

Avoiding Wage and Hour Complaints

A Guide to Compliant Pay,
Including Today's Insights
for the Gig Economy

April 16, 2019



Our Wage and Hour Experts



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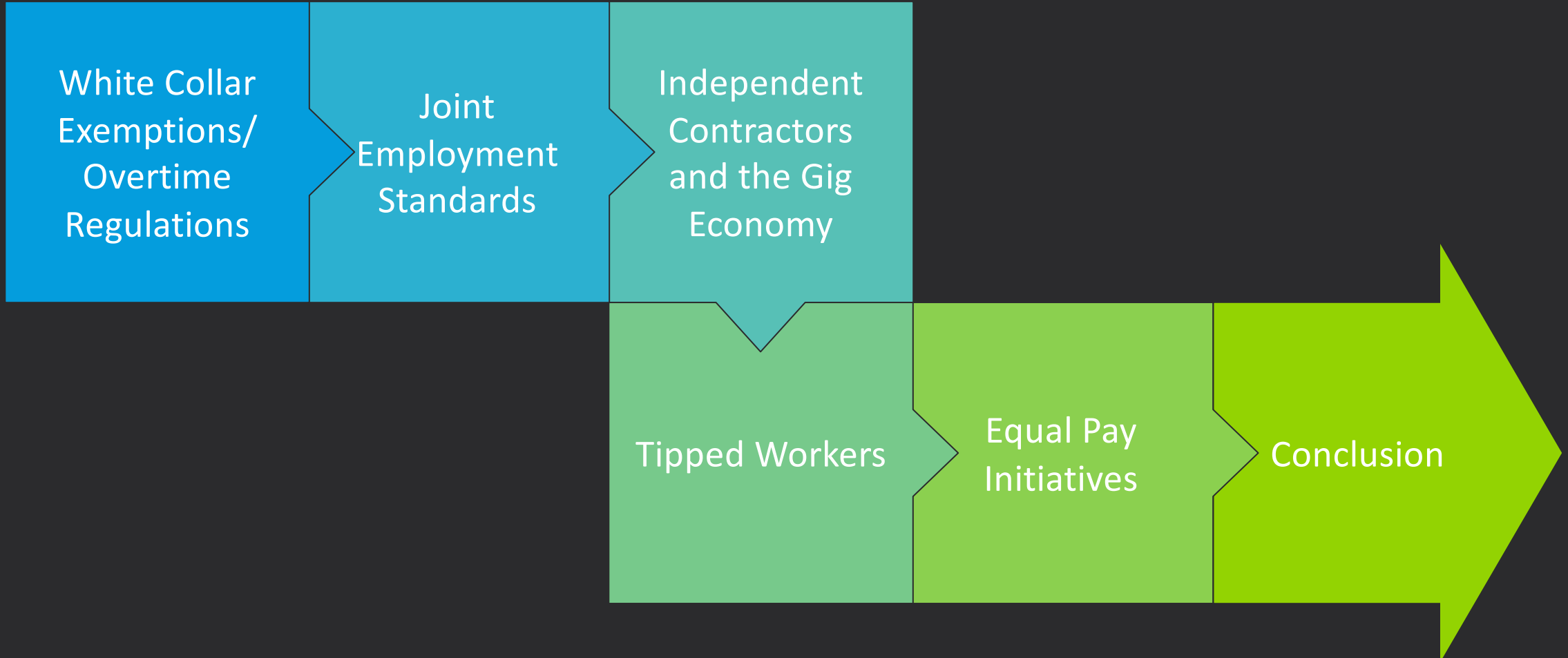
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- You will be sent a recording.
- See the handouts widget to download the slides and resources.
- There is HRCI and SHRM credit—but not until the end. It will appear in the Q&A box and in a follow-up email.
- We can help you. Use the question box.
- We value your input. Please take our short survey at the conclusion.

Agenda



Wage and Hour Compliance is Risky Business



White Collar Exemptions/ Overtime Regulations



White Collar Exemptions

Brief History/Timeline

- Issued March 7, 2019
- Rescinds 2016 rule
 - Current \$455/week too low
 - 2016 proposed \$913/week too high
 - 2019 proposed \$679/week or \$35,308/year
- Effective January 1, 2020
- Currently in public comment period



White Collar Exemptions

Salary Levels

- Sets salary level at 20th percentile of full-time salaried earnings in the lowest-wage census region and in retail sector
- May use non-discretionary bonuses and commissions for up to 10 percent of salary
- Maintains Salary Duties Test with no changes



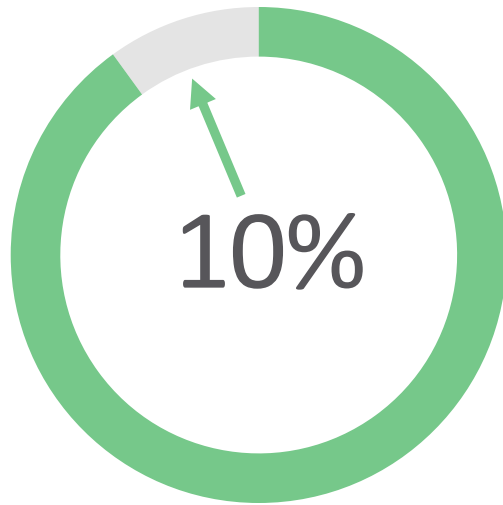
White Collar Exemptions

Special Circumstances

- Highly compensated employees
 - 90th percentile for full-time salaried employees nationally
 - \$147,414
- Certain U.S. territories
 - Puerto Rico, Virgin Islands, Guam, Northern Mariana Islands (\$455/week)
 - American Samoa (\$380/week)
- Motion picture industry
 - Base rate \$1,036/week

White Collar Exemptions

Bonuses and Commission



- Up to 10 percent of minimum salary level can be:
 - Non-discretionary bonuses
 - Incentive pay
 - Commissions
- Must be paid annually or more frequently

White Collar Exemptions

How to Be Compliant



Must meet both tests

Salary threshold and job duties tests



Perform job duties tests

Executive, administrative, learned professional, creative professional, computer professional



Know your state laws

California, New York

See DOL Fact Sheets 17a, 17e, and 17f.

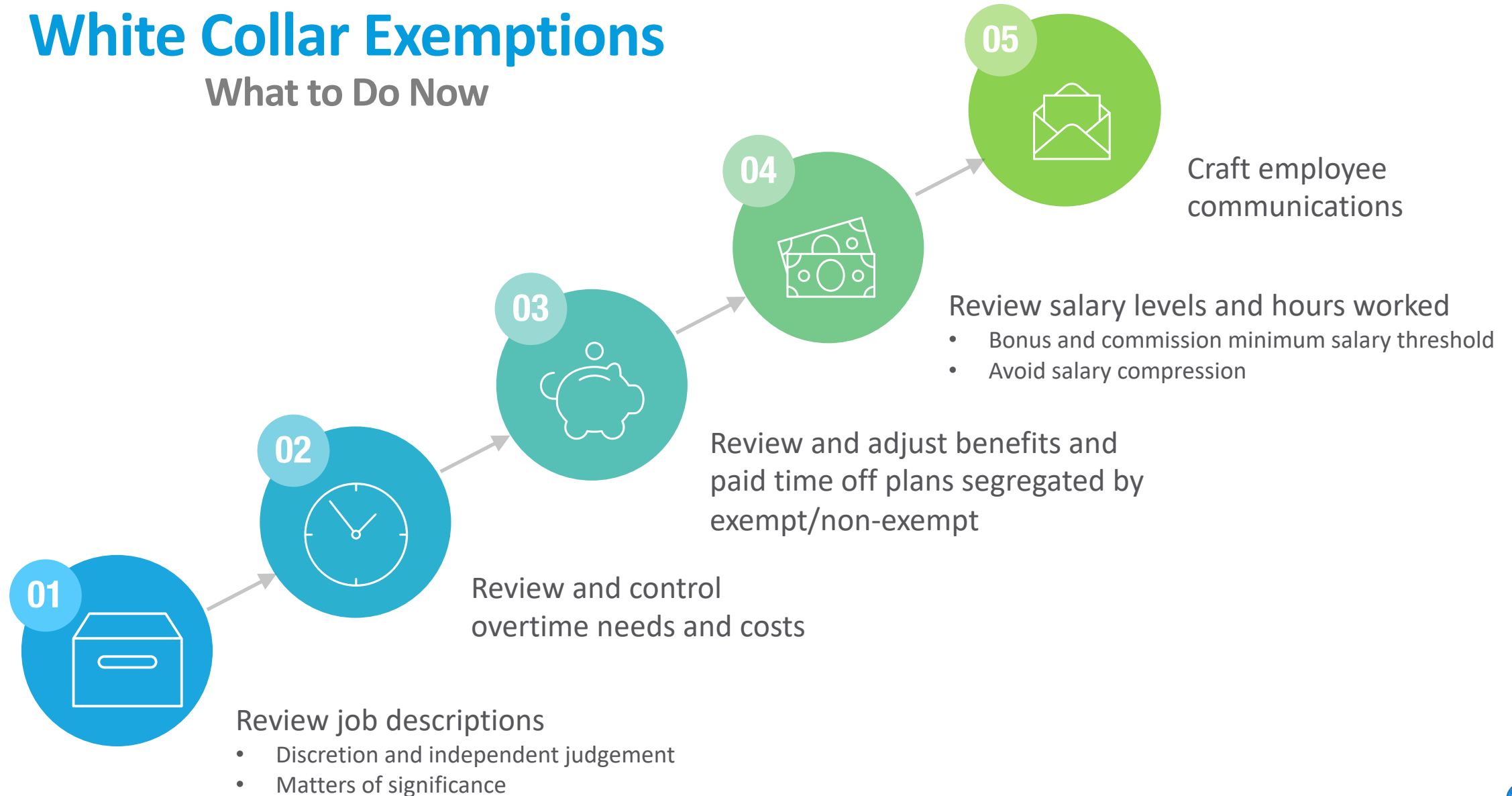
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https://www.dol.gov/whd/overtime/fs17e_computer.pdf

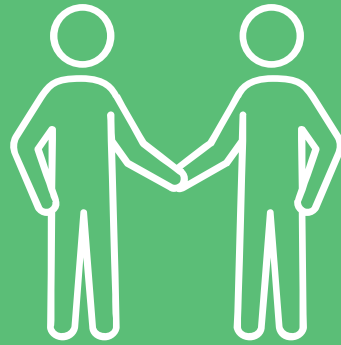
https://www.dol.gov/whd/overtime/fs17f_outsidesales.pdf

White Collar Exemptions

What to Do Now



Joint Employment Standards



Joint Employer Standards

2019 DOL Proposal

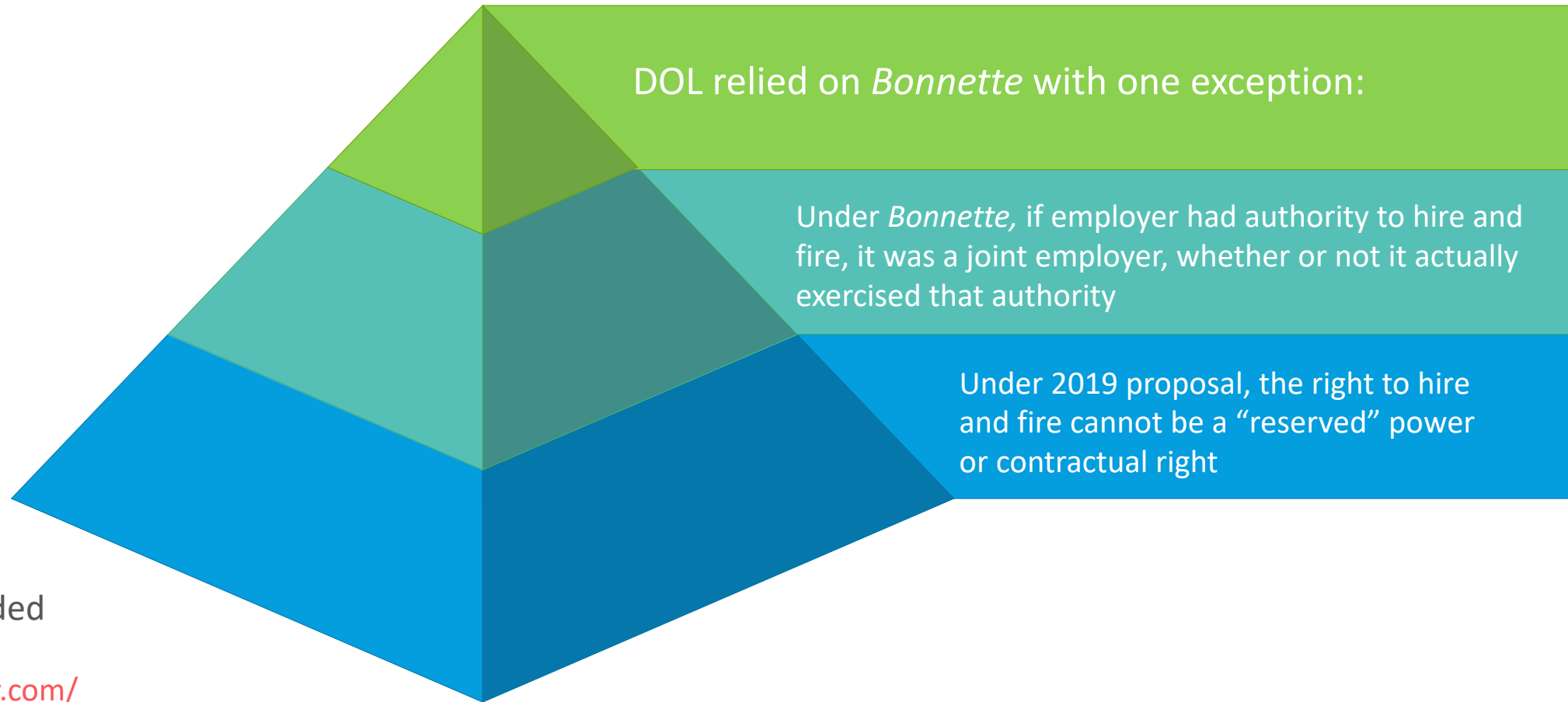


- Issued April 1, 2019
- Proposes four-factor test
- Joint employer would have to *actually exercise* the power to:
 1. Hire or fire the employee
 2. Supervise and control the employee's work schedules or conditions of employment
 3. Determine the employee's rate and method of payment
 4. Maintain the employee's employment records



Joint Employer Standards

Key Difference



Nine examples included
with proposal

[https://www.constangy.com/
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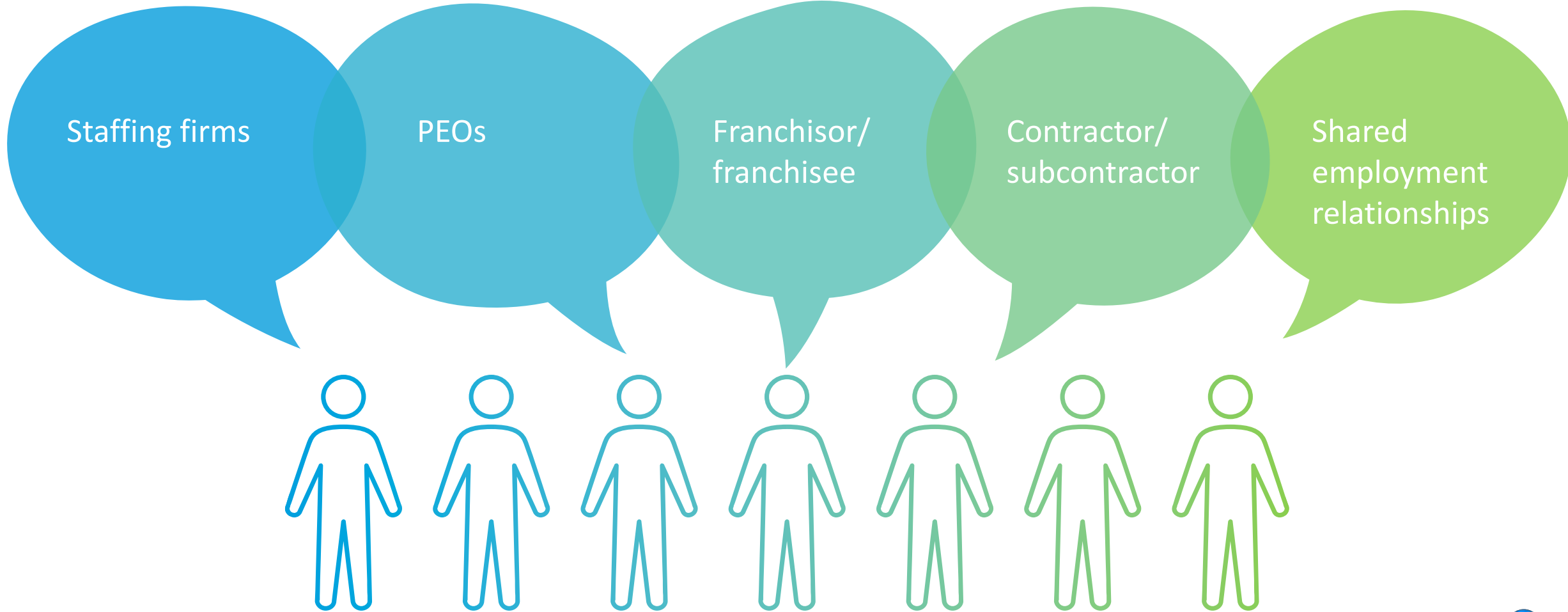
Joint Employer Standards

Who is Liable?

- If there is a “joint employer” relationship under the FLSA, both employers are legally responsible for seeing that minimum wage and overtime are paid
- Employees who work for joint employers are entitled to pay for all hours worked for *both* employers
 - They are much more likely to be entitled to overtime pay in a given workweek

Joint Employer Standards

Common Situations



Review your co-employment/joint employment contracts and agreements

Independent Contractors and the Gig Economy



Independent Contractors and the Gig Economy

Definitions

- Businesses and workers marked by alternative jobs that are usually temporary and influenced by technology
- Gig workers are mostly independent contractors and freelancers, but may also be:
 - Agency temps
 - On-call workers
 - Contract company workers
 - Self-employed workers
 - Standard part-time workers
- **Uber, Lyft, and Airbnb** are just a few examples of how companies are merging the temporary work arrangements of the gig economy with the sharing aspects of an online marketplace



Independent Contractors and the Gig Economy

How Big is It?



14–23%

of workers are involved
in the gig economy

Year	Gig 1	Gig 2	Gig 3
2002	18.9 million	22.7 million	26.0 million
2006	19.7 million	24.8 million	30.0 million
2010	18.5 million	25.4 million	29.7 million
2014	20.5 million	25.8 million	29.7 million

- Gig 1: Independent contractors, consultants, and freelancers
- Gig 2: All Gig 1 workers plus temp agency workers and on-call workers
- Gig 3: All Gig 2 workers plus contract company workers



Independent Contractors and the Gig Economy

Federal Regulations

- The U.S. Supreme Court says there is no single rule or test for determining whether an individual is an independent contractor or an employee for purposes of the FLSA.
- Depends on total activity or situation and some significant factors are:
 - The extent to which the services rendered are an integral part of the principal's business
 - The permanency of the relationship
 - The amount of the alleged contractor's investment in facilities and equipment
 - The nature and degree of control by the principal
 - The alleged contractor's opportunities for profit and loss
 - The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor
 - The degree of independent business organization and operation



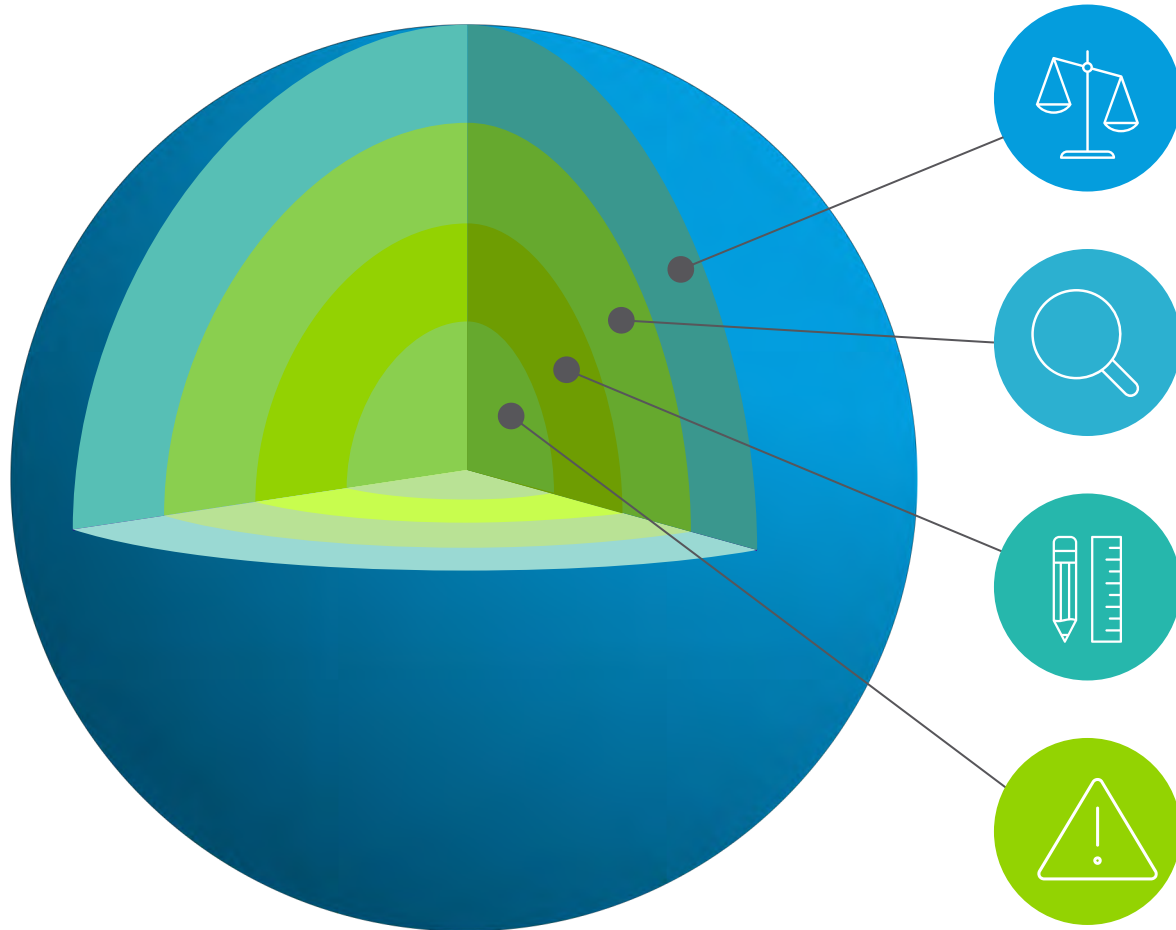
Independent Contractors and the Gig Economy

The ABC Test

- A worker can ONLY be an independent contractor if each of these three factors is met:
 - A. The worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact
 - B. The worker performs work that is outside the usual course of the hiring entity's business
 - C. The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed
- Applies in California, New Jersey, and Massachusetts

Independent Contractors and the Gig Economy

How to Be Compliant



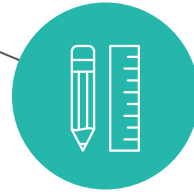
Understand your state laws

Does the ABC test apply?



Review your business relationships with your gig workers

The nature of their work, level of direction company provides, are they being reimbursed for business expenses, can they experience a profit or loss



Review your written agreements with your gig workers



Take into consideration financial risks

Wage and hour law violations, payroll tax liabilities and penalties, workers' comp laws, OSHA liabilities, leave of absence laws (FMLA, ADA)

Tipped Workers





Tipped Workers

Federal Regulations

- 2018 federal spending bill included an amendment to the Fair Labor Standards Act (FLSA) prohibiting employers, managers, or supervisors from collecting or retaining tips made by employees, regardless of whether the employer takes a tip credit
- WHD will no longer prohibit an employer from taking a tip credit based on the amount of time an employee spends performing duties related to a tip-producing occupation that are performed contemporaneously with direct customer-service duties or for a reasonable time immediately before or after performing such direct-service duties



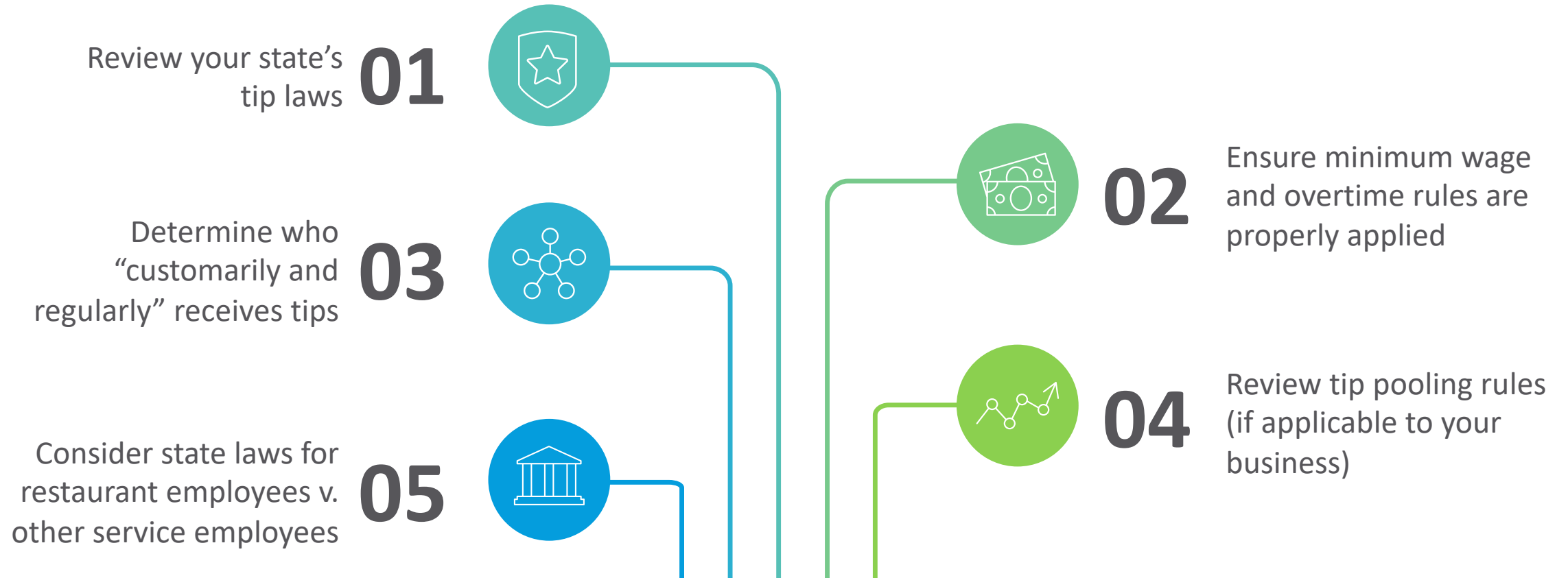
Tipped Workers

State Laws

- Employers may pay their tipped employees either:
 - The applicable minimum wage for all hours worked and overtime according to state law; or
 - A reduced minimum wage for each hour worked and apply a tip credit up to the maximum allowed, when permitted by state law
- At no time may an employer permit an employee to earn less than the applicable minimum wage when combining tips received and wages paid by employer
- States may allow or require tip pooling, but generally:
 - Only tips employee keeps after pooling apply to tip credit
 - Only permitted amongst employees who regularly and customarily receive tips

Tipped Workers

How to Be Compliant



Equal Pay Initiatives



Equal Pay Initiatives

Federal Regulation

- EEO-1 pay data reporting
 - Reinstated March 2019
- NLRB Section 7 protections
 - Allow employees to discuss wages and other working conditions
 - Many states and jurisdictions also passing pay transparency laws
- Equal Pay Act
 - In April 2018, in *Rizo v. Yovino*, the Ninth Circuit Court of Appeals held that an employer cannot justify a wage differential between male and female employees by relying on prior salary.



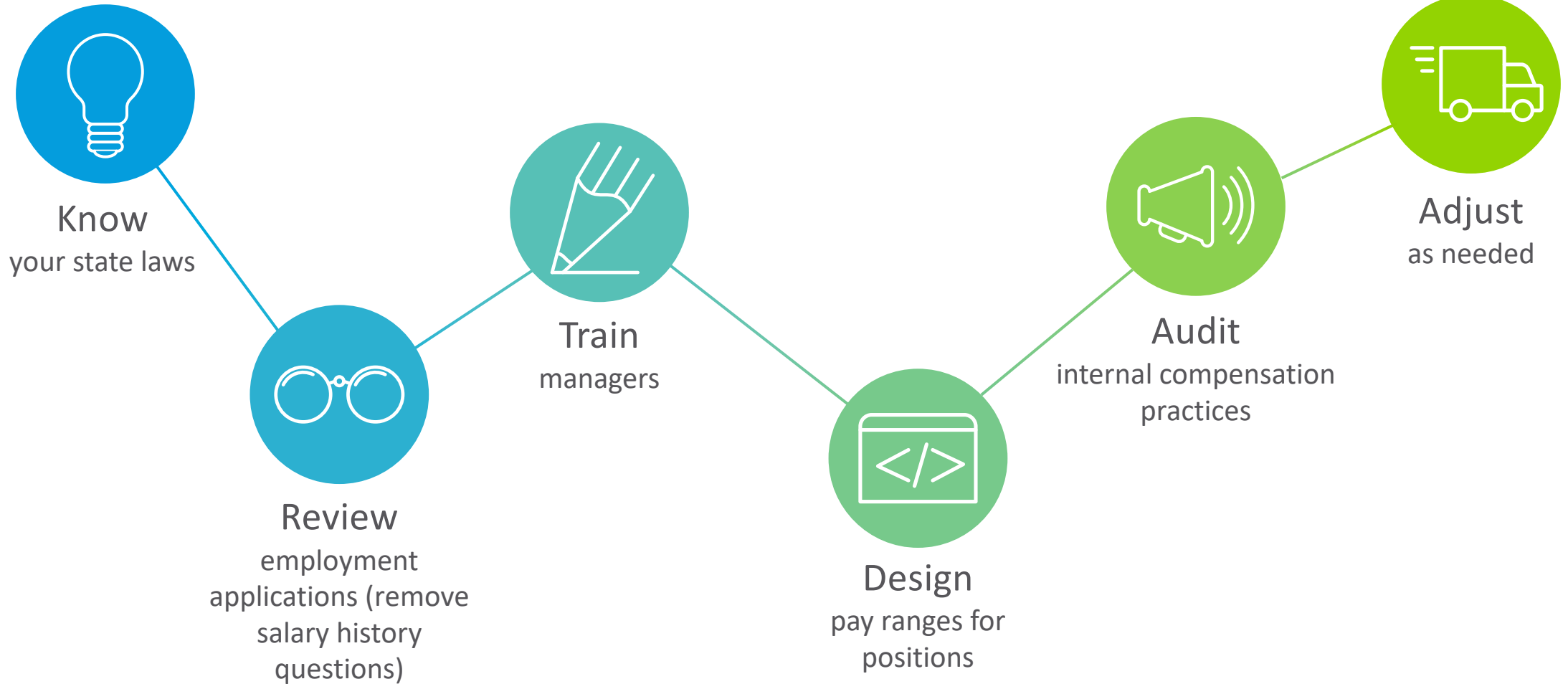
Equal Pay Initiatives

Salary History Bans

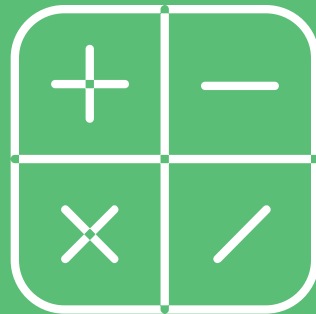
- In more than 20 states (see chart)
- For example, in Massachusetts:
 - If you are applying for a new job, the employer may not ask you how much you have been paid in the past until after making you a job offer that includes compensation
 - Employers may not refuse to consider you for a job based on how much you earned in your last job
 - Employers generally may not prohibit you from talking about either your own wages or your coworkers' wages

Equal Pay Initiatives

How to Be Compliant



Conclusion



Key Takeaways



Know

federal and state laws that apply to your organization



Review

employee classifications and revise as necessary



Follow

Department of Labor, EEOC, and other agency proposals



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