The Work Week

Bassford Remele Employment Practice Group

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Welcome to another edition of *The Work Week with Bassford Remele.* Each Monday morning, we will publish and send a new article to your inbox to hopefully assist you in jumpstarting your work week.

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Non-Competes and New Standards for Employment Discrimination

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As employers wait for the Minnesota legislative session to shake out, SCOTUS and the FTC are giving employers something to talk about. Last week, the U.S. Supreme Court released its decision in *Muldrow v. City of St. Louis*, and the FTC appears set to ban non-competes tomorrow.

Muldrow v. City of St. Louis

As we previewed last fall, the United States Supreme Court issued its much-anticipated decision in *Muldrow v. City of St. Louis* last week. SCOTUS's unanimous decision in *Muldrow* lowers the threshold of harm an employee must show as a result of an employment action, such as forced transfer. Under Title VII of the Civil Rights Act of 1964, employers are prohibited from discriminating against employees concerning compensation, terms, conditions, or privileges of employment because of their race, color, sex, religion, or national origin. An employee alleging discrimination must show the employment action caused some disadvantage to a term or condition of employment.

In *Muldrow*, SCOTUS resolved a circuit split and adopted the "some harm" standard. No longer must an employee show a "significant," "material," or "serious" employment disadvantage. Instead, a plaintiff need only show "some" harm as a result of a forced job transfer to establish a prima facie case of discrimination. The harm does not need to be "economic or tangible." Although the adverse employment action in *Muldrow* involved a forced job transfer, the "some harm" standard applies to any adverse employment action.

The Court in *Muldrow* noted that the plaintiff incurred "some" harm based on the loss of FBI credentials, an unmarked car, and a regular work week as a result of a forced job transfer. Additionally, the Court observed that a less-prestigious position may be sufficient to meet this new threshold. The Court also highlighted cases where some disadvantages had been disregarded because they were not "significant," suggesting that a transfer to a position that involves exclusively nighttime work or involves different

working conditions may also meet the "some harm" standard. Under the standard set by *Muldrow*, summary judgment may be more difficult for employers to obtain in discrimination cases. While in some instances there is no economic harm and, consequently minimal damages, Title VII allows for employees to recover attorney's fees and costs incurred in litigation.

Potential FTC Ban on Non-Competes

In January 2023, the FTC proposed a new rule that would ban the use of non-compete agreements nationwide. Now, the Commission may issue a final rule banning non-competes as soon as tomorrow. On Tuesday, April 23, 2024, the Commission will vote on whether to publish the final rule during a virtual open meeting. If the final rule is published, employers and businesses are expected to have 60 days before the rule goes into effect, and a 180-day grace period to ensure they're compliant.

The FTC's proposed rule is an extensive ban on non-compete clauses. It applies to any contractual term between an employer and a worker that prevents the worker from seeking or accepting employment elsewhere or operating a business after the worker leaves that employer. Notably, the rule defines "worker" broadly as "any natural person who works, whether paid or unpaid, for an employer," including independent contractors, externs, interns, volunteers, apprentices, or sole proprietors.

The rule does have some limited exceptions. For example, it does not impact franchisee-franchisor agreements or agreements between buyers and sellers of a business. Nor does it prohibit nondisclosure or customer non-solicitation agreements (unless those agreements are so broad that they function as "de facto" non-competes).

The rule preempts contrary state laws, meaning that state laws with no non-compete bans or less restrictive ones will no longer be enforceable. This preemption may even impact states like Minnesota, which already have laws significantly restraining the use of non-competes. In July 2023, Minnesota became the fourteenth state to ban non-competes, and the Minnesota legislature is currently considering expanding the ban. But, while Minnesota's prohibition is not retroactive and applies only to non-competes entered into on or after July 1, 2023, the FTC's proposed rule would apply retroactively and would invalidate all existing non-compete agreements. Additionally, the FTC rule would require employers to directly inform employees that their non-compete agreement is no longer valid.

It remains to be seen how the FTC will vote on the final rule, and whether the final rule ends up being as restrictive as the proposed version from last year. The FTC's rule has seen no shortage of controversy and is likely to result in immediate litigation if passed (the Commission received more than 26,000 comments from members of the public and had to extend its public comment period to accommodate the high volume of public feedback). Regardless, businesses should be prepared for a relatively short compliance period should the rule go into effect.

At Bassford Remele, we constantly monitor case-law and legislative updates to keep our clients apprised of new developments in employment law. Please feel free to reach out to our team with any questions!

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