

Employment Law Updates

Association of Corporate Counsel

Hannah D. Stetson
Shareholder
Turner Padget Graham & Laney, P.A.

Brian Comer
General Counsel
South Carolina Youth Advocate Program, Inc.

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Overview

- **Wage and Hour Updates**
- **FTC Non-Compete/Trade Secrets Act**
- **NLRB/NLRA**

Wage and Hour



Basics of the Fair Labor Standards Act

- Minimum wages
- Overtime
- U.S. Department of Labor oversight
- Broad coverage
- DOL or aggrieved employee can sue
- No administrative prerequisites
- Prohibits retaliation
- 2 or 3 year statute of limitations
- Liquidated damages for willful violations
- Civil/Criminal penalties/attorneys' fees
- Personal, individual liability

DOL Complaints are Up



In fiscal year 2023, DOL recovered over \$274 million in back wages and damages for more than 163,000 workers

DOL Overtime Threshold

- The United States Department of Labor (DOL) announced new minimum wage and overtime pay requirements for executive, administrative, and professional employees under the Fair Labor Standards Act (FLSA)
- Partially went into effect July 1, 2024
- Expected to impact upward of 4 million workers across the United States
- Occurs in two stages:
 - **July 1, 2024: 23% increase**
 - **January 1, 2025: additional 10% increase**

EAP Exemption

Qualify as “exempt” under the FLSA:

- Employee must be paid a predetermined and fixed salary (the salary basis test)
- Amount of salary paid must meet a minimum specified amount (the salary level test)
- The employee’s job duties must primarily involve executive, administrative, or professional duties as defined by the regulations (the duties test)

EXECUTIVE	ADMINISTRATIVE	PROFESSIONAL
<p>The Employee’s “primary duty” must be managing the enterprise or managing a customarily recognized department or subdivision of the enterprise</p> <p>Must also supervise two or more full time employees</p> <p>29 CFR 541 (D)</p>	<p>The Employee’s primary duty must include the <i>exercise of discretion and independent judgement with <u>respect to matters of significance</u></i></p> <p>29 CFR 541 (C)</p>	<p>The Employee’s primary duty must be to primarily perform work that either requires advanced knowledge in a field of science or learning or that requires invention, imagination, originality, or talent for a recognized field of artistic or creative endeavor</p> <p>29 CFR 541 (D)</p>

Salary Level Changes

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

Legal Challenges

- *State of Texas v. U.S. Dep't of Labor* (4:24-CV-499-SDJ E.D. Tex., June 3, 2024)
 - Texas sued DOL under a theory that the increased salary threshold was so high as to constitute an unlawful de facto “salary only” test, exceeding the DOL’s authority under the FLSA
 - June 28, 2024: District Court enjoined enforcement of the rule only against employees of State of Texas
 - Found Texas was likely to succeed on the merits, as increased threshold “effectively eliminated” the duties test
 - “In sum, since the EAP Exemption requires that exemption status turn on duties—not salary—and the 2024 Rule’s changes make salary predominate over duties for millions of employees, the changes exceed the authority delegated by Congress to define and delimit the relevant terms”
- Consolidated with *Plano Chamber of Commerce, et al. v. U.S. Dept. of Labor, et al.*

Current Status

- **A similar rule from the DOL was struck down in 2016 by the same Texas Court**
- **The DOL's decision to stagger the increase and use a different methodology as was used in 2026 may result in a different outcome**
- **January 1, 2025 increases still effective to date**

Strategies for Employers

- **Increase salary to keep exempt status**
 - Tracking time
 - Regular rate calculations
- **Reclassify affected employees to non-exempt**
 - Morale concerns
 - How to communicate the same to employees
- **Audit all exempt jobs**
 - Look at job duties and descriptions

DOL Independent Contractor Rule

- Minimum wage and overtime requirements applicable to employees but not independent contractors
- **Effective March 11, 2024:** Totality of the Circumstances Test:
 1. Opportunity for profit or loss depending on managerial skill
 2. Nature and degree of control
 3. Degree of permanence of the work relationship
 4. Work performed is an “integral” part of the potential employer’s business
 5. Specialized skill and initiative
 6. Relative amount of investment of capital or entrepreneurial effort by the worker compared to investment by potential employer
- Under previous rule, Factors 1 and 2 given more weight

FTC Non-Compete Ban



FTC Non-Compete Rule

- **The FTC has deemed non-compete agreements an “unfair method of competition”**
 - Defines “non-compete clause” as “[a] term or condition of employment that *prohibits* a worker from, *penalizes* a worker for, or *functions to prevent* a worker from” either seeking or accepting work after the conclusion of employment, or operating a business after the conclusion of employment
 - **Ban originally scheduled to go into effect September 4, 2024**
 - Breaches to non-competes that occur before this date can be pursued

Who It Applies To

- **All employees, independent contractors, and legal entities**
 - **Exemptions for seller of a business or franchisor/franchisee**
- **All forms of employment, paid or unpaid**
- **Covers all for-profit entities and many non-profit entities**
 - **Tax status is not dispositive**
- **Does not apply to existing non-competes for senior executives**
 - **New ones cannot be created**
- **Before the effective date, employers are required to provide notice to all current and former individuals with non-competes that such agreements will not and cannot be enforced (notice is not required if the non-compete is expired)**

Current Status

- **05/07/2024: Final Rule is published**
- **06/28/2024: US Supreme Court overrules the Chevron deference**
- **07/03/2024: Texas District Court grants a preliminary injunction as to enforcement against the plaintiffs**
- **07/23/2024: PA District Court rejects plaintiff's argument in favor of the FTC; trial pending**
- **08/14/2024: Florida District Court enters limited injunction as to enforcement against the Plaintiff only**
- **08/20/2024: Texas District Court rules FTC Rule unenforceable**

FTC Non-Compete Ban

August 14, 2024: Federal Judge enters limited injunction prohibiting FTC enforcement against the named Plaintiff

- Injunction based on the “major questions doctrine”
 - administrative agencies need to point to clear and unambiguous congressional intent to confer such power on the agency to issue rules of significant economic and political significance
 - Pennsylvania District Court rejected this argument

FTC Non-Compete Ban

August 20, 2024: Federal Judge struck down the FTC's rule banning non-competes

- FTC lacked the authority to issue the rule to begin with, as the FTC's actions exceeded the power delegated to the FTC by Congress.
- FTC's rule—which applied to most employers across the country—was overly broad, arbitrary, and capricious.

Case Study: *Pyrsman Cables & Systems USA, LLC v. Stephen J. Szymanski and Sterlite Technologies, Inc.* (United States District Court for the District of South Carolina)

- **Dispute between two telecommunications companies that manufacture and sell fiberoptic cables**
- **Senior Vice Present of *Pyrsman Cables* left for a competitor, had previously signed a Non-Compete and Non-Solicitation**
- **Claims for:**
 - **Breach of contract**
 - **Tortious interference**
 - **Misappropriation of trade secrets**

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Prysmian Cables & Systems USA, LLC,

Plaintiff,

v.

Stephen J. Szymanski and Sterlite
Technologies, Inc.,

Defendants.

C/A No. 3:21-cv-01641-SAL

AMENDED ORDER

This matter is before the court on defendants Stephen J. Szymanski and Sterlite Technologies, Inc.'s motion for summary judgment. [See ECF Nos. 188, 189, and 191; ECF No. 190 (supporting memoranda).] For the reasons below, the court grants the motion in part.

BACKGROUND

Breakups are never easy. And some are harder than others. This one ended up in federal court and involves allegations of breach of contract, tortious interference with customers and the misappropriation of trade secrets. Plaintiff Prysmian Cables & Systems USA, LLC is a

Case Study:
*Prysmian Cables &
Systems USA, LLC
v. Stephen J.
Szymanski and
Sterlite
Technologies, Inc.*
**(United States
District Court for
the District of South
Carolina)**

Case Study: *Pyrsman Cables & Systems USA, LLC v. Stephen J. Szymanski and Sterlite Technologies, Inc.* (United States District Court for the District of South Carolina)

- **Summary Judgment granted:**
 - Contract claims (lack of consideration)
 - Tortious interference claims dependent on the contract
- **Summary Judgment denied:**
 - Tortious interference with prospective contractual relationships
 - Misappropriation of trade secrets claims
 - Defend Trade Secrets Act (DTSA)
 - South Carolina Trade Secrets Act (SCTSA)
- **Three-week trial in August 2024**

Case Study: *Prysmian Cables & Systems USA, LLC v. Stephen J. Szymanski and Sterlite Technologies, Inc.* (United States District Court for the District of South Carolina)

1. Do you the jury find by a preponderance of the evidence that any of the following alleged trade secrets are trade secrets? (*Choose either "Yes" or "No" for each alleged trade secret*)

5a. We award **compensatory damages** to plaintiff Prysmian Cables & Systems USA, LLC, and against the defendant, **Stephen J. Szymanski**, for unjust enrichment in the total amount of

\$ 200,000.

5b. We award **exemplary damages** to plaintiff Prysmian Cables & Systems USA, LLC, and against the defendant, **Stephen J. Szymanski**, for unjust enrichment in the total amount of

\$ ∅.

6a. We award **compensatory damages** to plaintiff Prysmian Cables & Systems USA, LLC, and against the defendant, **Sterlite Technologies, Inc.**, for unjust enrichment in the total amount of

\$ 96,500,000.

6b. We award **exemplary damages** to plaintiff Prysmian Cables & Systems USA, LLC, and against the defendant, **Sterlite Technologies, Inc.**, for unjust enrichment in the total amount of

\$ ∅.

NLRA/NLRB ISSUES



National Labor Relations Act

“Employees shall have the RIGHT to self-organization, to form, or assist labor organizations, to bargain collectively through representatives of their choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the RIGHT TO REFRAIN from any or all activities...”—section 7 of the NLRA

Employee Rights (Section 7)

- **To unionize or not to unionize**
- **To bargain collectively**
- **To engage in other concerted activities (strikes, complaints, criticisms, etc.)**

Protected / Concerted Activities

- **Discussing or complaining about working conditions, wages, hours, safety, discrimination, harassment, or a supervisor's conduct;**
- **Supporting a co-worker's complaints;**
- **Seeking to replace company management;**
- **Criticizing management; and**
- **Forming or attempting to form a union, discussing a union, or engaging in union-related activities.**

Violate the NLRA

- **Interfere with, restrain, or “chill” employees’ rights to engage in protected concerted activity.**
- **A workplace rule will violate the NLRA if: (1) employees would reasonably construe the rule’s language to prohibit their protected concerted activity; (2) the employer promulgated the rule in response to union-related activity; or (3) the employer applied the rule to restrict employees’ exercise of protected concerted activities.**

Unlawful Conduct Policies

- Board protects any form of protected, concerted activity, except physical violence and threats of physical violence.
- NLRB and 2nd Circuit Court of Appeals ruled the following Facebook posting lawful:

“Bob is such a NASTY MOTHER FKER don't know how to talk to people!!!!!! F**k his mother and his entire f**king family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!!”**

- *NLRB v. Pier Sixty, LLC*, 2017 U.S. App. LEXIS 6974 (2d Cir. Apr. 21, 2017).

Lawful Conduct Policies

Employers have legitimate business interests in having and may require employees to act respectfully or professionally to, co-workers, clients, business partners and other third parties, but not to the employer or management.

- “No rudeness or unprofessional behavior toward a customer, or anyone in contact with the company.”**
- “Employees will not be discourteous or disrespectful to a customer or any member of the public while in the course and scope of company business.”**
- “Each employee is expected to abide by Company policies and to cooperate fully in any investigation that the Company may undertake.”**
- “Being insubordinate, threatening, intimidating, disrespectful or assaulting a manager/supervisor, coworker, customer or vendor will result in discipline.”**

NLRA Does Not Cover Supervisors

Supervisors are any individual with authority to:

- **hire, transfer, suspend, lay-off, recall, promote, discharge, assign, reward, or discipline other employees;**
- **direct employees;**
- **adjust grievances;**
- **recommend such action; or**
- **exercise independent judgment.**

Good Supervisors Prevent Unions

- **Listen**
- **Loyal**
- **Competent**
- **Consistent**
- **Follow policies and procedures**
- **Require satisfactory performance / conduct / attendance**
- **Follow the law**
- **Communicate**

Building Trust and Respect

- **Show genuine interest**
- **Honest / Transparent**
- **Listen more than you talk**
- **Open door**
- **Solicit / Act on feedback**
- **Walk the floor**
- **Give credit / recognition and show appreciation**
- **Help people grow / develop**

- **Have empathy**
- **Empower through delegating / autonomy**
- **Show enthusiasm**
- **Embrace diversity and inclusivity**
- **Expect / Accept Criticism**