hourly positions
- ▼ Restructure jobs to move overtime related functions and responsibilities away from newly non-exempt employee to other employees/jobs that will remain exempt
- ▼ Outsource to a vendor, PEO, temp staffing firm, or independent contractor
- ▼ Fixed salary for a fluctuating workweek
- ▼ Salary plus overtime for newly non-exempt employees
- ▼ Grandfathering certain fringe benefit terms

DOL Rule To Increase Minimum Salaries for FLSA Exemption (Again)

Court Challenges are Inevitable

- ▼ DOL has proposed the rule **without a Senate confirmed Secretary of Labor**
- ▼ The rule is **nearly identical to the Obama-era rule** that was the subject of a nationwide injunction
- ▼ Justice Kavanaugh recently stated in *Helix Energy Solutions Group, Inc. v. Hewitt*, that the FLSA is **focused on the employee's exempt duties, "not how much an employee is paid or how an employee is paid..."** and that **"it is questionable whether the Department's regulations—which look not only at an employee's duties but also at how much an employee is paid and how an employee is paid—will survive if and when the regulations are challenged as inconsistent with the Act."**

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Practical Guidance:

- ▼ Early compliance adopters in 2016 were **kicking themselves** after a federal court issued an injunction on the eve of the rule taking effect
- ▼ The rule is **subject to a public comment** period and **employers should file** public comments at [regulations.gov](https://www.regulations.gov)
- ▼ The rule is **likely to affect budget decisions for 2024**
- ▼ Be thoughtful about workers earning at or near the minimum salary and **consider hiring in non-exempt** until the rule is finalized/clarified

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