

Don't Get Burned By Boilerplate

Presented for ACC by:



Gregory Hendershott
Davis Wright Tremaine LLP
929 108th Ave. NE; Suite 1500
Bellevue, WA 98004
(425) 646-6100
greghendershott@dwt.com

Blake Barnes
Senior Attorney
Microsoft Corporation
16858 SE 35th Street
Bellevue, WA 98008
(425) 704-7585
blbarnes@microsoft.com



Agenda

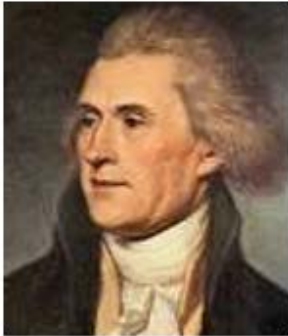
- Offer Letters
- Executive Employment Agreements
- NDA / Noncompetes
- Arbitration Agreements
- Employee Handbooks
- Commission / Bonus Agreements
- Severance Agreements
- In-House Perspective

The Origin of “Boilerplate”

“Boiler plate” originally referred to the sheet steel used to make boilers. In the field of printing, the term dates back to the early 1900s. From the 1890s onwards, printing plates of text for widespread reproduction such as advertisements or syndicated columns were cast or stamped in steel (instead of the much softer and less durable lead alloys used otherwise) ready for the printing press and distributed to newspapers around the United States. By analogy, they came to be known as ‘boilerplates.’ Until the 1950s, thousands of newspapers received and used this kind of boilerplate from the nation’s largest supplier, the Western Newspaper Union.

Some companies also sent out press releases as boilerplate so that they had to be printed as written. The modern equivalent is the press release boilerplate, or “boiler,” a paragraph or two that describes the company and its products.

Who said, "If I had time, I would have written a shorter letter?"



 Thomas Jefferson



 Blaise Pascal



 Charles Dickens



 Benjamin Franklin

Key Points in Using Boilerplate

Read the entire document carefully

Consider relationship to other documents, e.g., conflicting definitions of cause, arbitration provisions in some but not all documents

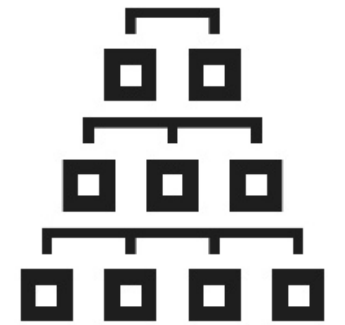
Multi-state issues

Corporate entity/affiliate issues

Purpose of contract is to document agreement so do not feel trapped by language of forms

Affiliate / Subsidiary Entity Issues in Boilerplate

- Be sure right entity is named in all documents
 - Paychecks, handbook, application
- Impacts:
 - Punitive damages
 - Class action size
 - Union organization
- “Common control of Labor Relations” is key factor in joint employer test



Offer Letters

- Statement of at will employment
- State all conditions to hire and expected start date (attach noncompete agreement)
- Reference handbook or other policies that will apply
- State whether position is exempt (identify outside sales)
- Do not bring secrets with you from prior employers
- Relocation required? Reimburse expenses if resign?
- Any payroll reductions require written approval



Re: Employment Offer

Dear _____,

On behalf of ACME, I am very pleased to offer you the position of _____, initially reporting to _____. This letter establishes the initial terms of your employment with ACME should you accept this offer.

Start Date.

Your start date with ACME will be _____. Your job is classified as a regular employee.

Compensation.

Your starting salary will be _____, which is equivalent to \$ _____ on an annualized basis. Paydays are semi-monthly on the _____ and _____ day of the month. This position is [exempt/nonexempt] from overtime pay requirements.

Benefits.

As a regular employee, you will receive during your employment such paid holidays, vacation, sick leave, group dental and medical insurance, and other employee benefits as ACME may offer from time to time, subject to ACME's policies and benefit plan eligibility requirements and your full-time status. [The current employee benefits are outlined in the Employee Handbook, which will be shared with you after your start date. You will be required to sign a form indicating that you have read the Employee Handbook.]

Employment at Will.

If you accept our offer of employment, you will be an employee at will, meaning that either you or ACME may terminate your employment relationship at any time for any reason, with or without cause. Any statements to the contrary that may have been made to you are unauthorized and are superseded and cancelled by this offer letter. Please also remember that initial employment terms like your position, hours of work, work location, compensation, employee benefits, and the Employee Handbook may change over the course of employment at ACME's discretion.

Confidentiality and Noncompete Agreement.

As a condition of your employment, you will be required to sign the enclosed Confidentiality and Noncompete Agreement ("Agreement"). ACME's willingness to employ you is based in significant part on your commitment to fulfill the obligations specified in this Agreement. Please review the Agreement carefully and, if you have any questions let us know.

Other Conditions.

This offer is further conditioned upon successful completion of a reference/background check. Additionally, on your start date, you will be required to complete INS Form I-9. Completion of this form requires you to present documentation confirming your identity and eligibility to work in the United States by your third day of employment. A list of acceptable documents is enclosed. Please note that the documents you present must be originals or you must provide a receipt evidencing that replacement documents have been requested. Moreover, you warrant that you are not bringing any secret or proprietary information from your prior employer(s), and you will not use any such information during your employment at ACME. You have provided a copy of any agreement with any prior employer that contains ongoing obligations to ACME.

Steps to Take to Accept Employment.

This offer will remain open through , 2014. If you wish to accept employment with ACME, please do the following:

- sign both copies of this letter;
- sign both copies of the enclosed Confidentiality and Noncompetition Agreement;
- retain for your files one copy of each of the documents you signed; and return the other signed copy of each document to .

Summary.

If you accept employment with ACME by performing all the above steps, this offer letter will document your initial employment terms. This letter supersedes any previous discussions or offers, no matter what their source. Any future modifications of or additions to the terms set forth in this letter will be of no affect unless in writing and signed by you and an officer of ACME.

We are very excited about the possibility of you joining us. We hope that you will accept this offer and look forward to a productive and mutually beneficial working relationship. Please let me know if I can answer any questions for you about any of the matters outlined in this letter.

Sincerely,

(Name)

(Title)

Acceptance.

I accept employment with ACME under the initial terms set forth in this letter:

(signature line)

(date)

(printed name of employment applicant)

Enclosures: 1 copy of Offer Letter; 2 copies of Confidentiality/Nondisclosure Agreement; List of Acceptable I-9 Documents

Executive Employment Agreements

- Executive agreement probably only necessary when pre-arranged severance pay is in effect
- “Term” can be indefinite
- “Change in Control” and “Good Reason”
- Cause in “Employer’s reasoned discretion” provisions can be overused
- Deal with Board seat when employment ends
- Deal with death / disability
- Clear bonus language – is it prorated?
- 409A/280G tax implications of severance
- Require a release for severance pay



“Noncompete” Agreements Terminology

- NDA/Confidentiality: Bars employee from using or disclosing confidential information
- Nonsolicitation: Bars employee from soliciting customers or employees
- Noncompetition: Bars employee from working at competitor
- Inventions Assignment: Intellectual Property developed by employee belongs to company
- “Trade Secret”: Independent economic value and not capable of being generally known

Noncompete Multi-State Issues

- Numerous state-specific laws, most significantly noncompetition and nonsolicitation agreements, are unenforceable in California (except sale of business)
- Increasing number of states require agreements to be presented before employment starts
- Law of state where employee resides likely to apply
- “Red” states more likely to enforce
- Be aware of state laws requiring minimum compensation for enforceability



Noncompete Agreements: New Washington Law



- Does not apply to nonsolicits or sale of business noncompetes
- Must be presented pre-employment
- Employee must make over \$100k per year at time of departure (can put in language for when the employee crosses \$100k)
- "Garden leave" if employee is "laid off"
- Maximum 18 months
- Employee can recover fees if employer attempts to overreach



Revised Oregon Statute

Noncompetes are voidable in Oregon unless they meet the following:

- Only apply to salaried exempt employees whose total compensation exceeds median income for family of 4
- Employee must have access to trade secrets or other sensitive proprietary information
- Enforced only up to 2 years
- Employer must provide 2-week notice that noncompete is a condition of employment (unless executed in connection with a bona fide advancement of employee)

Noncompete Consideration

- As part of initial offer of employment = ✓ OK
- In exchange for continued at-will employment? = ✗ Increasingly NOT OK
- Other things of new value to employee
 - Access to confidential information
 - Access to customer goodwill and relationships
 - Promotion
 - Stock grants
 - Stock option grants
- Make consideration something you would be comfortable taking to court

Noncompete Key Questions

- What is the legitimate business interest being protected?
 - Trade secrets / proprietary information? ✓ OK
 - Customer goodwill? ✓ OK
 - Significant investment in training? ✓ MAYBE
 - Restrict competition? ✗ NOT OK
 - Retribution? ✗ NOT OK

Noncompetes in M&A Transactions

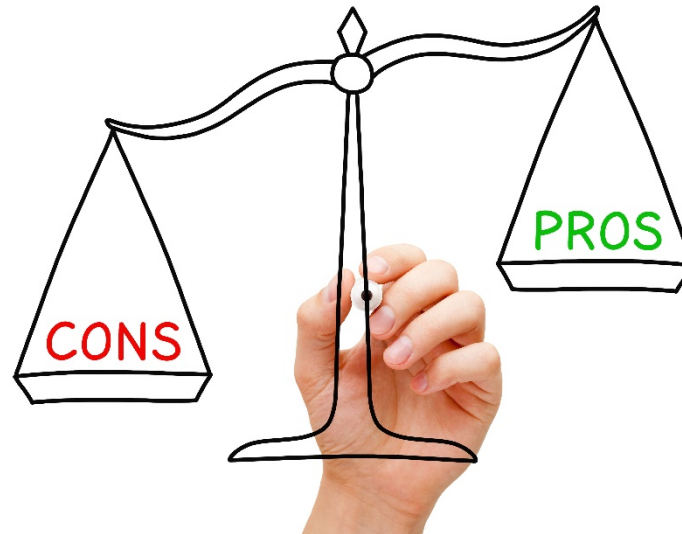
- Typically an essential element of deal
- Longer durations – up to 5 years – more enforceable than in pure employment context
- Make sure employment agreement and sale agreement noncompetes are consistent and integrated and consideration is clear

Noncompete Drafting Tips

- Not everyone should get one [Technology, Marketing, Sales]
- Place reasonable and specific limits tailored to protection of secret information (Consider specifically naming competitors)
- Include severability and choice of law
- Consider nonsolicitation of vendors, referral sources, or other proprietary entities
- “Regardless of who initiates contact”
- Include “knowledge of employee skillsets/human resources information” as trade secrets
- Carve out injunction from arbitration provision
- Include right to assign, and assign in M&A deal

Arbitration Agreements

- Pros:
 - Can be more predictable
 - Less likely to receive a “lottery verdict”
 - More accommodating on schedule / discovery
 - Class action waiver
 - Confidential



Arbitration Agreements

- Cons
 - Tendency to “split the baby”
 - No (or limited) appeal rights
 - Narrowing service gap with courts
 - Employer pays all fees
 - Enforceability questions
 - Publicity backlash
 - Case may be better for jury



Arbitration Agreements

- FAA preemption
- New CA law prohibits “forced” arbitration of state claims
- “Moving target” in some states
- Get wet signature / stand-alone document in California, or consider anytime class action waiver at issue

Employee Handbooks

- Identify purpose
- Identify “decider” and set timeline
- How to distribute / get acknowledgement
- Multi-state issues
- Consider “Your state may have different laws. See HR state law governing any conflict.”
- How to circulate updates with proof employee received



Employee Handbook Landmines

- Benefits
- Other needless promises / happy talk
- Does any employee read them until lawsuit?
- Beware of lengthy policy documents that aren't searchable

ACME Company Handbook

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ACME Company

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Commission and Bonus Plans

- Be wary of letting sales managers draft
- Be aware of state-law implications of calling at-risk comp “commissions”, and consider using alternative phrases
- State when and how commission is “earned”
- Deal with all contingencies
- Use the term “conditional advance” never “forfeit”
- Check state law
- State if servicing account is part of earnings
- Reserve right to modify, interpret, cancel the plan prior to when “earned”

Commission and Bonus Plans

- Termination with / without cause
- Customer payment not received
- Returns
- Splits
- Company merger
- Any clawback provisions must be defensible and explained prominently
- Regular rate issues
- Beware agreements to agree



Bonus Topic - Paychecks

California Labor Code 212 States Paychecks Must Include:

- Gross wages
- Total hours worked for non-exempt broken down by regular rate and overtime
- Piece-rate units earned if applicable
- All deductions
- Inclusive dates
- Name and address of legal entity that employs
- All applicable hourly rates
- Drawn on bank with operations in California where it can be cashed with no fees or waiting time
- Proper legal name of Employer

Severance Agreements

- Need consideration
- Be thoughtful and plain spoken in recital (time to look for job, not suing employee for restitution)
- Only good through date signed
- If “integrated” document make sure to cover all issues:
 - Equity compensation
 - Transition assistance
 - Noncompete
 - Tail commissions
 - Unemployment
 - COBRA
 - Nondisparagement
 - Job references
 - Dispute resolution
 - Prevailing party fees
 - Transition bonus – sign release at end
 - Affirm no knowledge of illegality?



Severance Agreements

- OWBPA
 - 21 days to consider signing, 7 days to revoke
 - 45 days to consider in "Group Layoff" situation (2 or more ensure job action)
 - Age chart given to everyone, only over-40s get consideration / revocation periods
 - Consider uniform agreement for efficiency in group layoff
 - Can do away with the 7-day revocation period under the ADEA in settlements of age-based litigation where the plaintiff is represented by counsel

Group Release Chart

NOTICE TO EMPLOYEES

We are required to provide this information to you under the Older Worker's Benefit Protection Act.

Covered Employees and Eligibility Requirements

The only employees eligible to receive enhanced severance benefits are those whose positions have been eliminated as part of the _____ layoff and who executed a Separation Agreement and Release. **Selective factors include skillsets needed for the company's anticipated future needs.**

Time Limits Applicable to Program

All eligible employees who wish to participate in the severance program must sign the Separation Agreement and Release (the "Agreement") and return it to _____ no later than forty-five (45) days after receiving it. Once an employee has signed and returned the Agreement, the employee has seven (7) days to revoke the Agreement.

Individuals Eligible and Ineligible for the Program

The following is a listing of the ages and job titles of employees who were and were not selected for layoff and offered consideration for signing the Separation Agreement and Release. Except for those employees selected for layoff, no other employee is eligible or offered consideration in exchange for signing the Severance Agreement and Release:

Job Title	Selected	Not Selected
Assembler I	27, 43, 58	30, 48, 61
Assembler II	40, 51, 32	19, 33, 54

If you have any questions about this severance program, please contact _____ at Human Resources at _____.

Handling COBRA in Severance Agreements

- There is a risk to the employer if a payment is missed or if something happens to cause COBRA to lapse while the employer is responsible for making the premium payments.
- If the plan is self-insured, a pre-tax COBRA payment may cause the health plan to be discriminatory if the former employee is a highly compensated employee (for this purpose, a highly compensated employee is one who is in the top 25% of earners, a 10% shareholder, or one of the 5 highest paid officers); and,
- The loss of COBRA coverage due to nonpayment is not a qualifying event under the state health care marketplaces. As a result, if you pay for 3 months of COBRA coverage and the former employee can no longer afford to pay the premiums following this period, the former employee may lose coverage due to nonpayment and will not be able to enroll in individual coverage until the next open enrollment period.

Handling COBRA in Severance Agreements

COBRA. Employer will pay Employee a lump sum of _____, less applicable withholdings, which is equivalent to the estimated amount required to cover __ months of COBRA continuation coverage at Employee's current level of participation; provided, that this Paragraph shall not be construed as placing any restrictions upon any amount paid under this Paragraph with respect to Employee's use of such amount. Employee acknowledges that, if he/she wishes to enroll in COBRA continuation coverage, it will be his/her sole responsibility to timely elect any COBRA continuation coverage and to make any payments for such coverage. Employee also understands that if he/she enrolls in COBRA coverage but such coverage is terminated prior to the end of the COBRA coverage continuation period, he/she may not immediately not be immediately eligible to enroll in an Affordable Care Act Marketplace plan. This amount will be processed through Employer's regular payroll system in a lump sum with fifteen (15) business days of the Effective Date of this Agreement.

Sarbanes Oxley/Whistleblower Release

4. **Employee understands that nothing in this Agreement or in any other agreement between Employee and the Company shall in any way limit or prohibit Employee from engaging for a lawful purpose in any Protected Activity.** For purposes of this Agreement, "Protected Activity" shall mean filing a charge or complaint, or otherwise communicating, cooperating, or participating with, any state, federal, or other governmental agency, including the Securities and Exchange Commission, the Equal Employment Opportunity Commission, and the National Labor Relations Board. Notwithstanding any restrictions set forth in this Agreement, Employee understands that he is not required to obtain authorization from the Company prior to disclosing information to, or communicating with, such agencies, nor is Employee obligated to advise the Company as to any such disclosures or communications. Notwithstanding, in making any such disclosures or communications, Employee agrees to take all reasonable precautions to prevent any unauthorized use or disclosure of any information that may constitute Company confidential information under the Confidentiality Agreement to any parties other than the relevant government agencies.

Sarbanes Oxley/Whistleblower Release

4. **Employee further understands that “Protected Activity” does not include his disclosure of any Company attorney-client privileged communications**, and that any such disclosure without the Company’s written consent shall constitute a material breach of this Agreement. In addition, pursuant to the Defend Trade Secrets Act of 2016, Employee is notified that an individual will not be held criminally or civilly liable under any federal or state trade secret law for the disclosure of a trade secret that (i) is made in confidence to a federal, state, or local government official (directly or indirectly) or to an attorney solely for the purpose of reporting or investigating a suspected violation of law, or (ii) is made in a complaint or other document filed in a lawsuit or other proceeding, if (and only if) such filing is made under seal. In addition, an individual who files a lawsuit for retaliation by an employer for reporting a suspected violation of law may disclose the trade secret to the individual’s attorney and use the trade secret information in the court proceeding, if the individual files any document containing the trade secret under seal and does not disclose the trade secret, except pursuant to court order.
5. Subject to the exceptions set forth in Paragraph 9 below, Employee agrees to give written notice immediately to _____, General Counsel for _____, if Employee is requested or required pursuant to court order, judicial process or regulatory authority to reveal any information specified in this Agreement prior to providing this information. However, Employee is not required to provide the Company with such notice as set forth in Paragraph 9 or if the court order, judicial process or regulatory authority prohibits Employee from doing so.

Severance Cover Letter

[ACME Letterhead]

February __, 2019

Wily Coyote

RE: Your Departure

Dear Mr. Coyote:

This will confirm that your employment at ACME Inc. terminated effective ____, 2019. Because your employment was on an at-will basis, no cause or notice is required for either side to end it. We do, however, note that the reason for our decision **is overall unsatisfactory performance and conduct.**

To ease the impact of this decision and facilitate an amicable parting, we are offering you a severance package, [including continued pay and health benefits] through ____, 2019. The specific terms of our offer are contained in the enclosed Severance Agreement and Release, which you must sign to obtain the severance package.

You will receive your final paycheck including any accrued unused vacation on the next regular payroll date regardless of whether you sign the Severance Agreement. You will also receive information concerning your right to elect continued medical coverage under COBRA under separate cover.

Please return any and all Company property in your possession immediately, including _____.

Please contact me at _____ if you have any questions. We thank you for your past efforts and wish you success in your future endeavors.

Very truly yours,

Name

Settling Lawsuits

Agreement similar to
severance

Reference “Lawsuit”
“DOL charges” or
similar, require
dismissal with prejudice

Dispute resolution

Refer disputes back to
Mediator

Consider CR2A at
Mediation

Bring draft Settlement
Agreement to
Mediation

“Me too” Laws and Boilerplate

- States limiting nondisclosure and nondisparagement agreements in harassment cases
- No rehire settlement clauses banned in California after 1/1/20
- Limits on confidential arbitration of harassment claims



Inhouse Employment Law Perspective

Multistate Class Action Trends: Lawsuits & Settlements

- **Class Certification granted at high rates** in 2019 (compared to '17-'18) for these cases:
 - ERISA
 - wage & hour
 - employment discrimination
- **Settlements Still Low** Historically
 - The top ten employment class settlements:
 - \$1.34 billion in 2019
 - \$1.32 billion in 2018
 - \$2.72 billion total in 2017
 - Wage/Hour top settlements increased 50% year over year --\$449M 2019 vs. \$253M in 2018).
 - Discrimination class action top settlements decreased 36% YOY -- \$139.2M 2019 vs. \$216M 2018).

Inhouse Employment Law Perspective

Multistate Class Action Trends: Arbitration

- *Epic Systems* (2018) (upheld class action waivers in arbitration agreements) – most important workplace class action ruling in 20 yrs; has had a huge impact defense of workplace class action litigation
 - But – public perception of mandatory arbitration is negative after Me Too
- Microsoft's approach re mandatory arbitration

Inhouse Employment Litigator's Perspective

EEOC Litigation Trends

- EEOC brought fewer lawsuits in '19 than '18 (27% fewer cases filed)
- Settlement value declined (top 10 EEOC lawsuits)
 - 2019: \$57.52 million
 - 2018: \$126.7 million
 - 2017: \$485.25 million
 - Predict this will decrease even further in 2020

Inhouse Employment Litigator's Perspective

Multistate Policies & Practices - Approach

- Policies generally align to the most generous state law
- State-specific addenda to policies where required, e.g.:
 - Family Leave / LOA (many states)
 - Sick Leave (PA, WA, Minneapolis, Austin, others)
 - Commissions / at-risk comp (CA specific agreement)
 - Restrictive covenants (CA and TX-specific agreements)
- Global policies more challenging. Expansive policy definitions (e.g., protected characteristics catch-all) intended to cover all US laws.

Inhouse Employment Litigator's Perspective

Multistate Policies & Practices – Approach(*cont'd*)

- Central Services team distributes & tracks paperwork for state-specific at-hire requirements
 - Wage notices
 - Secure Scheduling
 - At-hire
- Less a “handbook” than a policy website (MSPolicy)
 - Click-through acknowledgement every time an employee accesses policies
 - Trackable – helpful in litigation
 - Policy vs. “Guidance”
- S/H training
 - online everywhere
 - CA & NYS-specific as well

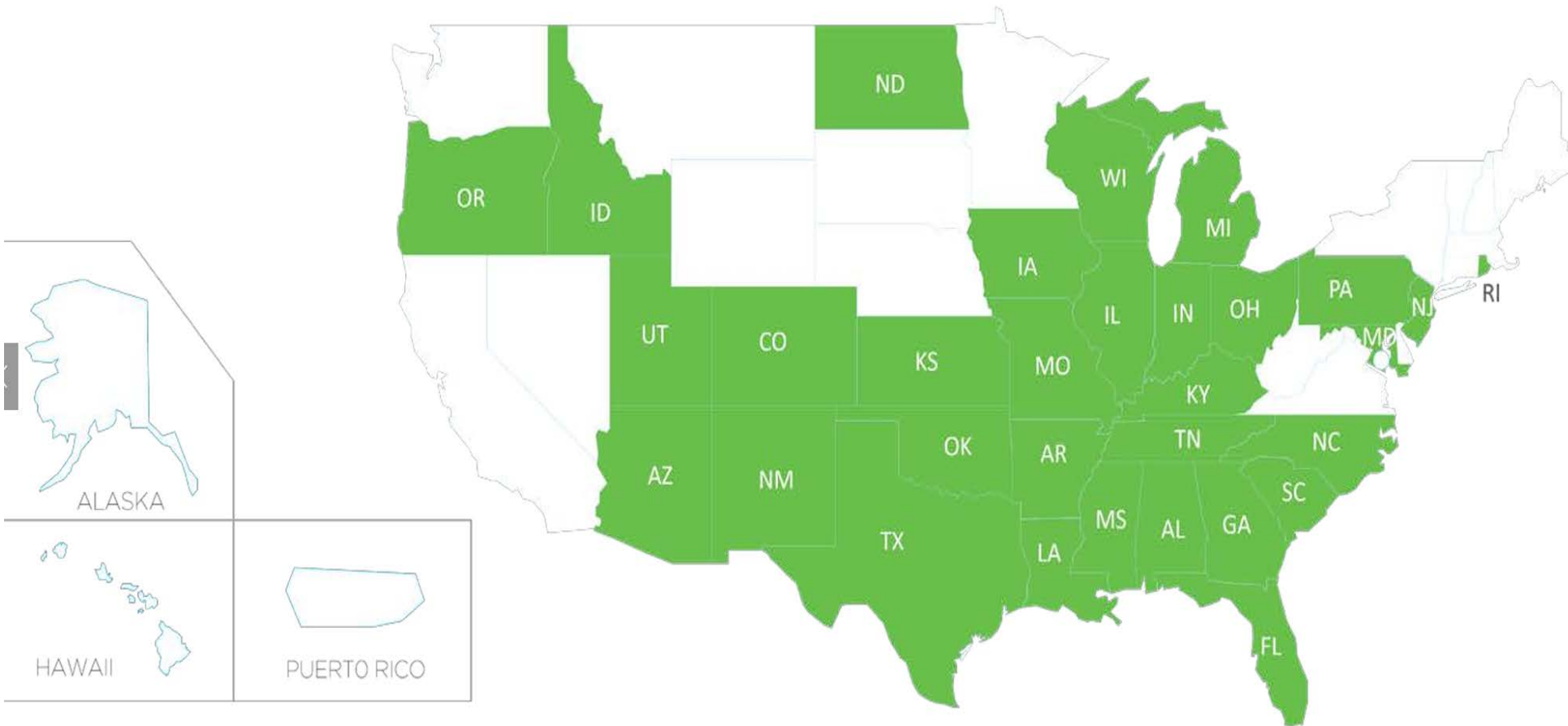
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Nonexhaustive List Of Multistate Laws Causing Headaches

- Secure Scheduling (Seattle)
- Equal Pay (equal gender pay for comparable work)
- Ban on Prior Pay Inquiries
- Family Leave / LOA (many states)
- Paid Sick Leave (PA, WA, Minneapolis, Austin, others)
- Commissions / At-risk Comp (CA specific agreement)
- Restrictive Covenants (CA and TX-specific agreements)
- Background Checks – mini-FCRA laws
- Drug / Alcohol Testing
- Employment Verification (E-Verify)
- Meal / Rest laws
- Pay Stubs (esp. CA)
- Final Pay Laws

Inhouse Employment Law Perspective

Multistate Issues: States with Municipal Preemption Statutes



Cities vs.
States –
battle to
regulate the
workplace

Inhouse Employment Law Perspective

Multistate Issues: States with Municipal Preemption Statutes

21+ separate city minimum wage rates in the San Francisco Bay Area alone



Minimum Wage



Mandatory sick
leave



Predictable and
Flexible Scheduling



Opportunity To
Work

Inhouse Employment Law Perspective

Multistate Issues: States with Municipal Preemption Statutes

Battles in the Red States

- Arizona passes a preemption law – cities can't establish their own minimum wages.
- The state preemption law is challenged and struck down in court.

Meyer v. Arizona, 246 Ariz. 188 (Az. App. 2019)

Inhouse Employment Law Perspective

Multistate Issues: States with Municipal Preemption Statutes

Battles in the Blue States

- New York City adopts a “Fair” Workweek Ordinance.
- The ordinance is preempted by state law.

International Franchise Ass’n v. City of New York,
N.Y. Sup. 0655987/2018

Thank You



Gregory A. Hendershott

Partner
Davis Wright Tremaine LLP
Bellevue
T 425.646.6187
E greghendershott@dwt.com

Greg Hendershott helps his clients by offering practical, direct advice to employers in all areas of legal compliance, from compensation and executive employment agreements to disability, leaves of absence, workplace culture issues, union relations and union avoidance, handbooks and policies, discipline, and sensitive terminations. Greg regularly conducts training in harassment and other employment issues and leads high-profile workplace investigations including executive misconduct. With first-chair litigation and trial experience, Greg has the knowledge and expertise to counsel clients on how to avoid litigation. He rounds out his practice by offering strategic advice to employers covering labor matters.



Blake L. Barnes

Senior Attorney
Microsoft
Bellevue
T 425.704.7585
E blbarnes@microsoft.com

Blake Barnes is a Senior Attorney at Microsoft, managing and defending employment litigation brought against Microsoft. Her experience covers all areas of workplace litigation, including discrimination/harassment/retaliation, wage/hour, FMLA, ADA, and all types of class actions brought by employees against employers. Blake has extensive experience providing advice to HR and management, as well as managing people and programs.