Labor and Employment LAW

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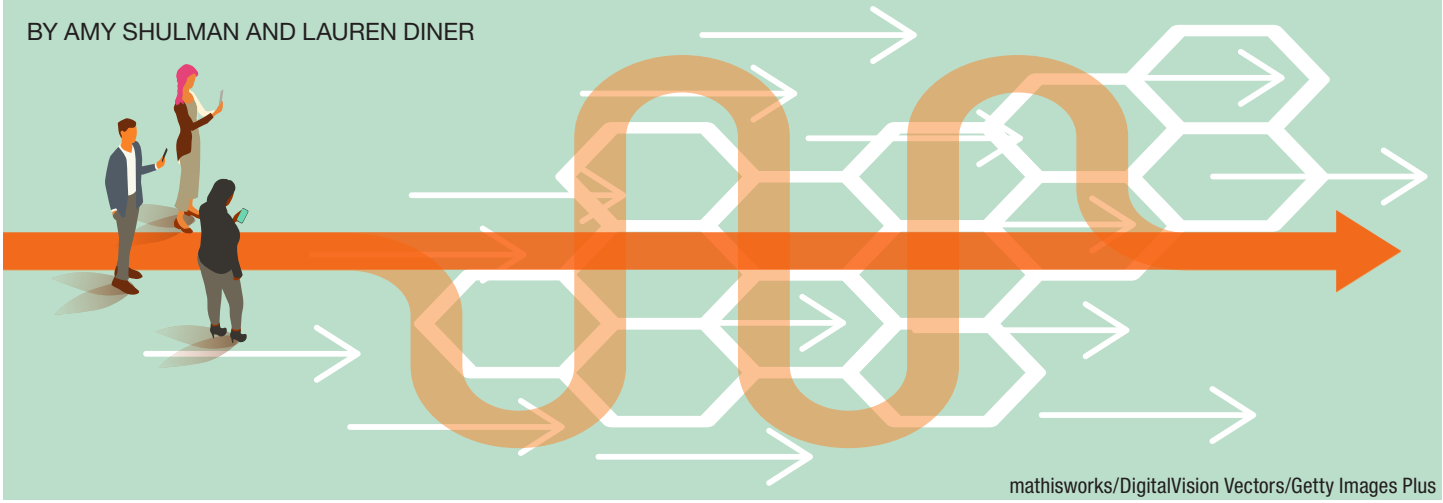
Non-Competes

Where Are We Now?

BY AMY SHULMAN AND LAUREN DINER



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When the Federal Trade Commission ("FTC") proposed a rule on January 5, 2023, banning most non-compete agreements, Non-Compete Clause Rule, 88 Fed. Reg. 3482 (Jan. 19, 2023), it was seen as a watershed moment in the evolving landscape of restrictive covenant law. Worker advocates hailed the proposed rule as necessary to ensure that workers can leave their jobs for better or even comparable opportunities, while employers strenuously opposed it as abrogating their contract rights and threatening their abilities to safeguard confidential information. After receiving thousands of comments, on April 23, 2024, the FTC promulgated a final rule (the "Rule"), Non-Compete Clause Rule, 89 Fed. Reg. 38342 (May 7, 2024) (to be codified at 16 C.F.R. Pt. 910, et seq.) prohibiting most non-competes, but litigation ensued, and enforcement was enjoined. Thus, two years later, what, if anything, has changed?

The FTC's Non-Compete Ban and the Ensuing Challenges

Non-compete agreements generally prevent employees from leaving a job to work for a competitor or to work within a specific industry or field for a specified period of time after employment ends. Previously, non-competes were predominantly regulated by states. A small number of states banned non-competes completely, and a growing number of states limited non-competes in certain industries or by income level, but many states enforced non-competes to the extent they fell within judicially established standards of reasonableness.

The FTC found that non-competes are unfair methods of competition, within the meaning of the Federal Trade Commission Act, 15 U.S.C. § 41, et seq. (the "Act"), because they restrict employee mobility and are often coercively imposed. 89 Fed. Reg. 38364-65. The Rule, which was set to take effect on September 4, 2024, would prohibit enforcement of most new non-competes and void existing non-competes except for those entered into by certain "senior executives." (The Rule would not apply to companies excluded by the Act, such as certain banks, savings and loan institutions, federal credit unions, non-profits, and common carriers.)

Within hours of the FTC's vote to promulgate the Rule, Ryan LLC filed a federal lawsuit in the Northern District of Texas to block the Rule's enforcement. Similar actions to block the Rule followed: on April 25, 2024, ATS Tree Services, LLC filed suit in the Eastern District of Pennsylvania, and, on June 21, 2024, Properties of the Villages, Inc. ("POV") filed suit in the Middle District of Florida.

The FTC promulgated the Rule pursuant to Sections 5 and 6(g) of the Act, which authorize the FTC to prevent unfair methods of competition and to "make rules and regulations for the purposes of carrying out the provisions of" the Act, respectively. 15 U.S.C. §§ 45(a)(1)-(2) and 46(g). The plaintiffs alleged that: (1) the FTC lacked authority to issue substantive regulations governing unfair methods of competition; (2) even if the FTC had such authority, the Rule exceeded it because it implicated a "major question" that only Congress could decide, and (3) the Rule was arbitrary and capricious in violation of the Administrative Procedures Act, (5 U.S.C. § 706(2)(A)). (Under the "major questions doctrine," an agency can only decide an

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THE SECTION

BY JOSEPH J. TORRES, CHAIR

New Year Heralds Another Exciting New Year of Midwinter Meetings

Happy New Year! I hope you all had a chance to take some time with your families, and relax and recharge for the coming year.

Once again, we begin the year with an exciting roster of Midwinter Meetings. Whether you are a longstanding member or someone just getting involved in the Section, these meetings are an excellent way to get up to speed on cutting-edge legal developments in a variety of areas. They are also outstanding vehicles for engaging with other Section members and expanding your professional network.

Just like prior years, attendees at these meetings will come from all constituencies and from across the world. The meetings will also provide helpful information regarding how you can become more involved in the various Section committees.

Information regarding the various meetings, their locations, and the meeting agendas can be found at https://www.americanbar.org/groups/labor_law/events_cle/mw/. As you will see, the meetings span a variety of subject matters and run from late January through early May 2025.

I hope you have time to join us this year for one or more of the meetings. I have had the pleasure of attending a wide variety of meetings over my 20+ years in the Section, and I have always found them informative, welcoming and fun! If you have questions about any of the meetings feel free to reach out to me at jtorres@jenner.com.

Best wishes for an engaging and productive year and look forward to seeing you at one of this year's meetings. •

Joseph J. Torres is a Partner at Jenner & Block LLP in Chicago, Illinois, where he serves as Co-Chair of the firm's ERISA Litigation, Business Litigation, and Labor and Employment practices.

Section Chair Joe Torres presents the 2024 Frances Perkins Public Service Award to Nathalia Varela, Supervising Attorney, Workplace Justice Project, and Elizabeth Joynes Jordan, Co-Legal Director, on behalf of Make the Road New York at the Annual Section Conference in New York City.

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Political Parties and Working Americans

Is There Anything New Here?

BY MARK RISK

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In September 2023, Joe Biden became the first U.S. president to walk a picket line. In July 2024, Teamsters president Sean O'Brien became the first union leader to address the Republican National Convention. Are the Democratic and Republican parties competing more vigorously for the support of working Americans and their families? Can the Republicans become the party of the working class?

According to census data, as of 2021, fewer than 40% of Americans aged 25 and older had a four-year college degree. There is evidence that the New Deal political coalition, in which workers supported the Democratic Party and the economic policies of an active federal government willing to intervene in the market, is over. The election results appear to confirm that white Americans without a college degree, in particular men, have defected in large numbers to Donald Trump's Republican Party. Hispanic and Black working people are also doing so in increasing numbers.

Economic policies embraced by both political parties that have facilitated the reduction of corporate costs by offshoring jobs to less developed countries, and the resulting hollowing out of the American manufacturing base, have caused the destruction of working-class communities throughout the United States.

A decade ago, economists Anne Case and Angus Deaton were surprised to learn from public health statistics that the mortality rate for white working-class males was rising, a statistical anomaly in view of the pace of medical advances. Their 2020 book *Deaths of Despair and the Future of Capitalism* attributed this increase to deaths from drug overdoses, suicide, and alcohol-related disease, which they associated with the decline of working-class communities and the industrial base.

Traditionally, Republican political candidates, including Mitt Romney in his presidential run of 2012, have advanced economic policies that favored free markets and a lighter regulatory touch, arguing that prosperous businesses are the best thing for working Americans because rising profits would lift all boats.

That view seems to have changed in some parts of the Republican party. In 2018, Oren Cass, a young lawyer who had served as domestic policy director on the Romney campaign, published *The Once and Future Worker*, an attempt to put forward "conservative" or even "populist" policy proposals that would favor workers. Cass then established a think tank called American Compass to advance these principles.

Cass says the goal of economic policy should be "human flourishing," and that "the economy is supposed to be serving people, not people serving the economy." "[S]trong, stable communities, family formation, the ability of people to build decent lives, typically in the communities where they've lived and where their families have lived, to raise children, to be productive contributors to their communities—that's really what the goal is supposed to be," Cass told Ezra Klein of the *New York Times* in a July 2024 interview.

American Compass also advocates for strong unions, public policies that support families, and regulation of immigration to protect the wages of American workers.

It favors national "industrial policy" and the "re-shoring" of American manufacturing, including by the imposition of tariffs on imported goods. It looks favorably upon industry-wide sectoral bargaining as a new model for the organization of workers and unions. Vice President J.D. Vance, Secretary of State

CASS POINTS TO THE EMBRACE OF A MORE WORKER-FRIENDLY AGENDA BY THE YOUNG REPUBLICAN SENATORS WHOM HE BELIEVES ARE THE FUTURE OF THE PARTY.

Marco Rubio, Senator Tom Cotton (Ark.), and Senator Josh Hawley (Mo.), have each become associated with American Compass proposals.

Cass served on the committee that drafted the labor chapter of Project 2025, the putative policy guide for a second Trump administration that the Democrats made a centerpiece of the fall campaign. That chapter—which reads more like a catalog of discrete ideas than a coherent treatise—provides little evidence of movement of Republican labor policy in Cass's direction.

It talks about eliminating critical race theory, limiting diversity initiatives, protecting employees' freedom of religion and the rights of independent contractors, and it proposes limiting employers' rights to require a college degree for certain jobs. It does not express support for existing labor unions, though it does support greater worker involvement in the management of companies. It does not give the impression that a new Republican administration would be more likely than past Republican administrations to support workplace regulation or existing labor unions.

Cass acknowledged as much to the *New York Times*: "[I]f your observation is that the politically salient things that Trump is focused on don't align entirely with this economic vision, you won't get any argument from me about that." But Cass points to the embrace of a more worker-friendly agenda by the young Republican senators whom he believes are the future of the party.

Of course, organized labor remains a reliable pillar of support for the Democratic Party. The Biden administration promoted itself as "the most pro-union administration in American history." Perhaps motivated in part by President Trump's electoral strength, including support from working people in regions suffering from industrial decline, Democrats have been more focused on restoring the American manufacturing base.

During the Biden presidency, Congress passed a series of bills that made investments in infrastructure and manufacturing. These included the 2022 Chips Act, which made major investments in the subsidies for U.S. semiconductor manufacturing, research and workforce training. Federal regulatory agencies during the Biden administration have been more vigorous in taking actions thought to be supportive of labor standards and employee rights.

A few weeks after Teamsters president O'Brien addressed the Republican National Convention, Trump, in an interview with Elon Musk, appeared to praise Musk's 2022 firing of large numbers of Twitter employees. "I won't mention the name of the company," he said, "but they go on strike, and you say, 'That's okay, you're all gone.'"

The ambiguities in Republican labor policy are on display in the nomination of Lori Chavez-DeRemer as Secretary of Labor. Chavez-DeRemer, the former mayor of a small city in Oregon, served one term in Congress but recently lost her re-election bid. The first Republican woman to be elected to Congress from Oregon, she is also notable as one of only three House Republicans to vote in favor of the PRO Act, a bill passed by the Democrat-controlled House in 2021 that would have increased the power of unions.

Republican senators, especially those from right-to-work states, have expressed concern about the Chavez-DeRemer nomination. Some union leaders have expressed support.

AFL-CIO President Liz Shuler has praised Chavez-DeRemer's pro-labor record in Congress, but said "it remains to be seen what she will be permitted to do as Secretary of Labor in an administration with a dramatically anti-worker agenda."

It is too early to tell whether the Republicans' embrace of free markets will give way to a politics with a different approach to worker representation and to working-class families and communities. •

Mark Risk is principal at Mark Risk P.C. in New York City.

Let's Be Transparent

Pay Transparency Laws in New York and Beyond

BY RICK REYES

There can be no doubt that labor and employment laws rank high at the top of many states' new and proposed legislations. In recent years, there has been a large uptick in labor and employment laws ranging from paid sick leave, pregnancy accommodation, and wage and hour requirements and regulations. Undoubtedly, compensation and the payment of wages have always been a high priority in many states. After all, the very foundational aspect of an employment relationship is bargained-for compensation.

It should then come as no surprise that, in the past couple of years, employers across different jurisdictions have been impacted by new legislation requiring the disclosure of salary ranges in connection with potential employment. These new laws have come to be known as Pay Transparency Laws. Some states have been at the forefront of enacting Pay Transparency Laws, including California and New York. This article will discuss New York State's Pay Transparency Laws, as well as an overview of other states that have enacted similar requirements.

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New York Transparency Laws: An Overview

Put in the simplest terms, New York Transparency Laws can be divided into two main categories: (1) wage transparency and (2) salary history restrictions. Each is briefly discussed below.

Wage Transparency Requirements

On September 17, 2023, New York joined a growing number of states in enacting Pay Transparency Laws. In general, New York law requires that covered employers disclose salary ranges in job postings and advertisements.

More specifically, under New York law any employer with 4 or more employees that advertises a job, promotion, or transfer opportunity that will physically be performed, at least in part, in New York must disclose the following information: (1) the compensation or range of compensation, i.e., the minimum and maximum annual salary or hourly range of compensation; and (2) the job description, if any, for the advertised job, promotion, or transfer opportunity. Importantly, and largely as a result of the post-COVID-19 remote workplace, New York law also applies to those advertisements that will be physically performed *outside* of New York, but that will report to a supervisor, office, or other worksite in New York. Put simply, New York Transparency Laws have extraterritorial implications. Further, for commission-based positions, employers may satisfy the disclosure requirement by stating in writing that the compensation will be based on commission.

As any labor and employment practitioner should expect, New York law also contains an anti-retaliation provision within its Pay Transparency Laws. Indeed, employers cannot refuse to interview, hire, promote, employ, or otherwise retaliate against either an applicant (for new positions) or a current employee (for promotion or transfer opportunities) for exercising their rights under the Pay Transparency Laws.

Salary History Restrictions

A second, though related, component of New York Pay Transparency Laws relates to whether employers may rely on salary history in determining the compensation of applicants or employees.

Under New York law, employers with 1 or more employees are prohibited from (1) relying on the wage or salary history of an applicant in determining whether to offer employment to the applicant or in determining the applicant's wages or salary; (2) requesting (orally or in writing) or requiring the wage or salary history of an applicant or current employee as a condition of being interviewed or considered for promotion; and (3) refusing to interview, hire, promote, or otherwise employ an applicant or current employee for failure to disclose their wage or salary history.

The law carves out a few significant exceptions, however. First, an employer may confirm the wage or salary history the individual in response to an offer of employment. Second, an employer may ask an applicant for their salary expectations for the position, provided that the employer does not ask what the applicant

previously earned. Third, if the individual voluntarily and without prompting discloses their salary history, an employer may consider and verify the individual's wage or salary history and rely on information about the individual's salary history in determining what to offer in salary, benefits, or other compensation However, New York law prohibits an employer from relying on an individual's prior salary to justify any disparities in pay that would otherwise violate applicable law.

Local Pay Transparency Laws

It is also important to be aware of city- or locality-specific requirements that may impact an employer's rights or responsibilities when operating within specific municipalities. For example, New York City, Ithaca, Westchester County, Albany County, and Suffolk County have promulgated salary history bans and employers operating within those jurisdictions should be mindful of additional legal obligations.

Transparency Laws in Other Jurisdictions

As mentioned above, New York is only one of many states that have actively taken steps in enacting Pay Transparency Laws. For example, the following states or districts have similarly enacted both wage transparency and salary history restrictions: California, Colorado, Connecticut, Washington, D.C., Hawaii, Illinois, Maryland, Massachusetts, Minnesota, Nevada, Rhode Island, Vermont and Washington. In addition, the following states have enacted only salary history restrictions: Alabama, Delaware, Maine, New Jersey and Oregon.

As with New York, many local jurisdictions within these states—such as San Francisco—have enacted specific requirements.

Conclusion

Many states have now enacted Pay Transparency Laws—though at various degrees of compliance and requirements. The push for equitable and transparent compensation practice is expected to continue throughout the nation, as more states and municipalities introduce new legislation or expand upon previously enacted legislation. Thus, multi-state employers, or employers with remote employees in various states, should continue to be mindful of this developing area of the law. One thing is certain: we are in a new era of pay transparency and these laws are here to stay. •

Rick Reyes is a New York-based attorney who routinely counsels and advises employers of all sizes on cutting edge labor and employment issues, and represents employers in formal litigation as well.

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Partner,
Am Law 200

When "Or Else" Becomes Illegal

A Guide to Workplace Threats

BY TIMES WANG

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Imagine you're an associate at a big law firm. Your boss walks in and tells you to write a brief by tomorrow or you're fired. You tell your spouse you must cancel dinner plans once again. "What a jerk," they say. "Is it even legal for her to do that?"

The answer to your spouse's question is, of course, probably yes. But what if your boss says that you're not only fired, but that you'll have to pay the firm back the tens of thousands of dollars they spent on your bar preparation, moving expenses, signing bonus, and the like? What if she also says she's going to report to you the bar association for incompetence?

Now it's a closer question. In fact, there is a very good chance you would have a claim against her for forced labor.

The forced labor section of the Trafficking Victims Protection Act, codified at 18 U.S.C. § 1589, makes it unlawful when someone "knowingly . . . obtains the labor or services of a person . . . by means of serious harm or threats of serious harm to that person or another person." It defines "serious harm" to include "psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labor or services in order to avoid incurring that harm." And victims have a private right of action under 18 U.S.C. § 1595.

Under these statutes, civil and criminal actions have been brought over forced labor performed by:

- live-in housekeepers (*Aneiros v. Viormar Trading Corp.*, No. 1:24-CV-20772, 2024 WL 4103921 (S.D. Fla. Sept. 6, 2024))
- veterinarians (*Martinez-Rodriguez v. Giles*, 31 F.4th 1139 (9th Cir. 2022))
- farm workers (*Garcia v. Stemilt Ag Servs.*, LLC, No. 2:20-CV-0254-TOR, 2022 WL 2760796 (E.D. Wash. July 14, 2022))
- detainees in private detention facilities (*Menocal v. GEO Grp., Inc.*, 882 F.3d 905 (10th Cir. 2018))
- construction workers (*Lopez v. Janus Int'l Grp., Inc.*, No. 1:23-CV-01671 (WBP), 2024 WL 4294638 (E.D. Va. Sept. 24, 2024))
- survivors of cult-like organizations (*United States v. Dickey*, 52 F.4th 680 (7th Cir. 2022))
- attendees of residential treatment centers (*Sherman v. Trinity Teen Sols., Inc.*, 84 F.4th 1182 (10th Cir. 2023))

Some civil plaintiffs have even successfully certified their lawsuits as class actions. *See, e.g., Menocal v. GEO Grp., Inc.*, 882 F.3d 905 (10th Cir. 2018); *Owino v. CoreCivic, Inc.*, 60 F.4th 437 (9th Cir. 2022); *Magtoles v. United Staffing Registry, Inc.*, No. 21CV1850KAMPK, 2022 WL 1667005 (E.D.N.Y. May 25, 2022). And, while no lawyers or other white-collar workers appear to have brought such an action, nothing in the statute suggests they could not.

The key is coercion, and especially the use of sticks as opposed to carrots. Large law firms work their associates hard, but the main incentive is a particularly delicious carrot, in the form of very high pay.

Where employers get in trouble is when they use sticks, including, as in the opening hypothetical, threatening to require repayment of alleged debt and threatening to report someone to authorities. *E.g., United States v. Dann*, 652 F.3d 1160, 1162 (9th Cir. 2011); *Paguirigan v. Prompt Nursing Emp. Agency LLC*, 286 F. Supp. 3d 430, 438 (E.D.N.Y. 2017); *Francis v. APEX USA, Inc.*, 406 F. Supp. 3d 1206, 1211-12 (W.D. Okla. 2019), *e.g., Foukas v. Foukas*, No. 20-CV-05516-NCM-SJB, 2024 WL 3813253 (E.D.N.Y. July 26, 2024) (employer threatened to report employees to immigration authorities and IRS); *Ali v. Khan*, 336 F. Supp. 3d 901 (N.D. Ill. 2018) (allegations threats to call immigration authorities against domestic worker). But the statute is sufficiently broad that other threats, such as threats of ostracism from a community, threats of character assassination, threats to future career prospects, and the like, have been held to be sufficiently coercive. *E.g., S. v. Ali*, No. 3:23-CV-05074-JSC, 2024 WL 150728, at *5 (N.D. Cal. Jan. 11, 2024) (alleged threats included "spreading rumors of her infidelity, which would cause her to be ostracized and subject to physical harm"); *Schneider v. OSG, LLC*, No. 22CV7686AMD-VMS, 2024 WL 1308690, at *6 (E.D.N.Y. Mar. 27, 2024) (alleged threats by defendant to "shame disobedient students and ostracize those who left the organization"); *United States v. Dann*, 652 F.3d

LARGE LAW FIRMS WORK THEIR ASSOCIATES HARD, BUT THE MAIN INCENTIVE IS A PARTICULARLY DELICIOUS CARROT, IN THE FORM OF VERY HIGH PAY.

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JANUARY 30–FEBRUARY 1 | 2025
State and Local Government Bargaining and Employment Law Committee
MIDWINTER MEETING
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FEBRUARY 5–8 | 2025
Employee Benefits Committee Midwinter Meeting
Westin Savannah Harbor Resort
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FEBRUARY 23–26 | 2025
Committee on Development of the Law Under the NLRA
MIDWINTER MEETING
Opal Sol
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FEBRUARY 25–28 | 2025
Committee on Practice and Procedure Under the NLRA
MIDWINTER MEETING
Opal Sol
Clearwater Beach, Florida

MARCH 4–7 | 2025
Workplace and Occupational Safety and Health Law Committee
MIDWINTER MEETING
Omni Rancho Las Palmas
Rancho Mirage, California

MARCH 5–7 | 2025
Railway and Airline Labor Law Committee
MIDWINTER MEETING
Royal Sonesta San Juan
San Juan, Puerto Rico

MARCH 18–21 | 2025
Employment Rights and Responsibilities Committee
MIDWINTER MEETING
Westin Resort
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MARCH 18–21 | 2025
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MAY 4–8 | 2025
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Denver, Colorado

NOVEMBER 4–7 | 2026
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1160 (9th Cir. 2011) (threat of false accusations of theft); *Treminio v. Crowley Mar. Corp.*, 707 F. Supp. 3d 1234 (M.D. Fla. 2023) (threats to future career prospects).

Notably, the legislative history of the TVPRA makes clear that an expansive conception of coercion was a deliberate choice by Congress. Previously, the law was generally that, even if an employee's "will to quit has been subdued by a threat which seriously affects his future welfare," the employer could not be punished, so long as the employee "still has a choice, however painful." *United States v. Kozminski*, 487 U.S. 931, 950 (1988) (quoting *United States v. Shackney*, 333 F.2d 475, 487 (2d Cir. 1964)). In enacting the TVPRA, Congress recognized that where the "threat to future welfare" is sufficiently serious, the fact that an employee has the theoretical ability to quit is not particularly meaningful.

To be sure, that doesn't mean that employers can never threaten bad outcomes, such as firing an at-will employee, as such threats would not meet the statute's definition of "serious harm." *See, e.g., Treminio*, 707 F. Supp. 3d at 1253 ("mere warnings of unfavorable but legitimate consequences do not rise to the TVPRA's requirements"). That said, the question isn't where to draw the line—Congress has drawn it at "serious harm"—but whether a given set of facts crosses it. And the best practice for employers is to make sure they never come close to it. •

Times Wang is the co-founder of Farra and Wang PLLC, a plaintiffs-oriented firm based in Washington, DC. He has litigated several TVPRA cases.

The Fifth Circuit Court of Appeals, Acting under *Loper Bright*, Invalidates DOL Tip Rule

BY ADRIENNE WOOD AND NICK COTTON

On August 23, 2024, the United States Court of Appeals for the Fifth Circuit in *Rest. Law Ctr. v. United States DOL*, 115 F.4th 396 (5th Cir. 2024), struck down the Department of Labor's final rule that restricts when employers can claim a "tip credit" for "tipped employees." The Fifth Circuit, no longer having to defer to agency interpretations based on the Supreme Court's recent rebuke of the *Chevron* deference, held that DOL's final rule fails under both the Administrative Procedures Act ("APA") and the Fair Labor Standards Act ("FLSA").

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Background

Under the FLSA, employers are permitted to pay employees $2.13 per hour if employees receive enough in tips to make up the $5.12 per hour difference between the $2.13 hourly rate and the federal minimum wage of $7.25. *Rest. Law Ctr. v. United States DOL*, 115 F.4th 396, 400 (5th Cir. 2024). Based on this rationale, employers of "tipped employees," under the FLSA, have counted a portion of an employee's tips as part of their wages which has been referred to as the "tip credit."

Going back to 1988, DOL slowly formalized the "80/20" rule in which DOL took the position that the "tip credit" was not available to employers when tipped employees devoted more than 20% of their time to non-tip producing activities. Starting in 2009, the "80/20" rule began to come and go in concert with the changing presidential administrations.

In December 2021, DOL issued their final rule which clarified what it meant to be "engaged in a tipped occupation" under 29 U.S.C. § 203(t) as "tipped occupation" is not a term defined within the FLSA. *Rest. Law Ctr. v. United States DOL*, 115 F.4th 396, 400 (5th Cir. 2024). The rule provided that an employee is "engaged in a tipped occupation when the employee performs work that is part of the tipped occupation." 29 C.F.R. § 531.56(f) (2021). Therefore, "[a]n employer may only take a tip credit for work performed by a tipped employee that is part of the employee's tipped occupation." *Id.*

Further, DOL's final rule created three categories of work: tip-producing work, work supporting the tip-producing work, and work that is not part of the tip-producing work. These categories determined when, and at what rate, an employer had to compensate an employee. Under DOL's 2021 interpretation of the 80/20 rule, if more than 20% of an employee's work week is spent on "directly supporting" work, then the employer cannot claim the tip credit for that excess. Moreover, if an employee spends more than 30 minutes on "directly supporting" work, the employer may not claim the tip credit for that excess either.

Restaurant Law Center v. U.S. Department of Labor

Shortly after DOL published the final rule, but prior to the rule taking effect, the Plaintiffs, the Restaurant Law Center and the Texas Restaurant Association, filed a lawsuit in the Western District of Texas seeking to enjoin DOL's enforcement. Both Plaintiffs are advocacy groups which represent the interests of restaurant owners. In their argument against the rule, the Plaintiffs alleged that smaller restaurants would be unable to comply with such a complicated rule, as it would be nearly impossible to track a worker's time with that level of specificity to determine when they are engaging in which category of "work." Plaintiffs also argued procedural defects in the promulgation of the rule such as a failure to comply with the APA. At the district court level, the Plaintiffs were denied their request for injunctive relief and appealed to the Fifth Circuit.

Analyzing DOL's Final Rule after *Loper Bright*

The Fifth Circuit first had to consider the impact of the U.S. Supreme Court's decision in *Loper Bright Enters. v. Raimondo* before analyzing the case on the merits. 144 S. Ct. 2244 (2024). Under the APA, courts are given authority to set aside agency decisions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

5 U.S.C. § 706(2)(A). Before *Loper Bright*, the Supreme Court applied the *Chevron* Deference doctrine which required courts to defer to a federal agency's interpretations, if those interpretations were "permissible," even when the court would have reached a different interpretation. *Rest. Law Ctr,* 115 F.4th at 403. As a result of *Loper Bright*, agencies are no longer owed deference for their interpretations and the judiciary can exercise their own "independent judgment" in interpreting law. *Loper Bright,* 144 S. Ct. at 2273 (2024) ("Chevron is overruled.") Therefore, the Fifth Circuit analyzed the final rule under the FLSA without giving deference to DOL's interpretation.

The Fifth Circuit found the FLSA text to be clear. Although the meaning of "engaged in tipped occupation" was often reinterpreted, the term was not defined within the law, so the Court looked to the "ordinary, contemporary, common meaning," which the Court found left no room for ambiguity. The Fifth Circuit determined that "engaged in a tipped occupation," simply meant "employed in a job." *Rest. Law Ctr.,* 115 F.4th at 405. By applying this ordinary meaning, the Fifth Circuit found that DOL's rule drew an impermissible and arbitrary line between tip-producing and tip-supporting work that was not supported by the text of the FLSA as it "disaggregated the component tasks of a single occupation."

Practical Implications

As a result of the Fifth Circuit's decision, employers no longer need to track what specific work their employees are engaged in throughout the day. After this ruling, an employee is engaged in a tipped occupation if their job includes tips of at least $30 per month, based on the FLSA language. Employers may now simply take a tip credit for any tipped employee. •

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What to Expect with Trump 2.0

Workplace Enforcement

BY JOSHUA H. ROLF AND JONATHAN A. GRODE

On January 20, 2025, Chief Justice John Roberts swore in Donald J. Trump as the 47th President following his decided Electoral College win. Unlike his first term, President Trump will enter office having won the popular vote and with Republican majorities in both the House of Representatives and Senate. When coupled with the inherent powers of the President to make policy via Executive Order and the ability to shape policy, process, and posture through agency appointments and directives, and considering his campaign's fixation on the issue and the executive branch appointments proposed so far, Trump 2.0 appears primed to swiftly introduce and implement sweeping changes to the U.S. immigration system. If the last half decade of Supreme Court jurisprudence is any indication, Trump 2.0's efforts are likely to go unchecked.

While foreign nationals, immigration attorneys and the general populace may have been caught slightly off-guard when Trump 1.0 wasted no time in keeping his campaign promises, (i.e., the administration announced the first Muslim Ban within a week of taking office on January 20, 2017) there is no doubt within the community whether Trump 2.0 "means what he says" when it comes to immigration: We can feel confident that Trump will at least try to follow-through on public statements or other policy proposals floated. In that vein, immigration practitioners and other stakeholders can also anticipate upcoming changes based on experience and relevant trends during Trump 1.0 and use those lesson to inform how to prepare for prospective targets of anti-immigrant executive action on an individual and organizational level. Put differently, even if Trump 2.0 may be emboldened by Republican control over the Executive and Legislative Branches and assured by the Supreme Court's rightward shift, immigration attorneys are also in a better position to forecast and preempt potential shifts in immigration policy and equip clients with the wherewithal to proactively manage and, when needed, respond to Trump 2.0's measures.

A key pillar of Trump 2.0's immigration policy is his stated intent to remove any and all undocumented foreign nationals present in the United States. The extent to which he will achieve this goal remains to be seen as it inherently poses almost insurmountable logistical challenges as well as dramatic impact to certain areas of the economy. What we can predict with near certainty is one method by which the Trump administration will try to do so: through workplace enforcement actions.

The Department of Homeland Security's Homeland Security Investigations ("HSI") and Immigration and Customs Enforcement ("ICE") are the principal actors in this forum and may, without warning, appear at a workplace, effectively detain all persons on-site for interrogation, and search the premises for evidence of unauthorized employment practice and the unauthorized employees themselves. During such an investigation, HSI and/or ICE may also audit an employer's I-9 records to ensure they have taken the proscribed steps to verify each and every worker's employment authorization within the requisite time period. By way of comparison, Trump 1.0 conducted 12,000 I-9 audits in 2020 while the Biden Administration only conducted 400 such audits last year. Thus, employers should not be surprised if, or when, HSI or ICE officers appear at their door.

With that in mind, employers can take preemptive steps to prepare for uninvited government visitors and avoid, or minimize, the negative impact(s) of such visits. These steps include but are not restricted to the following:

- **Be sure to know your workforce.** If you employ foreign nationals, be prepared for enhanced scrutiny and workplace disruptions. Encourage workers to always carry proof of their status (as required by law).
- **Train managers.** ICE or HSI must take certain steps before and during a workplace enforcement visit. There are limits on what they must do in advance and what they can do in the moment. All managers should be prepared for a site visit, so they know what to look for when first meeting a government officer, and throughout the investigation.
- **Know who to call.** Whether it is your in-house counsel, employment counsel, outside immigration attorney, or someone else, identify and do not hesitate to contact your advisor to assist in the investigation. Doing so can limit the scope of the investigation and the effect of a raid.
- **Develop record-keeping policies.** Possessing clear, comprehensive, and well-understood record-keeping policies as they relate to I-9 document maintenance and access will help avoid any wrongdoing or mitigate liability in the event there is an oversight.
- **Maintain thorough records.** Follow through with record-keeping protocols—simply having them is not enough.
- **Stay calm.** ICE and HIS officers want to fluster employers and workers, panicking will only aid those efforts.

Importantly, be proactive. Those who represent employers should reach out to clients now and encourage them to take the above steps. Waiting for what will come is not enough. The old adage of an ounce of prevention will be worth a pound of cure has never been more true. •

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issue of extraordinary economic and political significance where Congress clearly delegates the authority to do so. *ATS Tree Servs., LLC v. FTC*, No. 24-1743, 2024 U.S. Dist. LEXIS 129398, at *52-53 (E.D. Pa. July 23, 2024)).

Each of the plaintiffs moved to preliminarily enjoin the Rule's enforcement, and each court interpreted the scope of the FTC's authority differently. The *Ryan* court, in a July 3, 2024, decision granting the motion, held that the plaintiffs were likely to succeed on their claims that the FTC lacks authority to issue any substantive rules regulating unfair methods of competition (and that the Rule is arbitrary and capricious). *Ryan LLC v. FTC*, No. 3:24-CV-00986-E, 2024 U.S. Dist. LEXIS 117418, at *15-16 (N.D. Tex. July 3, 2024). Conversely, in a July 23, 2024, decision, the *ATS* court denied injunctive relief, holding, *inter alia*, that the Act authorized the FTC to issue such substantive rules and that the Rule fell within the ambit of that authority and did not present a "major question." In an August 15, 2024, decision, the *POV* court agreed that the FTC is authorized to issue these substantive rules, but granted an injunction, holding that the Rule implicated a "major question" without a clear delegation of authority by Congress for the FTC to issue the Rule. *Props. of the Vills., Inc. v. FTC*, No. 5:24-cv-316-TJC-PRL, 2024 U.S. Dist. LEXIS 151982, at *18-24 (M.D. Fla. Aug. 15, 2024).

Ultimately, in an August 20, 2024, decision, the Ryan court set aside the Rule nationwide. The FTC has appealed the *Ryan* and *POV* decisions, such that the Rule's fate remains to be seen, although many employers believe that *Ryan* and *POV* will be upheld. (*ATS* was voluntarily dismissed on October 4, 2024.)

The Rule's Impact

While the Rule is currently enjoined, worker advocates believe that the Rule (and the proposed rule before it) have spurred state non-compete regulation and helped to alert courts and governmental agencies to the effects of non-competes on workers and the public.

For instance, in General Counsel Memoranda issued on May 30, 2023 and October 7, 2024, respectively, National Labor Relations Board's former General Counsel Jennifer Abruzzo stated her view that, with limited exceptions, non-competes violate Section 8(a)(1) of the National Labor Relations Act ("NLRA") by interfering with employees' rights under Section 7 of the NLRA to collectively act to improve working conditions, such as by "concertedly seeking employment with competitors that offer better working conditions" and describing a plan that would "remedy the harmful monetary effects" of non-competes and similar provisions. (General Counsel Memoranda 23-08 and 25-01).

Moreover, in *Globus Med. Inc. v. Jamison*, 2:22cv282, *report and recommendation adopted*, 2023 U.S. Dist. LEXIS 153858 (E.D. Va. Aug. 30, 2023), the Eastern District of Virginia denied a preliminary injunction to enforce a non-compete, acknowledging the evolving "national discussion" on the public interest implications of non-competes and noted that, "while the public interest is served by enforcing valid contracts," "the FTC's proposed rule suggests the public interest in enforcing non-compete agreements may no longer be a viable argument." *Id.* at *59.

At the state level, California passed legislation enhancing its long-standing ban on most non-competes. Amendments to California Business and Professions Code § 16600, effective January 1, 2024, provide that all non-competes, "no matter how narrowly tailored," are void, unless a statutory exception applies, confirm that employers cannot enforce such unlawful non-competes regardless of whether the employee worked, or whether the agreement was signed, outside of California, and create a private right of action to challenge unlawful non-competes. As of July 1, 2023, nearly all non-competes were banned in Minnesota, and, since early 2023, several other states, including Illinois, Iowa, Louisiana, Maryland, Pennsylvania, and Rhode Island, have limited the use of non-competes in the healthcare industry. While the New York State legislature passed a non-compete ban, it was vetoed by the governor.

WHEN NEGOTIATING NON-COMPETES, ALL PARTIES NOT ONLY NEED TO ENSURE THAT THE SCOPE OF THE RESTRICTIONS IS REASONABLE AND NARROWLY TAILORED BUT MUST ALSO FOCUS ON THE CHOICE OF LAW AND VENUE PROVISIONS.

As the Rule is currently (and may be permanently) set aside, employees should continue to abide by existing non-competes. When negotiating non-competes, all parties not only need to ensure that the scope of the restrictions is reasonable and narrowly tailored but must also focus on the choice of law and venue provisions. Given the current patchwork of state laws, until and unless federal regulations come back into play, contractual choice of law and venue provisions can substantively impact rights and obligations stemming from non-competes. •

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