GAWDA GASES AND WELDING DISTRIBUTORS ASSOCIATION	**Member Alert**
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Federal Court Issues Preliminary Injunction Against FTC Non-Compete Rule

A federal court judge in Texas has issued a preliminary injunction against the Federal Trade Commission's ban on non-compete agreements for departing employees, which is scheduled to go into effect on September 4, 2024.

By its terms, the preliminary injunction only applies to the specific Plaintiffs and Plaintiff-Intervenors in the case: Ryan LLC, a tax services firm located in Texas; the Chamber of Commerce of the United States; the Business Roundtable; Texas Association of Business; and the Longview Chamber of Commerce. Although the business associations generally file suit on behalf of their member companies (and their standing to sue is based on this representational capacity), it is unclear whether the injunction also applies to each of the member companies of the associations.

But the court's opinion indicated the judge would issue an ultimate decision on the merits of the case by August 30, 2024, which is before the rule is scheduled to go into effect, so the scope of the preliminary injunction is largely academic.

In granting the preliminary injunction, the court ruled that the FTC lacks substantive rulemaking authority with respect to unfair methods of competition under

Section 6(g) of its enabling statute, the Federal Trade Commission Act. Thus, the court held the Commission could not issue the rule to ban most non-compete agreements. In reviewing the statutory grant of authority, the court gave no deference to the FTC's interpretation of its powers, citing the Supreme Court's recent decision in Loper Bright Enterprises v. Raimondo, and instead considered the statute as a matter of first impression.

Thus, the court found the Plaintiffs were likely to succeed on the merits because the Act does not expressly grant the Commission authority to promulgate substantive rules regarding unfair methods of competition.

The preliminary injunction does not affect the four States (California, New York, North Dakota and Oklahoma) that prohibit non-compete agreements or the various State laws that limit or restrict their terms.

Federal Court Enjoins DOL Overtime Rule as to State of Texas

A federal court has enjoined implementation of the U.S. Department of Labor's final rule increasing the threshold salary amounts for Executive, Administrative and Professional employees to be exempt from overtime pay requirements.

The final rule increased the standard salary level employee total annual compensation threshold on the rule's effective date of July 1, 2024. The rule will again increase the thresholds on January 1, 2025, when changes in the methodologies used to calculate these levels become applicable. The final rule also provides for future updates of these levels every three years to reflect current earnings data.

On July 1, 2024, the salary level exemption increased from $684 per week (equivalent to $35,568 per year) to $844 per week (equivalent to $43,888 per year). On July 1, 2025, the salary exemption level will increase again to $1,128 per week (equivalent to $58,656 per year).

The State of Texas filed suit as an employer and sought a preliminary injunction, which the court granted. The court's ruling only applies to the State of Texas and not to private employers in Texas or elsewhere, but the decision is an indication of how other courts will rule.

A number of national business organizations have also filed suit in federal court in Texas challenging the final rule threshold salary amounts for Executive, Administrative and Professional employees to be exempt from overtime pay requirements.

That additional lawsuit, filed by 13 business organizations, alleges the final rule impermissibly makes an employee's salary level rather than the employee's duties the determining factor in whether the worker is exempt from overtime requirements. The complaint asserts that Congress did not authorize the Department of Labor to make the salary test the sole determining factor in this inquiry.

In 2017, the same court struck down an Obama Administration increase in overtime threshold salary requirements and prohibiting the Department from increasing the minimum salary for exemption to a level that "essentially make[s] an employee's duties, functions, or tasks irrelevant if the employee's salary falls below the new minimum salary level." The court further held unlawful the Department's attempt to "make salary rather than an employee's duties determinative of whether a 'bona fide executive, administrative, or professional capacity employee' should be exempt from overtime pay," and also struck down the Department's indexing automatic increases in the salary threshold without notice or comment as required by law.

DOT Secretary Asserts Marijuana Reclassification Will Not Affect Drug Testing Requirements

At a June 27 oversight hearing by the House Transportation and Infrastructure Committee, Transportation Secretary Pete Buttigieg assured members that the Drug Enforcement Administration's recent proposal to reclassify marijuana from Schedule I to Schedule III will not affect the current requirements to test transportation workers, including truck drivers, for marijuana.

The American Trucking Associations has argued that the DOT drug testing rules are governed by the Department of Health and Human Services mandatory guidelines which limit testing to Schedules I and II drugs. Secretary Buttigieg testified that the DOT requirements refer to cannabis by name, and not merely by the class of drug, so the agency's testing program would not be affected by reclassification.

OSHA Issues Proposed Rule to Protect Workers from Heat Illness and Injury

The Occupational Safety and Health Administration has issued a proposed rule to protect indoor and outdoor workers from heat illness and injury while on the job.

The Administration said excessive heat in the workplace can cause a number of adverse health effects, including heat stroke and even death, if not treated properly. According to the Bureau of Labor Statistics, 479 workers in the U.S. died from exposure to environmental heat from 2011-2022, an average of 40 fatalities per year in that time period. Additionally, there were 33,890 estimated work-related heat injuries and illnesses that resulted in days away from work from 2011-2020, an average of 3,389 per year in that time period.

The proposal is expected to be published in the Federal Register in the next few days. If finalized, the rule would affect 35 million workers nationwide.

The regulatory text shows that employers will have to have a written heat injury and illness prevention plan and monitor heat levels at each work site, both indoors and outdoors. OSHA would adopt two heat index thresholds that would apply nationally and would factor in humidity as well as temperature. One, at 80 degrees Fahrenheit, would require employers to provide drinking water and break areas that workers can use as needed. Employers would also need to have a plan for new and returning workers to gradually increase their workload so their bodies adjust to the heat.

More protections would kick in at 90 degrees, including monitoring for signs of heat illness and mandatory 15-minute rest breaks every two hours. Employers would be required to check on people working alone every few hours and to issue a hazard alert, reminding their workers of the importance of staying hydrated.

The employer would have to review and evaluate the effectiveness of the heat plan whenever a heat-related illness or injury occurs that results in death, days away from work, medical treatment beyond first aid, or loss of consciousness, and also at least annually. The employer would also have to make the plan readily available at the work site to all employees performing work at the work site.

At outdoor work sites, the employer would be required to provide one or more area(s) for employees to take breaks that can accommodate the number of employees on break, is readily accessible to the work area(s), and has at least one of the following:

(a) Artificial shade (e.g., tent, pavilion) or natural shade (e.g., trees), but not shade from equipment, that provides blockage of direct sunlight and is open to the outside air; or
(b) Air-conditioning, if in an enclosed space like a trailer, vehicle, or structure.

At indoor work sites, the employer must provide one or more area(s) for employees to take breaks (e.g., break room) that is air-conditioned or has increased air movement and, if appropriate, de-humidification, can accommodate the number of employees on break, and is readily accessible to the work area(s).

The employer must also provide one or more of the following heat controls at indoor workplaces:

- Increased air movement, such as fans or comparable natural ventilation, and, if appropriate, de-humidification;
- Air-conditioned work area; or
- In cases of radiant heat sources, other measures that effectively reduce employee exposure to radiant heat in the work area (e.g., shielding/barriers, isolating heat sources).

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