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FTC noncompete ban and FLSA overtime pay final rules

Steve Hall, ACEC Executive Vice President shares a quick summary of two key federal rules that were finalized yesterday:

The **Federal Trade Commission (FTC)** approved a [final rule](#) banning most noncompete agreements and it takes effect in 120 days. Key provisions include:

- Once the rule takes effect, noncompete agreements – including existing ones – are banned and cannot be enforced, with two limited exceptions. Employers do not have to legally rescind existing noncompete agreements but must provide notice to employees that the agreements will not be enforced.
- Existing noncompete agreements with senior executives – defined as workers earning more than \$151,164 annually and who are in policy-making positions – can remain in effect.
- The FTC's **proposed** rule allowed for non-competes in connection with the sale of a business for individuals who own at least 25 percent of the business. The **final** rule allows non-competes for any owner in the bona fide sale of a business entity, **without the 25 percent threshold**. You can read the discussion of this change on pages 335-343 of the preamble to the final rule. The actual language of this provision appears in Section 910.3(a) of the final rule.

This is a positive step relative to the rule as originally proposed. The FTC states that commenters were persuasive in pointing out that in many industries and businesses, ownership shares are typically less than 25 percent – a point that ACEC advocated in our comment letter.

It appears that the final rule didn't deviate much from what was originally proposed, which is disappointing. As you can see in the attached comment letter, in response to the original proposed regulation ACEC had recommended that the FTC make the noncompete ban *prospective* and not retroactive, allow noncompetes with any firm owners, and provide clarity on acceptable alternatives to noncompetes. Alternatives to noncompetes, such as nondisclosure agreements, are still allowed as long as the FTC does not see them as functionally equivalent to a noncompete ([FTC press release](#)). The U.S. Chamber of Commerce has been preparing litigation against the rule since the FTC first proposed it, and this effort may be joined by other organizations. It's possible that the implementation of the rule could be delayed in response to these challenges. ACEC will keep you informed on the progress and potential impacts of that litigation, and look for upcoming educational programming on this issue.

In addition, yesterday the **Department of Labor** (DOL) released its [final rule](#) updating the Fair Labor Standards Act (FLSA) overtime pay salary threshold below which employees must be paid time and a half for hours more than 40 worked in a week. Key provisions include:

- On July 1, 2024, the current salary threshold of \$35,568 will increase to \$43,888. This is an inflationary update using the methodology of the FLSA final rule from 2019.
- On January 1, 2025, the salary threshold will increase to \$58,656. This is an update using the new methodology proposed by DOL last year.
- The highly-compensated salary threshold will increase to \$132,964 on July 1, 2024 and again to \$151,164 on January 1, 2025, using the new methodology.
- There will be automatic updates of these salary thresholds every three years beginning on July 1, 2027.
- No changes were made to the duties test.

It is possible that some industries will bring legal action against the rule due to the automatic updates, which are not authorized in the law and were the basis of the 2016 FLSA rule being successfully challenged in court. ACEC will keep you informed of any legal action against the rule.

Let us know if you have any questions or need additional information.

Steve