

Federal Trade Commission Bans Most Noncompete Agreements

On April 23, 2024, the Federal Trade Commission (“FTC”) adopted a rule outlawing most noncompete clauses and agreements for US workers. The only exception to the rule, called the “Noncompete Rule,” is existing agreements for certain senior executives.

Ban on New Post-Employment Restrictions. The law, once effective, will comprehensively ban all new noncompete arrangements with all “workers.” The law will be effective 120 days after the FTC formally publishes it. Currently, the FTC has not announced a publication date.

Limited Exceptions for Existing Restrictions. Existing noncompetition restrictions will also be unenforceable, with the exception of restrictions on “senior executives” that were in effect before the law’s enactment. A senior executive is defined

as a person who made more than \$151,164 in the prior year and is in a policy-making position. The FTC intends to apply this exemption to the highest levels of a business entity.

Formal Notice Required Soon. Employers must notify any restricted worker that the employer will not and cannot enforce the worker’s noncompete after September 4, 2024. This notice must be provided before September 4, 2024 by email, text, or regular mail. The FTC provides a model form of notice that can be used.

Expanded Definition of a “Noncompete Clause.” The law applies to any policy or contractual term that “has the effect of prohibiting the worker from seeking or representing

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Provides Stable Framework for Corporate Operations Filings for Corporate Transparency Act to Continue in 2024

A U.S. District Court in Alabama declared the Corporate Transparency Act (CTA) unconstitutional on March 1, 2024, concluding that it exceeds the Constitution’s limits on Congress. The decision is causing uncertainty about the CTA’s beneficial ownership reporting requirements, which recently started on January 1, 2024.

Congress passed the CTA in 2021 to help prevent the dishonorable use of corporate structures to hide illicit funds by requiring non-exempt entities to disclose their beneficial owners. More than 25 million reporting companies are estimated to be subject to the CTA’s reporting requirements, many of which are small businesses.

The Financial Crimes Enforcement Network (FinCEN), the



governmental agency in charge of the beneficial ownership filings, has stated that it will continue to enforce the CTA against all non-exempt companies except for the plaintiffs in the Alabama case. The Justice Department filed an appeal to the Eleventh Circuit Court on March 22, 2024, but it will take time to resolve.

In the meantime, we recommend that companies comply with the CTA requirements unless they are exempt.

Companies impacted include corporations, LLCs, LPs, LLPs, and LLLPs, as well as most homeowners’ associations. There are 23 types of exemptions, but the qualifications are very detailed and complex.

For listing, see: https://www.fincen.gov/boi-faqs#C_2

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Awards and Celebrations

At the 2024 winter conference for the Arizona City/County Management Association, **Andrew McGuire** presented “Avoiding the ‘Checkmark’–Legal Considerations for Bond Elections.”

Christina Noyes was elected Chair of the Arizona State Bar Business Law Council.

Peter Collins, Jr. gave a presentation to the U.S. Air Force University Library and Historical Foundation on tactical and strategic planning after various incidents.

At the Arizona State Bar’s CLE by the Sea in summer 2024, **Christopher McNichol** will be teaching a seminar as part of the Real Estate Law Track entitled “Strategies in a Turbulent Economy with Fluctuating Resources.”

In February, **Scott Malm** spoke to the Arizona State Escrow Association about how to read legal descriptions. Scott was also interviewed by Best Lawyers and discussed what residents and business owners may want to know before buying or leasing a property in Arizona.

In the 14th edition of *Millenium Magazine*, a publication of Marquis Who’s Who®, **Gerard R. O’Meara** was recognized for his years of professional and civic service in the community.

Business Today, an online publication, named **Chas Wirken** one of the Top 10 Influential Appellate Lawyers in Arizona 2024. Also, Chas is ranked in the Chambers USA 2024 guide and is listed among the top 2 to 3% of lawyers ranked globally.

Maddalena Savary continues her mentoring of law students, recently adding a University of Arizona group to her existing Arizona State University groups. She regularly participates in ASU College of Law panels, networking, and admission events, including a recent student Federal Bar Association lunch panel focused on networking.

Ná baa hózhó (Congratulations) to **John Austin Gaylord** and **Barry Williams II** for passing the Navajo Nation Bar exam. John and Barry now join colleagues **Claire DeChambre, Nathan Schott, Gehl Tucker, Ben Hufford, Joseph Williams, and Flora Ben** in representing our clients before the Navajo Nation courts.

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employment.” In addition, employers cannot represent that a worker is subject to a noncompete restriction.

Exceptions for Business Sales and Franchises. The Noncompete Rule does not apply to any noncompete restriction entered into by a person as part of selling that person’s ownership interest in a business or its assets. Further, the law does not apply to agreements between a franchisee and a franchisor because the FTC considers that relationship to be similar to arrangements between separate businesses.

Other Restrictive Agreements May be Permitted. The law does not ban other types of restrictive agreements, such as

non-disclosure agreements, non-solicitation agreements, or non-recruitment agreements, unless those agreements meet the definition of a noncompete clause by preventing the worker from being employed.

The U.S. Chamber of Commerce and a Dallas-based tax firm have sued the FTC in Texas District Court to block the law. The court is currently scheduled to announce a decision on July 3, 2024.

If you have questions, please do not hesitate to contact us.

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Non-exempt reporting companies formed on or after January 1, 2024, must file a Beneficial Ownership Information (BOI) report within 90 days after receiving notice of its formation. This time is shortened to 30 days in 2025. Non-exempt reporting companies formed before January 1, 2024, must file a BOI report by January 1, 2025, and may wish to wait until Fall 2024 before filing for the law to be determined.

The BOI report must contain:

1. The company’s legal name, trade name or dba, street address, state of formation, and taxpayer ID number.
2. Personal information on individuals who exercise substantial control over the company, including senior

officers, board of directors’ members, and individuals who own at least 25% of the company.

3. For companies created on or after January 1, 2024, personal information on the individual directly filing the document creating the company and the individual primarily responsible for the filing.

We can help evaluate whether a company is exempt from the CTA requirements or if it must comply. We can also help with BOI reports. We suggest seeking advice promptly.

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Christina focuses her practice on franchise, corporate, and intellectual property law.

Gust Rosenfeld Bond and Public Finance Update

Gust Rosenfeld's public finance practice has been around since the firm was founded more than 100 years ago. This practice group represents cities, towns, community facilities districts, school districts, fire districts, other special districts, community colleges, and industrial development authorities, among others, with respect to bond issues, refundings, defeasances, capital leases, and other types of financing and elections.

Our public finance group currently consists of four members: **Andrew McGuire**, **Jim Giel**, **Brandon Caywood**, and **Fred Rosenfeld**, along with two paralegals, **Jennifer Honea** and **Annette Shively**. We regularly represent more than 100 political subdivisions around Arizona and, due to our wide and varied client base, provide bond counsel services on more bond issues every year than any other law firm in the state.

In 2023 alone, we successfully closed 35 bond issues, representing a principal amount of nearly \$680 million, including a \$76,550,000 school improvement bond issue; a \$37,735,000 new money and refunding issue for a community facilities district; a \$6,762,136 issue for a rural development and water infrastructure finance authority (WIFA) grant and loan; and a \$500,000 school improvement bond issue that was privately placed. In addition, in 2023, we provided election counsel services to more than 40 school districts and cities on 55 ballot questions in 12 of Arizona's 15 counties.

Gust Rosenfeld also provides post-issuance compliance services related to tax issues and continuing disclosure on bond issues. We regularly give input to our public finance clients and their financial advisors on new deal structures and proposed legislation.

Please reach out to Gust Rosenfeld's public finance group with any assistance you may need as it relates to the issuance of tax-exempt bonds, other capital needs, and authorizing elections.

James T. Giel | 602.257.7495 | jgiel@gustlaw.com Jim has a broad range of experience in public finance.

What is a “Landlord’s Lien?”

Under Arizona law, a landlord in a commercial lease holds a statutory lien on the personal property of the tenant located in the leased premises. If the tenant does not pay the rent, the landlord can then seize and sell that property as an offset to the tenant's rent obligations.

Tenants also borrow money. As part of financing to tenants, lenders routinely take liens on the tenant's personal property, including so-called intangible interests such as the tenant's accounts receivable, using the securitization provisions of the Uniform Commercial Code.

That can then lead to a question as to whether the landlord or the lender has priority in that property. The order can be established up front through subordination or similar agreements between a landlord and a lender. But what if there is no such agreement?

In a recent decision addressing a dispute between the landlord and the lender over some of the tenant's property, where the tenant defaulted both under the lease and under the loan, the Arizona Court of Appeals held that the statutory landlord's lien applies only to tangible personal property found and used on the leased premises (think: equipment, machinery, furniture, etc.), and not to the tenant's accounts receivable. As to those intangibles, the court held that the landlord had no rights to those. The lender alone could pursue those collateralized assets.

*Christopher M. McNichol | 602.257.7496 | mcnichol@gustlaw.com
Chris concentrates his practice on commercial and real estate transactions and related litigation in these areas.*



NEW FACES



Barry Williams II

Barry brings expertise in negotiation and Alternative Dispute Resolution (ADR) to Gust Rosenfeld where he focuses on education and employment matters. Barry is a Certified Mediator and has mediated disputes in Maricopa County

Justice Courts and the Equal Employment Opportunity Commission.

Prior to joining Gust Rosenfeld, Barry worked for a legal aid provider, serving individuals across Northern Arizona, Northwest New Mexico, the Navajo Nation, and Southern Utah.

Barry graduated from the Sandra Day O'Connor College of Law at Arizona State University in 2019 with the Pro Bono Highest Distinction award for his efforts in serving the public interest. Barry also holds both a Bachelor of Science in Political Science and a Bachelor of Arts in History from Arizona State University, where he graduated summa cum laude.



Peter Stazzone

Peter is an associate in the Litigation Group at Gust Rosenfeld. His practice areas include commercial litigation and insurance defense. While in law school, Peter served as a law clerk in private firms and interned as legal counsel for companies in Arizona. Prior to joining

the firm, he practiced personal injury, insurance defense, and commercial litigation.

Peter received his J.D. from the Sandra Day O'Connor College of Law at Arizona State University in 2021. During law school, Peter was an article editor for *The Sports & Entertainment Law Journal* and a legal research aide. In spring 2020, Peter interned for the Arizona Department of Gaming.

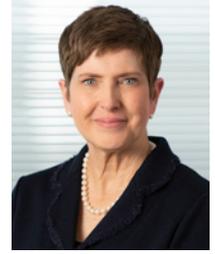
Partnership Expanded



Daniel Coumides



Robert Williams



Kari B. Zangerle



Robert C. Stultz

Daniel Coumides (Insurance, Litigation and Health Care); **Robert Williams** (Bankruptcy and Creditors Rights; Litigation); and **Kari B. Zangerle** (Health Care Law; Litigation) were elected as capital members of the firm.

Robert C. Stultz (Health Care Law; Litigation) was elected to the firm's partnership.

"Bob, Dan, Kari and Robert are wonderful people and lawyers who are truly dedicated to their clients, and I am thrilled with their recognition," said Christina Noyes, Gust Rosenfeld Executive Committee member.

ET·Y·MOL·O·GY COR·NER

Bond: A Tie That Binds

A single word deriving from multiple roots often has many meanings. The word "bond" (from 13c Old English) can refer to a security under which the issuer owes the holder a debt (late 16c Early Modern English). When combined with the word "bail" (from Latin "baiulare" "to bear a burden") it meant to obtain the release of a prisoner (late 15c Middle English), now referring to security for a future court appearance. In recent times, it has come to describe the relationship between atoms. Most importantly, though, it is used to describe a relationship between family, friends or associates (from 13c Old English "band" meaning to bind).

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Rick, our etymologist, practices in the areas of
commercial law and litigation.*

Changes to Rule by Department of Labor “Independent Contractor” Test Recently Changed by U.S. Department of Labor

A new rule issued by the U.S. Department of Labor (“DOL”) that became effective on March 11, 2024, provides a new test for determining whether a worker is an employee or an independent contractor under the Fair Labor Standards Act (“FLSA”). Independent contractors are not entitled to minimum-wage and overtime-pay protections afforded to employees by the FLSA. For that reason, application of the rule to the classification of workers can have important economic consequences for public and private businesses and employers.



The new rule, which replaces a rule adopted in 2021, now utilizes a six-part test known as the “economic reality” test. The factors now to consider in determining whether a worker is an employee or an independent contractor are intended to determine the extent to which a worker is economically dependent on the potential employer. These factors are:

1. **Opportunity for profit or loss depending on managerial skill**, which “primarily looks at whether a worker can earn profits or suffer losses through their own independent effort and decision making.”
2. **Investments by the worker and the employer**, which “primarily looks at whether the worker makes investments that are capital or entrepreneurial in nature.”
3. **Permanence of the work relationship**, for example, work that is “sporadic or project-based with a fixed ending date (or regularly occurring fixed periods of work), where the worker may make a business decision to take on multiple different jobs indicates independent contractor status” and may lead to the conclusion that the worker is an independent contractor.



4. **Nature and degree of control**, which looks to the level of control and supervision the potential employer has over the worker.
5. **Whether the work performed is integral to the employer’s business**, which “primarily looks at whether the work is critical, necessary, or central to the potential employer’s principal business, which indicates employee status.”
6. **Skill and initiative**, where “the focus should be on whether the worker uses their skills in connection with business initiative.”

The above information comes from the DOL “Fact Sheet 13: Employee or Independent Contractor Classification Under the Fair Labor

Standards Act.” No one factor is determinative and, as the DOL points out, other relevant factors may be considered.

<https://www.dol.gov/agencies/whd/fact-sheets/13-flsa-employment-relationship>

The previous rule adopted by the Trump administration, which was never fully implemented, attempted to simplify the test to make it easier to classify a worker as an independent contractor and allow the contractor to avoid FLSA restrictions. The new economic reality test is a reversion to a multi-factor test that the DOL and courts have used since the 1940s. Nonetheless, there have been and continue to be many legal challenges to the new rule on many fronts. Gust Rosenfeld will continue to update our clients on this important topic.

Susan Plimpton Segal | 602.257.7425 | spssegal@gustlaw.com

Susan Segal brings exceptional expertise in the area of public law and employment law.

American Red Cross Blood Drive

On April 30, 2024, Gust Rosenfeld held a blood drive in its ongoing commitment to the community. It was a collective effort that made the blood drive successful. Our dedicated Gust Rosenfeld employees worked hand in hand with the American Red Cross team and exceeded expectations. Jason Benedict, Donor Services Executive of the American Red Cross, states that “recipients receiving life-saving blood are highly grateful to Gust Rosenfeld for hosting a successful blood drive. The donors who rolled up their sleeves to help those in need reflect Gust Rosenfeld’s dedication to the community and embody the true spirit of generosity.”



Gust Rosenfeld attorney Robert Williams with family friend and blood drive donor Mark Hughes.

Gust Rosenfeld Attorneys Recognized by Super Lawyers® 2024

Ten Gust Rosenfeld attorneys were selected to the 2024 Southwest Super Lawyers® list, including four as Rising Stars. Super Lawyers® is a national rating agency that evaluates lawyers from more than 70 practice areas.

Super Lawyers®

- Peter Collins, Jr. (Insurance Coverage)
- Frederick M. Cummings (Medical Malpractice)
- Scott A. Malm (Real Estate)
- Christina M. Noyes (Franchise/Dealership)
- Séan P. O’Brien (Bankruptcy: Business)
- Charles W. Wirken (Appellate)

2024 Southwest Rising Stars

- Brandon Caywood (Government Finance)
- Heidi Purtzer (Franchise/Dealership)
- Brittany J. Reed (Schools & Education)
- Robert Williams (Creditors’/Debtor Rights)



Gust Rosenfeld Ranked in Multiple Categories by Ranking Arizona®

The five categories Gust Rosenfeld ranked in are:

- Law Firms: Appellate
- Law Firms: ADR/Mediation or Arbitration
- Law Firms: Creditors’ Rights, Bankruptcy/Reorganization
- Law Firms: Tax
- Law Firms: 40 Attorneys or More

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