

# Top Multistate Compliance Issues: Employee Handbooks, Remote Workers, and Nondisclosure and Noncompetition Agreements in the New Age of Work

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# Agenda

- I. Benchmarking Data
- II. Employee Handbooks and Other Multistate Issues
- III. Restrictive Covenant Agreements

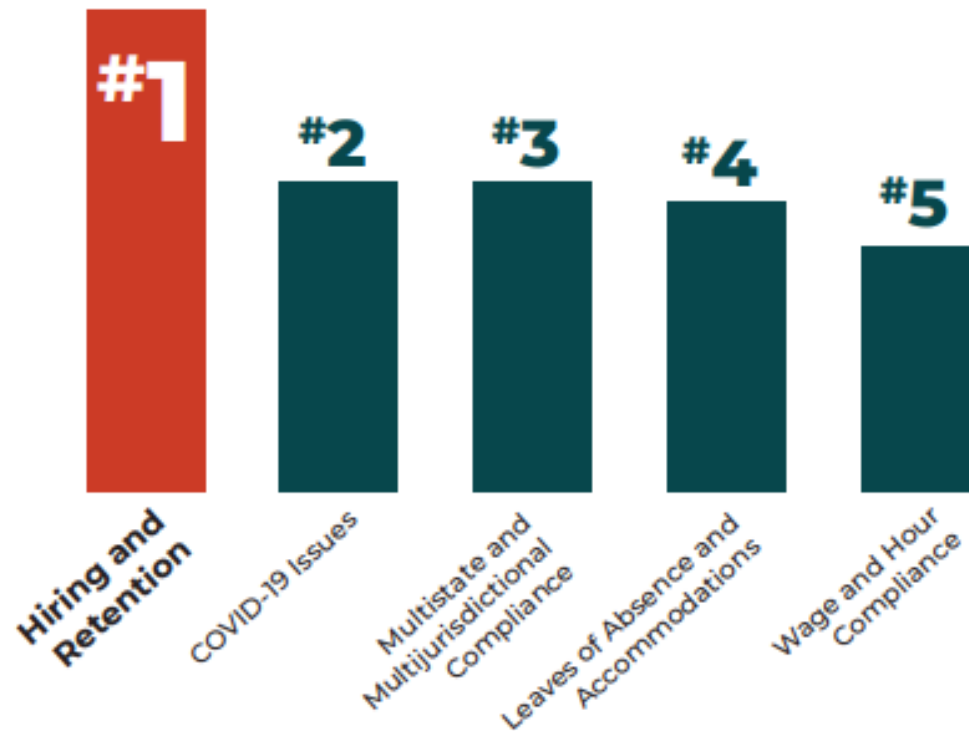


# Benchmarking Data



# 2022 Benchmarking Survey

**Most challenging issues, ranked from 1 (most challenging) to 5 (least challenging)**



## Multijurisdictional Compliance

"Compliance with all regulations especially if you are in almost all 50 states."

"The complexity and continual changing on multi-state laws/expectations."

\*Ogletree Deakins Benchmarking Survey of Legal Decision-Makers at Top Companies, published April 2022



# **Employee Handbooks And Related Multistate Issues**

# Multistate Employee Handbooks

- Interplay of federal, state, and local laws
  - One size typically does not fit all
  - Using disclaimers; at-will language
  - Use of state-specific policies or addenda?
  - Apply the most generous requirements across the board?
- Consider how employees will access handbook
  - How to obtain acknowledgments
  - What languages do employees speak?
- Consider headcount in each jurisdiction and any government contracts

# Multistate Employee Handbooks

- Handbook structure
  - Strongly consider *not* including:
    - Arbitration agreements
    - Restrictive covenant agreements
    - Releases of liability or other contracts
    - Temporary policies (including COVID-19-related policies)

# Multistate Employee Handbooks

- How often to update? Annually, if possible.
  - State leaves and paid sick leave requirements vary widely
  - Drug testing and marijuana are more complicated than you think
- Keeping pace with where your organization does business
  - States and localities with challenging regulations
    - AZ, CA, CO, HI, IL, MA, MD, MN, NJ, NM, NY, OR, VA, and WA
    - Boston, Chicago, Los Angeles and San Francisco (and many more in CA), Miami, New York, Philadelphia, Pittsburgh, Seattle, Tacoma, Washington, D.C., etc.

# Multistate Employee Handbooks

- Best way to roll out new/updated handbook?
  - Training for managers
  - Sending correct message to employees
  - Obtain acknowledgments each time the handbook is updated

# Multistate Employee Handbooks

- What key policy updates should be considered before 2023?
  - Did you put COVID-19 policies in the handbook?
  - Workplace safety and health (general statement)
  - Remote work (consider whether to keep separate)
  - Retaliation (not just in the anti-harassment policy)
  - The tide is turning at the NLRB
  - Double-check paid sick leave compliance

# Top Multi-State Issues

- Minimum Wage and Overtime Laws
- Meal and Rest Break Laws
- Paid Sick Leave Laws
- Expense Reimbursement Laws
- PTO/Vacation policies
- Tax Implications
  - Expense reimbursement tax
  - Income tax
  - Unemployment tax



# Paid Sick Leave States/Localities

- Arizona; California (plus 9 localities); Colorado; Connecticut (*limited to service workers*)
- District of Columbia; Chicago and Cook County, Illinois; Maine (paid time off law)
- Maryland (plus Montgomery County); Massachusetts; Michigan
- Duluth, Minneapolis, St. Paul, Minnesota
- Nevada (paid leave law); New Jersey; New Mexico (plus Bernalillo County)
- New York (plus New York City); Oregon
- Allegheny County, Philadelphia, Pittsburgh, Pennsylvania
- Rhode Island; Vermont; Virginia (*limited to home health workers*)
- Washington (plus Sea Tac, Seattle, and Tacoma)

# Flexible/Unlimited PTO Policies

- Currently lawful in all states
- Clear policy is key
- Recommend addressing use of PTO for extended leaves of absences
- No accrual and no bank of time
- Avoid annual use cap
- Clearly indicate paid sick leave compliance (*if applicable*)
- Transition from current plan is key to comply with applicable state laws

# Expense Reimbursement States

- California
- Connecticut (follows federal law)
- District of Columbia
- Illinois
- Iowa
- Massachusetts (travel expenses only)
- Montana
- New Hampshire
- South Dakota
- North Dakota

# Consider Taxes!!!

- Payroll registrations in states where the business is not otherwise registered
- Tracking employee work locations/Remitting proper state taxes
- Potential corporate tax issues



# **Restrictive Covenant Agreements**

# One Size Does NOT Fit All

- Understand federal, state, and common laws governing unfair competition
- Draft and implement restrictive covenant agreements that will be enforceable in your state
- Be prepared to enforce and litigate

# Restrictive Covenants

- Why do you want one?
- Why do you need one?
- Will you enforce it?
- Where will you enforce it?
- Will your executive and business teams take the time/expense to enforce it?

# What Is a Restrictive Covenant?

- An agreement with an employee to refrain from engaging in certain activities during employment and post-employment
- It's a contract
  - Needs consideration
  - Needs to be separate from other employee contracts
  - NOT an contract for employment



# Four Main Restrictive Covenants

- Non-Competition: Don't work for the competition or open a competing business
- Non-Solicitation: Don't solicit customers, employees, vendors, and/or referral sources
- Trade Secrets/Confidential Information: Don't disclose or use

# Support for Restrictive Covenants – State-Specific

- Legitimate business interests
  - Trade secrets or other confidential information
  - Extraordinary or specialized training
  - Existing customer relationships and/or prospective relationships
- Consideration
  - Employment or continued employment
  - Promotion, raise, bonus
  - \$\$\$\$
- Reasonable limitations
  - Length of time
  - Geography

# Drafting Agreements

- Narrowly tailored restrictions
- Reasonable restrictions
  - What restrictions are allowed by your state?
  - Does your state have limits on low-wage earners or certain professions/job titles?
- How to make it assignable
- Does your state “blue-pencil” and what does that mean?
- Know who signs them

# Implementing Agreements

- Stand-alone contracts – not part of a handbook or employment agreement
- Decide who gets them
  - Executives, high-level sales, certain professionals
- State notice requirements
- Consideration requirements, including timing of consideration
- Know when your state requires signing
  - Before employment, first day of employment, during employment

# Handing Them Out Is Not Enough

- Understand applicant's agreements with prior employer
- Protect trade secrets and confidential information
  - Data security – the more valuable the secret, the more protection it needs
- Protect company against unlawful competition
  - Understand your state's stance on selective enforcement and inevitable disclosure

# Some of the “Problem” States – It’s Not Just California Anymore

- Massachusetts
  - Restrictions on geography and length
  - Conditions on enforcement, including paying employee compensation during restriction
- Oregon
  - 2-week notice in an written offer letter
  - Must be paid a salary exceeding \$100,533, adjusted for inflation OR receive specific severance
- Illinois
  - Low-wage restrictions (\$75,000 – non-compete; \$45,000 – non-solicit)
  - Industry restrictions
  - Employee review period – 14 days with attorney

# Some of the “Problem” States

- Washington
  - Salary requirements
  - Garden leave – when there is a layoff, employee must be paid base salary during the restricted period
- Nevada
  - Carve out for customers, if there was no solicitation and the customer moved voluntarily
  - Can’t enforce non-compete against hourly employees
- Virginia
  - Low wage restrictions
  - Poster requirements
  - Assignment issues

# How to Handle Multistate Agreements

- Separate agreements
- One agreement with riders
  - May lose some rights in employer-friendly states
- Choice of law provisions



# Enforcement – Upon Termination

- Be prepared to move quickly
- Turn off access
- Preserve everything – email, cell phone, laptop, messaging
- Provide employee with copy of agreement
- Send reminder letter/cease and desist letter
- Be mindful of violations and damages
- Be ready to mitigate damages

# Thank you!

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