



Employment Law Fast Forward: 2024

January 18, 2024

Agenda

1 Non-Competes:
State and Federal

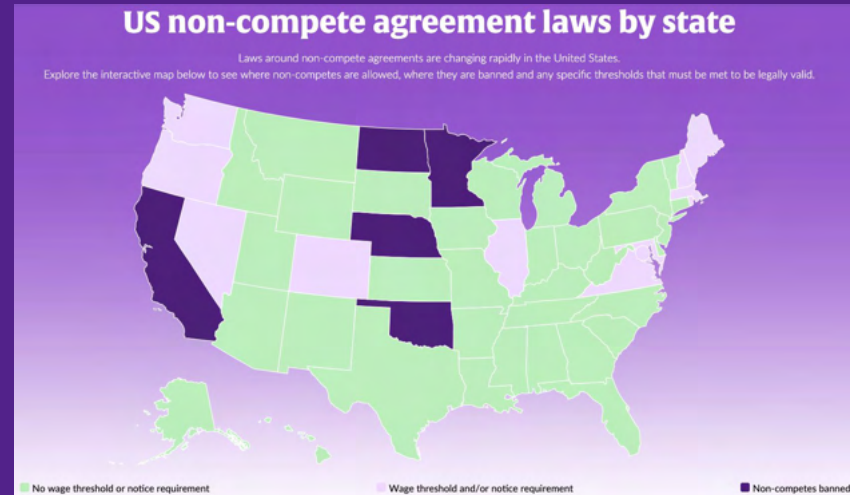
2 Paid Leave

3 Other Trends to
Watch

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

Unsurprisingly, since they are set to an annual cadence, some states have already updated their income thresholds this year.

- Colorado
- Maryland
 - MD tied its threshold to minimum wage, so now it will be updated annually.
- Maine
- Oregon
- Rhode Island
- Washington
- Washington D.C.

Virginia: waiting for average weekly income

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 ~27,000 comments on the proposed rule. The Commission voted to postpone the release of the rule until April. 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
- **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
- **Prudential Security**: employees prohibited from working for other security companies within 100 miles. \$100,000 penalty for violations

Prudential Security Consent Order

Who can have a non-compete with Prudential?

Prudential is prohibited from “entering or attempting to enter into, maintaining, or attempting to maintain, enforcing or attempting to enforce, or threatening to enforce a Noncompete Agreement or communicating to an Employee, or any prospective or current employer of that Employee, that the Employee is subject to a Noncompete Agreement.””

but,

“‘Employee’ means a Person employed by, previously employed by, or in the process of being employed by, {Prudential}.”

NLRB Joins the Non-Compete Party

- As of May 30, 2023, NLRB has been interpreting 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 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.



Non-Compete Bans Expand at State Level

- **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.
- Governor Hochul has previously stated that she wants to protect low and middle-wage workers but that there are valid uses of non-competes.
- What the final bill might look like is up for debate, but it seems likely that we will see legislation this year that restricts non-competes and institutes income thresholds.
 - There's talk of a \$250,000 threshold.



What's more restrictive than a complete ban?

Last year, California took two large steps to further restrict non-compete use in and out of the state.

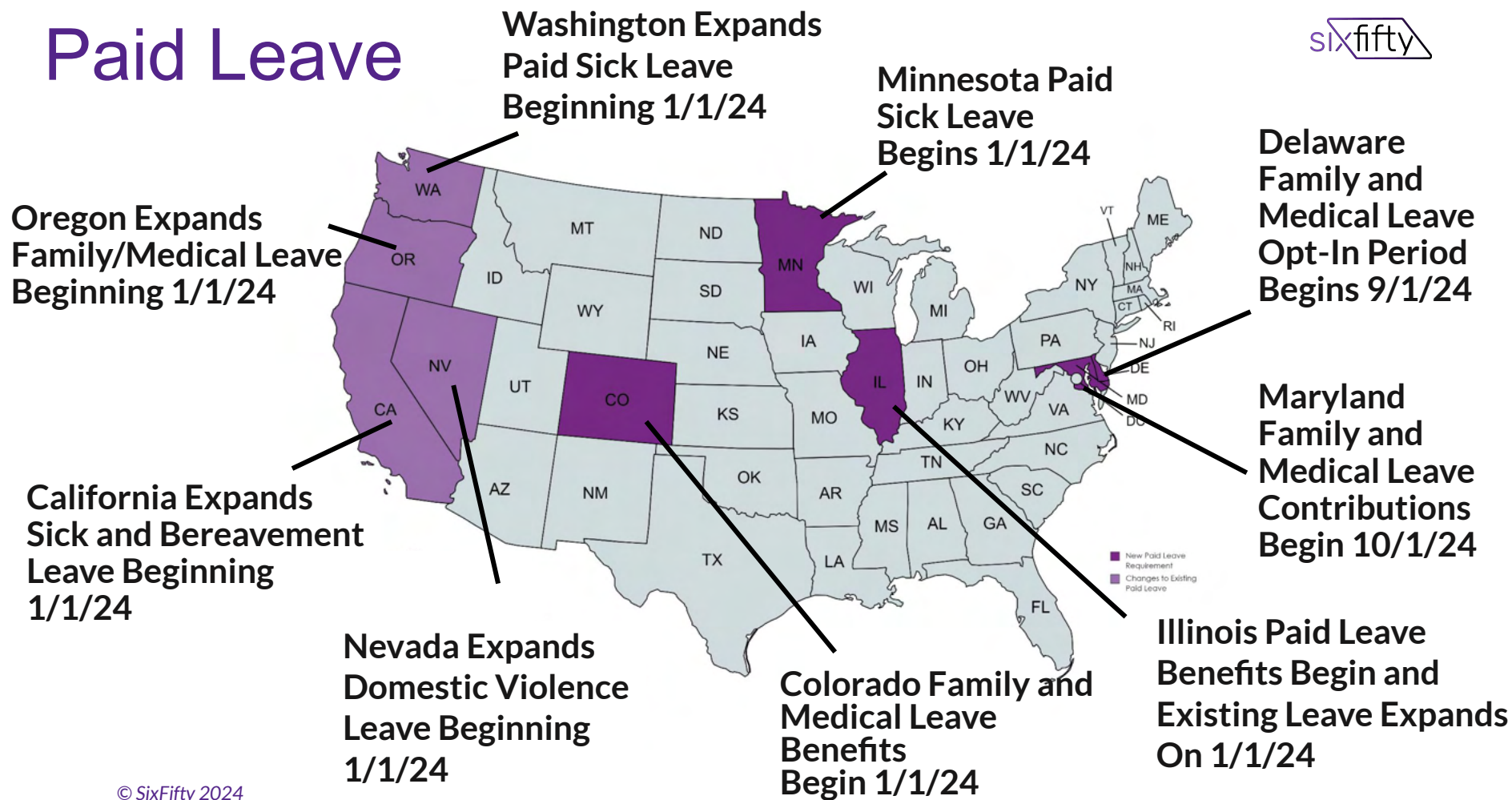
SB 699 Out-of-State Void

- “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.”
- Creates private right of action for injunctive relief, damages, or both
- 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 fines up to \$2,500 per violation
- Effective January 1, 2024

Paid Leave



Trends to Watch

1. New requirements to offer paid leave employees can use “For Any Reason”
2. Expanding eligibility for sick leave (and increasing the amount employers are required to provide)
3. New requirements to offer paid family/medical leave
4. Giving employees more ways to use existing leave



Illinois Paid Leave “For Any Reason”

Illinois State Paid Leave

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

Employers may only deny leave for “operational necessity”

Leave is accrued gradually unless employer chooses to frontload

Effective January 1, 2024

Chicago & Cook County Paid Leave

Up to 40 hours

Payout requirements that impact Unlimited Time Off policies

Written policy and notice requirements

Effective January 1, 2024

Broadest “Any Reason” Leave Law to Date

Nevada (50+ EEs) and Maine (10+EEs) have similar requirement for larger employers

Illinois’ law applies to **all** employers, regardless of EE count*

Employers **cannot** request documentation of employee’s reason for taking leave

Expanding Sick Leave

Minnesota

Applies to all MN employers with 1+ EE

1 hour accrued per 30 hours worked, up to 48 hours/year

Unused leave is carried over (up to 80 hours) unless employer front loads

Includes recordkeeping and notice requirements

Effective January 1, 2024

California

Employers must provide 5 days/40 hours annually (up from 3 days/24 hours)

Carryover cap increased to 10 days/80 hours (up from 6 days/48 hours)

Front loading still permitted, but must use the higher rate

Effective January 1, 2024

Washington

Expands existing sick leave law to cover “construction workers”

Nature of their employment made it difficult to ever receive sick leave benefits

Covered employers (Code 23 NAICS) must now pay out accrued sick leave at the end of employment

Effective January 1, 2024

More Family and Medical Leave

New Laws in Colorado, Delaware, Maryland, Minnesota, & Maine

- Colorado already in effect, benefits in other states start January 1, 2026
- Employers must start paying premiums early - October 1, 2024 in MD; January 1, 2025 in DE & ME; and January 1, 2026 in MN
- Substantively similar, but some variation in how leave can be used and how long it lasts

Oregon Expands Existing Leave to Allow Time Off for “Bias Crimes”

- Illustrates the potential for Family/Medical Leave to intersect with other types of required leave



More Ways to Use Leave

Nevada Expands Domestic Violence Leave

- Can now be used in response to incidents of sexual assault as well as DV

Illinois Expands Domestic Violence and Crime Victim Leave

- Can now be used to (1) attend the funeral of, (2) make arrangements for, or (3) grieve the death of a family member who was killed by a crime of violence

Illinois Expands Blood Donation Leave

- Can now be used for organ donation as well as donating blood

CA Expands Bereavement Leave

- Can now be used for “reproductive loss,” which includes failed adoption, failed surrogacy, miscarriage, stillbirth, or unsuccessful assisted reproductive procedure (e.g. IVF)

DOL Announces New (Old) Independent Contractor Rule

- Six-factor test focused on the economic realities of the relationship:
 - Opportunity for profit or loss
 - Investments by the worker and potential employer
 - Degree of permanence of the work relationship
 - Nature and degree of control
 - Extent to which work performed is an integral part of the business
 - Skill and initiative
- Prior rule looked at two core factors: (1) control over work and (2) opportunity for profit or loss
- Why it matters: employees have rights under FLSA, contractors don't
- New rule goes into effect March 11, 2024

Looming Changes to Exempt/Non-Exempt Status

- Current white collar exemption under FLSA requires salary of \$648/week (\$35,568/year)
 - Proposed rule would increase it to \$1,059/week (\$55,068/year)
- Current highly compensated employee exemption requires salary of \$107,432/year
 - Proposed rule would increase it to \$143,988/year
- The Proposed rule would automatically update the earning thresholds every three years to reflect current wage data

Other trends to Watch in 2024

- Wage transparency
- Pre-employment inquiries (salary history, medical history, criminal history, credit history)
- Artificial intelligence in the workplace
- *Stericycle* aftermath



Thank you!



Scan to see SixFifty's
Employment Tools