

WEBINAR SERIES

FTC and DOL Issue Important New Final Rules

May 1, 2024



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Today's Presenters



Robyn Rusignuolo
Chief Operating Officer
PrestigePEO



Heather Keefer Saulsbury
Executive Vice President
PrestigePEO



Elisabeth Shaw
VP- General Counsel
PrestigePEO

Today's Agenda

- FTC's Rule Banning Noncompete Clauses
 - Requirements
 - Exemptions
 - Practical Guidance
- DOL
 - Requirements
 - Practical Guidance
- Questions

Webinar Forum

All participants are muted.

Please type questions in the side navigation panel and we will try to address most questions during today's session.

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FTC Final Rule on Non-Compete Agreements

What the FTC's New Rule Requires

Prohibited Conduct

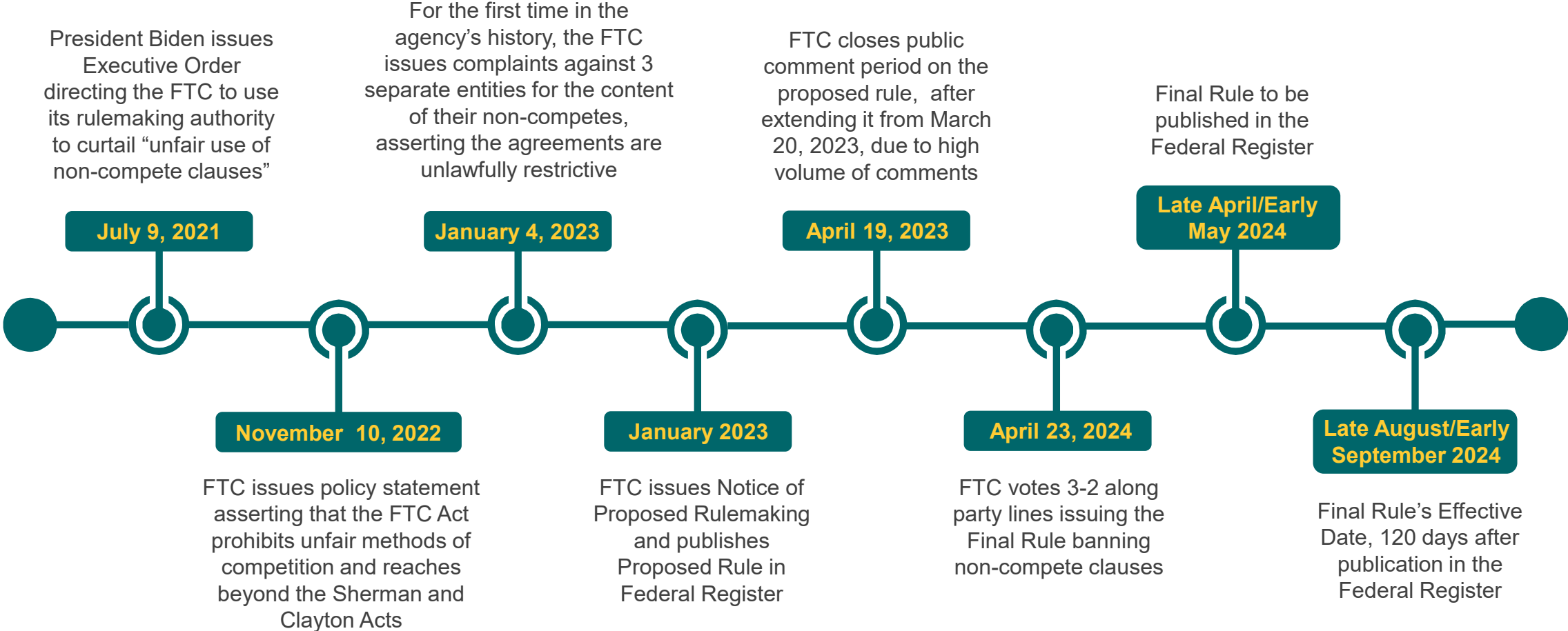
Subject to three exemptions (discussed in further slides), the FTC will consider it to be an **unfair method of competition** for an employer:

- i. To enter into or attempt to enter into a non-compete clause;
- ii. To enforce or attempt to enforce a non-compete clause; or
- iii. To represent that the worker is subject to a non-compete clause.

The FTC: Background

- Mission of the Federal Trade Commission: *Protecting the public from deceptive or unfair business practices and from unfair methods of competition through law enforcement, advocacy, research, and education.*
- The Commission is headed by five Commissioners, nominated by the President and confirmed by the Senate, each serving a seven-year term. No more than three Commissioners can be of the same political party. The President chooses one Commissioner to act as Chair.
- Current political makeup of FTC:
 1. Lina Khan (D) (Chair)
 2. Rebecca Kelly Slaughter (D)
 3. Alvaro Bedoya (D)
 4. Melissa Holyoak (R)
 5. Andrew Ferguson (R)

FTC's Proposed Ban on Noncompetes: Timeline



New FTC Rule: Background

- FTC commissioners narrowly (3-2) approved the noncompete ban along party lines on April 23, 2024, after receiving more than 26,000 public comments over the past year.
- FTC has never before claimed jurisdiction over non-compete agreements.
- Legal challenges
 - The two commissioners who voted no foreshadowed the likely grounds for those challenges, voicing concerns that the FTC lacked the constitutional and statutory authority to adopt the Rule nullifying existing contracts and outlawing a category of contracts that were legal when the Federal Trade Commission Act was passed in 1914.

Broadly Bans Noncompetes

- “With respect to a worker other than a senior executive, it is an unfair method of competition for a person: (i) To enter into or attempt to enter into a non-compete clause; (ii) To enforce or attempt to enforce a non-compete clause; or (iii) To represent that the worker is subject to a non-compete clause.”
- “With respect to a senior executive, it is an unfair method of competition for a person: (i) To enter into or attempt to enter into a non-compete clause; (ii) To enforce or attempt to enforce a non-compete clause entered into after the effective date; or (iii) To represent that the senior executive is subject to a non-compete clause, where the non-compete clause was entered into after the effective date.”

A Closer Look: FTC's Definition of Worker

“Worker” is Broadly Defined

- The term includes “an employee, independent contractor, extern, intern, volunteer, apprentice, or sole proprietor who provides a service to a person.”
- Both current and former workers
- By its express terms, not limited to the employer-employee context.

Prohibited Agreements Under the FTC's New Rule

Noncompete clauses are **defined** under the Rule as follows:

A term or condition of employment that **prohibits** a worker from, **penalizes** a worker for, or **functions to prevent** a worker from:

- (i) seeking or accepting work in the United States . . . where such work would begin after the conclusion of the employment . . . ;
- (ii) operating a business in the United States after the conclusion of the employment

Term or condition of employment includes, but is not limited to, a contractual term or workplace policy, whether written or oral.

This is very broad

Additional Guidance on Agreements that Violate the Rule

Specific examples of agreements that may not initially appear prohibited, but *are prohibited* under the new rule

- a “**severance arrangement** in which the worker is paid only if they refrain from competing” would be a penalty.
- “that a payment to a prospective competitor to stay out of the market may also violate the antitrust laws even if it is not a non-compete under this rule” (e.g. a “no poaching” agreement between two employers)

De Facto Test

Rather than explicitly identifying certain types of restrictive employment agreements as permitted or prohibited, the Rule provides guidance that requires a fact-based analysis applying the de facto test to the terms of a particular agreement to assess whether it functions as a noncompete.

- **De facto test** - referencing nondisclosure agreements (NDAs), training repayment agreements (“TRAPs”), nonsolicitation agreements, no-hire agreements, and “no-business” agreements as examples, the FTC stated that where such an agreement is “so **broad** or **onerous** that it has the **same functional effect** as a term or condition **prohibiting** or **penalizing** a **worker** from seeking or accepting other work or starting a business **after their employment ends**, such a term is a **non-compete clause** under the final rule.”

Exemptions

The Rule lists **three exemptions**, though, practically, there are really only two, and one of those is temporary:

Noncompetes entered into in connection with a **bona fide sale of business**, meaning, the sale of the person's ownership interest in a business entity or of all or substantially all of a business entity's operating assets.

Causes of action concerning noncompetes that **accrued prior to the effective date**.

Enforcement or attempts to enforce a noncompete, or making representations about a noncompete, where the person has a **good-faith basis to believe that the ban is inapplicable**.

Retroactivity

- The Rule will operate **retroactively** for **all noncompetes** *except* those agreed to by “**senior executives**” (to the extent the senior-executive noncompetes were agreed to before the effective date of the Rule).
- Senior executives are a *very* limited group.
 - Estimated to be fewer than 1% of workers.
- To qualify, the employee must be in the C-suite or hold an equivalent role, have “**final authority** to make policy decisions that control significant aspects of a business entity or common enterprise,” and earn over \$151,164 (excluding discretionary bonuses, board, lodging, payments for medical, dental, or vision insurance, retirement contributions, or other “fringe benefits”).
- If the employee qualifies as a senior executive and entered into a noncompete *before* the effective date of the Rule, that noncompete will be outside the scope of the Rule.

Written Notice Requirement

The Rule requires employers to send “clear and conspicuous” **notice** to all workers with a noncompete (except senior executives) “that the worker’s non-compete clause will not be, and cannot legally be, enforced against the worker,” no later than the Rule’s effective date.

Specifically, assuming the company has a way to reach the employee, the notice must:

- (i) **Identify the person** who entered into the non-compete clause with the worker;
 - (ii) Be on paper delivered **by hand** to the worker, or **by mail** at the worker’s last known personal street address, or **by email** at an email address belonging to the worker, including the worker’s current work email address or last known personal email address, **or by text message** at a mobile telephone number belonging to the worker.
- Oral notice does not count
 - **Current** and **former** workers must be notified

The Rule includes a sample notice that will satisfy the requirement and creates a safe harbor for employers that use the model notice.

FTC's Sample Notice

A new rule enforced by the Federal Trade Commission makes it unlawful for us to enforce a non-compete clause. As of [DATE EMPLOYER CHOOSES BUT NO LATER THAN EFFECTIVE DATE OF THE FINAL RULE], [EMPLOYER NAME] will not enforce any non-compete clause against you. This means that as of [DATE EMPLOYER CHOOSES BUT NO LATER THAN EFFECTIVE DATE OF THE FINAL RULE]:

- You may seek or accept a job with any company or any person—even if they compete with [EMPLOYER NAME].
- You may run your own business—even if it competes with [EMPLOYER NAME].
- You may compete with [EMPLOYER NAME] following your employment with [EMPLOYER NAME].

The FTC's new rule does not affect any other terms or conditions of your employment. For more information about the rule, visit ftc.gov/noncompetes. Complete and accurate translations of the notice in certain languages other than English, including Spanish, Chinese, Arabic, Vietnamese, Tagalog, and Korean, are available at ftc.gov/noncompetes.

When the Rule Takes Effect

The rule will not take effect for over four months.

The process is as follows:

- The Rule must be published in the Federal Register. *Nothing happens until the final rule is published in the Federal Register.* Based on the timing of the original Notice of Proposed Rulemaking (January 2023), this will likely take about two weeks.
- The Rule will become effective **120 days from publication.**
- The earliest that the Rule will take effect is August 22, 2024.

Note that even though there is time, the rule will have *retroactive* effect, meaning that once it becomes operative, it will invalidate existing agreements.

FTC Rule – Legal Challenges

- Several business groups have already filed legal challenges to the FTC Rule banning noncompetes.
 - U.S. Chamber of Commerce has challenged the regulation in federal court in East Texas.
 - Ryan LLC, a global tax services and software provider has also filed a legal challenge in federal court in North Texas.
- There undoubtedly will be other legal challenges to implementation of the rule, but they won't automatically stop the rule from taking effect. Rather, the 120-day compliance clock will keep ticking unless and until a court issues an injunction staying the rule's effectiveness pending judicial review.

What to Do Now

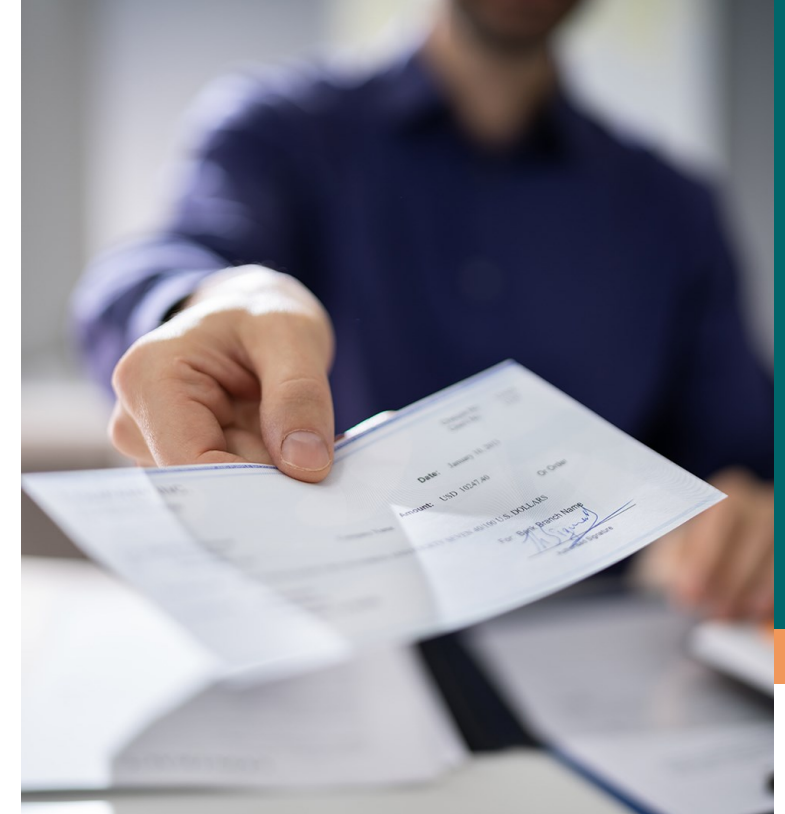
- 1 Take inventory of existing non-compete clauses in your workforce and prepare (but do not yet issue) required notices
- 2 Review nondisclosure agreements and policies
- 3 Take advance steps to protect trade secrets and confidential information
- 4 Update and refine your customer and employee non-solicitation provisions
- 5 Consider other alternative agreements



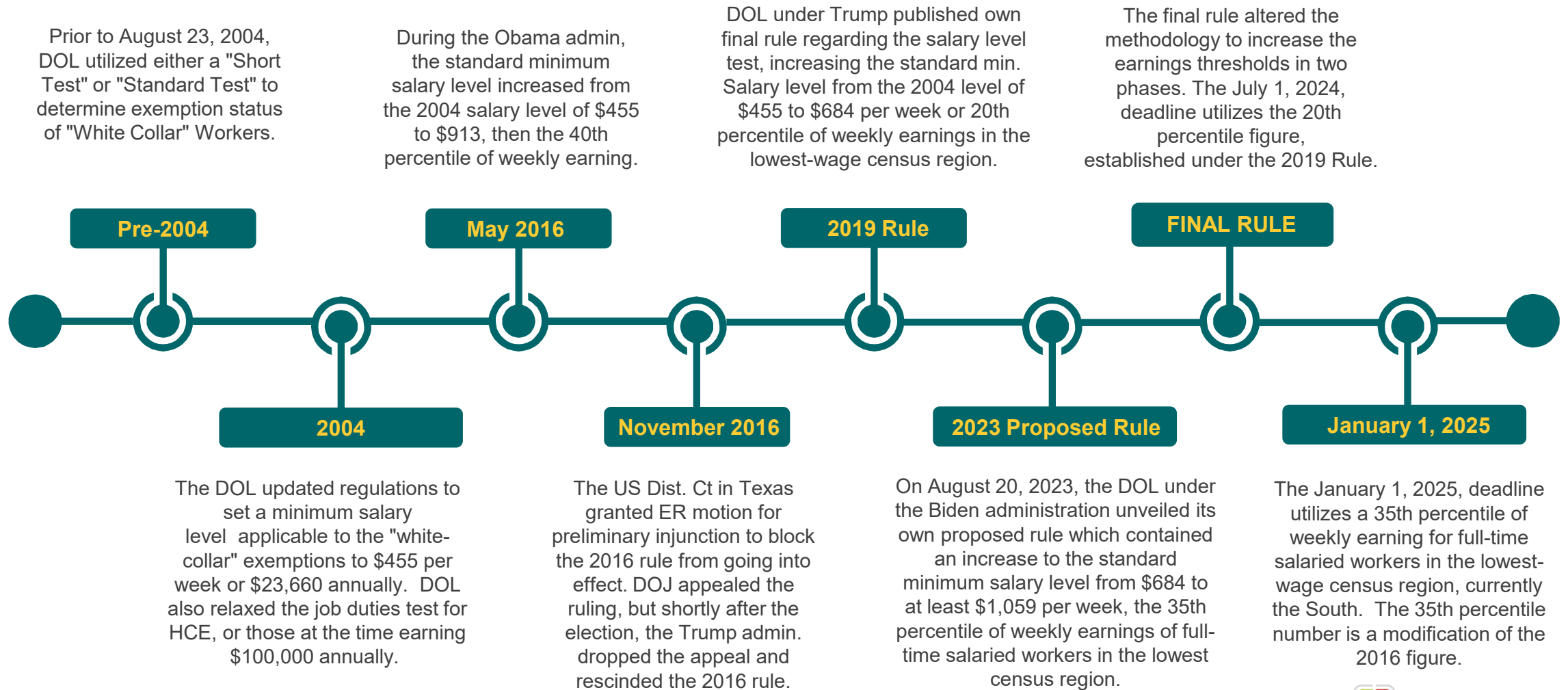
DOL Final Rule on Overtime Exemptions

DOL 's New Salary Threshold

- On April 23, 2024, the DOL finalized the new salary requirements for salaried exempt employees to be phased in incrementally, starting **July 1, 2024**, and again on **January 1, 2025**.
- The new salary thresholds are higher than initially proposed and will impact both "white-collar" salaried exempt employees and highly compensated employees.
- The new standard "white-collar" salary level threshold and the total annual compensation threshold for highly compensated employees will take effect very shortly.



DOL: "White-Collar" Exempt Status Timeline



DOL 's New Salary Threshold, continued

- The **July 1, 2024**, deadline requires the salary level for employees classified as "white-collar" or bona fide executive, administrative, or professional (EAP) employees exempt from overtime to increase:
 - from **\$684 per week or \$35,568/year**
 - to **\$844 per week or \$43,888/year.**
- The **July 1, 2024**, deadline also substantially increases the salary level required for highly compensated employees (HCE) from:
 - from **\$107,432/year** to **\$132,964/year.**

DOL 's New Salary Threshold, continued

- An additional salary level threshold increase is required by **January 1, 2025**.
 - For employees classified as bona fide executive, administrative, or professional (EAP) employees exempt from overtime, the threshold will increase to:
 - **\$1,128 per week or \$58,656/year.**
 - For highly compensated employees (HCE), it will increase to:
 - **\$151,164/year.**

DOL 's New Salary Threshold, continued

- Future increases to these salary levels will automatically update every three years to reflect current earning data, beginning on **July 1, 2027**.
- There are no changes to the job duties test/requirements for any exemption.
- Although the DOL proposed increased for Puerto Rico and other US territories, the Final Rule does not adopt those changes. Salary threshold in those locations will remain the same.

U.S. Department of Labor (DOL) Finalizes New Salary Thresholds

Date	Standard Salary Level	Highly Compensated Employee Total Annual Compensation Threshold
Before July 1, 2024	\$684 per week (equivalent to \$35,568 per year)	\$107,432 per year, including at least \$684 per week, paid on a salary or fee basis.
July 1, 2024	\$844 per week (equivalent to \$43,888 per year)	\$132,964 per year, including at least \$844 per week, paid on a salary or fee basis.
January 1, 2025	\$1,128 per week (equivalent to \$58,656 per year)	\$151,164 per year, including at least \$1,128 per week, paid on a salary or fee basis.
July 1, 2027, and every 3 years thereafter	To be determined by applying to available data the methodology used to set the salary level in effect at the time of the update.	To be determined by applying to available data the methodology used to set the salary level in effect at the time of the update.

What are Salaried Exempt Employees?

Salaried exempt employees are:

- Employees that are exempt from the Fair Labor Standards Act's (FLSA) minimum wage and overtime protections which require workers to be paid an overtime premium of **1.5 times** their regular hourly rate of pay for all hours worked over **40 hours in a workweek**.
- However, the salary threshold is just one aspect to be considered for exemption status.

What are Salaried Exempt Employees?

Additional considerations include:

- "White-collar" salary exempt employees are those employees classified as bona fide executive, administrative, or professional (EAP) employees, that generally must meet the following:
 - Be paid a salary, or predetermined and fixed amount not subject to discretionary reduction;
 - Be paid at least a specific weekly salary level; and
 - Perform executive, administrative, or professional duties as outlined in the DOL job duties tests.
- Highly compensated employees (HCE) are those that are:
 - Paid a salary; or predetermined and fixed amount not subject to discretionary reduction;
 - Earn above a higher total annual compensation level; and
 - Satisfy a minimal duties test as outlined by the DOL.

What To Do Now

Employers need to act quickly to ensure compliance by the initial July 1, 2024, deadline

Develop a plan to evaluate all available options:

- First, identify which employees are considered exempt within your workforce that currently earn between \$35,568 and the July 1, 2024, threshold of \$43,888 per year.
- Second, consider whether to increase their salary to meet the new minimum threshold or whether the employee could be reclassified to another exemption such as outside sales or possibly Non-Exempt status.

What To Do Now, continued

Reclassification to Non-Exempt hourly status requires additional considerations:

- Cost & financial implications of having hourly rate of pay plus potential overtime versus salary increase;
- Tracking and retention of hours worked in compliance with DOL rules;
- Impact on benefits, including vacation, PTO, sick leave accruals.
- Morale considerations, including impact on employees feeling of value. Educate your workers on the DOL requirements and necessary modifications to help mitigate any negativity around possible changes.

What To Do Now, continued

Next, consider all other applicable state and local regulations:

- Many state and local regulations already require higher, stricter, or in some cases different wage and hour requirements to meet salaried-exempt status. New York is a good example and will be discussed later.
- If the decision to increase salaries is chosen, employers will need to decide if they want to transition to the January 1, 2025, threshold from the outset or implement the changes incrementally, meeting the July 1, 2024, and January 1, 2025, deadline individually.

What To Do Now, continued

Communication is Key

- Develop a plan of communication.
 - **Wage Notices:** Wage Notices may be a required part of your communication plan. It is important to consider all required notices to employees, as some state and local governments require wage notices be given to all employees impacted by changes to their wages or to the conditions of how their wages are earned.
 - Educate employees on any aspect of necessary modifications to their wages and/or job duties, any new expectations surrounding timekeeping requirements, and any other condition of employment that may be impacted.
 - Train management to be responsive and respectful to employee questions. This could be unsettling for many impacted employees. Educate your workers on the DOL requirements and necessary modifications to help mitigate any negativity around possible changes.

Impact on New York State

As mentioned, many states and local governments have more stringent requires.

New York is one such state that has its own minimum salary level thresholds **for executive and administrative** employees, as does the City of New York, and the counties of Nassau, Suffolk, & Westchester:

Geographic Location:	Current 2024 Salary Threshold:
• New York City	\$1,200.00 per week (\$62,400.00 per year)
• Nassau, Suffolk, & Westchester counties	\$1,200.00 per week (\$62,400.00 per year)
• Remainder of New York State	\$1,124.20 per week (\$58,458.40 per year)

These amounts remain compliant with the new federal regulations throughout 2024.

Impact on New York State

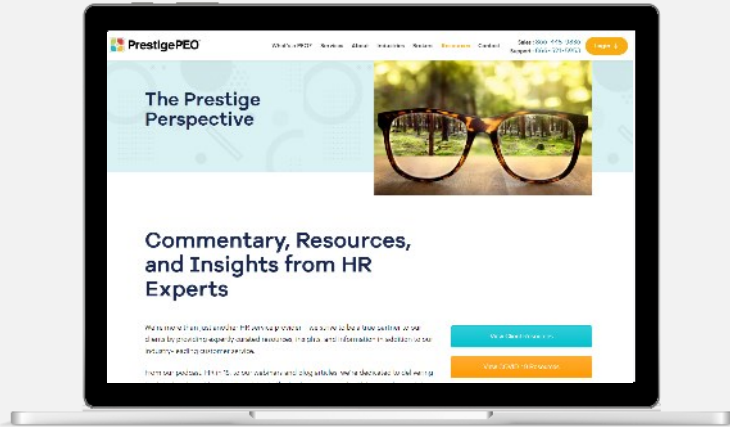
New York employers also are reminded of the NYDOL yearly threshold increases for employees who work in an **"executive"** or **"administrative"** exempt capacity that began in January 2024. These threshold increases will continue to keep New York employers compliant with the new federal regulations for the **"executive"** and **"administrative"** exempt classifications.

- New York City and the rest of “downstate” (Nassau, Suffolk, and Westchester counties):
 - \$1,200 per week (\$62,400 per year) on Jan. 1, 2024.
 - \$1,237.50 per week (\$64,350 per year) on Jan. 1, 2025.
 - \$1,275 per week (\$66,300 per year) on Jan. 1, 2026.
- The rest of New York State (areas outside of New York City and Nassau, Suffolk and Westchester):
 - \$1,124.20 per week (\$58,458.40 per year) on Jan. 1, 2024.
 - \$1,161.65 per week (\$60,405.80 per year) on Jan. 1, 2025.
 - \$1,199.10 per week (\$62,353.20 per year) on Jan. 1, 2026.

Impact on New York State

- Professional exempt employees are currently subject to the federal exempt salary threshold of \$684.00/week or \$35,568 per year.
- As of July 1, 2024, **professional exempt employees** in all of New York state, including in New York City and Nassau, Suffolk, & Westchester counties will require an increase from the current federal salary threshold of **\$684 per week (equivalent to \$35,568 per year)** to **\$844 per week (equivalent to \$43,888 per year)** in salary to remain compliant with the new federal minimum salary threshold requirements. The incremental threshold increases, including the January 1, 2025, deadline will also need to be given particular attention moving forward.

Questions / Comments / Discussion?



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