



Recent Changes to Federal Guidelines and What You Need to Know

EMPLOYMENT AND LABOR ATTORNEYS FROM HOLLAND & HART

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Materials referenced or requested during the presentation (if applicable)

Agenda

Pregnancy accommodation requirements under new EEOC regulations

EEOC's new sexual harassment policy guidance

FTC's regulation against noncompete agreements

DOL's changes to the exempt salary requirements

Pregnancy Accommodation Requirements Under New EEOC Regulations

DORA LANE

Final Rule Effective June 18, 2024

Rule is 408 pages long; over 100,000 public comments received in response to the proposed rule issued in August 2023

Please remain mindful of applicable state laws, many of which address pregnancy accommodations – the employees will get the benefit of what is most favorable to them

Covered employers – for private employers, same as Title VII

Today we discuss key highlights

Broad Scope of Covered Conditions

Covered conditions subject to reasonable accommodation under the PWFA include

- pregnancy (current and past),
- potential pregnancy,
- lactation (including breastfeeding and pumping),
- use of birth control,
- menstruation,
- migraines,
- pregnancy-related conditions that are episodic – e.g., morning sickness, postpartum depression, gestational diabetes, infertility and fertility treatments, preeclampsia, endometriosis, miscarriage, stillbirth, and having or choosing to have an abortion, among other conditions.

Employers need not pay for abortion or provide paid time off for abortions

Can't consider ameliorative measures

Accommodations for “Known Limitations”

- Need not meet the definition of “disability” under the ADA
- “Known” means the employee or the employee’s representative has communicated the limitation to the employer
- “Limitations” means:
 1. An impediment or problem that may be modest, minor and/or episodic;
 2. A need or problem related to maintaining the employee's health or the health of the pregnancy; or
 3. Seeking health care related to pregnancy, childbirth, or a related medical condition itself.

Additional Considerations

The condition must be one of the employee

“Related to, affected by, or arising out of” – does not require sole, original, or substantial causation; broad inclusivity

Who is a Qualified Employee

One way is to meet the “qualified” definition under ADA, but ***additionally***:

Under the PWFA, an employee may qualify for an accommodation, ***even if they are unable to perform one or more essential job functions of the job***, if:

- the inability to perform the essential function(s) is “temporary,”
- the employee could perform the essential function(s) “in the near future,” and
- the inability to perform the essential function(s) could be reasonably accommodated.

“Near future” is presumed to mean generally 40 weeks for a current pregnancy, but case-by-case determination

“Near future” not defined with respect to childbirth or related medical conditions.

Examples of Possible Reasonable Accommodations Provided

- Possible reasonable accommodations include: frequent breaks, sitting/standing, schedule changes, part-time work, and paid and unpaid leave to recover, telework/remote work, parking, light duty, making existing facilities accessible or modifying the work environment, job restructuring, temporarily suspending one or more essential functions, acquiring or modifying equipment, uniforms, or device, and adjusting or modifying examinations or policies.

Examples of Accommodations that Would Be Reasonable “Virtually in All Cases”



Lactation Accommodations

Breaks

Accommodations related to pumping, such as, but not limited to, ensuring that the area for lactation is in reasonable proximity to the employee's usual work area; that it is a place other than a bathroom; that it is shielded from view and free from intrusion; that it is regularly cleaned; that it has electricity, appropriate seating, and a surface sufficient to place a breast pump; and that it is in reasonable proximity to a sink, running water, and a refrigerator for storing milk;

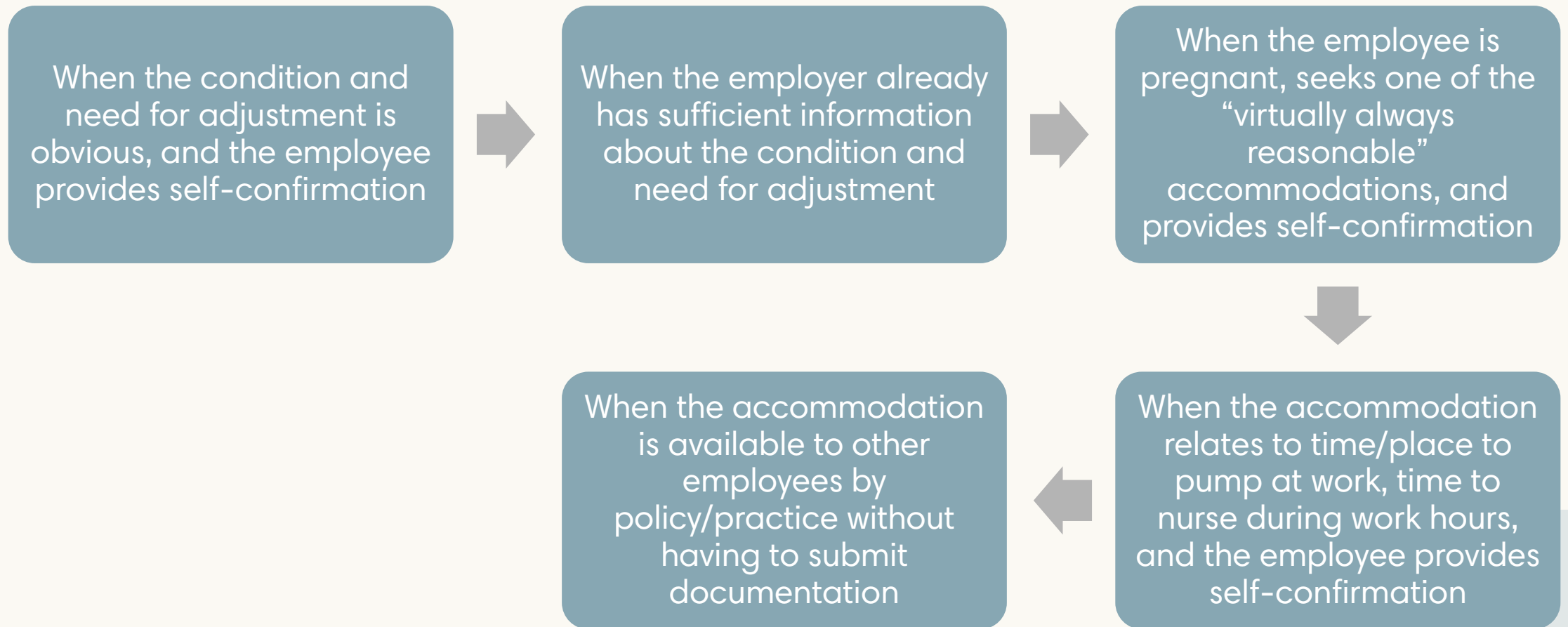
Nursing accommodations during work hours

Scope of Supporting Documentation that Can Be Requested

Employers are limited to reasonable documentation, which includes:

- Minimum documentation sufficient to confirm the employee's physical or mental condition;
- Documentation that confirms that the physical or mental condition is related to, affected by, or arises out of pregnancy, childbirth, or related medical conditions; and
- Documentation that describes the change or adjustment needed at work due to the limitation.

Examples of When Documentation Request Not Reasonable



Employer Prohibitions

Failing to provide a qualified employee or applicant with reasonable accommodations (or unnecessarily delay providing reasonable accommodations);

Requiring a qualified employee or applicant to accept an accommodation other than one arrived at through the interactive process;

Denying employment opportunities to a qualified employee or applicant if the denial is based on the employer's need to make a reasonable accommodation for the known limitation of the employee or applicant;

Requiring a qualified employee or applicant to take paid or unpaid leave if another reasonable accommodation exists; and

Taking adverse action against a qualified employee or applicant for requesting or using a reasonable accommodation.

Rule Challenged in Court

- A coalition of Republican Attorneys General from 17 states filed a lawsuit on April 25, 2025, challenging the requirement that employers accommodate conditions related to abortion



EEOC's New Sexual Harassment Policy Guidance

ADAM BOUKA

Background

- For the first time in 30 years, the EEOC updated its guidance on harassment in the workplace, incorporating major legal and social developments that have dramatically altered the landscape for employers and employees nationwide in recent years.
- The final Enforcement Guidance was issued by the commission after receiving approximately 38,000 public comments in the fall of 2023 and includes more than 70 examples of scenarios the commission considers illustrative of unlawful harassment.

Sexual Harassment

Title VII prohibits unlawful harassment based on sex. Under Title VII, “Sex” includes “pregnancy, childbirth, and related medical conditions” and sexual orientation and gender identity”

To establish a sexual harassment, claim in violation of Title VII:

- The plaintiff must be a member of a protected class;
- The plaintiff must have subjected to unwelcome sexual harassment;
- The harassment must be based on sex;
- The harassment must have affected a term, condition, or privilege of employment; and

Harassing Conduct of a Sexualized Nature or Otherwise Based on Sex

Conduct of a Sexualized Nature

- Unwanted conduct expressing attraction or involving sexual activity (sexual conduct),
- Sexual attention or Sexual coercion:
 - Demands or pressure for sexual favors
 - Rape
 - Sexual assault
 - Other acts of sexual violence
- Discussing or displaying visual depictions of sex acts or sexual remarks

Non-sexual Harassing Conduct Based on Sex

Sex-based epithets

Sexist comments (such as remarks that women do not belong in management or that men do not belong in the nursing profession)

Facially sex-neutral offensive conduct motivated by sex (such as bullying directed toward employees of one sex)

Examples of Sex-Based Harassment

- John – employee in a supermarket bakery department
- Aiko – construction worker on a road crew
- Ferguson – the millwright at a cabinet manufacturer



Sexual Orientation and Gender Identity

Sex-based harassment includes harassment based on sexual orientation or gender identity, including how that identity is expressed. Includes:

- Epithets regarding sexual orientation or gender identity
- Physical assault due to sexual orientation or gender identity
- Outing (disclosure of an individual's sexual orientation or gender identity without permission)
- Harassing conduct because an individual does not present in a manner that would stereotypically be associated with that person's sex
- Repeated and intentional use of a name or pronoun inconsistent with the individual's known gender identity (misgendering)
- Denial of access to a bathroom or other sex-segregated facility consistent with the individual's gender identity.

Examples of Harassment Based on Sexual Orientation and Gender Identity

- Heidi – staff journalist at a media conglomerate
- Chloe – purchase order coordinator at a retail store warehouse



Sex Stereotyping

Harassment is based on a protected characteristic if it is based on social or cultural expectations – be they intended as positive, negative, or neutral – regarding how persons of a particular protected group may act or appear. This includes harassment:

- based on sex-based assumptions about family responsibilities,
- suitability for leadership,
- gender roles,
- weight and body types,
- the expression of sexual orientation or gender identity,
- or being a survivor of gender-based violence.

Example of Sex Stereotyping

- Eric – iron worker
- Maria – receptionist



Intraclass Harassment Based on Sex

- When the harasser is a member of the same protected class as its victim, it is intraclass harassment

Example of Intraclass Harassment Based on Sex

- Dara and Sloane – lab technicians at a pharmaceutical research laboratory

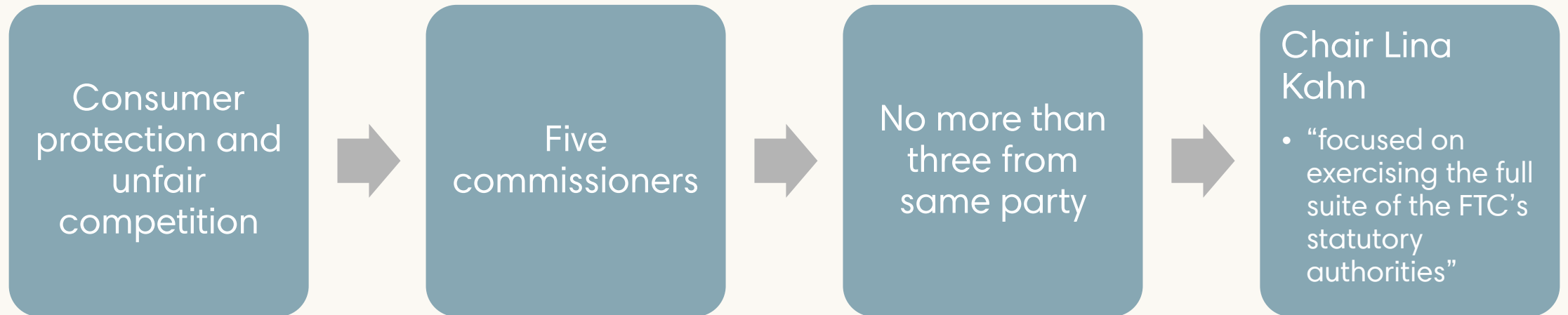




FTC's Regulation Against Noncompete Agreements

BRAD CAVE

Federal Trade Commission????



Non-Compete Rule Basics

Unfair method of competition to:

- enter into or attempt to enter into a non-compete clause
- enforce or attempt to enforce a non-compete clause
- represent that a worker is subject to a non-compete clause

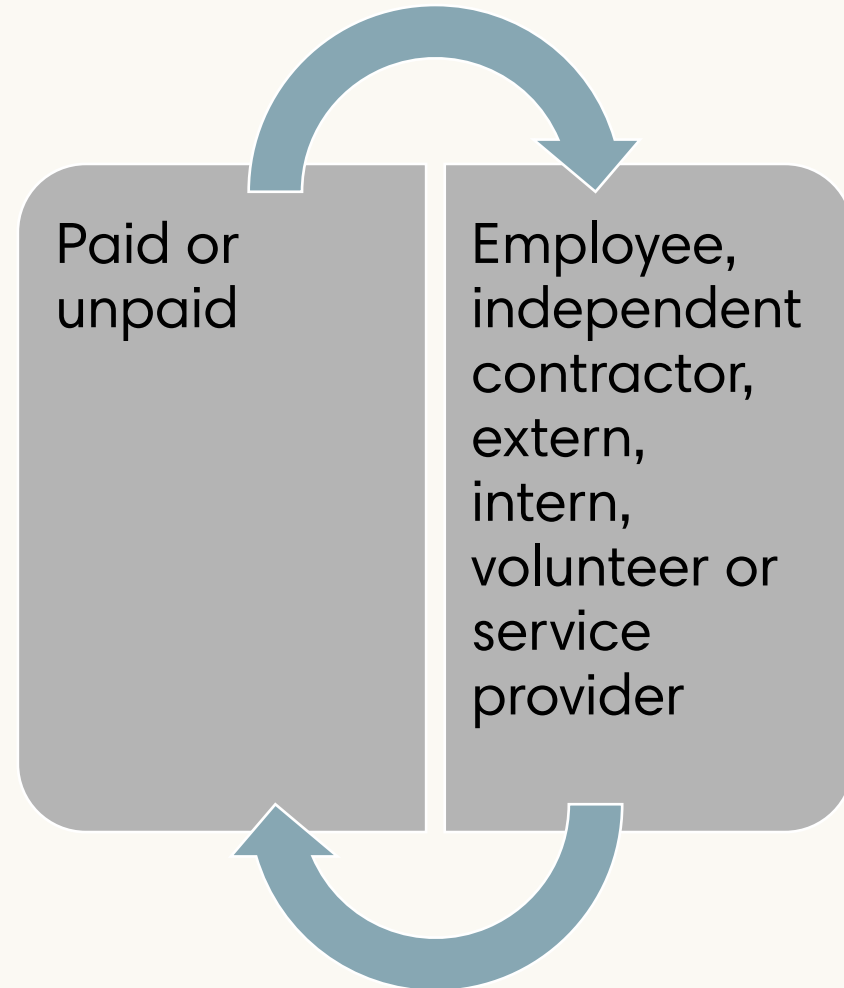
Non-Compete Rule Basics – What's a Non-Compete?

Term or condition of employment by policy or agreement

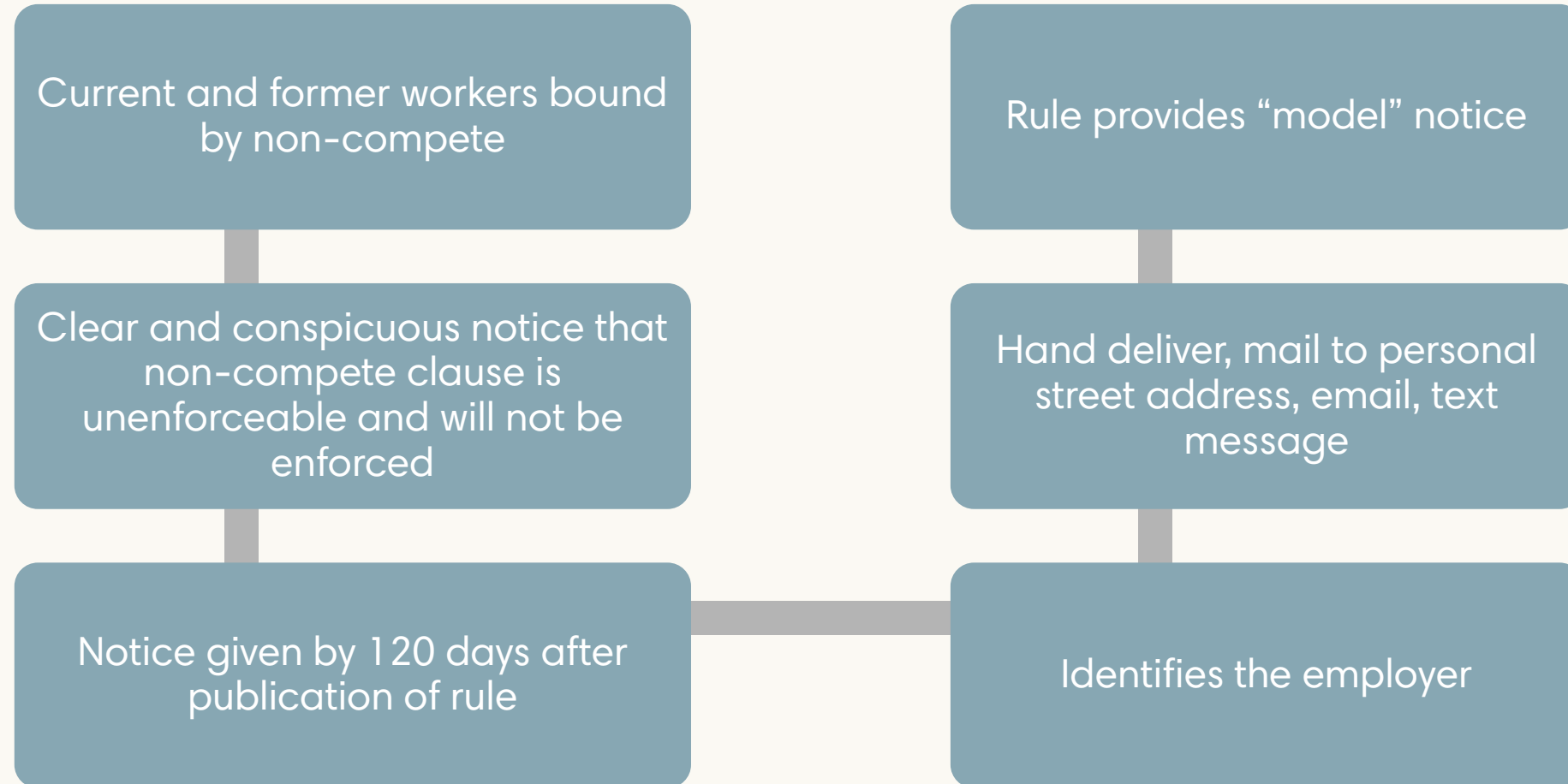
Prohibits, penalizes or functions to prevent a worker from:

- Seeking or accepting any work after employment
- Operating any business after employment

Non-Compete Rule Basics – Covered Workers



Non-Compete Rule Basics - Notice



Senior Executive Exception

Holds a policy-making position

Officer with final authority to make policy decisions to control significant aspects of business; not just advising or influencing policy

Not an officer of a subsidiary or affiliate of a business entity unless they have policy-making authority for the parent entity

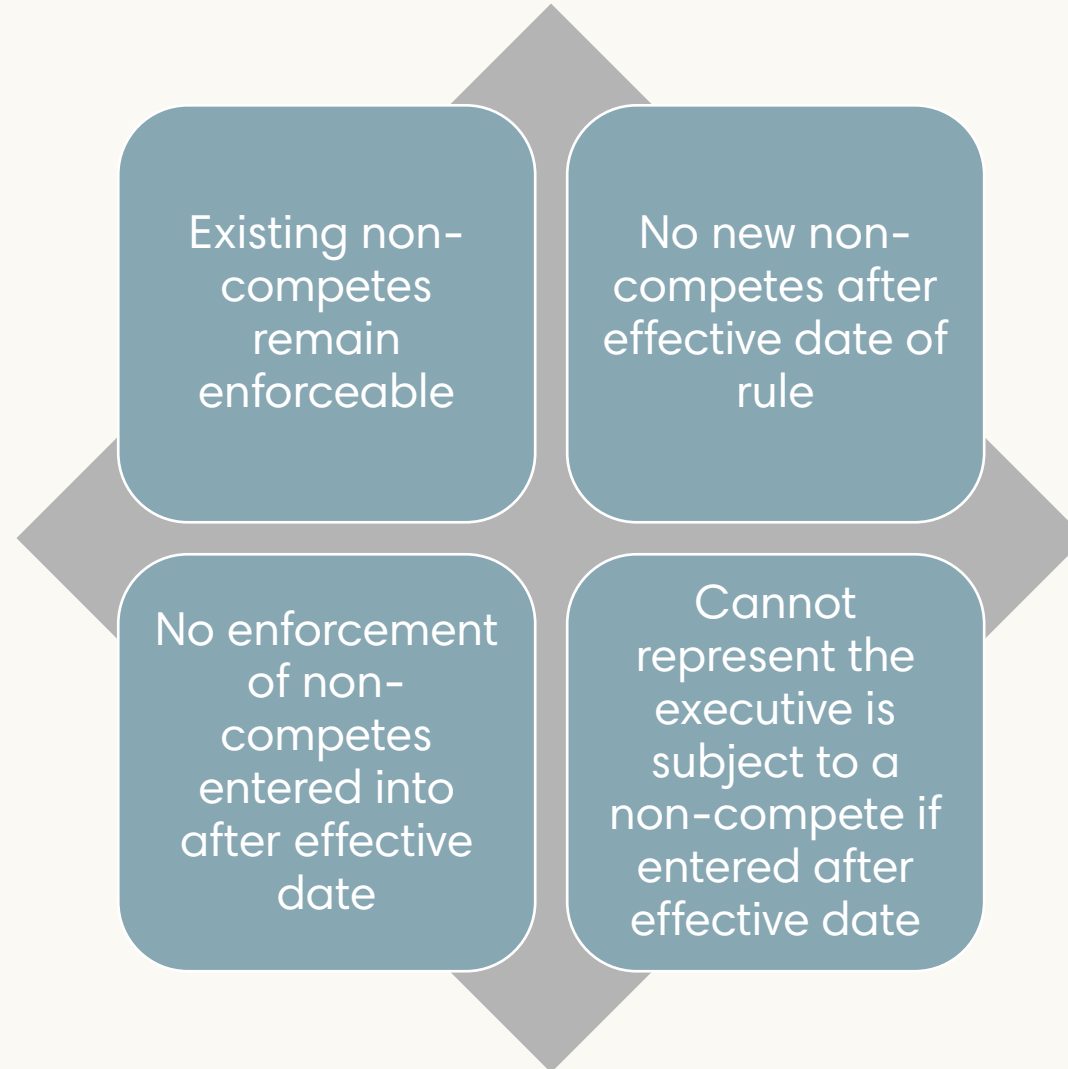


Officer – president, VP, secretary, treasurer or principal financial officer, comptroller or principal accounting officer, or a person performing corresponding functions



Annual comp above \$151,164, not including benefits

Senior Executive Exception



What Entities Are Covered?

Very broad (and
ambiguous)
definitions



“Person” – any
natural person,
partnership,
corporation,
association “or other
legal entity” within
FTC’s jurisdiction
“including any
person acting under
color or authority of
State law.”



To the extent of the
jurisdiction under
FTC Act

What next?



DOL's Changes To The Exempt Salary Requirements

STEVEN EHEART

DOL Issues Final Rule – Now What?


Potential implementation date of July 1, 2024

Significantly increases the minimum salary threshold for certain overtime exemptions under the Fair Labor Standards Act (FLSA)


- New rule affects executive, administrative, professional, and highly compensated employee exemptions
- New rule does not change duties test

Final Rule Threshold Increase


Beginning **July 1, 2024**, the final rule increases the salary threshold for FLSA's bona fide executive, administrative, and professional employees from \$684 per week (\$35,568 annually) to \$844 per week (\$43,888 per year).



Beginning **January 1, 2025**, the final rule increases the salary threshold for FLSA's bona fide executive, administrative, and professional employees to \$1,128 per week (\$58,656 per year).



With respect to the highly compensated employees exemption, beginning **July 1, 2024**, the final rule will raise the annual compensation threshold from \$107,432 to \$132,964 per year. Beginning **January 1, 2025**, the annual compensation threshold for this exemption is raised to \$151,164 per year.



Beginning **July 1, 2027**, *and every three years thereafter*, the salary thresholds will automatically update, using the methodology in effect at the time of each update.

DOL's Reasons for the Final Rule

The previous salary threshold increase was on January 1, 2020

Increased wages for workers who are eligible for overtime have decreased the effectiveness of the previous salary threshold

A higher salary threshold better screens lower-paid employees from the overtime exemption

State Salary Thresholds May Be Higher

- Use the state's salary thresholds when they are higher than the DOL's
- Higher state thresholds for administrative, professional, and executive exemptions include:

State/Locality	2024 Annual Salary	State/Locality	2024 Annual Salary
Alaska	\$48,796.80	New York City and Nassau, Suffolk, and Westchester Counties	\$62,400*
California	\$66,560	New York (Other Counties)	\$58,458.40*
Colorado	\$55,000	Washington	\$67,724.80

- *Executive and administrative exemptions only; professional exemptions are based on the DOL threshold.

How Will States Respond?

Expect California and Washington to continue to be aggressive

- CA: threshold is two times the minimum wage—an ever-increasing number
- WA: threshold is currently two times the minimum wage—but it is increasing to 2.5 times the minimum wage by 2028

Monitor how other states respond when the DOL's threshold increases above their current threshold

What Can Employers Do To Prepare by July 1, 2014?

In the next month, audit employees classified as exempt under the executive, administrative, professional, and highly compensated employee exemptions in states that use the DOL salary thresholds

- Identify employees whose current salaries may not meet the July 1, 2024 threshold
- Identify employees whose current salaries may not meet the January 1, 2025 threshold
- Determine if the business can raise the salaries identified in (a) and (b) to the newly increased salary thresholds
- Determine if exempt positions continue to meet the duties test
- If the answer to (c) or (d) is questionable or not workable for the business, make the change to a non-exempt position with the potential for overtime

What Can Employers Do To Prepare by July 1, 2014?

For any employees receiving salary increases:

- Prepare a communication plan

For any employees who will be newly classified as non-exempt:

- Prepare a communication plan
- Implement training
- Provide relevant policies

If you have employees in states that have higher salary thresholds, confirm that employee salaries meet those thresholds

Plan (and Budget) Ahead

The next DOL salary increase is scheduled to take place January 1, 2027—and again every three years

- The new salary levels are set to be announced at least 150 days prior to the update

Some states will increase salary thresholds annually

Thank you – any questions?



Dora Lane
[View Bio](#)
775.327.3045
Reno, NV



Steven Eheart
303.293.5264
Denver, CO



Brad Cave
[View Bio](#)
307.778.4210
Cheyenne, WY



Adam Bouka
801.799.5976
Salt Lake City, UT