



# FTC, FLSA, Disparate Impact

May 9, 2024



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# Agenda

- Critical Legislative Updates
  - FTC
  - FLSA
- Disparate Impact Discrimination
  - What is it?
  - Case law examples

# Critical Legislative Updates:

Federal Agencies have been busy this week!

- Federal Trade Commission bans noncompete agreements – future and current
- FLSA Salary Basis Increased:
  - \$844/week July 1, 2024
  - \$1,128/week January 1, 2025
  - Increase every 3 years
  - Still must meet duties test



# FTC:

## Why now?

- Growing reluctance by courts to enforce such agreements
  - Misuse by employers
  - Types of employees
  - Length of time/scope
  - Uneven bargaining and litigation power.
- Many states have already imposed limitations
  - Either prohibition
  - Or limiting them to employees who earn a certain amount (usually well over \$100,000)



# FTC:

FTC believes it has authority to issue regulations to oversee this because noncompetes affect commerce.

- About one in five American workers—approximately 30 million people—are bound by a non-compete clause and are thus restricted from pursuing better employment opportunities.
- The FTC estimates that the proposed rule would increase American workers' earnings between \$250 billion and \$296 billion per year.



# FTC:

- Prohibits ALL current and future noncompetes.
  - except sales of business; and
  - current noncompetes with “senior executives” who earn more than \$151,164/year and make policy decisions.
- Does NOT apply to nonprofits (beyond the scope of FTC authority)
- Requires clear notice of prohibition regarding noncompetes by employer to any affected worker.
- “Worker” includes employees AND independent contractors.
- KEY POINT: This applies to ANY agreement – whether labeled as a noncompete or not – which has the potential to “chill” the ability of a worker to change jobs. Not well-defined but certainly could apply to anti-poaching agreements and/or overly-broad non-disclosure agreements.
- Many unknowns (e.g. how will this apply to deferred compensation that includes a noncompete etc.)
- Effective 120 days after publication in Federal Register.
- Will this withstand a Court challenge? And, if not, why did we just waste the last 10 minutes on this?

# FLSA:

For an employee to be exempt they must meet BOTH the duties test and the salary basis test for the particular exemption.

The most common exemptions are the executive, administrative and professional exemptions.

## Who will become eligible for overtime pay under the final rule?

Date:	Most salaried workers earning less than:
Currently	\$684/week (\$35,568/year)
July 1, 2024	\$844/week (\$43,888/year)
Jan. 1, 2025	\$1,128/week (\$58,656/year)

*Starting July 1, 2027, the eligibility thresholds will be updated every three years, based on current wage data.*

dol.gov/OT

## FLSA:

### Highly Compensated Executives:

The rule will also increase the total annual compensation requirement for highly compensated employees (who are not entitled to overtime pay under the FLSA if certain requirements are met) from \$107,432 per year to \$132,964 per year on July 1, 2024, and then set it equal to \$151,164 per year on Jan. 1, 2025.

Must also perform office/nonmanual work and perform at least one duty from the EAP exemptions.





## FLSA:

Employers may use nondiscretionary bonuses and incentive payments (including commissions) to satisfy up to 10% of the standard salary test requirements for white collar employees, so long as the bonuses are paid at least annually.

Additionally, employers may use nondiscretionary bonuses and incentive payments earned during a 52-week period for calculating the compensation threshold for the HCE exemption, so long as they are not used to satisfy the weekly standard salary level portion of the exemption test.

- **FLSA:**

- The Department of Labor (DOL) estimates that the proposed rule would result in a Year 1 income transfer of \$1.2 billion from employers to employees, predominantly from new overtime premiums, or pay raises to maintain the exempt status of some affected employees.

- Beyond these wage transfers, the proposal could reduce the risk of misclassification, increase worker productivity, reduce employee turnover, and increase personal time for workers.



## FLSA:

Timeline will likely be pushed back by the courts.

Likely will head to Supreme Court (Justice Kavanaugh has invited this case – saying he doesn't believe that the law requires a salary basis test/DOL's regulations are invalid).

IF the courts approve, employers will have little to no time to implement.

Look now for three “buckets” of employees – clearly nonexempt, clearly exempt, newly nonexempt.

Decide how to handle newly nonexempt (e.g. pay OT, raise salary when needed, hire more for less OT, restrict working OT, etc.) - You want a contingency plan in place!

# Disparate Impact Discrimination:

What is the difference between disparate treatment vs. disparate impact discrimination?

**Disparate Treatment** – direct or overt discrimination

**Disparate Impact** - is a facially neutral rule, policy, plan, whatever that has an adverse impact on a protected class, without any legal justification. **NO INTENT NEED BE PROVEN.**

Results in substantially different rate of selection in hiring, promotion or other employment decision which works to the disadvantage of members of a protected class. What is “substantially different?” (Proven through statistics.)

- Often looks at 80% rule – but not exclusive method of determining disparate impact.

Disparate impact is most commonly found with:

- Tests – physical, skills-based, educational based and/or intellectual
- Layoffs

EEOC says AI disparate impact discrimination is an enforcement issue.

- AI “learns” from historical information or the people who input information – all of which may contain biases that AI will “learn” from and incorporate.

**NOTE: DOL is concerned about AI making erroneous assumptions about who is/is not entitled to OT.**

## Disparate Impact:

### **Waisome v. Port Authority of NY/NJ – 2<sup>nd</sup> Circuit**

For promotion, a port authority police officer had to pass: 1.) written test; 2.) oral exam; 3.) social/psychological problem-solving test.

617 candidates – 508 white; 64 black; 45 in other groups.

Written test passed: 455 white; 50 black. This translated into white candidates having a passing rate of 89.57 percent and black candidates having 78.13 percent passing rate.

Oral exam passing rates: white: 57.58%; black: 67.35%

Problem-solving exam passing rates: white: 94.37% and black: 94.17%

Ultimate promotions rates: Promotions made from the eligible list from the “top down” in scores resulting in 78 white promotions and 5 black promotions over 3-year span.

# Disparate Impact:

## **Ricci v. DeStefano – U.S. Supreme Court 2009**

Test to promote firefighters. 19 whites passed, 1 Hispanic, 0 blacks

City threw out test results and would not promote anyone because of disparate impact

What did the Supreme Court say?

# Disparate Impact:

## Meacham v. Knolls Atomic Power Laboratory – Supreme Court 2008

Layoff of 31 individuals; 30 over age 40.

Determining factors:

- Performance
- Years of service
- Flexibility
- Criticality of skills

Trial court found in favor of employees as did Circuit Court on appeal.

What did the Supreme Court say?

Take away for employers! Use counsel with layoff decisions.



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**Thank You**