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The FTC has attempted to ban nearly all employer-employee non-competes. Is that regulation enforceable?

DID YOU KNOW?

Hollywood portrays lie detector test results (a/k/a polygraph tests) as definitive evidence in criminal cases. But polygraph tests results are *inadmissible* in criminal and civil cases due to lack of scientific reliability.

CONTACT US

WINTERS & KING, INC.
CityPlex Towers
2448 E. 81st St., #5900
Tulsa, OK 74137
Phone: 918.494.6868



FTC Scrutinizes Business Reviews/Testimonials

By: Attorney James Rayment

Online business reviews or testimonials, such as through Google reviews or paid compensation for reviews, are common marketing tools for businesses. However, the FTC has grown concerned that the use of fake reviews and testimonials can mislead the public. In addition, recent case law has restricted the FTC's ability to seek monetary relief for consumers. In response, the FTC issued a new final rule that goes into effect on October 13, 2024, imposing strict civil penalties for certain consumer reviews and testimonials or the way the reviews and testimonials were secured.

Fake/Misleading Reviews: The final rule prohibits businesses from creating or selling reviews or testimonials that give the appearance they are by a real individual but is someone who actually does not exist, such as fake AI-generated reviews, or someone pretending to have had an actual experience with the business or its products or services. Businesses are also prohibited from buying fake reviews, procuring them from company insiders, or disseminating fake testimonials, when the business knew or should have known that the reviews or testimonials were fake or false. The FTC's rule further prohibits anyone from selling or buying fake indicators of social media influence, such as followers or views generated by a bot or hijacked account.

Compensated Reviews: The final rule also prohibits businesses from providing compensation or other incentives conditioned on the writer expressing either a positive or negative consumer review. The conditional nature of the offer can be implied to violate the rule.

Company Insiders: While fake reviews/testimonials are generally accepted to be deceptive practices, the FTC's final rule also addresses a broad array of other commonly employed business advertising practices that may on their face not appear to be an improper advertising tactic. For instance, the final rule prohibits certain reviews and testimonials written by company insiders that fail to clearly and conspicuously disclose the reviewer's material connection to the business, such as reviews and testimonials given by officers or managers. Businesses are prohibited from disseminating testimonials or reviews if the business should have known they were by an insider. The rule also imposes certain requirements when officers or managers solicit consumer reviews from their own immediate relatives or from employees or agents, or when officers or managers tell employees or agents to solicit reviews from relatives.

Groundless Threats: The rule prohibits a business from using unfounded or groundless legal threats, physical threats, intimidation, or certain false public accusations to prevent or remove a negative consumer review. Businesses are also prohibited from misrepresenting that the reviews on a review portion of its website represent all or most of the reviews submitted when other reviews were suppressed based upon their ratings or negative sentiment.

Violating this final rule could subject offenders to civil penalties up to \$51,744, but mitigating factors may be considered by the Courts. Note, however, that the rule considers each "fake review" to be a separate violation, thus, penalties for violation of this provision can be quite steep.

If you are concerned that your current business practices may be in violation of the FTC's new rule, or you are a victim of deceptive trade practices in violation of FTC regulations, contact Attorney James Rayment at jrayment@wintersking.com to discuss your legal rights and remedies.

Court Upholds DOL's Authority to Define Salary Level for White Collar Exemption Under FLSA

By: Attorney Alyssa LaCourse

In 2019, the U.S. Dept. of Labor (DOL) issued a final rule raising the minimum salary required to qualify for the executive, administrative, and professional exemption (a/k/a the "White Collar Exemption") under the Fair Labor Standards Act (FLSA). A business owner, Mayfield, challenged the DOL's authority to define the salary requirement for the White Collar Exemption in a Texas federal district court. Mayfield argued the DOL's authority was limited to defining only the job duties for which the exemption applied but not setting the salary level. The DOL prevailed at the district court and Mayfield appealed.

On Sept. 11, 2024, the Fifth Circuit confirmed the DOL had the authority to impose and define the minimum-salary level as an additional qualification to the White Collar Exemption under the FLSA. The Court held that although the FLSA does not expressly require a minimum salary level for the White Collar Exemption, the DOL has clear congressional authority to establish and define requirements of the exemption including imposing additional factors for exempt status (such as salary level). Thus, the Court concluded the DOL has, and always had, authority from Congress to define the Minimum Salary Rule and its requirements.

As of July 1, 2024, the FLSA's minimum salary threshold is \$844/wk. (\$43,88/yr.), which increases to \$1,128/wk. (\$58,656/yr.) on January 1, 2025. A federal district court in Texas has enjoined this new 2024 salary rule for Texas employees only, but this injunction does not affect the Fifth Circuit's ruling discussed above.

For questions concerning the FLSA, the minimum salary requirement, or how it applies to your business or employees, please contact Attorneys Wes Carter at wecarter@wintersking.com or Alyssa LaCourse at alacourse@wintersking.com.



BC Lee



Spencer Pittman

Okla. Governor Stitt Appoints Firm Attorneys to Board and Task Force

Attorney BC Lee was recently appointed by Oklahoma Governor, Kevin Stitt, to a position on the Oklahoma State University-Tulsa Board of Trustees. Attorney Lee's appointment was confirmed by the Oklahoma Senate. The OSU-Tulsa Board of Trustees consists of 9 members including 7 appointed for seven-year terms by the governor and approved by the Oklahoma Senate and 2 who also serve as members of the OSU/A&M Board of Regents. BC Lee is the Firm's estate planning and probate attorney. He has a broad legal, regulatory and financial background including a decade at a major regional bank as President, CEO, and Chairman.

Attorney Spencer Pittman was also appointed by Oklahoma Governor Stitt to serve on the Task Force for the Study of Business Courts in Oklahoma. Attorney Pittman is 1 of 11 task force members charged with studying and issuing reports regarding the implementation of a new business court system in Oklahoma designed to handle complex business/commercial disputes or litigation. Attorney Pittman is a shareholder at the Firm and handles business litigation and transactions and also serves as Chairman of Tulsa County Bar Association's Corporate and Business Law Section.

FTC's Non-Compete Ban Set Aside Nationwide, *For Now*

By: Shareholder Spencer C. Pittman

In early 2024, the FTC issued a final rule with an effective date of Sept. 4, 2024, which banned nearly all employer-employee non-compete agreements with limited exceptions. A private business challenged this rule in a Texas federal court seeking to enjoin its implementation and enforcement.

On August 20, 2024, the Court ruled the FTC exceeded its statutory authority by issuing the rule and also finding that the rule was improperly arbitrary and capricious. The Court set aside the implementation and enforcement of the rule nationwide. Scholars speculate the FTC will appeal this decision to the Fifth Circuit, but other courts (such as a Pennsylvania federal district court) have issued conflicting rulings on the same issue. A split among federal circuits may indicate this issue will be headed to the U.S. Supreme Court for a final determination.

Despite the Texas court's ruling on a federal level, enforceability of non-compete provisions vary widely on a state-level. Some States (e.g. Kansas) do not prohibit non-competes in employment agreements. These Courts generally look to the reasonableness of the restrictions to determine enforceability. On the other hand, Oklahoma has one of the strictest laws on non-competes in the U.S., banning nearly all such provisions with very limited exceptions. Email Shareholder Pittman at spencer@wintersking.com for additional information or updates.

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