



Employment Agreements: Is Your Company Protected?

January 27, 2022

* Although we will be providing legal information during this webinar, we will not be providing legal advice.

AGENDA

Is Your Non-Compete
or Non-Solicitation
Agreement
Enforceable?



What are the Limits on
Non-Disclosure and
Confidentiality
Agreements?



Can States Ban
Mandatory Arbitration
of Employment
Disputes?



Which State's Laws
Govern a Remote
Workforce?



Definitions

Non-Compete Agreement: A contract where an employee agrees to not compete with a company for a certain period after employment.

Non-Solicitation Agreement: A contract where an employee agrees not to solicit the company's clients, employees, or other individuals with whom the employee worked.

Jurisdictions Limiting Non-Competes



Colorado



Illinois



Maine



Maryland



Massachusetts



New Hampshire



Nevada



Oregon



Rhode Island

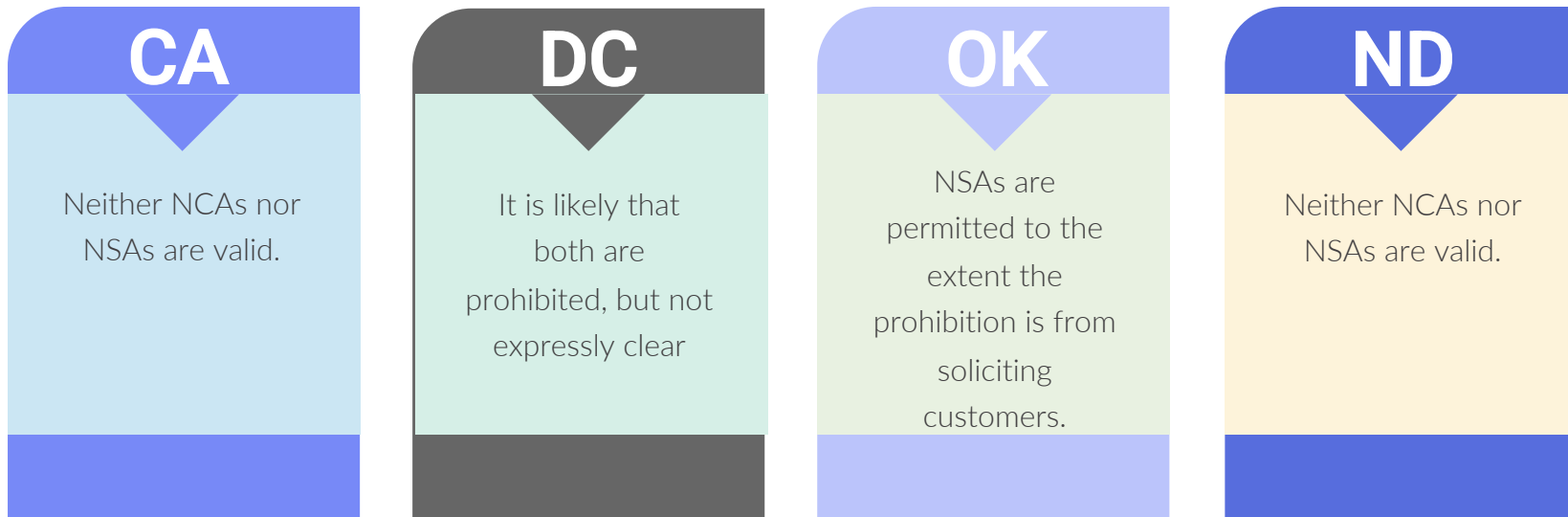


Virginia



Washington

Jurisdictions Banning Non-Competes*



*D.C.'s ban has been approved by the legislature, but will not be enforced until April, when a budget including the changes is passed.

Jurisdictions With 2022 Updates



Colorado

CO will begin criminalizing restrictive covenants. Penalties include up to 120 days imprisonment, \$750 fine, or both.



Illinois

Income Thresholds: \$45k/yr for NSAs, and \$75k/yr for NCAs. New consideration requirements. Fines up to \$10k/violation for recurrence.



Oregon

NCA Income Threshold: \$100,533/yr. The increase is based on annual cost of living growth. New maximum duration: 12 months—down from 18.



Washington

NCA Income Threshold: \$107,301.04. The increase is based on annual cost of living growth.



New York

Governor Hochul pledged to introduce legislation banning Non-Compete and Non-Solicitation Agreements but has not yet.

Federal Action



Executive Order

President Biden ordered the FTC to develop statutory protections for US workers, including curtailing the use of non-compete agreements.



Freedom to Compete Act

Congress introduced this bill on July 15, 2021. It would void all existing non-compete agreements and prohibit them going forward.



Workforce Mobility Act

This bill was introduced in Congress on February 25, 2021, and would prohibit enforcement of new non-compete agreements, except regarding the sale of a business.

Non-Disclosure/Confidentiality Agreements

- Employers use NDAs to (1) protect company trade secrets and proprietary information and (2) prohibit employees from disclosing unlawful employment practices.
- Non-disclosure provisions are typically contained in (1) employment contracts, (2) stand-alone NDAs, or (3) settlement/severance agreements.
- NDAs that prohibit disclosure of facts related to claims of sexual harassment and discrimination in the workplace are under fire.



Limits on Non-Disclosure/Confidentiality Agreements

- These laws do not limit employers' ability to prohibit employees from disclosing company trade secrets or proprietary information.
- Two approaches: limit NDAs related to sexual harassment/abuse only, or limit NDAs related to all workplace discrimination claims.
- Common exceptions: if complainant requests NDA so that identity remains confidential; settlement amount
- States with limits: California, Illinois, Maryland, Nevada, New Jersey, New Mexico, New York, Oregon, Tennessee, Vermont, Virginia, and Washington



State Limitations on NDAs

States take several approaches to limiting the use of NDAs, from outright bans on NDAs in agreements settling any discrimination claim to limited bans on NDAs in employment contracts regarding sexual harassment claims:

CA

Pre-dispute: Can't deny right to disclose information re: "unlawful acts in the workplace"

Post-dispute/separation:
Can't prevent disclosure of facts re: any discrimination, harassment, or retaliation claim or info re: unlawful acts in the workplace

Exceptions: (1) claimant's identity, upon request, (2) settlement amount, (3) negotiated settlement agreement

IL

Pre-dispute: Can't prevent employees/applicants from making truthful disclosures re: unlawful employment practices.

Post-dispute/separation:
Can't require confidentiality re: alleged discrimination, harassment, retaliation

Exceptions: For both, must meet strict mutuality requirements

NV

Pre- and post-dispute:
Can't prohibit testimony re: criminal offense, sexual harassment, or discrimination (any protected category), retaliation

Post-dispute: Can't prohibit disclosure of factual info re: sexual offense or sex discrimination

Exceptions: Claimant's identity, upon request

NJ

Pre- and post-dispute:
Can't prohibit disclosure re: claim of discrimination, harassment, or retaliation. NDA only enforceable against employer, unless employee publicly reveals details that lead to identification of employer.

Exceptions: Non-competes, proprietary information, trade secrets

State Limitations on NDAs

States take several approaches to limiting the use of NDAs, from outright bans on NDAs in agreements settling any discrimination claim to limited bans on NDAs in employment contracts regarding sexual harassment claims:

NY

Pre-dispute: Can't prohibit disclosure of future discrimination claims

Exception: Unless employee informed that NDA doesn't prohibit cooperation w/ gov't agencies.

Post-dispute: NDAs prohibited in all discrimination, harassment, retaliation settlements

Exceptions: Upon claimant's request. Non-waivable review/revocation period

TN

Pre-dispute: Can't require "employee or prospective employee to execute or renew a [NDA] with respect to sexual harassment in the workplace as a condition of employment."

Post-dispute: No limitations (unless gov't entity)

VT

Pre-dispute: Can't prohibit employee from opposing, disclosing, reporting, or participating in an investigation of sexual harassment.

Post-dispute: Sexual harassment settlement can't prohibit complaint to state agency or participation in investigation/discovery, can't waive future claims. Ban on no rehire agreements.

VA

Pre-dispute: Can't prohibit disclosure of facts related to sexual assault claims.

Post-dispute: No limitations.

Arbitration - overview

- Arbitration is a private dispute resolution process.
- Unlike lawsuits filed in court, it is not a public process.
- Employers often prefer arbitration because:
 - Speedy resolution of disputes
 - Cheaper than litigation
 - Non-public process
- The Federal Arbitration Act (“FAA”) is broad and very friendly toward arbitration.
- FAA preempts conflicting state law



State Limitations on Mandatory Arbitration

Despite the broad federal law, many states have attempted to ban mandatory arbitration of certain employment disputes, with varying degrees of success.

CA

State Law: Can't as a condition of employment require arbitration of violation of CA Fair Employment and Housing Act or Labor Code.

Exceptions: Post-dispute settlement agreements or negotiated severance agreements.

Status: Currently in effect while litigation continues.

IL

State Law: Can't require as a unilateral condition of employment require employee to arbitrate harassment or discrimination claims based on any protected category.

Exception: Strict requirements for showing of mutuality.

Status: In effect, so far unchallenged

NY

State Law: Can't unilaterally require arbitration of any claim of discrimination.

Exceptions: By mutual agreement

Status: Split of authority; probably preempted

- 3 federal courts and 2 NY state courts found preemption
- 1 NY state court found no preemption

WA

State Law: Can't require arbitration of any discrimination claim

Exceptions: None

Status: In effect, unchallenged

Governing Law

A few of the ways governing law matters

Employment
Agreements



NDA, noncompete and non-solicitation provisions, pay schedules...

Taxes



Sales tax, corporate income tax, franchise tax, use tax...

Leave
Requirements



Paid time off, family and medical leave, parental leave, COVID leave...

Insurance
Requirements



Participate in state unemployment insurance fund...

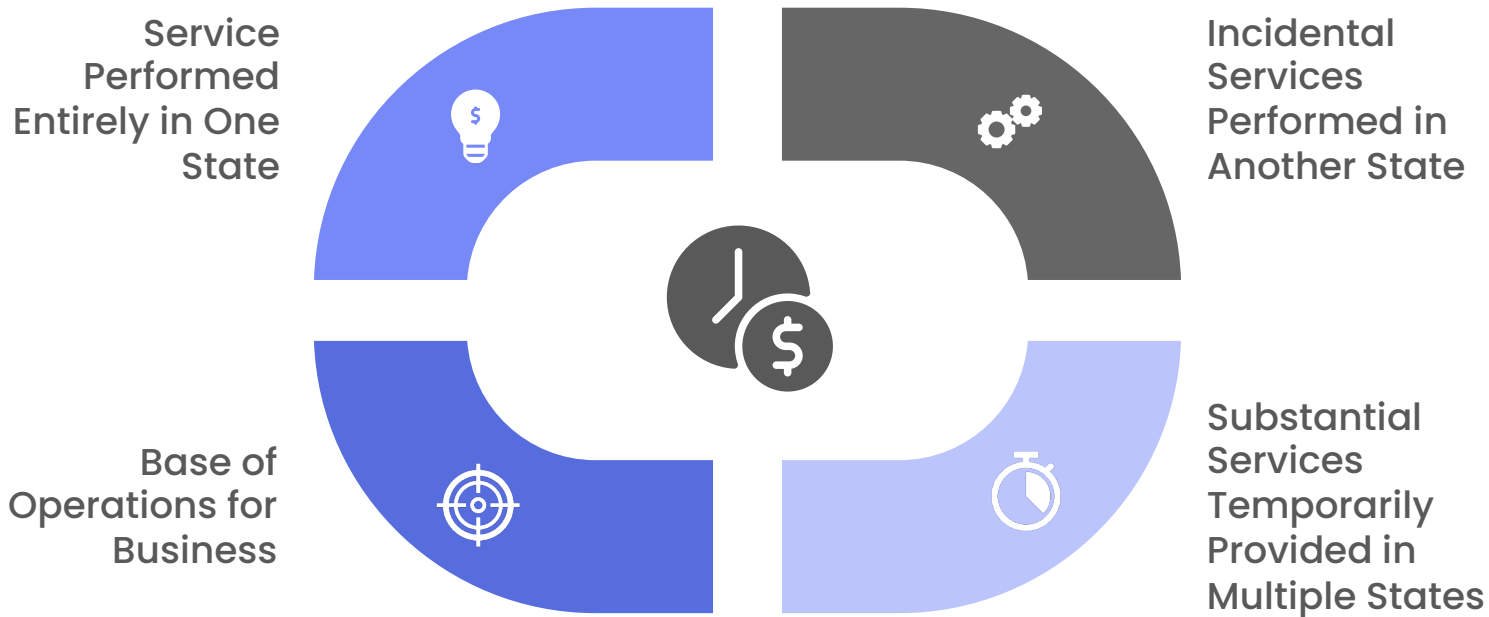


The law that applies will most likely be the law of the jurisdiction where the person is working.

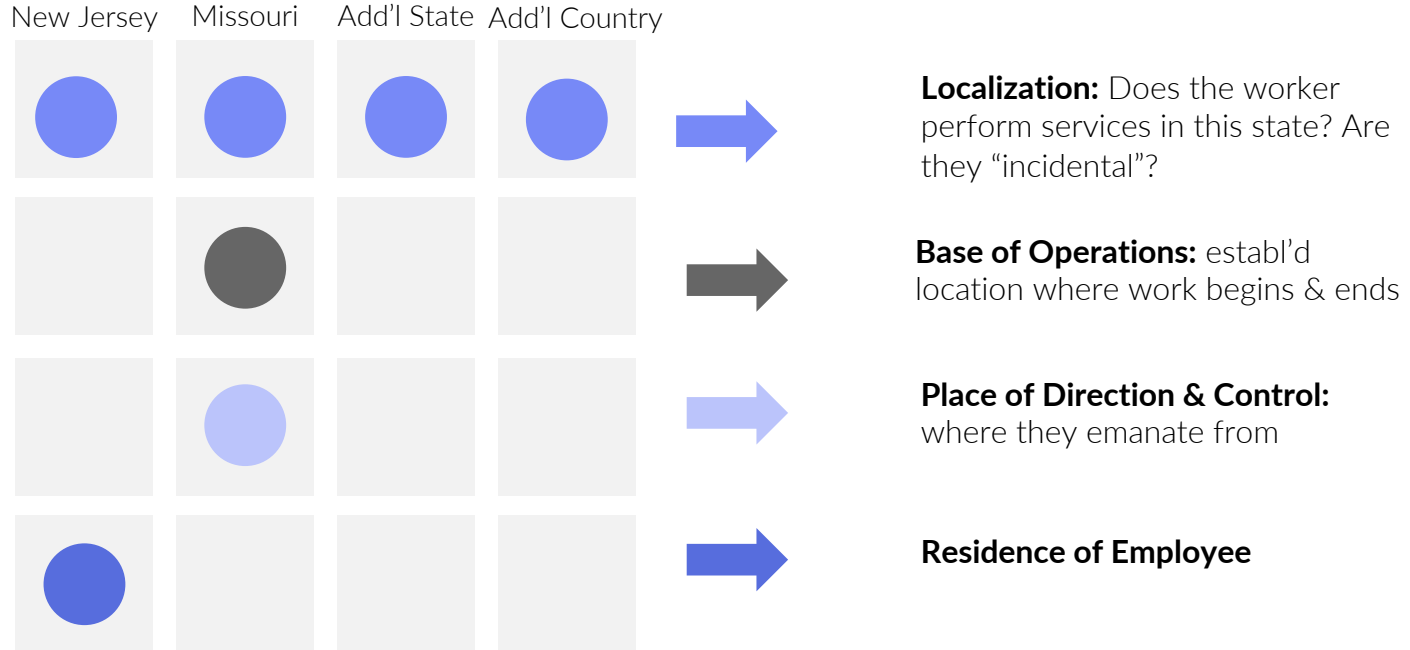
Which States Govern?

	In Person	Hybrid	Fully Remote
Single	State in which office is located	Depends – nexus exemption may apply	State from which employee is working
Multiple	Potentially governed by more than 1 state	Potentially governed by more than 1 state	Potentially various states if employee relocates for long enough

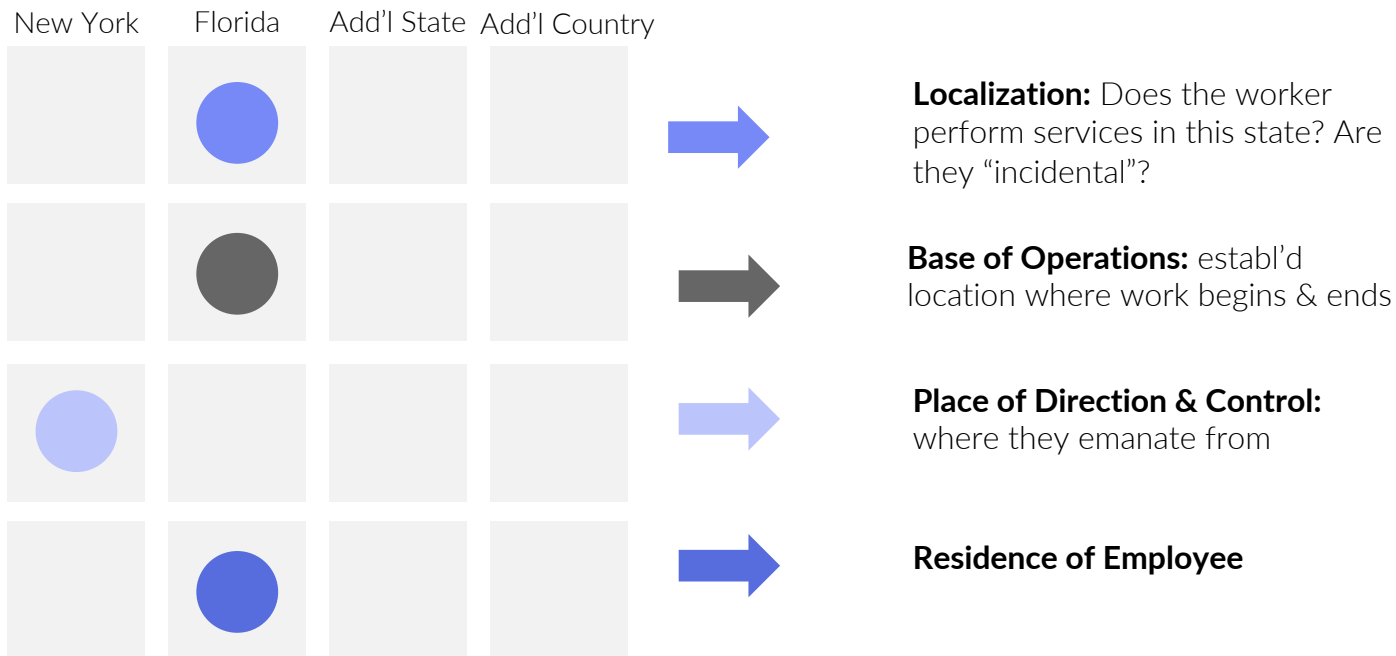
Factors to Consider for Where to Report Wages



New Jersey Airline



NY Employee Moves to FL



COVID



California

Original base of operations



Colorado

Works from home



Washington

Three month relocation



Colorado

Back again



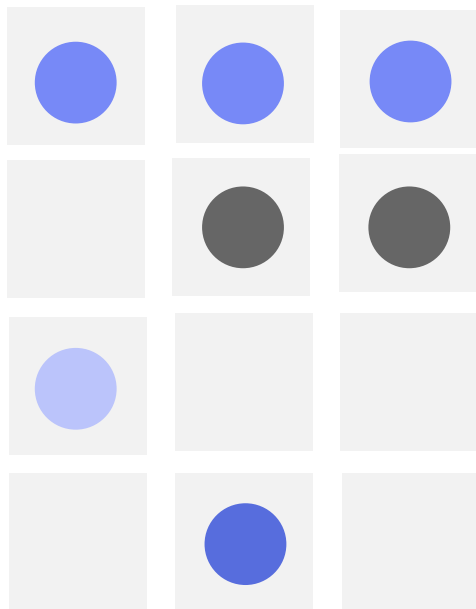
Timing of Governing Law?

Starts his own business and, in eyes of the employer, violates the non-compete



COVID Relocation

California Colorado Washington



Localization: Does the worker perform services in this state? Are they “incidental”?



Base of Operations: establ'd location where work begins & ends



Place of Direction & Control: where they emanate from



Residence of Employee

COVID Hybrid Workers

