



Employment Law Rewind: What you Might have Missed in 2023

December 7, 2023

Agenda

1 Non-Competes:
State and Federal

2 Stericycle

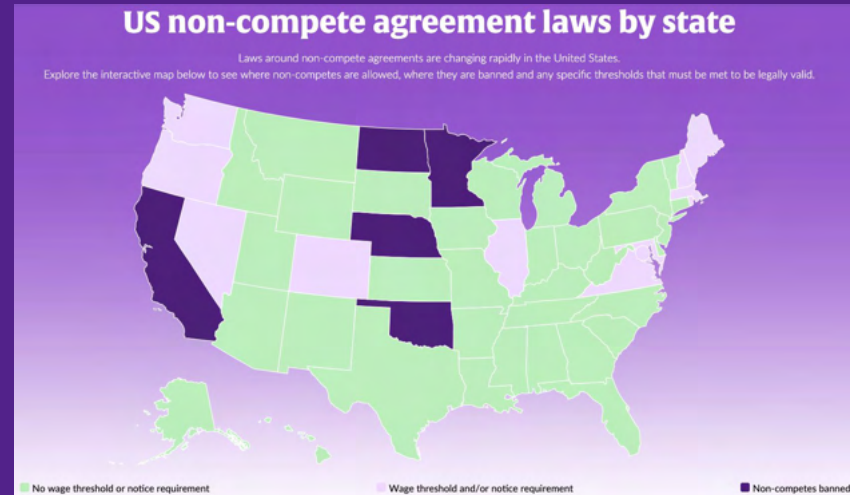
3 Wage
Transparency

4 Paid Leave,
Discrimination,
and Accommodations

Current Non-Compete Landscape

Patchwork of state and federal laws:

- Banned in four states
- Wage thresholds in 11 states and D.C.
- All states require non-competes to be reasonable in their limitations.
- Proposed federal ban
- Federal enforcement actions



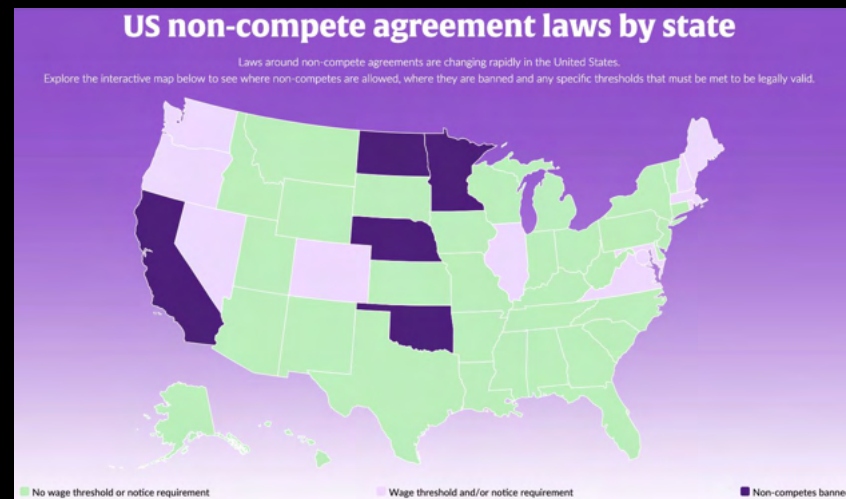
[SixFifty Non-Compete Map](#)

Updated Income Thresholds

- Colorado
- Maine
- Maryland
 - Not only raised the threshold, but changed the measurement system
- Oregon
- Rhode Island
- Virginia
- Washington
- Prospective Updates: CO, MD, WA

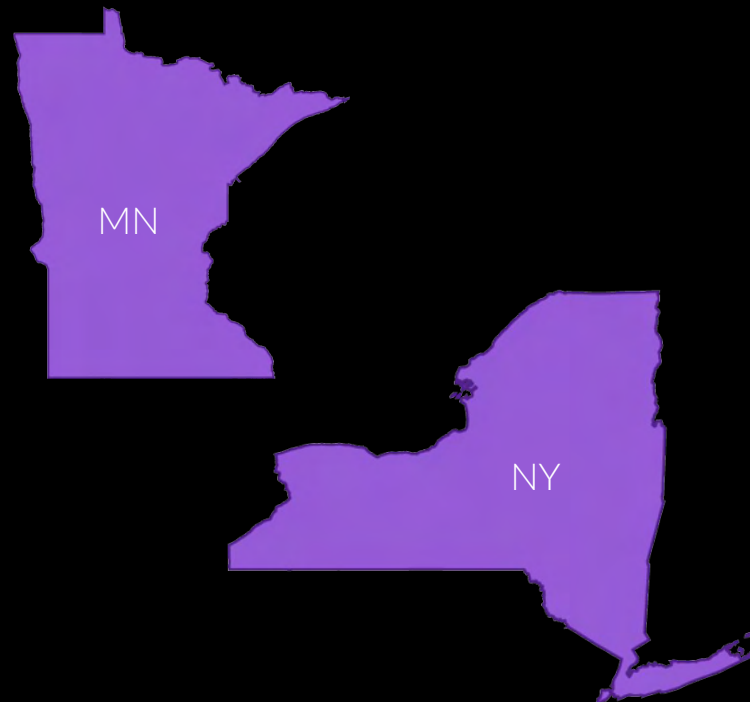
More State Non-Compete Regulation

- **Connecticut** - additional restrictions on non-competes with physicians
- **Indiana** - non-competes banned for primary care physicians and new restrictions for other types of physicians
- **Maine** - non-competes banned for veterinary practices
- **Tennessee** - temporary healthcare staffing agencies banned from using non-competes with direct care staff
- **Enforcement Actions**



Non-Compete Bans Expand at State Level

- **Minnesota** became first state to completely ban non-competes since 1890
 - Applies to employees and contractors
 - If employee primarily works in MN, MN state law must govern and any dispute has to be heard in MN courts
 - Doesn't apply to non-solicitation agreements, NDAs, or confidentiality agreements
- **New York**'s state legislature passed a full non-compete ban, but the Governor declined to sign. She is still in favor of regulating non-competes and we can expect the bill to return with amendments.
 - There's talk of a \$250,000 threshold, which would be the highest in the country.
- Neither law is retroactive.



What's more restrictive than a complete ban?

California has taken two large steps this year to further restrict non-compete use in and out of the state.

SB 699 Out-of-State Void

- “An employer or former employer shall not attempt to enforce a contract that is void under this chapter regardless of whether the contract was signed and the employment was maintained outside of California.”
- Effective January 1, 2024

AB 1076 Notice and Penalties

- Likely applicable to more agreements than just traditional non-competes
- Notice required for current and ex-employees by February 14, 2024
- Creates penalties up to \$2,500 per violation
- Effective January 1, 2024

FTC's Proposed Non-Compete Ban

- The rule:
 - Proposes a categorical ban on worker non-compete agreements, with one exception for a sale of business
 - Covers virtually all workers, including independent contractors
 - Applies retroactively to non-competes already signed
 - Imposes strict notice requirements
- The FTC is wading through almost 27,000 comments on the proposed rule. It could be April 2024 before the FTC issues its final rule. Likely to face immediate challenges.
- For more information, see [SixFifty's webinar](#) on the FTC's proposed rule.

FTC Enforcement Actions

“Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.” 15 U.S.C. § 45.

- **O-I Glass**: prohibited over 1,000 employees from connected, in any manner, with a business selling similar products
- **Ardagh Group S.A.**: 2-year restriction for 700+ employees from working with anyone similar in the U.S., Canada, or Mexico
- **Prudential Security**: hourly guards prohibited from working for other security companies within 100 miles. \$100,000 penalty for violations.
- **Anchor Glass**: 1-year restriction, barred working with anyone providing “the same or substantially similar” products in the US or from dealing with any current or prospective customer they dealt with

NLRB Joins the Non-Compete Party

- As of May 30, 2023, NLRB will interpret employers' use of non-competes as a violation of the NLRA.
- Non-compete provisions violate the NLRA because they “could reasonably be construed by employees to deny them the ability to quit or change jobs by cutting off their access to other employment opportunities that they are qualified for based on their experience, aptitudes, and preferences as to type and location of work.”
- This opinion isn't a rule, but it is effective immediately, and has already been used in enforcement actions.
- Importantly, this does not affect non-competes with supervisory or managerial employees because they aren't protected under the NLRA.



NLRB Enforcement Action

- 2 enforcement actions have been brought to the NLRB. One settled, so no guidance.
- Juvly Aesthetics
- Complaint identifies problematic provisions in (among others) the:
 - Offer Letter
 - Company Rules
 - Code Of Conduct
 - Non-Compete Agreement
 - Non-Solicitation Agreement
 - Confidentiality Agreement
 - Training Repayment Agreement Provision (“TRAP”)
 - Exit Interview
- Alleges these provisions have a chilling effect on employee NLRA rights..
- Hearing originally scheduled for November 28, 2023.
- Postponed until December 12, 2023.
- Stay tuned.

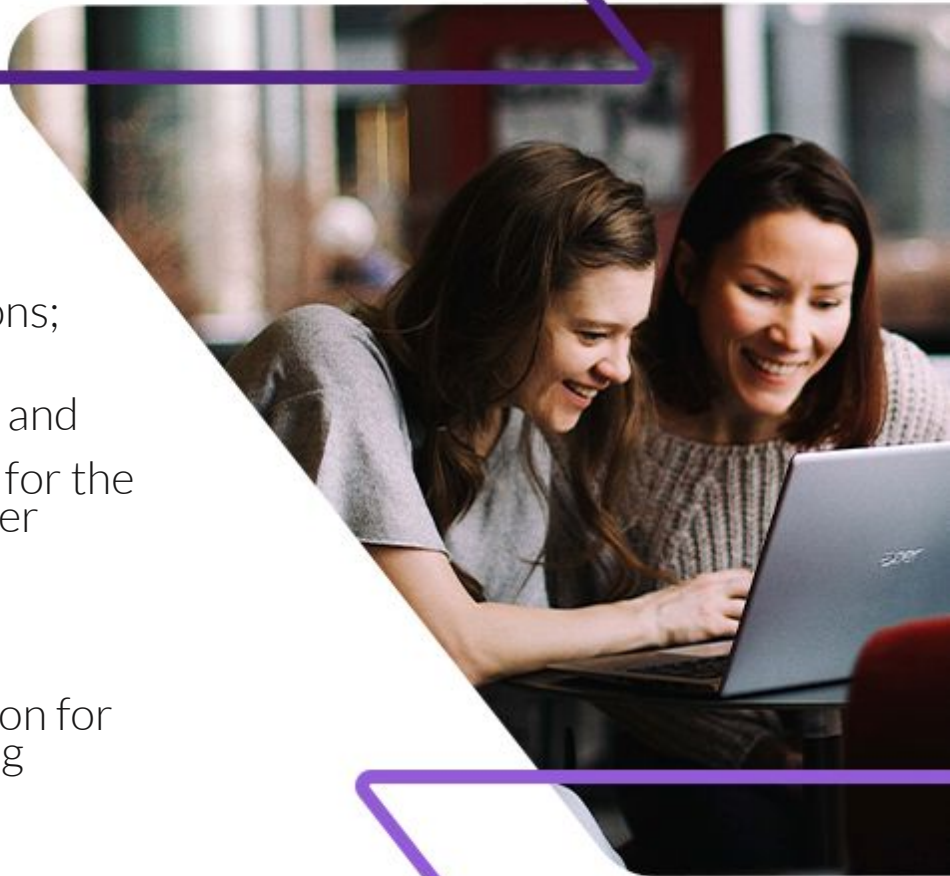
NLRA - Section 7

The NLRA protects employees' rights

- to self-organize;
- to form, join, or assist labor organizations;
- to bargain collectively through representatives of their own choosing; and
- to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

Also known as “Concerted Activity”-

- when two or more employees take action for their mutual aid or protection regarding terms and conditions of employment.



Stericycle, Inc. and Teamsters Local 628

1 Overrules Previous Cases

- *Boeing* and *LA Specialty Produce*
- These cases created a balancing test that weighed a policy's impact on Section 7 rights against the employer's justification for the rule.
- Importantly, this standard held that certain categories of employer policies (e.g., bans on photography) were always lawful, regardless of the employer's circumstances

2 Shifts Analytical Perspective

- *Stericycle* rejects the old standard as too biased toward employers and failing to account for employees' economic dependence on their employer.
- It tweaks the old standard by changing how the NLRB evaluates a rule's burden on Section 7 rights and the employer's justification for enacting it.

3 Implements New Standard

- From a balancing test to a burden-shifting framework
- First, GC must show that an employee *could* interpret a rule as restricting Section 7 rights.
- Then, burden shifts to employer to prove that the policy is necessary to advance a legitimate and substantial business interest.
- Always evaluated case-by-case (no categories)



Practical Implications

- Review suspect employment policies
- Reevaluate your need for each policy
- Consider using disclaimers
- Document the need for your workplace rules

Some Policies to Review

- Cell Phone
- Code of Conduct
- Confidentiality
- Conflict of Interest
- Equal Employment Opportunity
- Employee Dating
- Exit Interview
- Pay Transparency
- Protected Activities
- Outside Employment
- Social Media

Using Disclaimers

- Should be designed to assure employees that they can engage in “concerted activity” without fear of reprisal
- Likely not enough to avoid liability standing alone, but they can help
- NLRB’s General Counsel describes a sufficient disclaimer as one that:
 - Is “prominently placed” in an employer’s handbook;
 - “Mak[es] explicit that the employer’s rules will not be applied to protected concerted activity”; and
 - Explains the rights employees have under the NLRA in “an appropriate level of detail”

Documenting the Need for Rules

- Timely and thorough documentation of your rationale for enacting workplace rules can help avoid liability by:
 - Establishing the “legitimate and substantial business interests” that support your policies; and
 - Showing that those interests cannot be achieved with less restrictive policies
- The form of documentation is less important than the function – anything that shows why your organization needs a certain policy and establishes that you took Section 7 rights into account is sufficient

Wage Transparency Laws in Vogue

Illinois to Require Employers to Disclose Equal Pay Law Promotion Opportunity

Hawaii Enacts Pay Transparency Law and Broadens Equal Pay Law

June 7, 2023
By Hilarie M. C.

CLOSING THE GAP

More than 25% of U.S. workers are covered under pay transparency laws—that could soon be near 50%

Massachusetts

goes into effect Sept.



December 4, 2023, 3:40 AM MST

Pay Transparency Strive to Comply

DEEP DIVE



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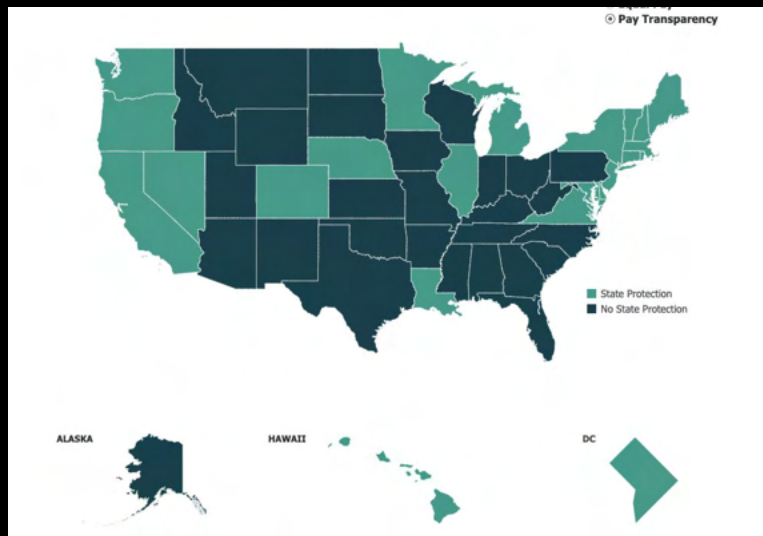
BUSINESS SEP 18, 2023 7:00 AM

Pay Transparency Is Sweeping Across the US

New York joined a wave of states that require pay transparency in job ads. New data suggests most US postings now include a salary range, but they are sometimes laughably vague.

Wage Transparency

- According to the U.S. Department of Labor, 22 states and D.C. have some type of wage transparency protections.
- Federally, the National Labor Relations Act protects employees' right to discuss their wages.



Salary Range Disclosure Requirements



<u>State</u>	<u>What Information Must be Shared</u>	<u>When and Where Must it be Shared</u>
California	The compensation the employer expects to pay	In job postings and upon request by current employees
Colorado	The pay or pay range plus description of benefits and other compensation	In job postings
Connecticut	The wage range for the applicant/employee's position	Earlier of applicant's request or before an offer; for employees, when hired, changing position, or upon request
Maryland	The wage range for the position applied for	Upon request
Nevada	The wage range or rate for position, promotion, or transfer	For applicants, after the interview; for employees that have applied for a promotion/transfer, after a completed interview or offer if requested
New York	Pay or pay range for position	In job postings or advertisements
Rhode Island	The wage range for the position applied for	For applicants, upon request and prior to discussing compensation; for employees, at time of hire, when moving into new position, and upon request
Washington	The wage range and general description of all benefits and other compensation	In job postings; for internal transfer or promotion, upon request

What Employers are Covered?

<u>State</u>	<u>Covered Employers</u>
California	Job posting requirement applies to employers with 15 or more employees
Colorado	Those with at least one employee in the state
Connecticut	Those with at least one employee in the state
Maryland	Those engaged in business in the state
Nevada	An employer in the state
New York	Those with four or more employees
Rhode Island	Those with at least one employee in the state
Washington	Those with 15 or more employees

Coming soon . . .

Illinois

- Effective January 1, 2025
- Applies to employers with at least 15 employees
- Job postings must include “good faith” wage range and benefits
- Promotion opportunities must be communicated to employees
- Required for positions to be performed in state or out of state if employee reports to supervisor/office in IL

Colorado

- Effective January 1, 2024
- Updated definition of “job opportunity”
- More lenient requirements for employers outside CO with fewer than 15 employees in CO
- New hires must be made known to coworkers

Hawaii

- Signed July 3, 2023
- Effective January 1, 2024
- Applies to employers with at least 50 employees
- Postings must include hourly rate or salary range that reasonably reflects the actual expected compensation

Federal

- Introduced in the House March 14, 2023
- Would apply to all employers, regardless of employee headcount
- Requires job postings to include good faith wage ranges and benefits
- Wage range must be supplied at time of hire, upon request, and annually

Best Practice:

- Review your employee handbook every month for updates
 - Consider any new laws, states, and employee counts
 - Depending on your company complexity you may need to make many or no changes
 - A little time each month saves you a lot of time down the road
- A lot can change in a month
 - SixFifty Employee Handbook Update for August 2023 →

What is changing?

In August 2023, we made updates to our handbook to align with changes in federal and state employment laws. You can find a list of these updates below, along with the corresponding policies in the SixFifty Employee Handbook and Policy Library that have been revised.

Legal Updates

- The National Labor Relations Board in its *Stericycle* decision changed the standard for evaluating the legality of handbook policies. Policies are invalid if they infringe on or chill employees' rights under Section 7 of the National Labor Relations Act. We have reviewed all of our policies and updated them as needed. Read more about the decision and SixFifty's response in our [Special Handbook Update](#).
- Illinois passed the [Child Extended Bereavement Leave Act](#) which expands the uses for bereavement leave. Effective January 1, 2024, employees may use bereavement leave for the suicide or homicide of their child or if a family member was killed in a crime of violence. We will update our bereavement leave policy closer to the effective date of the law.
- Colorado passed [HB23-1045](#) which extended the annual leave entitlement for members of the Colorado National Guard or the Reserves from 15 days to three weeks. The [Military Leave policy](#) has been updated to reflect this change.
- Oregon employees are now eligible for up to 14 weeks of paid family, medical, and safe leave under [Paid Leave Oregon](#). Employees can apply for leave and employers can find more information online at paidleave.oregon.gov. We have added a Paid Leave Oregon policy to our [FMLA policy](#).

Paid Leave

**Minnesota Paid Sick Leave -
Maximum of 48 hours per year
Notice Requirement***

(1/1/24)

**New York Paid Sick Leave
Amendments
(10/14/23)**

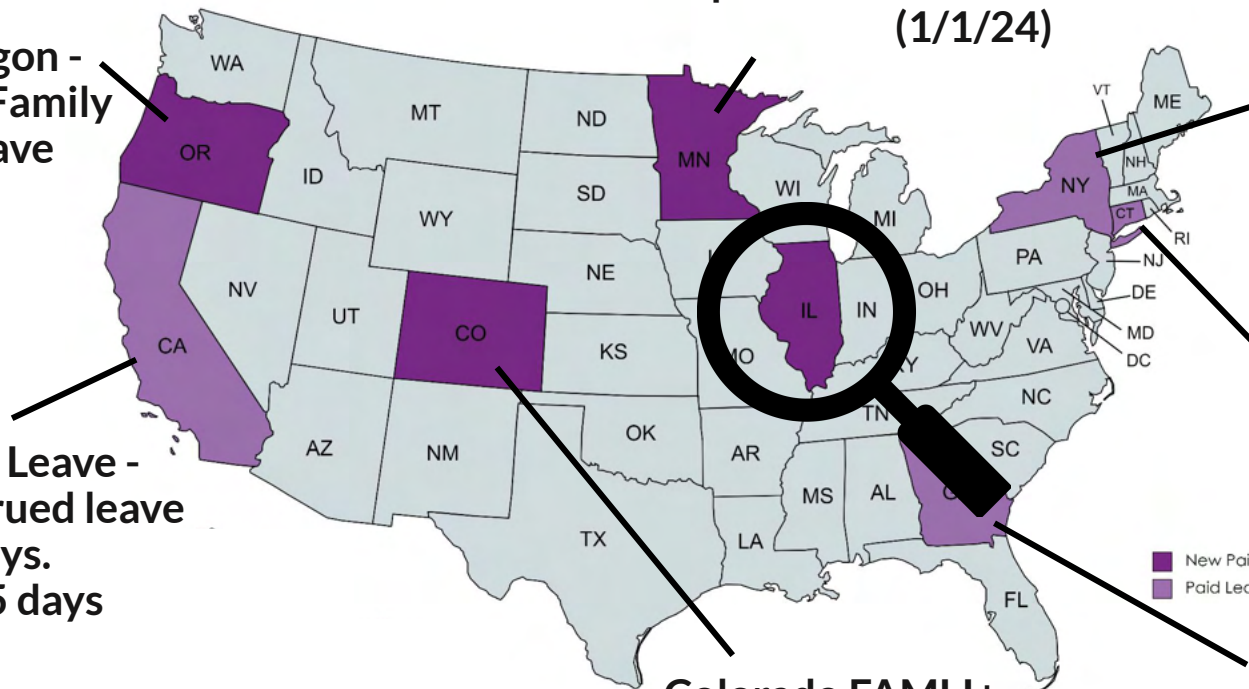
**Connecticut
Expanded Paid Sick Leave Use
(7/1/23)**

**Georgia Family Care Act
(4/30/23)**

**Colorado FAMILI+
State-run paid Family and Medical Leave
(1/1/24)**

**Paid Leave Oregon -
State-run paid Family and Medical Leave
(9/3/23)**

**California Sick Leave -
Maximum accrued leave from 6 -> 10 days.
Frontload 3 -> 5 days
(1/1/24)**



Illinois Paid Leave

Illinois State Paid Leave

Up to 40 hours each year of paid leave for any reason

Doesn't apply to employees covered by Local sick leave laws

Effective January 1, 2024

Chicago Paid Sick Leave and Paid Leave

Updates to existing Sick Leave and new Paid Leave (up to 40 hours each)

Payout Requirements and Impact on Unlimited Time Off policies

Written policy and Notice requirements

Effective January 1, 2024



Pregnancy & Lactation Accommodation



Providing Urgent Maternal Protection for Nursing Mothers Act (PUMP Act)

- Employers must provide lactating employees with reasonable break time and a private location to express milk for up to one year following childbirth.
- Employers with fewer than 50 employees may be exempt if complying would cause “an undue hardship imposing significant difficulty or expense.”

Pregnant Workers Fairness Act (PWFA)

- Employers with 15+ employees must make reasonable accommodations related to pregnancy, childbirth, or related medical conditions.
- The EEOC has released Proposed Rules implementing the law.

Protected Characteristics & CROWN Act

Arizona, Arkansas, Michigan, Minnesota, and Texas
passed CROWN Act Laws (protected hairstyles) in 2023

Colorado - Marital Status and POWR Act

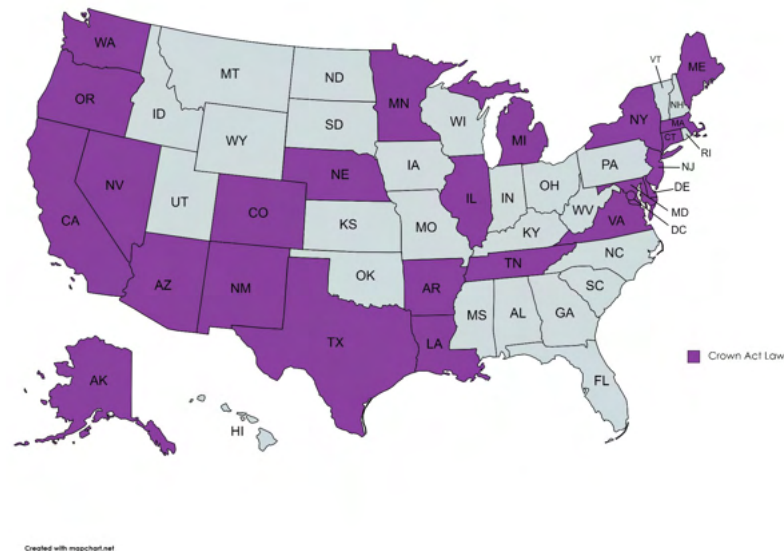
New Mexico - Gender and Gender Identity

New York City - Height and Weight

North Dakota - Pregnancy, childbirth, and related medical conditions

Maine - *Removed* Gender Identity and Expression

Seattle - Caste Discrimination



CROWN Act Law States

(24 states & DC)

Thank you!



Scan to see SixFifty's
Employment Tools