JacksonLewis

WAGE & HOUR DEVELOPMENTS: A YEAR IN REVIEW

2020

INTRODUCTION

The laws governing wages and hours of work affect nearly everyone. *How* employees are paid, whether as hourly non-exempt, salaried-exempt, tipped, or commissioned sales workers, and *how much* they are paid, are questions of deep interest to employees and employers alike. And because the laws regulating wages generally apply only to employees, as opposed to independent contractors, *who is* an employee is also a significant issue of concern. All these issues were addressed this year by the U.S. Department of Labor (DOL), the U.S. Circuit Courts of Appeal, and state legislatures. In this annual review, we look back at some of the significant developments in the laws governing the payment of wages and the limitations on hours of work at both the federal and state level.

The minimum wage continues to be a key issue. While the federal minimum wage remains at $7.25 per hour (the level set in July 2009), states, cities, and municipalities continue their march toward increasing the minimum wage, whether by legislation or at the ballot box. More than 20 states will increase their minimum wage rates in 2021, with California having the highest statewide minimum wage at $14.00 per hour (for employers with more than 25 employees). The small city of Emeryville, California (population approx. 12,000) boasts the highest minimum wage for any city at $16.84 per hour, while among large cities Seattle, Washington leads the pack at $16.69 per hour (for large employers); New York City's minimum wage is $15.00 per hour. Looking ahead to 2021, President-Elect Biden has stated an intent to increase the federal minimum wage. Currently, 19 states continue to apply the federal minimum wage.

On the regulatory front, the DOL was particularly busy in 2020 through the first week of 2021. Implementing an amendment to the FLSA regarding tipped workers, the DOL issued new regulations permitting directly tipped workers (*e.g.,* servers) to share tips with non-tipped workers (*e.g.,* cooks and dishwashers), so long as an employer does not utilize a tip credit. In the same Final Rule, the DOL also formally rescinded the so-called "20% Rule," limiting the amount of time a tipped employee can spend performing allegedly non-tipped duties. However, the Final Rule is not yet effective and may be stymied by the Biden Administration. And it remains to be seen how much deference courts will give to this new rule.

The DOL also issued a new Final Rule defining joint employment (although that Rule was enjoined by a New York federal district court) and another Final Rule, proposed in 2020 and published during the first week of January 2021, addressing independent contractor status under the FLSA. That Final Rule likewise is not yet effective and may be overridden by the Biden Administration or the Democratically-controlled Congress. The DOL also issued new detailed regulations explaining how to calculate the "regular rate" of pay for non-exempt employees, giving employers more leeway in offering certain "perks" without having to include the value of those perks in determining the overtime rate.

At the state level, Colorado had some of the most significant developments, rolling out a new law governing wages and hours that breaks from federal law in several respects, and providing greater protection to employees than required by the FLSA (*see infra*), while Florida (via the ballot box) and Virginia (via legislation) joined the list of states that will raise their minimum wage rate to $15.00 per hour within the next few years.

In light of several late-breaking wage and hour developments during the final days of the Trump Administration, this report will cover developments through January 8, 2021.

NOTABLE FEDERAL COURT CASES

Unlike most years, in 2020 the U.S. Supreme Court did not issue any decisions that focused either directly or indirectly on wage and hour issues. Additionally, with federal courts effectively shut down for the greater part of the year due to the COVID-19 pandemic, fewer decisions in general flowed from the courts of appeal and district courts. There were, however, a few notable decisions addressing wage and hour issues.

Second Circuit Affirms Use of Fluctuating Workweek Pay Method for "Big Box" Store District Managers

In *Thomas v. Bed Bath & Beyond*, 961 F.3d 598 (2d Cir. 2020), the U.S. Court of Appeals for the Second Circuit affirmed the use of the fluctuating workweek (FWW) pay method. Generally, the FLSA guarantees a minimum wage for all hours worked and overtime for any hours worked over 40 per week for all covered, non-exempt employees. Under certain conditions, an employer may use the FWW method to compute any overtime compensation due. When a non-exempt employee works hours that vary from week to week and receives a pre-established, fixed salary intended to compensate all "straight time" (non-overtime) hours the employee works, the employer satisfies the FLSA's overtime pay requirements if, in addition to the salary amount, it pays at least one-half of the "regular rate" of pay for any hours worked in excess of 40. The salary must remain fixed, it must be sufficient to pay at least minimum wage for all hours worked, and the employer and employee must have a "clear and mutual understanding" that the salary will remain the same regardless of the hours worked each week.

In *Thomas*, the employees cited three reasons why the employer improperly used the FWW method: (1) the company did not always pay them a fixed salary; (2) their hours did not fluctuate; and (3) when on occasion the company would ask the employees to work on a holiday or previously scheduled day off, the employees would be permitted to shift their paid time off to a later date, a practice disallowed under the FWW pay method. The Second Circuit rejected each contention in turn.

First, the Court of Appeals noted that, out of more than 1,500 combined weeks of pay, the district managers could identify only six occasions where an employee's fixed salary was not paid. Of those, three were payroll errors (two of which were corrected prior to the lawsuit); one was because the employee was discharged in the middle of the week; one was a pre-hire arrangement between the employee and the company for a fixed amount of unpaid vacation during their employment; and the final, and perhaps only questionable, occasion was when an employee took Family and Medical Leave Act (FMLA) leave. Under the totality of the circumstances, the Second Circuit held, this miniscule percentage of exceptions was insufficient to demonstrate that, as a policy or practice, the employees in question were not paid a fixed salary as required under the FWW method. The district managers next claimed that the FWW method requires hours that regularly fluctuate both above and below 40 hours per week, whereas they almost always worked well in excess of 40 hours every week. The Second Circuit disagreed, concluding that nothing in the FLSA's regulations or binding case law mandated such a requirement. In reaching this conclusion, the Court of Appeals acknowledged that the DOL had reached the same determination in the Final Rule it has released just prior to the Second Circuit's decision (*see infra*).

Finally, the district managers argued that the company's practice of permitting employees to take additional paid time off on later dates after working on a holiday or previously scheduled day off is inconsistent with the FWW pay method. While some courts have concluded that bonuses and shift differentials are inconsistent with the FWW pay method, observed the Second Circuit, the allegation here was only that the district managers received additional time off, not that they received additional compensation. Nothing under the FLSA, the applicable regulations, or controlling law prohibits such a practice. On the contrary, as long as an employee's pay is not docked, the employer is free to provide additional paid time off without running afoul of the FWW method. Regardless, and as unequivocally set forth in the DOL's new Final Rule addressing the FWW method, even if the paid time off *was* considered a form of additional compensation, its use is not inconsistent with the FWW pay method.

This decision, combined with the new regulations, may encourage more employers to consider implementing the FWW method, which provides a benefit to employees — a guaranteed fixed salary — and benefit to employers — reduced overtime payments to employees who work fluctuating hours.

Fifth Circuit Creates Circuit Split on FLSA's "Regular Rate" Burden, Addresses Inclusion of Bonuses

With specific, limited exceptions set forth in Section 207(e) of its regulations, the FLSA requires that all compensation provided to a non-exempt employee must be included when determining the employee's "regular rate" for overtime pay purposes. But whose burden is it

to demonstrate that one of these limited exceptions does, or does not, apply? That burden falls on the employee, a panel of the Fifth Circuit Court of Appeals has concluded. *Edwards v. 4JLJ, L.L.C.*, 976 F.3d 463 (5th Cir. 2020). In so holding, the Fifth Circuit has diverged from other circuit courts of appeal addressing the issue, thereby creating a circuit split.

The FLSA generally requires employers to pay non-exempt employees overtime pay at one-and-one-half times their "regular rate" for all hours worked over 40 in each workweek. The regular rate is defined, with few exceptions, as all "remuneration for employment paid to, or on behalf of, the employee," divided by the total number of hours worked during that week. The eight general types of exceptions to regular rate inclusion are set forth in Section 207(e) of the FLSA regulations and include, in part, such forms of compensation as "sums paid as gifts," "payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause," and

> sums paid in recognition of services performed during a given period [*i.e.* bonuses] if [] both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly[.]

29 U.S.C. § 207(e).

For decades, it has been undisputed that the burden of demonstrating an individual or position is exempt from the minimum wage or overtime provisions of the FLSA falls on the employer. For example, the employer has the burden of demonstrating that an employee falls under the FLSA's executive, administrative, or professional exemption to minimum wage and overtime, as set forth in Section 213(a)(1) of the FLSA. Making no distinction between the FLSA's minimum wage and overtime exemptions and the exceptions to regular rate inclusion found in Section 207(e), some circuit courts have placed the burden on employers to prove that some form of compensation paid to employees falls under one of the enumerated exceptions.

But the *exemptions* found in Section 213 and the *exceptions* to regular rate inclusion set forth in Section 207(e) are <u>not</u> the same, the Fifth Circuit explained. While it is true that the employer has the burden to show that an employee is exempt from an FLSA requirement, "plaintiffs bear the burden to prove all elements of their claims." Thus, "because [Section] 207(e)(3) is merely a definitional element of the regular rate – and therefore merely a definitional element of the Employees' claim – it was their burden to show that bonuses were not discretionary according to the statute's terms."

Having resolved that employees bear the burden of proving whether particular payments must be included in the regular rate of pay, the Court of Appeals then addressed the specific bonuses at issue in the case. The defendant provides oil well pump and fracking services and the plaintiff employees filed suit, alleging that two of the bonuses offered by the employer – a "stage" bonus and a performance bonus – were improperly excluded from the regular rate calculation. The jury found the employer was not required to include either bonus in the regular rate of pay. The Fifth Circuit affirmed that finding as to the stage bonus but reversed as to the performance bonus.

Because the fracking of a well occurs in identifiable "stages," the company offered a bonus for each stage completed. However, the details of the timing and amount of the stage bonuses was never put into writing, and the Court of Appeals therefore concluded that the plaintiffs failed to provide sufficient evidence that the bonus was non-discretionary under the factors set forth in Section 207(e)(3). Thus, the jury properly had determined the stage bonus did not have to be included in the regular rate calculation.

The company also offered a performance bonus, which *was* formalized and provided to employees in a written policy at the time of hire. Although the policy clearly indicated that the bonus was "not to be expected, it is to be earned" and that if an employee was "here just to get a paycheck, and get by with as little work as possible, don't expect to get a performance bonus," the policy also set forth both specific criteria by which employees would be judged with respect to bonus consideration and a pay

scale, of anywhere from 50 cents to $1.00 per hour depending on employee class, for such occasions when a bonus was deemed to have been earned.

The Court of Appeals held that the plaintiffs had in fact sufficiently demonstrated that the performance bonuses should have been included in the regular rate calculation because, while the jury reasonably could (and did) conclude that the employer retained discretion as to whether the bonus would be paid (*i.e.,* after evaluating the quarterly performance criteria), the employer did <u>not</u> retain discretion as to *how much* any such bonus would be. On the contrary, the policy provided for a specific, hourly bonus based on employee class. Thus, the exception requirements of Section 207(e)(3) were not met and the Court of Appeals reversed in favor of the employees.

Whether the circuit split, created by the Fifth Circuit's decision as it relates to the burden of proof, will be resolved by the U.S. Supreme Court remains to be seen. Regardless, employers need to assess all forms of compensation provided to non-exempt employees and determine whether they should be included in or excluded from the regular rate of pay. With respect to bonuses, employers also should review any communications with employees describing the conditions necessary to earn the bonuses and how they will be calculated, to ensure that if a bonus is intended to be at the employer's discretion, those communications do not inadvertently eliminate the discretionary nature of the bonus.

Eleventh Circuit Rejects Incentive Awards for Class Plaintiffs

In September 2020, the Eleventh Circuit Court of Appeals ruled that "incentive" or "service" awards to lead plaintiffs in Federal Rule of Civil Procedure 23 class actions are unlawful. This is the first circuit court of appeals to expressly invalidate such awards as a matter of law. *Johnson v. NPAS Solutions, LLC*, 975 F.3d 1244 (11th Cir. 2020). Although not a wage and hour, or even an employment, case, the decision in this case nonetheless has potentially significant implications for such cases.

Although the U.S. Supreme Court prohibited the award of incentive payments to plaintiffs more than a century ago, such payments had become a routine feature of class settlements. "But, so far as we can tell, that state of affairs is a product of inertia and inattention, not adherence to law," the Court of Appeals said, adding, "Although it's true that such awards are commonplace in modern class-action litigation, that doesn't make them lawful, and it doesn't free us to ignore Supreme Court precedent forbidding them."

As a practical matter, removing the prospect of service awards for named plaintiffs in class actions will impact the resolution of class actions within the Eleventh Circuit, adding further nuance to the negotiation of settlements and the drafting of settlement agreements. In addition, this decision will further increase judicial scrutiny of class action settlements in the Eleventh Circuit, already known for its active scrutiny of employment class action settlements, particularly in the area of wage and hour claims. However, given that *NPAS Solutions* was not an employment case, it remains to be seen whether the majority's rationale will be applied in the context of settling FLSA collective actions or hybrid class/collective action claims under Rule 23 and the FLSA. It also remains to be seen whether other federal circuits will find the Eleventh Circuit's holding persuasive and likewise opt to prohibit the use of incentive payments, or whether the Eleventh Circuit has further distanced itself from its sister circuits in closely scrutinizing the terms of class action settlements.

DOL AGENCY DEVELOPMENTS

Regular Rate Regulations

In January 2020, the DOL issued a Final Rule to revise the regulations governing the calculation of the "regular rate" under the FLSA. The FLSA generally requires employers to pay non-exempt employees overtime pay at one-and-one-half times their regular rate for all hours worked over 40 in a given workweek. Employers sometimes struggle, however, with properly determining the regular rate when providing various benefits and other forms of compensation to their employees in the modern workplace. The Final Rule is quite lengthy but generally addresses the following:

- Clarifying that payments for "paid time off" for PTO, when not worked, as well as payouts for unused PTO, need not be included in the regular rate, as this is pay for non-working time.

- Addressing an apparent contradiction in the current regulations surrounding whether pay for "bona fide meal periods" is excludable from the regular rate, the DOL proposes to amend the regulations to remove the reference to "lunch periods" in 29 C.F.R. § 778.218(b) to "eliminate any uncertainty about its relation to [Section] 778.320 concerning the excludability of payments for bona fide meal periods from the regular rate."
- Removing the word "solely" from the current regulations to clarify that an employee's reimbursable business expenses are excludable if they are incurred "in the furtherance of [the] employer's interests," even if they might also benefit the employee to some extent.
- Clarifying what constitutes a "reasonable" expense within the meaning of 29 C.F.R. § 778.217(b) and excludable from the regular rate.
- Adding a number of additional examples to the non-exhaustive list in the existing regulations of benefits excludable from the regular rate to include "conveniences furnished to the employee," such as on-site chiropractic treatment, massage therapy, physical therapy, and personal training services; gym, fitness and recreational classes and memberships; modern "wellness programs" such as health screenings, vaccinations, smoking cessation support, and nutrition classes; discounts on employer-provided retail goods and services; and tuition benefits.
- Clarifying that recent state and local laws, requiring "reporting pay" for employees who are unable to work their scheduled hours because the employer subtracted hours from a regular shift before or after the employee reports to duty, will be treated as "show-up" pay under existing regulations. The DOL referred to proposed laws in Arizona, Connecticut, Illinois, Massachusetts, Maryland, New York, and Chicago.
- Eliminating the requirement that call-back payments be received only on an "infrequent" or "sporadic" basis for the exclusion to apply, although they cannot be "so regular that they are essentially prearranged." Similarly, the proposed regulations provide that predictability/scheduling pay (for failing to provide a certain minimum advance notice of the work schedule) and "clopening" pay (for failing to provide a certain minimum break between working a closing shift and the subsequent opening shift) – something recently enacted or proposed in several states – may be excluded from the regular rate of pay, so long as they too are not so regular that they are essentially prearranged.
- Seeking to elaborate on the types of bonuses that are, and are not, "discretionary" and therefore excludable from the regular rate calculation.
- Adding more examples of the types of modern benefit plans that may be excludable from the regular rate of pay.
- Removing language from the existing regulations to clarify when employers may exclude from the regular rate certain overtime premium payments made for hours of work on special days or in excess or outside of specified daily or weekly standard work periods.

While unlikely to eliminate all problems stemming from the oft-confounding regular rate determination, the new Final Rule provides some much-needed and updated guidance to employers in their efforts to comply with the FLSA.

Labor Department Issues Final Rule on Tip Pooling Amendments, Elimination of "20%" Dual Jobs Rule

In December 2020, the DOL issued its long-awaited Final Rule addressing who may share tips under the FLSA and the circumstances under which employers may use a tip credit. The Final Rule implements a 2018 amendment to the FLSA that permits tipped employees (*e.g.*, servers in the restaurant industry) to pool tips with non-tipped workers (*e.g.*, cooks and dishwashers), so long as the employer does not take a "tip credit" (*i.e.*, paying tipped employees a direct wage below the minimum wage) and, instead, pays such workers a direct wage equal to or greater than the minimum wage. The Final Rule will permit both groups to receive tips, so long as the employer does not take a tip credit. The employer must fully redistribute tips at least as often as it pays wages and must align its policy of paying credit card- and cash-based tips. Due to

variances in state law, the Final Rule's expansion of tip pooling may not apply in some states.

In keeping with the 2018 amendment, the Final Rule also explains that employers, including managers and supervisors, are prohibited from keeping any tips received by employees, regardless of whether the employer takes a tip credit. On the other hand, under the amendment employers may mandate participation in a tip pool that includes both traditionally tipped and non-tipped employees. As to who constitutes a "supervisor" or "manager," and is thus excluded from accepting tips from a tip pool, the Final Rule explains that the duties test (but not the salary basis or level requirements) applicable to the "white collar" executive exemption will control who meets these definitions under the tip-pooling rules. Under the executive exemption, an employee must have management as their primary duty, must customarily and regularly direct the work of at least two employees, and must have the authority to hire or fire other employees or provide recommendations regarding employment status that are given particular weight. Moreover, an employee who owns a 20% equity interest in the business at issue and who is actively engaged in its management also would be considered a manager or supervisor.

The Final Rule also codifies, with minor changes, the DOL's previous guidance eliminating the so-called "20%" or "80/20" Rule. That Rule limited the percentage of time (*i.e.*, 20%) a tipped worker could spend performing allegedly non-tipped duties and still take a tip credit. By contrast, the Final Rule provides that, so long as tipped employees perform duties related to their tipped occupation, either contemporaneously or for a reasonable period before or after their tipped duties, an employer is permitted to pay using a tip credit, regardless of whether the duties directly generate a tip.

The Final Rule also provides guidance on what duties are considered "related" to tip generating duties, to assist employers in determining whether the tip credit rate applies to that work. A non-tipped duty will be considered as "related" to a tip-producing occupation if the duty is listed as a task of the tip-producing occupation in the Occupational Information Network (O*NET). Examples of such "related" duties include setting up and cleaning tables, making coffee, and occasionally cleaning glasses or dishes. However, the Final Rule clarifies that the O*NET is not the definitive and exclusive source of tip-related duties; rather, duties included in that source are merely presumed to be tip-related. This change from the proposed rule was in response to criticism that incorporating O*NET by reference could become problematic if O*NET is modified so that duties that were included are eliminated or others added. Again, state law may limit the application of the federal rule, depending on the state at issue, subject to arguments regarding possible preemption.

In explaining the rationale for the elimination of the 20% Rule, the Final Rule states, "[A]n employer of an employee who has significant non-tipped related duties which are inextricably intertwined with their tipped duties should not be forced to account for the time that employee spends doing those intertwined duties. Rather, such duties are generally properly considered a part of the employee's tipped occupation, as is consistent with the statute."

While not addressed in the proposed rule, the Final Rule also reaffirms the DOL's longstanding position that employers may reduce the tips paid to employees by the amount of (and no more than) the transactional fees associated with credit card payments without running afoul of the prohibition on employers sharing tips. "By deducting transactional fees, the employer exerts only the amount of control necessary to liquidate the tips to cash and distribute them to employees," the Final Rule notes, adding, "[c]redit-card processing fees are not an imposition by the employer on the employee; they are the price of converting credit obligations to cash. The same fees would be imposed upon servers themselves if they collected their tips through credit payments separate from the customer's payment to the establishment." The Final Rule reiterates, however, that employers may neither deduct more than the actual transactional fee charged by the credit card company attributable to liquidating the credit card tip nor reduce the amount of tips paid to the employee to cover other credit card-related costs, such as installation of a point-of-sale (POS) system. Some state laws prohibit employers from assessing such credit card transaction fees against employees, so employers need to ensure they comply with the applicable state laws and regulations where they operate.

In addition, the Final Rule clarifies that managers or supervisors may keep tips that they directly receive from a customer and for which they were the only ones who provided the relevant service. The Final Rule provides as

an example a salon manager who is tipped by customers whose hair they personally style.

The elimination of the 20% Rule and its replacement with a Final Rule that provides a concrete list of the types of duties qualifying as tip-related will provide much-needed clarity to employers and employees. Additionally, some employees will benefit from the Final Rule now that tips are not the sole property of servers and can be shared with kitchen staff, who are just as important to the customer's experience.

Joint Employer Standard Under the FLSA

In January 2020, the DOL released its Final Rule updating regulations governing "joint employer" status under the FLSA. The regulations in this area, which had not been updated in more than 60 years, seek to provide a more uniform interpretation that gives employers greater certainty, as well as to reiterate the DOL's "longstanding position that a business model — such as the franchise model — does not itself indicate joint employer status under the FLSA." The new test focuses on whether the purported joint employer "exercises substantial control over the terms and conditions of the employee's work." The Final Rule abandons prior interpretations that subjected employers to the risk of being liable as joint employers if they were "not completely disassociated" from a worker.

Derived from the decision of the U.S. Court of Appeals for the Ninth Circuit in *Bonnette v. California Health & Welfare Agency,* 704 F.2d 1465 (9th Cir. 1983), the DOL has adopted a four-factor balancing test assessing whether the purported joint employer:

- Hires or fires the employee;
- Supervises and controls the employee's work schedules or conditions of employment;
- Determines the employee's rate and method of payment; and
- Maintains the employee's employment records.

The Final Rule clarifies that not all four factors must be satisfied and that "[n]o single factor is dispositive in determining joint employer status, and the appropriate weight to give each factor will vary depending on the circumstances." It also emphasizes that "additional factors may be considered, but only if they are indicia of whether the potential joint employer exercises significant control over the terms and conditions of the employee's work." Moreover, the Final Rule provides that neither "standard contractual language reserving a right to act" nor maintenance of employment records, in and of themselves, will demonstrate joint employer status. With respect to the latter, the Final Rule defines "employment records" as those, "such as payroll records, that reflect, relate to, or otherwise record information pertaining to the first three factors (*i.e.,* hiring or firing, supervision and control of the work schedules or conditions of employment, or determining the rate and method of payment").

Importantly, the Final Rule states that "to be a joint employer under the Act, the other person must actually exercise – directly or indirectly – one or more of the four control factors. The other person's ability, power, or reserved right to act in relation to the employee may be relevant for determining joint employer status, but such ability, power, or right alone does not demonstrate joint employer status without some actual exercise of control." Thus, while "the reserved right to act can play some role in determining joint employer status, there still must be some actual exercise of control." Unlike the reserved right to act, however, which the DOL concedes may have some relevance, an employee's economic dependence on a potential joint employer is *irrelevant.*

Although the new Final Rule was considerably more employer-friendly than the DOL's previous position, a federal district court in New York struck down a significant portion of it. *State of New York v. Scalia*, 2020 U.S. Dist. LEXIS 163498 (S.D.N.Y. Sept. 8, 2020). While the DOL has filed an appeal, it is unclear if the Biden Administration will defend the rule. A good bet is that it will not.

Fluctuating Work Week (FWW) Pay Method

Under DOL regulations, if certain conditions are met, an employer may pay an employee who works fluctuating hours a fixed salary for all hours worked, and then an additional half-time for all hours over 40, a number that decreases as the number of hours increases. Although DOL regulations expressly permit employers to use it, uncertainty regarding its requirements and the potential for litigation (particularly during the last 10 years) has limited employer use of the pay method. In May 2020, the. DOL issued a Final Rule expressly permitting employers to provide additional pay, such as bonuses, commissions, or premiums, to employees when utilizing the FWW

method under the FLSA, without jeopardizing the use of that pay method. The Final Rule, which went into effect in August 7, 2020, adopts the DOL's view prior to 2011, with some further clarifications. In addition, the Final Rule incorporates examples of how to properly calculate pay under the FWW method when such additional compensation is involved, as well as several other clarifications that should enable employers to better understand and potentially implement the FWW pay method.

Some of the more notable clarifications include:

- In response to comments submitted by Jackson Lewis P.C. and others, the Final Rule expressly clarifies that the FWW pay method's requirement that an employee's hours "fluctuate from week to week" does *not* require fluctuation both above *and* below 40 hours per week, as some courts have held. On the contrary, "the regulation does not require that an employee's hours must sometimes fluctuate below forty hours per week, so long as the employee's hours worked do vary."

- The Final Rule clarifies that the use of the FWW pay method is "not invalidated by occasional and unforeseeable workweeks in which the employee's fixed salary did not provide compensation to the employee at a rate not less than the applicable minimum wage, so long as the fixed salary was reasonably calculated to compensate the employee at or above the applicable minimum wage in the foreseeable circumstances of the employee's work." The Final Rule cautions, however, if the employer could have foreseen that the salary would not at least equal the applicable minimum wage in all workweeks, or if this requirement does not occur "with some degree of frequency," either the employer and the employee must reach a new understanding as to the number of expected work hours or the amount of fixed salary (or both), or the employer must use a different pay method. And, of course, under the FWW method, during any week that the fixed salary failed to meet the applicable minimum wage, the employer must make up the difference.

The Final Rule provides much-needed clarification, both for employers seeking to further reward productive employees and for the non-exempt, salaried employees who will be eligible to receive such additional compensation. As the Final Rule itself notes, this may become even more important in the workplace during the ongoing COVID-19 pandemic, as "[s]ome employers are likely to promote social distancing in the workplace by having their employees adopt variable work schedules, possibly staggering their start and end times for the day," and the new Final Rule "will make it easier for employers and employees to agree to unique scheduling arrangements while allowing employees to retain access to the bonuses and premiums they would otherwise earn."

The Potentially Big Impact of the DOL's Change to the Commissioned Salesperson Regulations

Section 207(i) of the FLSA provides that certain commissioned employees of a "retail or service establishment," that is, those who earn at least 50% of their compensation in the form of commissions and who earn at least 1.5 times the federal minimum wage, are exempt from receiving additional overtime pay. This exemption has sometimes proven difficult to apply because of the uncertainty as to what qualifies as a "retail or service establishment."

In May 2020, the DOL withdrew its interpretative rules setting forth the types of businesses either not qualifying, or only possibly qualifying, as "retail or service establishments" when determining whether a commissioned salesperson may be exempt from overtime under Section 207(i). Rather than rely on the long lists, which were internally inconsistent and often nonsensical (as even the courts acknowledged), the DOL will apply a uniform standard to all businesses in determining whether a business qualifies as a "retail or service establishment" and, thus, potentially excluding from overtime the commissioned employees who work in that business.

The now-abandoned lists were developed nearly 60 years ago, with little or no reasoning or analysis, and likely no longer accurately reflected the nature of the modern workplace. On the contrary, noted the DOL, "an industry may gain or lose retail characteristics over time as the economy develops and modernizes, or for other reasons" and therefore "a static list of establishments that absolutely lack a retail concept cannot account for such developments or modernization, which could have caused

confusion for establishments as they tried to assess the applicability and impact of the list." Because the interpretative rules originally were issued without notice and comment, they were withdrawn in the same manner, thereby making the withdrawal effective immediately. Accordingly, establishments that previously were on the excluded list may now be independently analyzed to determine whether Section 207(i) applies.

DOL Issues New Independent Contractor Final Rule

In September 2020, the DOL issued a new proposed regulation setting forth the proper standard for determining a worker's status as an "independent contractor" under the FLSA and, in early January 2021, issued the related Final Rule. The regulation provides that "an individual is an independent contractor, as distinguished from an 'employee' under the Act, if the individual is, as a matter of economic reality, in business for him or herself." The final regulation largely adopts the proposed rule, with a few changes made in response to the more than 1,800 comments received regarding the proposed rule.

Under the Final Rule, five distinct factors inform the "economic dependence" inquiry, none of which are dispositive. Nevertheless, the Final Rule gives the following two "core factors" the most weight:

1. The nature and degree of the worker's control over the work; and

2. The worker's opportunity for profit or loss.

The DOL considers these two factors to be most probative of economic dependence. The Final Rule explains that these two factors are given greater probative value because, "if they both point towards the same classification, whether employee or independent contractor, there is a substantial likelihood that is the individual's accurate classification."

If these two factors point to different conclusions as to the individual's status, the DOL explains that the other three, less probative, factors can help guide the analysis:

3. "[T]he amount of skilled required;"

4. "[T]he degree of permanence" of the parties' work relationship; and

5. An analysis of whether the putative employee's work is "part of an integrated unit of production."

The emphasis is on the actual practices of the working relationship, not on what the parties' contract may theoretically allow, such as rights reserved but never exercised by the putative employer.

In response to public comment, the Final Rule includes a new subsection stressing that additional factors not listed also may be useful criteria in determining an individual worker's status under the FLSA, to the extent they are probative as to whether the individual is in business for themselves or is economically dependent on an employer. Additionally, the Final Rule more clearly articulates the difference between the "probative value" of a core factor, generally, and its weight in a particular case to emphasize that "greater probative value" does not always mean that the factor carries more weight.

While many commenters urged the DOL to add industry-specific examples to the Final Rule to demonstrate how the newly refined economic reality test would apply, the Agency largely declined to do so, noting that this would result in "an exhaustive treatise" and that it would be impractical "to provide examples for every conceivable scenario." However, a new section to the Final Rule offers six examples that shed light on the various economic reality factors in different factual and industry scenarios.

While the Final Rule is scheduled to go into effect in March 2021, the Biden Administration may try to delay, and ultimately block, it. President-Elect Biden is expected to issue a directive to all agencies to delay the effective date of any pending regulation that is not yet effective. Putting aside legal challenges to this directive, the Biden Administration could issue a new rule, rescinding this Final Rule. Further, under the Congressional Review Act, the Democratic majority in the Senate and House could rescind the new rule with presidential approval. Alternatively, the Final Rule could face legal challenge, and the Biden DOL may not defend it. Finally, the Final Rule makes clear that the standard adopted does not supplant state law or apply to other

federal laws beyond the FLSA. Employers must consider state law variances, including states (like California) that apply a more demanding standard.

DOL Wage & Hour Opinion Letters

In 2020, the Wage and Hour Division of the DOL issued nearly 20 new Opinion Letters regarding a variety of wage and hour topics. While this sub-regulatory guidance does not warrant the deference of formal regulations, reliance on such letters may form the basis of an employer's "good faith" defense to a wage and hour claim. The practice of issuing such Opinion Letters was abandoned during the Obama Administration. Whether the incoming Biden Administration will choose to continue the practice, or will give any credence to the Opinion Letters issued over the past few years, remains to be seen. Of the Opinion Letters issued in 2020, most of which were pro-employer, the following are some of the more significant opinions:

FLSA2020-6: Outside Sales Exemption

This Opinion Letter analyzed the applicability of the FLSA's outside sales exemption to salespeople paid a base salary and commission to travel to different locations to sell products, using employer-provided trucks outfitted with merchandise and marketing materials. These sales employees spent 80% of their time traveling around to make sales pitches and the remaining time on related administrative duties. To satisfy the outside sales exemption, an employee's primary duty must be "making sales" to, or "obtaining orders or contracts for services" from, customers, and the employee must be "customarily and regularly engaged" in performing that duty "away from the employer's place or places of business." In this case, the DOL concluded that the exemption was met. The DOL noted that employees who spend one to two hours a day or one to two times a week away from the office can satisfy the requirement that they are "customarily and regularly" engaged away from their employer's business. Here, the employees spent at least 80% of their time performing the primary duty away from the employer's business, with the remaining 20% of time spent on activities related to that primary duty, clearly satisfying the test.

FLSA2020-7: Auto Manufacturer Payments to Dealer Employee Count Toward Minimum Wage Obligation

In this Opinion Letter, the DOL concluded that an automobile manufacturer's direct payments to a dealership's sales employees, compensating them for work done on behalf of the dealership, may count toward the dealership's minimum wage obligation to the employee even though the manufacturer is not their employer. On occasion, the sales consultants receive payments directly from the manufacturer as part of an incentive program for selling certain vehicles or meeting certain sales goals. While the incentive programs are established by the manufacturers, participating dealerships communicate the program's terms to their sales consultants and work with manufacturers to determine whether payments need to be made. Amounts received pursuant to an incentive program are in addition to the compensation paid to the sales consultants by the dealership that employs them. Citing *Williams v. Jacksonville Terminal Company*, 315 U.S. 386 (1942), among other sources, the DOL noted that wages under the FLSA may include third-party payments. However, whether a payment from a third party constitutes wages depends on the terms of the employment agreement, express or implied, and compliance with the other requirements of the FLSA. In this case, the manufacturer payments were, at least implicitly, considered to be part of the employment agreement, and therefore count toward the dealership's minimum wage obligations. This Opinion Letter reaffirms the longstanding position under the FLSA that, in some circumstances, payments by a third party may suffice to satisfy an employer's minimum wage obligations.

FLSA2020-11: Section 207(i)'s "Retail or Service Establishment" Definition

In this Opinion Letter, the DOL concluded that the fluid waste transportation service at issue "appears" to qualify as a "retail or service establishment" under Section 207(i) and therefore its drivers, who are paid entirely on a commission basis and whose regular rate of pay meets or exceeds one and a half times the federal minimum wage, would not be eligible for overtime under the FLSA. In addition to clarifying the requirements necessary to satisfy 207(i) (a business "engaged in the making of sales of goods or services, of which at least 75% of the sales must be recognized as retail in the particular industry, and no more than 25% of the sales are for resale), the DOL reiterated that businesses that provide services only to commercial businesses, rather than to the general public, may still qualify for the exemption.

FLSA2020-11 was the first Opinion Letter issued since the DOL withdrew the two regulations identifying so-called “retail” and “non-retail” establishments in May 2020. Under these now-abandoned regulations, waste removal was listed as a clearly *non*-retail establishment, whereas in FLSA2020-6 the DOL concluded that such a business *may* qualify as retail (if, noted the DOL, the services provided are similar to those provided to the general public). Thus, this is the first Opinion Letter issued by the DOL where it found that an establishment possibly qualifies as a retail establishment, when the Agency’s prior regulation identified it as non-retail.

FLSA2020-14: The Fluctuating Workweek Pay Method

For years the DOL has recognized the fluctuating workweek (FWW) pay method as an exception to the general rule that employees be paid one-and-a-half times their regular rate for all hours worked in excess of 40 per week. Under the FWW method, if a non-exempt employee works hours that vary from week to week and receives a pre-established fixed salary intended to compensate all “straight time” (non-overtime) hours the employee works, the employer satisfies the FLSA’s overtime pay requirements if, in addition to the salary amount, it pays at least one-half of the “regular rate” of pay for any hours worked in excess of 40. The salary must remain fixed, it must be sufficient to pay at least minimum wage for all hours worked, and the employer and employee must have a “clear and mutual understanding” that the salary will remain the same regardless of the hours worked each week. Reiterating what it had stated in the FWW Final Rule it had released shortly before issuance of FLSA2020-14, the DOL reaffirmed that, notwithstanding the holdings of some district courts, the FWW pay method does not require that an employee’s hours fluctuate both above and below 40 on a regular basis. Rather, the pay method requires only that those hours regularly fluctuate, even if that fluctuation occurs primarily, or even exclusively, above 40 hours per week.

FLSA2020-17: Piece-Rate Compensation May Cover Both Productive *and* Non-Productive Time

In the scenario underlying this Opinion Letter, the employees performed unloading services at warehouses. Instead of a fixed hourly rate, the employer paid the unloaders based on the number and types of trucks that they unload. Some unloaders had nonproductive waiting time during their shifts, which was tracked as hours worked for minimum wage and overtime purposes but was not paid at a separate hourly rate. The employer calculated the regular rate for each workweek by dividing the employee’s total earnings, which include all piece-rate earnings, by the total number of hours worked by that employee during that workweek, including productive and nonproductive time. If the resulting regular rate was less than the minimum wage, the employer paid supplemental compensation to bring the regular rate up to the minimum wage. In addition to the regular rate for all hours worked, the employer paid each unloader an overtime premium equal to one-half the regular rate for all hours worked in excess of 40 in a workweek. The employer did *not* have a specific agreement with its employees regarding the above-described method of computing the regular rate and overtime pay.

The DOL concluded that the employer’s pay method was proper. 29 C.F.R. § 778.111(a) provides that, where an employee is paid on a piece-rate basis, the regular rate is calculated by adding together total piece-rate earnings for the workweek, plus any non-excludable supplemental pay, and dividing that sum by the total number of hours worked in the week, including both productive time and waiting time. “Only additional half-time pay is required” for each hour of overtime work because “the employee has already received straight-time compensation at piece rates or by supplementary payments for all hours worked.” Although the employer and employees did not have a formal agreement regarding this pay method, the agreement set forth in Section 778.318(c) “need not be in writing, but rather, may be inferred from the parties’ conduct.” *Espenscheid v. DirectSat USA, LLC*, 2011 WL 10069108, at *29 (W.D. Wis. Apr. 11, 2011) (citation omitted). Moreover, noted the DOL, employees need not understand the exact mathematical formula by which their compensation is calculated. On the contrary, just as with the FWW pay method, “it is enough that the employer and employee mutually understand that piece-rate earnings are intended to compensate the employee for all hours worked. There is no need for an additional understanding regarding the precise method by which the pieceworker’s regular rate and overtime pay are calculated.”

STATE UPDATES

CALIFORNIA

Statutory Revisions to Independent Contractor Law

The California legislature passed two bills in 2020 that amended Assembly Bill 5 (AB 5), the statute setting forth the requirements for classifying workers as independent contractors. Assembly Bill 2257 recasts, clarifies, and expands exemptions under AB 5, including adding exemptions for referral agencies and for professional service providers such as photographers. AB 323 similarly established exemptions from AB 5 for newspaper carriers.

During the November elections, California voters approved Proposition 22, allowing individuals engaged in app-based transportation services, such as rideshare and delivery drivers, to be classified as independent contractors. Prop 22 also provided workers with minimum compensation levels, health insurance subsidies to qualifying drivers, and medical costs for on-the-job injuries. In addition, Prop 22 prohibits drivers from working more than 12 hours in a 24-hour period for a single company, and requires companies to develop sexual harassment policies, conduct criminal background checks, and require safety training for drivers.

Statutory Clarity for On-Duty Rest Periods for Unionized Security Officers

The California legislature passed Assembly Bill 1512, which allows unionized security officers to take on-duty rest breaks. Historically, employees could agree to take on-duty meal breaks in California if certain prerequisites were satisfied, but the law had been silent regarding on-duty rest breaks. The new law provides much-needed clarity to applicable meal and rest break standards for security officers in California. Under the legislation, registered security officers covered by a valid collective bargaining agreement may be required to (1) stay on the premises during rest breaks, (2) remain on-call during rest breaks, and (3) carry and monitor a communication device during their 10-minute rest breaks.

Expansion of Professional Exemption to Adjunct Professors

California Governor Gavin Newsom (D) signed Assembly Bill 736 in September 2020, expanding the professional exemption under Industrial Welfare Commission Wage Orders Nos. 4-2001 and 5-2001 to include part-time or adjunct faculty at private, non-profit colleges and universities in California. AB 736 amends the Labor Code to provide that an employee providing instruction for a course or laboratory at a private, non-profit college or university may be classified as exempt under the professional exemption if the employee meets both the duties and salary test. The duties test is unchanged from the existing professional exemption in the IWC Wage Orders, but the salary test has changed. The new legislation sets forth that an employee can meet the salary test if the employee is paid either a monthly salary of two times the state minimum wage for full-time employment or is paid by the course or laboratory taught, provided that the employee's compensation meets specific requirements contained in the statute.

Equal Pay Act Defense

In *Rizo v. Yovino*, 950 F.3d 1217 (9th Cir. 2020), the Ninth Circuit held that the affirmative defense against an Equal Pay Act claim, that "any other factor other than sex" was the reason for an adverse employment action, was limited to job-related factors only. Furthermore, the Court of Appeals held that an employee's prior pay history was not a job-related factor and alone could not be used as a basis to defend a wage disparity under the Equal Pay Act. The Court found that because "prior pay may carry with it the effects of sex-based pay discrimination, ... an employer may not rely on prior pay to meet its burden of showing that sex played no part in its pay decision." A petition for a writ of *certiorari* (review) is currently pending before the U.S. Supreme Court.

Application of California Wage & Hour Laws to Out-of- State Employees

Responding to certified questions posed by the Ninth Circuit, the California Supreme Court held that an employee is entitled to California-compliant wage statements, and that California law governs the timing of wage payments, if the employee's principal place of work or base of operations is in California. The underlying cases involved pilots, flight attendants, and other interstate transportation workers who worked at least some portion of their time in California.

COLORADO

Comprehensive Changes in 2020 Wage Order

In March 2020, the Colorado Department of Labor and Employment (CDLE) adopted the Colorado Overtime and Minimum Pay Standards Order (COMPS Order) #36, significantly increasing the coverage of the rules, placing greater limitations on exemptions from the overtime requirements, expanding the definition of time worked, and imposing other requirements and potential liability on employers.

Under COMPS Order #36, virtually all private employees in all industries are covered by Colorado's minimum wage, overtime, and working condition rules, unless they are exempt. The COMPS Order also broadly defines "time worked" as all time for which the employer requires or permits an employee to be "on the employer's premises, on duty, or at a prescribed workplace. . . ." Unlike the law developed under the FLSA, which generally allows employers to disregard *de minimis* periods of time that may be difficult or impossible to track, the COMPS Order formally imposed a requirement on employers to track and compensate any and all time exceeding one minute.

COMPS Order #36 expanded the list of exempt employees. However, Colorado will construe the COMPS Order's exceptions and exemptions narrowly, formally rejecting the U.S. Supreme Court's decision in *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117 (2018), holding that with respect to the FLSA, exemptions are to be given a "fair reading," rather than a narrow construction. As a result, Colorado employers will continue to face the more demanding, pre-*Encino Motorcars* standard when facing state law claims that employees were improperly classified as exempt.

COMPS Order #36 also officially adopted the minimum salary rules of the FLSA for certain exempt employees, but the FLSA's current minimum salary of $35,568 only applied between July 1 and December 31, 2020. Thereafter, the minimum salary will increase annually as follows:

2021 – $40,500/year
2022 – $45,000/year
2023 – $50,000/year
2024 – $55,000/year

Beginning in 2025, the minimum salary may adjust further based on the same Consumer Price Index (CPI) that is used to determine increases to Colorado's minimum wage.

Additionally, the COMPS Order established specific numbers for rest breaks based on the number of hours employees work per day, ranging from no rest breaks for 2 or less hours worked up to 6 rest breaks for more than 22 hours worked. Importantly, the COMPS Order provides that if an employee is not authorized and permitted to take a 10-minute rest period as required, the employer must add an additional 10 minutes of compensable time for each missed rest period. This additional 10 minutes of time per missed rest break counts as "time worked" for purposes of calculating overtime.

The COMPS Order contains posting requirements. Employers must display a COMPS Order poster in an area frequented by employees and where it may be easily read or, if such a location does not exist, a copy of the poster (or the Order itself) must be provided to all employees within the first month of employment. A copy of the COMPS Order or poster also must be provided at any time upon employee request. Additionally, a copy of the COMPS Order must be included when any handbook, manual, or policy is published or distributed to employees. And, if an employer requires employees to sign a handbook, manual, or policy, it also must require its employees to sign an acknowledgment they have been provided a copy of the COMPS Order or poster. Most significantly, the COMPS Order provides that if an employer does not comply with the posting requirements, it "shall be ineligible for any employee-specific credits, deductions, or exemptions in the COMPS Order[.]"

Limited Changes in 2021 Wage Order

Effective January 1, 2021, COMPS Order #37 brings far fewer changes to Colorado wage and hour rules than COMPS Order #36 did. Perhaps the most significant revision in COMPS Order #37 concerns the transportation worker exemption. While COMPS Order #36 allowed certain transportation workers to be fully exempt, under COMPS Order #37, only certain taxi cab drivers remain fully exempt. Other transportation workers may be exempt only from the overtime and meal and rest break rules. Similarly, while COMPS

Order #36 provided an exemption for certain drivers, drivers' helpers, or loaders or mechanics of a motor carrier, COMPS Order #37 limits the exemption only to certain drivers and drivers' helpers. Conversely, while under COMPS Order #36 the transportation worker exemption applied only to workers who physically crossed state lines in the course of their work, under COMPS Order #37, drivers and drivers' helpers will no longer be required to cross state lines to be exempt from overtime and meal and rest break rules, provided they meet certain other requirements.

COMPS Order #37 revises the administrative and professional exemptions to broaden their scope. Previously, the language of the administrative exemption referred to "the" executive rather than "an" executive, which the CDLE concluded could have been interpreted too narrowly so as to apply only to employees who directly served the top-level executive. Under the revised administrative exemption, this exemption applies "as long as 'an' executive is no less engaged in higher-level, non-manual work than the 'administrative employee' serving them[.]" COMPS Order #37 adds to the professional exemption a "creative professional" exemption similar to that found under the FLSA.

COMPS Order #37 incorporates certain aspects of Colorado's Healthy Families and Workplaces Act (HFWA). COMPS Order #37 specifies that an "employee" is defined differently under the HFWA than under the Colorado Wage Act and COMPS Order. Under the HFWA, the definition of "employee" excludes those individuals subject to the federal Railroad Unemployment Insurance Act, as defined in 45 U.S.C. § 351(d), while such employees are not excluded from the Colorado Wage Act and COMPS Orders. In addition, COMPS Order #37 includes paid sick leave under the HFWA as "wages" or "compensation" under the COMPS Order.

Under COMPS Order #37, the standard hourly minimum wage will increase from $12.00 to $12.32, while the minimum hourly cash wage for tipped employees increases from $8.98 to $9.30 (the maximum $3.02 tip credit remains the same). The minimum salary for certain exempt employees will increase from $35,568/year to $40,500/year. Also, employees falling under the "highly technical computer-related occupation" exemption must be paid at least the minimum salary of $40,500/year or $28.38/hour.

CONNECTICUT

New Tip Credit Regulations

In September 2020, the Connecticut Department of Labor (CTDOL) issued new and revised regulations regarding the state's tip credit law. The final regulations greatly clarified some aspects of the existing regulatory language that had led to many class action lawsuits against Connecticut restaurants. The most significant revisions to the regulations were the following:

- The weekly tip credit attestation does not require an actual written signature by hand. Instead, the attestation may be obtained through an electronic acknowledgment or a POS system. Moreover, the attestation may be accomplished on a daily, weekly, or biweekly basis. In addition, employers may include the specific "tip credit" amount as a separate item in "a" wage record, meaning *any* wage record maintained by the employer. Furthermore, clarifying that the tip record regulations are not intended to be a litigation trap, the regulations state that an employer need only provide "substantial evidence" an employee received enough in tips to cover the tip credit.

- The duties "incidental to service" for which a tip credit may be taken have been clarified. The final regulations identify duties such as cleaning drink stations, rolling silverware, stocking side stations, garnishing and decorating dishes in preparation for serving, filling condiment containers, and setting up food stations as those "incidental to service" for which the employer may take the tip credit. Previously, the CTDOL website provided a much narrower list of such duties, and although the listed duties were meant to serve only as examples, some courts had construed the examples as being an exhaustive list.

- Segregation of service from non-service work is required only if the employee spends more than 2 hours per day or 20 percent of their shift

(whichever is less) performing non-service work.

- Employers *must* pay full minimum wage for opening or closing "side work" duties when the restaurant is closed to patrons.

Employers must follow not only these new Connecticut regulations, but also the regulations set forth under the FLSA. Moreover, the Connecticut law on which the new regulations were established requires the Labor Commissioner, within 30 days of the adoption of the new regulations, to conduct random wage and hour audits of tipped workers in at least 75 Connecticut restaurants.

DELAWARE

Extension of the Delaware Contractor Registration Act

In October 2020, the Delaware Department of Labor announced that the effective date of the Delaware Contractor Registration Act has been extended to July 1, 2021. The bill also extends the effective date of changes to the Workplace Fraud Act to align with the effective date of the Delaware Contractor Registration Act. The Delaware Contractor Registration Act provides a fair bidding environment for contractors by creating a contractor registration system to effectively regulate employee misclassification. It requires contractors to pay a small annual fee and apply for a certificate of registration to engage in construction activities within Delaware, mandates that registered contractors comply with Delaware labor and revenue laws, and ensures that all contractors who work on a public works contract comply with the new registration requirement.

FLORIDA

Floridians Approve $15 Minimum Wage

By way of voter referendum, Florida joined the list of states in 2020 that eventually will implement a $15.00 minimum wage rate, more than double the current federal rate of $7.25, which has remained stagnant for more than a decade. Virginia also joined that list, albeit by legislative action. The Florida minimum wage will increase twice in 2021, first to $8.65 in January and then to $10.00 in September, following by annual $1.00 increases every September until 2026. Amendment 2 does not change the allowable tip credit for tipped employees meeting the eligibility requirements under the FLSA. Florida employers may continue to take a tip credit of up to $3.02 per hour for properly classified tipped employees. Florida is the first state to raise the minimum wage as high as $15 an hour by a citizens' initiative ballot measure. Measures with similar increases were introduced during Florida legislative sessions in recent years but never passed.

GEORGIA

State Enacts Paid Lactation Break Law

In 2020, the Georgia legislature enacted "Charlotte's Law," inspired by a public schoolteacher whose supervisor would not allow her to pump breast milk during her planned break. The teacher was only allowed to pump during the break if she stayed after work to make up for that time. The new law, codified at O.C.G.A. § 34-1-6, requires employers to provide reasonable break time to employees who desire to express breast milk at the worksite during work hours. Employers cannot require employees to use paid leave for such breaks or reduce an employee's salary as a result of the employee taking a break to express breast milk. The law further requires employers to provide a private location, other than a restroom, where employees may express breast milk at the worksite. However, the law does not require employers to provide paid break time to an employee on any day the employee is working away from the employer's worksite.

HAWAII

Increased Penalties for Wage & Hour Violations

In 2020, Hawaii passed Act 44, increasing penalties for violations of various laws enforced by the Department of Labor and Industrial Relations. Those changes included an increase of the maximum civil penalty for willfully hindering a wage and hour investigation from $500 to $10,000, and an increase in the range of possible criminal fines for wage and hour violations. Previously, these fines ranged between $50 and $500, and now range between $500 and $5,000.

INDIANA

Employment of Minors

With the goal of simplifying rules regarding employing minors, the Indiana General Assembly amended the law to provide that employees aged 14 and 15 may not work before 7:00 a.m. or after 7:00 p.m. However, from

June 1 through Labor Day, these employees may work as late as 9:00 p.m., except on a day that precedes a school day. On those days, they may work only until 7:00 p.m. Employees who are aged 16 and 17 may not work more than 9 hours in a day, more than 40 hours in a school week, more than 48 hours in a non-school week, or more than 6 days per week. These employees may not start work before 6:00 a.m., but they may work until as late as 10:00 p.m. on a night that precedes a school day. This does not apply if the minor is working in an occupation deemed by the Commissioner of Labor to be: "(1) dangerous to life or limb; or (2) injurious to health or morals." If a parent gives written permission, these employees may work until 11:00 p.m. on a night that precedes a school day. This written permission must be kept on file by the employer.

One rule regarding hours of employment has stayed the same: Employees under the age of 18 may not work after 10:00 p.m. or before 6:00 a.m. in an establishment that is open to the public after 10:00 p.m. or before 6:00 a.m., unless another employee, who is at least 18 years old, also works with the minor. The new law also removes several key provisions regarding the employment of minors. Employers are no longer required to provide additional rest breaks for an employee who is under 18. However, the law allows the Indiana Department of Labor to establish recommendations for rest breaks for minors. Minors also are no longer required to present a written exception from their school allowing them to work between 7:30 a.m. and 3:30 p.m. on school days. However, employees who are under 16 may not be employed or permitted to work during school hours.

The new law also places additional requirements on employers. Significantly, an employer that employs at least 5 individuals 14 to 17 of age must register with the Department of Labor. The Department of Labor has until July 1, 2021, to develop a database that is open to the public, showing which businesses employ minors. Furthermore, employers are no longer allowed to pay minors below the federal minimum wage during the first 90 days of employment.

IOWA

During 2020, members of the Iowa House of Representatives introduced six bills related to proposed wage and hour laws, including a law that would penalize employers who are found to have willfully misclassified employees for purposes of unemployment contributions; a law that would require payout of all accrued vacation or paid time off to employees upon the termination of their employment; and a law that would require employers to provide meal breaks of at least 30 minutes for every shift of at least 7 hours and a rest break of 10 minutes for every 4 hours worked. Ultimately, each of these bills failed.

MAINE

City of Portland Enacts Minimum Wage Increase and Hazard Pay

In addition to a state minimum wage increase (listed at the end of this report), in November 2020 the voters of Portland approved an ordinance setting a higher minimum wage within the City. The Portland ordinance calls for the minimum wage to be progressively raised to $13.00 an hour beginning on January 1, 2022, with annual $1.00 increases until it reaches $15.00 on January 1, 2024. The minimum wage in Portland will then increase with the cost of living each year thereafter, similar to the statewide statute. The ordinance also raised the tip credit to 50% of the minimum wage.

Portland voters also approved a hazard pay measure, increasing the minimum wage to 1.5 times the standard rate while either the City of Portland or State of Maine is in a state of emergency. This increase will not apply to those working from home. There is significant ambiguity as to whether the hazard pay measure took effect on December 1, 2020 or not until January 1, 2022. The City appears to be taking the position that the hazard pay portion of the ordinance will not become effective until 2022, but the legal basis for that assertion is uncertain. Under ordinary circumstances, Maine law passed by direct initiative comes into effect 30 days following the election.

MINNESOTA

City of Minneapolis Freelance Worker Protections

The City of Minneapolis has enacted the Freelance Worker Protection Ordinance, expanding wage theft protections to independent contractors who perform services within the City of Minneapolis. The Ordinance becomes effective January 1, 2021 and requires commercial hiring parties and freelance workers to enter into a written agreement outlining the terms of

service to be performed, including: (1) name and addresses; (2) itemization of material services to be provided; (3) compensation of the services rate and method of compensation; and (4) the date compensation is owned or mechanism to determine the date. If the contract does not specify the date or mechanism for when payment becomes due, payment must be made no later than 30 days after the completion of services.

It is a violation of the Ordinance for a hiring party to fail or refuse to timely pay the agreed upon compensation or demand the freelancer accept as a condition of timely payment less compensation after work has commenced. Upon a finding of a violation of the Ordinance a freelance worker may be able to recover compensatory damages in the amount of the unpaid sum and liquidated damaged up to double the compensatory damage award. The Ordinance also imposes additional civil fines, fines for repeat violations, and permits the department to seek reimbursement for the costs of the investigation.

Teen Work Restrictions

Amendments to Minn. Stat. 181A.04 governing minimum age and maximum hours now allow 16- and 17-year-old employees to operate amusement rides at fixed-site amusement parks, and to operate lawn care equipment when employed by a golf course, resort, municipality, or rental property owner.

Court Upholds Double Damages under Payment of Wages Act

In *Mallberg v. Gustafson*, 2020 Minn. App. Unpub. LEXIS 438 (May 26, 2020), the Minnesota Court of Appeals upheld an award of double damages under the Minnesota Payment of Wages Act. That Act prohibits employers from altering the method, timing, or procedures of payment of commissions earned through the last day of an employee's employment if the result is to delay or reduce the amount of payment owed. An employer that violates this section is liable to an employee for twice the amount in dispute. The Court rejected the employer's argument that the statute was not applicable to the present dispute because the dispute over compensation arose *prior* to the employee's termination and the statute was meant to penalize employers who changed the terms *after* the employment relationship had ended. The Court found the plain language of the statute does not allow an employer to escape liability merely because the dispute arose before the employee's termination, rather than after.

NEBRASKA

Employer Policies for Vacation Leave

In 2020, the Nebraska Department of Labor issued a statement clarifying its position regarding employer policies for vacation leave. Under the Wage Payment and Collection Act, vacation leave or paid vacation time is included within the definition of wages. An employer may have a policy that sets the maximum amount of vacation time that can be accrued without being used. An employer also may limit the amount of accrued vacation that can be carried over into a new year.

The Department will consider the terms of an employer's vacation policies on a case-by-case basis. However, an employer that creates a new policy or changes an existing policy such that it limits accrual of vacation time cannot apply it so that it retroactively deprives employees of vacation time that was accrued prior to the creation of or change in the policy. Nebraska courts previously have held that a policy by which an employer refuses to compensate employees for vacation time that has been earned but unused at the time of termination of employment conflicts with the Act and is unenforceable. Nebraska courts also have determined that paid time off is the same as vacation leave, and that an employer may not combine vacation leave with other types of leave so that vacation leave is non-compensable. Under the Act, when an employment relationship between an employer and employee ends, all unpaid wages, including the monetary value of earned unused vacation leave, must be paid by the next regular payday or within two weeks after the date of termination, whichever is sooner. Nebraska courts have yet to face this issue since the Department clarified its position, so employers might consider capping accrual of paid time off rather than limiting carryover of accrued time.

NEW JERSEY

Wage Statement Requirements

As of May 20, 2020, New Jersey employers with at least 10 employees are required to furnish employees with information to assist them in determining whether their wages are being properly calculated. In addition to

furnishing employees with a statement of deductions from wages for each pay period, employers must also provide: (i) the employee's gross wages; (ii) the employee's net wages; (iii) the employee's rate of pay; and (iv) if relevant to the wage calculation, the number of hours worked by the employee during the pay period.

Independent Contractors

Effective April 1, 2020, New Jersey employers must conspicuously post a notice created by the state's Department of Labor (NJDOL) that includes: (i) the prohibition against employers misclassifying employees; (ii) the elements of the "ABC" independent contractor test; (iii) the benefits and protections to which an employee is entitled under the New Jersey wage, benefit, and tax laws; (iv) the remedies under New Jersey law to which workers affected by misclassification may be entitled; and (v) information on how a worker or the worker's authorized representative may contact, by telephone, mail and email, the NJDOL to provide information or file a complaint regarding misclassification.

New Jersey added an administrative "misclassification penalty" of up to $250 per misclassified employee for a first violation, and up to $1,000 per misclassified employee for each subsequent violation, in addition to any other penalties and fees. The NJDOL commissioner must provide notice of the violation, the amount of the penalty and an opportunity to request a hearing. The NJDOL also may require an employer to pay the misclassified worker a penalty of not more than 5% of the worker's gross earnings over the past 12 months.

New Penalty and Violator Publication Provisions

The NJDOL now has authority to issue stop-work orders if it determines an employer violated state wage, benefit, or tax laws. The NJDOL must provide seven days' notice of its intent to issue any stop-work order. The stop-work order will remain in effect until the issuance of a subsequent order by the NJDOL that the employer is in compliance and penalties have been paid. The NJDOL may issue civil penalties of $5,000 per day for violation of the order.

In addition, New Jersey law now provides for the joint liability of a client employer and labor contractors for violations of state wage and hour and tax laws, including workers' compensation law, unemployment compensation law, temporary disability benefits law, and laws under the New Jersey Gross Income Tax Act. Any individual acting on behalf of an employer may be liable for violations including "an owner, director, officer, or manager."

The NJDOL may now post a list on its website of the name(s) of any person found to violate any state wage, benefit, or tax law based on a final order issued by the commissioner. The NJDOL must provide the person notice of intent to post 15 business days prior to the posting. If the person satisfies the final order or a settlement has been reached and all payments are made, the posting will not occur.

Finally, the state Treasury Department may share with the NJDOL confidential tax files, including tax information statements, audit files, reports, returns, or reports from investigators.

NEW MEXICO

Paid Time Off in Bernalillo County

In 2020, Bernalillo County enacted Ordinance No. 2019-17, requiring employers to allow employees to accrue PTO to use for any reason. The Ordinance applies to any worker within Bernalillo County who is employed at least 56 hours per year, by an employer of two or more employees. Workers may earn up to 28 hours of PTO per year.

NEW YORK

"Pay Frequency" Claims On the Rise

2020 saw a continued drumbeat of lawsuits alleging that employers have violated New York's "frequency of pay" statute, which requires employers to pay "manual workers" weekly instead of bi-weekly. The claims flow from *Vega v. C.M. Assoc. Constr. Mgmt, LLC*, 107 N.Y.S.3d 286 (N.Y App. Div. 1st Dep't 2019), an Appellate Court decision holding – for the first time since New York Labor Law Section 191 was enacted over 125 years ago – that a private right of action (as opposed to fine by the DOL) exists for a pay frequency violation. Other courts have disagreed. *See, e.g. Kruty v. Max Finkelstein, Inc.*, 65 Misc. 3d 1236(A) (N.Y. Cty. Ct., Suffolk County, Dec. 12, 2019) (expressly declining to follow *Vega*, and instead explaining that another New York Appellate Court in *IKEA v. Indus. Bd. of Appeals*, 241 A.D. 454, 660 N.Y.S.2d 585 (2d Dep't 1997),

requires the opposite conclusion, *i.e.,* that *no* private right of action exists); *Hunter v. Planned Building Services, Inc.*, 2018 N.Y. Misc. LEXIS 2896 (N.Y. Sup. Ct., Queens County, June 11, 2018) (no private right of action for payment frequency violation). Until the New York Court of Appeals (the state's highest court) reviews this issue, these claims are likely to continue to rise.

The Tip Credit is Now Gone (Except for Hospitality Employers)

2020 was the last year that employers who employ tipped employees in car washes, nail salons, parking garages, and other establishments were permitted to use the tip credit. Beginning in 2021, employers covered by New York's Miscellaneous Industries and Occupations Wage Order will be required to pay all employees the full minimum wage, without any credit for tips employees receive. The tip credit was first reduced by 50 percent on June 30, 2020, followed by its complete elimination at the end of 2020. However, restaurants and hotels covered by the Hospitality Wage Order *are* still permitted to use a tip credit.

New York Appellate Court Upholds NYSDOL Regulation Governing Payroll Debit Cards

In 2016, the New York State Department of Labor (NYSDOL) issued regulations restricting the use of payroll debit cards. Among other things, the regulations require written consent, require employees to have local access to an ATM where no-cost withdrawals may be made, and prohibit various fees for using the payroll debit card. The regulations were held invalid by the New York State Industrial Board of Appeals (the applicable agency review body) but an Appellate Court in New York held the regulations were valid, *Matter of Reardon v. Global Cash Card, Inc.*, 179 A.D.3d 1228 (N.Y. App. Div. 3rd Dep't 2020), and the New York Court of Appeals dismissed the appeal, thus ending for now – absent further rulemaking or legislative action – litigation regarding the validity of the regulation.

PENNSYLVANIA

Salary Threshold for Overtime Exemption

The Pennsylvania Department of Labor and Industry (DOLI) amended Pennsylvania Code Chapter 231 to expand eligibility for overtime based on salary, effective October 3, 2020. The updated salary thresholds protect employees in Pennsylvania from being arbitrarily identified as exempt and required to work overtime hours without added compensation. Pennsylvania implemented a three-step process to update the salary threshold for exemption: first, $684 per week, $35,568 annually (per the U.S. DOL's regulation), on January 1, 2020; second, $780 per week, $40,560 annually on October 3, 2021; and third, $875 per week, $45,500 annually on October 3, 2022. The Pennsylvania DOLI provided that nondiscretionary bonuses, incentives, and commissions paid on an annual basis may now contribute to up to 10 percent of the salary threshold. Beginning in 2023, the salary threshold will adjust automatically, at a rate equal to the weighted average tenth (10th) percentile wages for Pennsylvania workers who work in exempt executive, administrative, or professional classifications. Employees who do not meet the salary threshold as of the dates stated above generally will not be exempt from overtime.

New Duties Test

Pennsylvania's new regulations for overtime exemptions revise the duties test to mirror the federal standards for Executive, Administrative, and Professional (EAP) exemptions from overtime. Specifically, the new regulations remove the requirement that executive employees "customarily and regularly" exercise discretionary powers, and the requirement that administrative employees "customarily and regularly" exercise discretion and independent judgment. Rather, exempt employees' positions must "include" the exercise of such duties, consistent with the federal regulations.

Business Response to the New Regulations

Employers may pursue one or a combination of the following several options to adjust to the new regulations for overtime exemptions: pay non-exempt employees overtime; limit non-exempt employees' work hours to 40 hours per week to avoid overtime payments; reduce base pay or benefits to non-exempt employees to allow for some overtime costs; or raise non-exempt employee salaries to above the threshold mandated by the DOLI.

SOUTH CAROLINA

Statute of Limitations for State Wage Claims

The U.S. District Court for South Carolina has confirmed that the "discovery rule" applies when determining the commencement of the statute of limitations for claims under the South Carolina Payment

of Wages Act. *Thornton v. Johnson*, 2020 U.S. Dist. LEXIS 229187 (D.S.C. Dec. 7, 2020). The court also ruled that a corporation is an “employee” under the Act and may therefore bring a claim for lost wages under appropriate circumstances.

SOUTH DAKOTA

State Law Protections for Interns

In 2020, the South Dakota Human Relations Act (SDHRA) was amended to expand protections under the state’s equal employment opportunity laws to interns, effective July 1, 2020. Under the SDHRA, an “intern” is defined as a “student or trainee who works, sometimes without pay, at an organization, industry, trade, or occupation in order to gain work experience or earn academic credit.” Among its provisions, the SDHRA prohibits adverse or unequal treatment with respect to compensation as a term of employment.

VIRGINIA

Virginia’s General Assembly made several overhauls impacting the wage and hour landscape in 2020. Primary topics of focus for the legislature included the minimum wage, nonpayment of wages, and misclassification of employees. These reflect a significant departure from what previously was a relatively employer-friendly jurisdiction. The result has been an already-discernible increase in state court employment lawsuits.

Minimum Wage

Effective May 1, 2021, Virginia’s minimum wage will increase to $9.50 per hour. The revised minimum wage statute provides for periodic increases to the state-mandated minimum from that point onward, until it reaches $15.00 per hour beginning January 1, 2026. Under the revised statute, if the federal minimum wage exceeds the state minimum wage at any time, employers are required to pay the federal minimum wage instead.

Additionally, beginning on January 1, 2027, employers are required to pay the greater of (1) the federal minimum wage, or (2) the adjusted state minimum wage. The statute requires the Commissioner of Labor and Industry to set the adjusted state minimum wage on an annual basis beginning in October of 2026. Once set, the adjusted minimum wage will apply for the entirety of the following calendar year.

Nonpayment of Wages

The General Assembly amended Section 40.1-29 of the Virginia Code. Previously, that section only provided that an employer failing to pay wages would be subject to certain civil penalties. Under the revised statute, these penalties remain in force but now an employee may bring a private cause of action against his or her employer for nonpayment of wages, and may recover the amount of unpaid wages, an equal amount of liquidated damages, prejudgment interest, and attorney’s fees. If the employee proves that the employer knowingly failed to pay wages, they may recover triple the amount of unpaid wages in addition to attorney’s fees.

The legislature also created new section 40.1-29.1, which expands the investigative powers of the Department of Labor and Industry (DOLI) as they relate to nonpayment of wages. Now, if during an investigation into nonpayment of wages to an employee DOLI finds reason to believe that the employer in question has not paid the wages of other employees, then DOLI may investigate whether the employer paid wages to those employees as well. If after investigation the DOLI finds that the other employees have not been paid their wages, it may institute proceedings on behalf of those employees against the employer.

In addition, the General Assembly enacted Section 40.1-33.1, prohibiting discriminatory or retaliatory action against an employee who takes action to recover unpaid wages. An employee subject to such treatment may file a complaint with DOLI, which may then institute proceedings against the employer on the employee’s behalf.

By adding Section 11-4.6 to Title 11 of the Virginia Wage Payment Act, the legislature also created direct liability for general contractors for nonpayment of wages, by holding them jointly and severally liable for their subcontractors’ failure to pay wages. It applies to contracts entered into on or after July 1, 2020, and that meet the requisite threshold criteria.

Misclassification of Employees

In recent years, Virginia Governor Ralph Northam has focused his government on the misclassification of employees as independent contractors. In August 2018,

he authorized an interagency task force to address the issue and in November 2019, the task force issued a report, offering several observations and recommended statutory amendments to increase the penalties associated with misclassification.

In 2020, the General Assembly acted on the task force's recommendations. The legislature enacted a new Chapter of the Code, codified at Section 59.1-1900 *et seq.*, to address misclassification of employees. This Chapter contains several new provisions which became effective on January 1, 2021. The Department of Taxation has been charged with investigating violations and enforcing the provisions of this new Chapter.

Employers should first note that any individual performing services for another person for remuneration is presumed to be an employee of the remunerating party. In the event of a misclassification dispute, the burden rests on the employer to refute this presumption. Next, the new statutes provide civil penalties for employee misclassification. Under Section 58.1-1901, the penalty is calculated on the number of misclassified individuals as well as on the employer's status as a repeat offender. For example, for a first offense, an employer is subject to a penalty of $1,000 per misclassified individual. For a third or subsequent offense, the penalty increases to $5,000 per misclassified individual. Under Section 58.1-1902, a repeat offender is debarred from entering into contracts with public institutions. For the second offense, debarment lasts up to one year. For a third or subsequent offense, debarment lasts for up to three years. An employer may appeal a debarment to the Department of Taxation or seek correction in the courts.

Under Section 58.1-1903, it is unlawful for an employer to request or require that an individual enter into an agreement or sign a document that results in misclassification or otherwise does not accurately reflect the relationship between the individual and the employer. Finally, under Section 58.1-1904, an employer may not discriminate or retaliate against a person for exercising any rights under Chapter 19.

Pursuant to Section 54.1-1102, contractors must now appropriately classify all workers as employees or independent contractors and if found to have intentionally misclassified any workers they can be sanctioned by the Board of Contractors.

WISCONSIN

State Law Requires Signed Declarations From Tipped Employees Each Pay Period

In *Hussein v. Jun-Yan, LLC*, 2020 U.S. Dist. LEXIS 122383 (E.D. Wis. July 13, 2020), the Eastern District of Wisconsin issued one of the first widely available decisions enforcing a state administrative code provision requiring employers to obtain signed tip declarations from tipped employees in each pay period demonstrating that the tipped employee was paid at least minimum wage, Wis. Admin. Code § DWD 272.03(2)(b)(1). The *Hussein* court said that an employer who did not obtain signed tip declarations could not claim the tip credit, even if employees actually received minimum wage when tips were taken into account. Thus, it is critical for employers with tipped employees to diligently obtain and retain signed tip declarations for all tipped employees during each pay period.

Employers May Not Negotiate Away "Donning & Doffing" Time During Collective Bargaining

In *Piper v. Jones Dairy Farm*, 940 N.W.2d 701 (Wis. 2020), the Wisconsin Supreme Court held that collective bargaining agreements cannot modify an employer's duty to compensate employees for donning and doffing protective equipment. Donning and doffing constitutes "preparatory and concluding activities," which are compensable under Wisconsin law. While federal law permits the employer to bargain with a union over donning and doffing time, there is no equivalent provision under Wisconsin law. Further, held the Court, employers may not contractually modify their obligation to compensate employees for "all" compensable time without a specific exemption. As a result, all employers must pay their Wisconsin-based employees for donning and doffing protective equipment, even if they have a collective bargaining agreement stating otherwise.

MINIMUM WAGE INCREASES

The following state minimum wage increases go into effect in 2021. These increases are effective on January 1, 2021 unless otherwise noted. States marked with an asterisk (*) also have city or other local minimum wage increases scheduled for 2021; contact a Jackson Lewis attorney if you need details for these local rates.

Alaska	$10.34
Arizona*	$12.15
Arkansas	$11.00
California*	$14.00 (26+ employees)
	$13.00 (1-25 employees)
Colorado*	$12.32
Connecticut	$13.00 (Aug. 1)
Dist. of Columbia	TBD (July 1)
Florida	$8.65
	$10.00 (Sept. 30)
Illinois*	$11.00
Maine*	$12.15
Maryland*	$11.75 (15+ employees)
	$11.60 (1-14 employees)
Massachusetts	$13.50
Michigan	$9.87
Minnesota*	$10.08 ("Large" employers)
	$8.21 ("Small" employers/90-Day Training Wage/Youth Wage
Missouri	$10.30
Montana	$8.75
Nevada	$9.75 (w/o health benefits)
	$8.75 (with benefits) (Jul. 1)
New Jersey	$12.00
New Mexico*	$10.50
New York	-See next column-
Ohio	$8.80
Oregon*	- See next column-
South Dakota	$9.45
Vermont	$11.75
Washington*	$13.69 (most employees)
	$11.64 (employees ages 14-15)

New York (eff. 12/31/2020)
Outside NYC and Nassau, Suffolk & Westchester Counties:
$12.50 (General)
$14.50 (Fast food workers)
$15.00 (Fast food workers) (July 1)

Nassau, Suffolk & Westchester Counties:
$14.00 (General)
$14.50 (Fast food workers)

Oregon (eff. 7/1/2021)
$12.00 ("Non-urban" counties)
$14.00 (Portland Metro)
$12.75 ("Standard" counties)

MINIMUM SALARIES FOR THE "WHITE COLLAR" EXEMPTIONS

The following state minimum annual salaries for the Executive, Administrative, and Professional exemptions (also known as the "white collar" exemptions) go into effect in 2021. These minimum salaries became effective on January 1, 2021 unless otherwise noted. Contact a Jackson Lewis attorney if you need additional details.

California
$58,240 (26+ employees)
$54,080 (1-25 employees)

Colorado
$40,500

Maine
$36,450

New York (eff. 12/31/2020)
Note: Applicable to Executive and Administrative exemptions only; Professional exemption follows federal law
$58,500 (New York City)
$54,600 (Nassau, Suffolk & Westchester Counties)
$48,750 (remainder of the State)

Washington
$49,831.60 (51+ employees)
$42,712.80 (1-50 employees)

Thank you for your interest in

2020 Wage & Hour Developments: A Year in Review

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