

MOVING TARGETS: Wage and Hour Law; Non-Competes; and PA's Medical Marijuana Law

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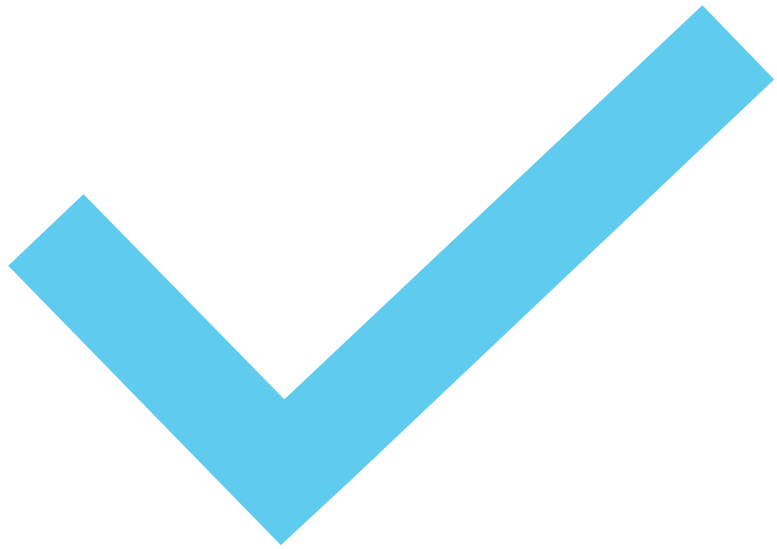
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Today's Discussion

- ▶ Wage and Hour Developments: Federal and State
- ▶ Non-Competes: FTC Regulation and PA Health Care Practitioners
- ▶ Medical Marijuana Update



Wage and Hour Developments - Federal and State

Threshold Question: Employee or Independent Contractor

- ▶ DOL Fact Sheet (March 2024)
- ▶ <https://www.dol.gov/agencies/whd/fact-sheets/13-flsa-employment-relationship>

For Wage and Hour Purposes, apply the “economic realities” test, to determine Employee v. Independent Contractor Status

The following factors, discussed more below, should guide the assessment of whether a worker is an employee under the FLSA or an independent contractor in business for themselves:

1. Opportunity for profit or loss depending on managerial skill,
2. Investments by the worker and the employer,
3. Permanence of the work relationship,
4. Nature and degree of control,
5. Whether the work performed is integral to the employer’s business, and
6. Skill and initiative.

**Federal FLSA Earnings thresholds for EAP Employees
(Part 541- White Collar Exemptions- Executive, Administrative and Professional)**

Earnings Threshold	Current Amount	Minimum Salary Amount Beginning July 1, 2024	Minimum Salary Amount Beginning January 1, 2025
Standard Salary Level	\$684 per week (equivalent to a \$35,568 annual salary)	\$844 per week (equivalent to a \$43,888 annual salary)	\$1,128 per week (equivalent to a \$58,656 annual salary)
Total Annual Compensation Requirement for Highly Compensated Employees (HCEs)	\$107,432 per year, including at least \$684 per week paid on a salary or fee basis	\$132,964 per year, including at least \$844 per week paid on a salary or fee basis	\$151,164 per year, including at least \$1,128 per week paid on a salary or fee basis
Special Salary Compensation Required for Computer Employees Paid on an Hourly Basis	\$27.63 per hour	\$27.63 per hour	\$27.63 per hour

The Backstory:

To Be Exempt from Overtime Under the FLSA, An Employee Must...

- ▶ Be paid the salary threshold amount weekly, which we are about to discuss
- ▶ Receive a salary with no deduction for quantity or quality of work
- ▶ Comply with the white-collar duties test

However: State Law Can Top FLSA Requirements



You must then comply with the stricter requirements.

<http://www.dol.gov/whd/minwage/america.htm>



Dilemma

- ▶ You can be “clean” under the FLSA, and “duty” under the PMWA, or vice versa.



Selected Non-Exhaustive Examples of Differences between Federal and Pennsylvania

- ▶ Highly Compensated Employees Acceptable Under Fair Labor Standards Act (“FLSA”), not Pennsylvania Minimum Wage Act (“PMWA”)
- ▶ NO Computer Employee Exemption Under PMWA, Applicable under FLSA
- ▶ Overtime for Health Care Institutions Stricter Under PMWA, than FLSA

Wage and Hour - Federal Wage Threshold Increase

- ▶ A partial injunction was issued on June 28, 2024 but that only applies to employees of the State of Texas for the \$844 weekly salary threshold.

Challenges Pending

- ▶ **April 23, 2024.**
- ▶ *Plano Chamber of Commerce v. U.S. Department of Labor*, (E.D. Texas) was filed in the U.S. District Court for the Eastern District of Texas and alleges that the DOL “acted arbitrarily, capriciously, and otherwise not in accordance with the law” in issuing the new rule, which was released. April 23, 2024.
- ▶ This litigation also seeks a nationwide injunction, but no nationwide injunction is currently in place on this set of regulations, so compliance is required.
- ▶ **August 31, 2017**, a federal judge in Texas invalidated highly controversial proposed revisions to federal overtime regulations that were supposed to go into effect on December 1, 2016. [An earlier set of overtime threshold exemptions]. The same judge previously had issued a nationwide temporary injunction blocking the [earlier set of overtime threshold regulations].

Nationwide Injunction of DOL Tip Rule

- ▶ *Restaurant Law Center v. U.S. Department of Labor* (5th Cir., August 23, 2024)
 - ▶ Remands case back to the district court for consideration
- ▶ Court determined that DOL had exceeded its authority by limiting to 20% amount of work that could be done in non-tip supporting activities, and limiting to 30 minutes the amount of time during a shift that a tipped employee may spend in activities directly supporting tips.

PMWA Update

- ▶ The FLSA salary threshold for white-collar exempt employees (Executive, Administrative, and Professional) is set at \$35,568 annually or \$674 weekly.
- ▶ Pennsylvania had issued regulations increasing that amount in October of this year and again in October of 2022 above the then federal minimum by approximately \$5,000 annually. Annualized the weekly increase would have been to \$780 or \$40,560 annually.
- ▶ That regulation was abrogated/rescinded as part of the Pennsylvania Budget Deal.
- ▶ The 2024 Federal threshold now controls.

PMWA Salary Threshold

- ▶ **October 3, 2020:** Pennsylvania adopted a change in its White-Collar salary threshold for administrative, executive and professional employees to be considered exempt from overtime payments. Effective October 3, 2021, Pennsylvania's salary threshold was to increase to \$780 per week (\$40,560 annually), while the same threshold under the federal Fair Labor Standards Act ("FLSA") would have remained at \$684 per week (\$35,568 annually).
- ▶ **June 2021:** That Pennsylvania regulation was abrogated in June 2021.
- ▶ For now, the federal FLSA thresholds, shown on the chart above, apply in Pennsylvania with the **higher level becoming effective on January 1, 2025.**

For Now, Forget About The Pennsylvania Threshold For the PMWA Overtime Exemption: PA Regulations Abrogated

- ▶ Note that the regulations contained on the Pennsylvania Department of Labor and Industry website as of November 9, 2021 are no longer correct in terms of dollar thresholds or in terms of the verbiage shown for the “white collar” exemptions. This language, albeit closer to the FLSA language, has been repealed.
- ▶ The website shows the regulations that were abrogated on April 23, 2024.
- ▶ For now, follow the 2024 Federal Threshold in Pennsylvania because it is more advantageous to employees than the last applicable Pennsylvania threshold amount.

The Secret to Success: Understand How to Calculate the “Regular Rate”



Compliance

- ▶ At its core, wage and hour compliance is not complicated. For hourly, non-exempt employees, the employer must obtain the number of hours worked by the employee and multiply that by the employee's regular rate of pay for the first 40 hours, and then multiply by 1.5 times the employee's regular rate of pay for hours worked after 40 hours in a workweek.
- ▶ The lack of compliance results from applying an improper exemption; not counting the number of hours properly and not computing the regular rate of pay properly.
- ▶ Watch out for Pennsylvania "compliance traps."

Regular Rate

- ▶ Determined by dividing total earnings in workweek by total number of hours worked in workweek

$$\text{Total Compensation} \div \text{Total Hours Worked} = \text{RR}$$

- ▶ Regular Rate may not be less than the applicable minimum wage
- ▶ Total earnings include commissions, certain bonuses, and cost of room, board, and other facilities provided primarily for the employee's benefits

Regular Rate

- ▶ Bonuses paid to employees on a non-discretionary basis must be included in the calculation of the “regular rate” of pay for employees.
- ▶ Recent problems and significant penalties resulted from failure to include COVID bonuses within the “regular rate” when computing overtime payments.

Exclusions from the Regular Rate

- ▶ Gifts, discretionary bonuses
- ▶ Payments for time not worked
- ▶ Reimbursements for expenses
- ▶ Profit sharing plans, stock options
- ▶ Retirement and insurance plan contributions
- ▶ Overtime premium payments

Pay, Then Discipline

- ▶ Many employers face wage and hour violations for failing to pay employees for unauthorized overtime.
- ▶ The basic rule is pay employees, even if overtime is unauthorized, and discipline the employee for failure to follow your policies.
- ▶ Make sure your policy requires employees to receive authorization for any hours worked over a maximum number of hours in a workweek dictated by your normal workweek of 35, 37.5 or 40 hours.
- ▶ *Vacation, PTO, holidays, and other time NOT worked is not used for this calculation UNLESS your policy or CBA provides differently.*




DOL Timesheet App

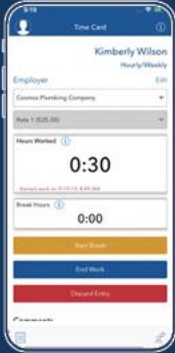
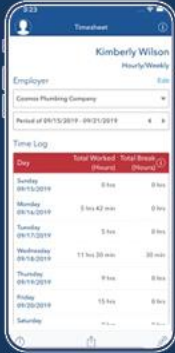
<https://www.dol.gov/agencies/whd/timesheet-app>


Track Your Hours: Just Tap the App

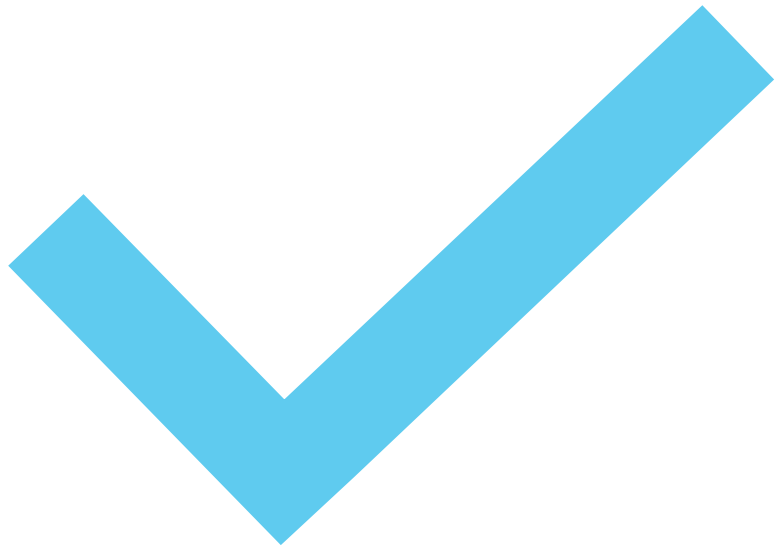
DOL-Timesheet App

- ✓ For workers *and* employers
- ✓ Calculates pay automatically
- ✓ Records work hours simply and quickly
- ✓ Available for iOS and Android
- ✓ English and Spanish versions

 dol.gov/whd



CHANGES IN RESTRICTIVE COVENANTS: Federal FTC Regulation and PA Law

Federal Non-Compete Change

- ▶ The Federal Trade Commission (“FTC”) Regulation and Non-Competes
 - ▶ The FTC issued sweeping final regulations on non-competes on April 23, 2024, with an intended effective date of September 4, 2024.
 - ▶ The FTC determined that a non-compete is an unfair method of competition violating Section 5 of its enabling legislation.
 - ▶ More information is available at: <https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-rule-banning-noncompetes>.
 - ▶ Effective date is September 4, 2024.

Exceptions from the FTC Regulation

- ▶ Senior Executives earning more than \$151,164 annually.
- ▶ Sale of a business or interest in a business

More Decisions on the Federal Non-Compete

- ▶ August 14, 2024: Federal Court for the Middle District of FL ruled that FTC non-compete ban cannot be enforced because it exceeded the FTC's authority. The ruling only applies to those involved in that case. *Properties of the Villages, Inc., v. FTC.*
- ▶ A Pennsylvania case upheld the FTC ruling in July. (ED, PA).

Breaking News: Federal Court Strikes FTC's Non-Compete with Nationwide Impact

- ▶ The Honorable Ada Brown
- ▶ Decision: August 20, 2024
- ▶ Ryan LLC v. FTC, No. 3:24-CV-00986-E, 2024 U.S. Dist. LEXIS 148488 (N.D. Tex. Aug. 20, 2024)(PERMANENT INJUNCTION)
- ▶ Ryan LLC v. FTC, No. 3:2024cv00986 (N.D. Tex. 2024)
<https://law.justia.com/cases/federal/district-courts/texas/txndce/3:2024cv00986/389064/153/> (Preliminary Injunction)



Pennsylvania’s “Fair Contracting for Health Care Practitioners Act”

- ▶ Pennsylvania adopted the “Fair Contracting for Health Care Practitioners Act”
- ▶ Act 74 of 2024
- ▶ Sponsored: The Honorable Dan Frankel (D-Allegheny)
- ▶ Signed: July 17, 2024
- ▶ Effective: January 1, 2025
- ▶ Full text:

https://www.legis.state.pa.us/cfdocs/billinfo/bill_history.cfm?syearch=2023&sbid=0&body=H&type=B&bn=1633



IMPACT

Act 74 severely limits non-competes for health care practitioners (including doctors (MD/OD), nurse anesthesiologists, physician assistants, and nurse practitioners) at a health care facility or office, after its January 1, 2025, effective date.



Act 74 (2024) Pennsylvania Health Care Non-Compete Law ALLOWS

- ▶ Non-competes of no more than one year if the employee health care practitioner was not dismissed by the employer.
- ▶ Non-Competes coupled to the sale of a business or business interest.
- ▶ Recovery of training costs and reasonable expenses over a 5-year period.

Health Care Practitioners: Defined

- ▶ Doctors (MD/OD)
- ▶ Nurse Anesthesiologists
- ▶ Physician Assistants, and
- ▶ Nurse Practitioners

...working at a health care facility or office.

Primary Health Care Facility: Defined

- ▶ Primary health care facility or office is defined as:
“The office, facility or location where a majority of the revenue derived from a health care practitioner's services is generated.”

CONCERNS

- ▶ Impact on pre-existing non-competes based only in employment, not business sales
- ▶ Issues related to impairment of existing contracts
- ▶ Lack of enforcement agency/regulatory ability
- ▶ Health Care Cost Containment Council is authorized to study and report back to the General Assembly

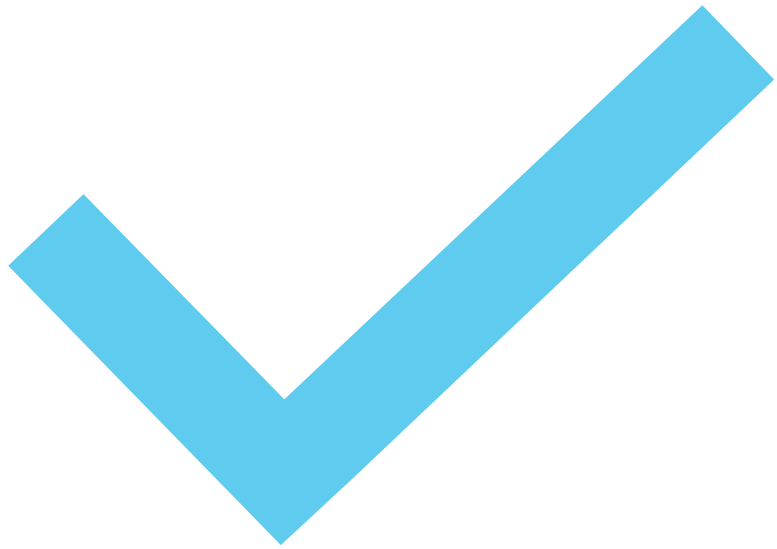
Effective Date May Spawn Litigation

- ▶ Effective date is January 1, 2025
- ▶ However, language in the bill attempts to void preexisting non-competes for health care practitioners, who are not a party or a sale or transfer of a business

What to Think About After Non-Compete Bans to Protect Your Business

- ▶ Trade Secret Laws
- ▶ Confidentiality Agreements
- ▶ Non-Disclosure Agreements





Medical Marijuana in the Workplace

Employers

- ▶ May not discharge, threaten, refuse to hire, or otherwise discriminate or retaliate against an employee based solely on the employee's status as a person certified to use medical marijuana.
- ▶ Are **not** required to:
 - accommodate medical marijuana use at a place of employment; or
 - commit an act that would put the employer or any person acting on its behalf in violation of federal law.
- ▶ May discipline employees for being under the influence of medical marijuana at work or while working if the employee's conduct falls below the standard of care normally accepted for that position.

▶ A federal district court has clarified that a plaintiff must prove that an employer's discrimination or adverse action was based "solely" on their status as a medical marijuana cardholder. A plaintiff must show both that:

- They were discriminated against on the basis of their medical marijuana cardholder status.
- But for their status as a medical marijuana cardholder, they would not have suffered an adverse employment action.

▶ (*Reynolds v. Willert Mfg. Co.*, 2021 WL 4860759 (E.D. Pa. Oct. 19, 2021) (granted summary judgment to employer because plaintiff could not show that the employer knew of plaintiff's status as a medical marijuana patient at the time of termination).)

Fegley v. Firestone Tire & Rubber, 291 A.3d 940 (Pa. Cmmw. 2023)

- ▶ There is no language in MMA precluding workers' compensation carrier from “reimbursing” claimants who lawfully use medical marijuana to treat accepted work injury when such treatment is medically reasonable and necessary; and
- ▶ Employer's failure to reimburse claimant's out-of-pocket costs for medical marijuana to treat his work-related injury was a violation of the Workers' Compensation Act; abrogating *Heckman v. Workers' Compensation Appeal Board (BBU, Inc.)*, 2020 WL 1817378.

Questions?



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Thank you!



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