WPI Labor Day Report

2021

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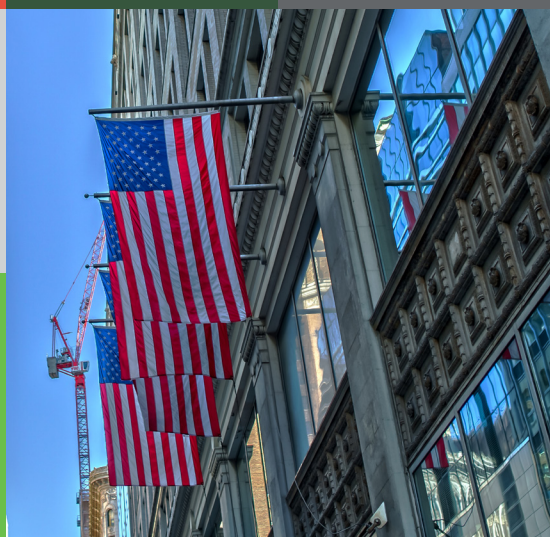

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Introduction

Over a year and a half since the pandemic first started to take its toll on the health and welfare of individuals and the economy, the country is still reeling and struggling to recover. Some employers and industries were able to pivot and weather the devastating effects of COVID-19. Others scaled back operations or closed permanently due to changes in demand, supply chain issues, or hiring shortfalls. As businesses start to reopen, employers are facing new challenges.

COVID-19 fundamentally changed the nature of work and how it will be performed going forward. With the rise of the COVID-19 Delta variant, a growing number of employers are resorting to mandatory vaccine policies, an option they avoided just months ago. And while many employers are finally welcoming their workers back to the physical office, albeit on a limited basis, many employees—by necessity or design—are still working remotely. As a result, employers are dealing with new logistical and operational hurdles, particularly when workers set up shop in states or cities that differ from their primary residence and/or the employer's brick-and-mortar location. In addition to new issues that arise from employing wandering workers, employers are juggling new accommodation requests and discrimination claims based on the pandemic and vaccination requirements.

At the same time, a large percentage of employers seeking to rehire are encountering staffing difficulties. Some employers—especially those in the restaurant and hospitality industries—simply cannot find enough workers to meet demand and are turning to novel ways to recruit.

The pandemic remains a key factor as to why is there an apparent labor shortage after months of crippling long-term unemployment. Workers, particularly those older and immunocompromised, are still concerned about their safety at the worksite given the new variants and vaccine hesitancy. Others are shouldering caregiving responsibilities, including for children too young to take the vaccine.

The law of supply and demand is another factor. With increased demand for workers, employees are holding out for better pay and working conditions. Still others are using this opportunity to change careers altogether, particularly as AI and automation are on the rise.

Against this backdrop is the change in administration. Several executive orders, rulemaking activity, and legislative efforts indicate a shift in the federal government's approach to regulating the workplace. The Biden administration's agenda will continue to take shape as more key administration officials are confirmed.

Part I of this Report examines the current jobs market and who has been especially impacted by the changing economic conditions since the pandemic began. This section discusses which industries and job sectors have been damaged the most and which are recovering faster. Although the economy has regained most of the 22.2 million jobs lost in the spring of 2020, the jobs level remains about 4.3% short of the pre-pandemic benchmark and does not take into consideration the growth of the civilian labor force in the interim. The leisure and hospitality industry was the most damaged by job losses and continues to lag in recovery. This sector still needs to fill almost 1.7 million jobs to reach the February 2020 pre-pandemic benchmark. In addition, women, people of color, and members of the LGBT+ community have suffered disproportionately during the pandemic.

Part II discusses how legislative and regulatory measures at the federal, state and local levels are addressing the current economic climate. Since the pandemic began, over 500 new COVID-19-related laws, rules and ordinances have been enacted, including measures providing employees with paid time off to get vaccinated or care for a sick family member, and granting rights of recall to employees affected by pandemic-related job loss. Many of these new laws were temporary emergency measures, but some are still in effect. This section also includes an overview of the new administration and how it is driving employment policy.

Part III focuses on the changing nature of work. How have jobs changed? How will the increased use of AI and automation accelerate these changes? Many businesses, including fast-food chains and hotels, availed themselves of technology during the pandemic to maintain social distancing requirements while keeping their operations running. Many retailers switched to online sales. The newfound reliance on automation could ultimately decrease wages for low-skilled workers or displace them entirely. At the same time, an increasing number of workers are looking for new jobs or are switching careers. Training will be necessary to close the skills gap.

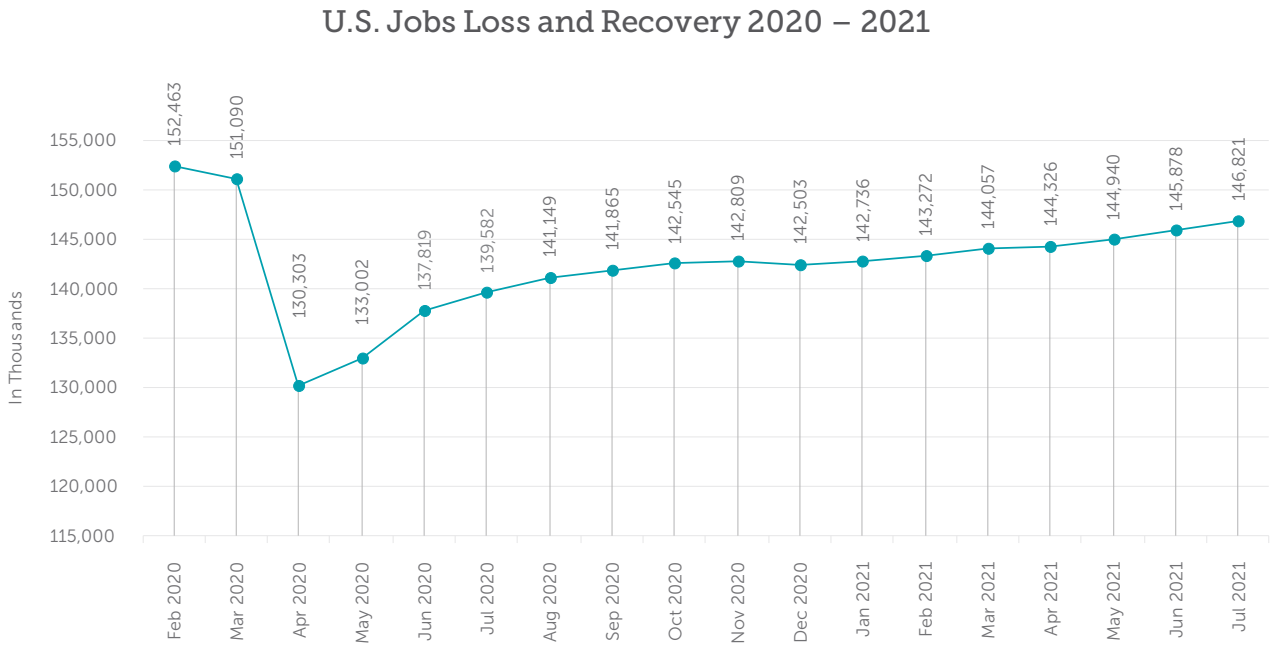
Part IV looks ahead. What challenges will employers face in the coming months? Many employers are still struggling to find workers and are resorting to innovative ways to recruit and retain staff. Job hunters are seeking flexibility as well as increased pay. Many employees who have been working remotely would rather quit than give up this work option. Some employers are offering nontraditional benefits, such as home gyms, fertility benefits, and pet insurance, to attract talent. In addition to remote work and novel benefits, vaccine mandates will become increasingly common as the pandemic wears on.

We hope this Labor Day Report 2021 provides some insight on what employers can expect.

* *Economist Ronald Bird, PhD, provided the charts and tables summarizing publicly available data describing the current status and recent trends in the U.S. labor market.*

Part I: Current Jobs Market

The U.S. economy has had a turbulent ride over the past year and a half. In early 2020, the United States had enjoyed a historic high rate of employment. Once the pandemic hit, payrolls plummeted. Jobs declined by 1.4 million in March 2020, and then by a staggering 20.8 million in April 2020, the largest drop ever recorded. By July of 2021, the economy had regained most of this loss, but the jobs level remained about 4.3% short of the February 2020 pre-pandemic benchmark and does not take into consideration the growth of the civilian labor force in the interim. These figures also do not include workers who remained on payrolls but experienced wage losses because of reduced hours and lost sales commissions or tips. These losses also omit the lost work and earnings of self-employed small business owners, contractors, craft trades workers, professional services providers (lawyers, dentists, etc.) and independent service providers. Even those who were able to switch to remote operation platforms may have experienced a loss of productivity and income. All told, full economic recovery might require a higher job gains target (*i.e.*, 6.3 million more jobs) for full recovery relative to the now-higher population.

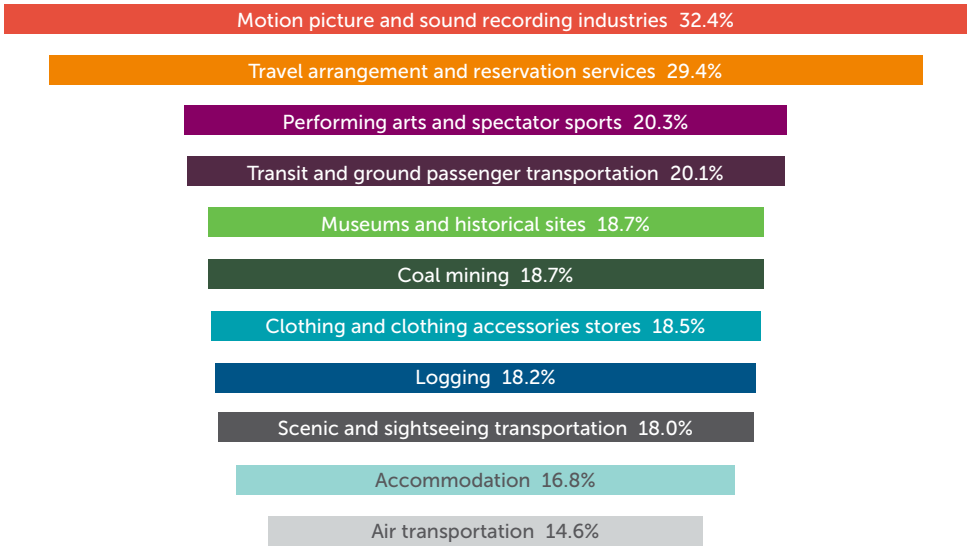


Source: U.S. Bureau of Labor Statistics, Employment Situation Reports (monthly) at www.bls.gov. https://www.bls.gov/webapps/legacy/cesbtab1.htm. This chart shows U.S. nonfarm payroll employment only.

Which Industries were Affected the Most?

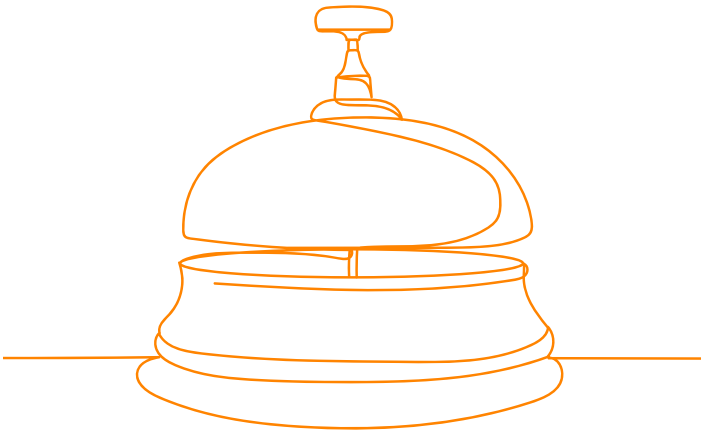
It is not surprising that some industries were affected more than others. Jobs in the travel, hospitality, retail, and in-person entertainment sectors were hit particularly hard due to pandemic restrictions and decreased demand. The below chart shows the percentage change in employment in these hard-hit industries. For example, in July 2021, motion picture industry employment is still nearly a third of its February 2020 benchmark.

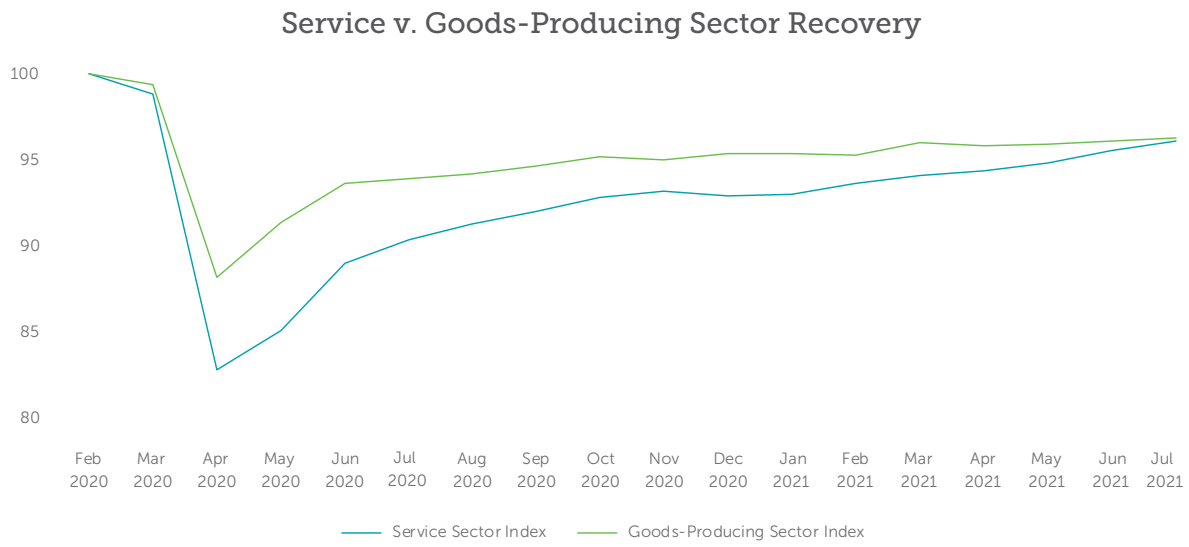
Industries Hardest Hit By Pandemic (% Decline from February 2020 to July 2021)



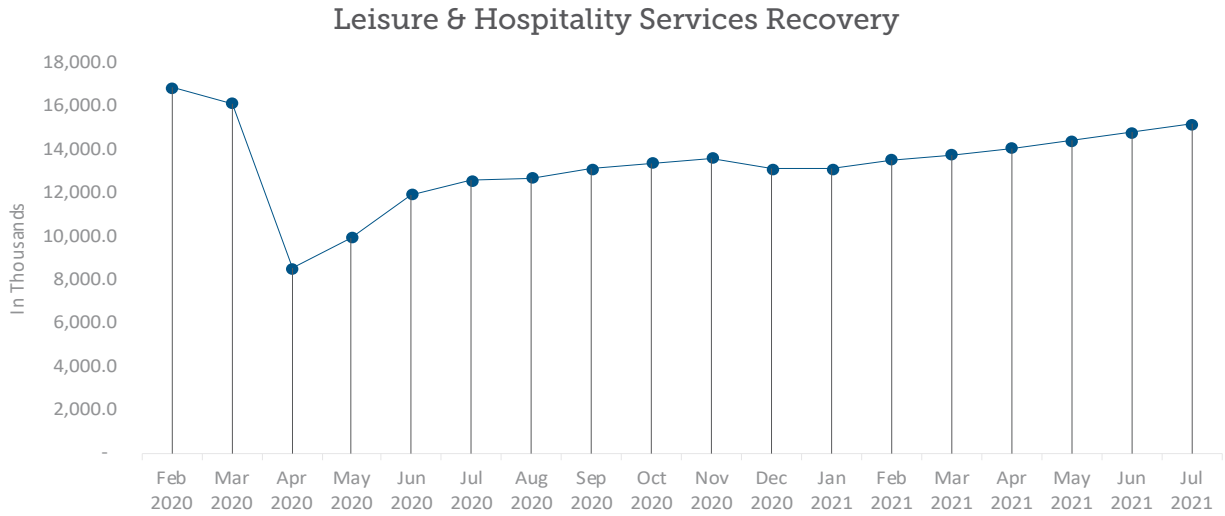
Before the pandemic, goods-producing sector jobs—*i.e.*, those that produce tangible goods—accounted for only 16.3% of payroll employment, reflecting the long-term economic shift of jobs from the manufacturing, construction, and extraction industries to the services sector. In February 2020, this sector employed more than 21 million people. By April 2020, 2.5 million goods-producing jobs were lost. Because the pandemic contraction impacted service jobs (which often involve more interaction with customers) somewhat more severely, the goods-producing sector has recovered more steadily. The latest data shows that by July 2021, the goods-producing sector had rebounded to over 20.4 million jobs.

The service industry has had a tougher climb. The private services sector had lost 18.7 million jobs by April 2020 in the initial stage of the pandemic. This accounted for 89.3% of total jobs lost in the United States. Recovery was rapid from April to July 2020, as businesses adapted to pandemic conditions. Recovery has continued over the year, albeit more slowly. By July 2021, private services sector employment reached 104.3 million, only 4.2 million (3.9%) under the February benchmark.





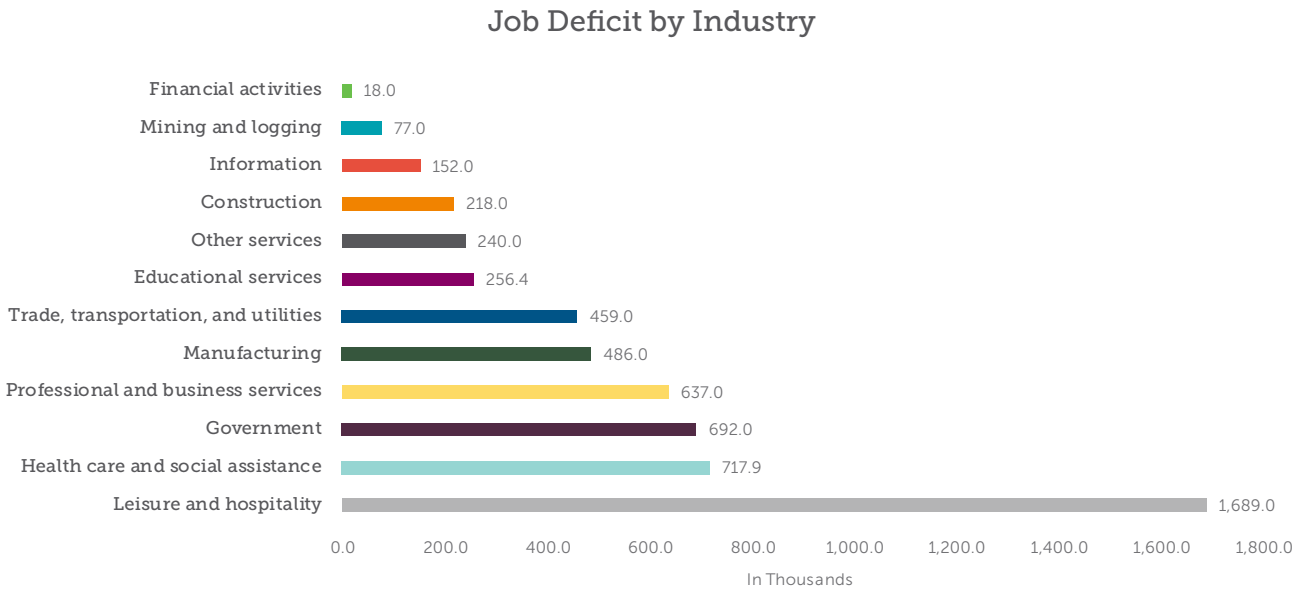
Within the service sector, the leisure and hospitality industry was the most damaged by job losses and continues to lag in recovery. Jobs fell by 49.3% by April 2020. This jobs deficit was still 25.5% in July 2020 and remained at a 10% deficit as of July 2021. The sector still needs to fill almost 1.7 million jobs to reach the February 2020 pre-pandemic benchmark.



Source: U.S. Bureau of Labor Statistics, Employment Situation Reports (monthly) at www.bls.gov. https://www.bls.gov/webapps/legacy/cesbtab1.htm

As noted, not all industries were affected equally. The below chart shows the difference between the July 2021 and February 2020 employment levels in certain trades. After the leisure and hospitality sector, which, as discussed, has a nearly 1.7-million-jobs deficit, health care and social assistance jobs were the next most-impacted industries, which need to fill over 700,000 jobs to reach pre-pandemic employment levels.

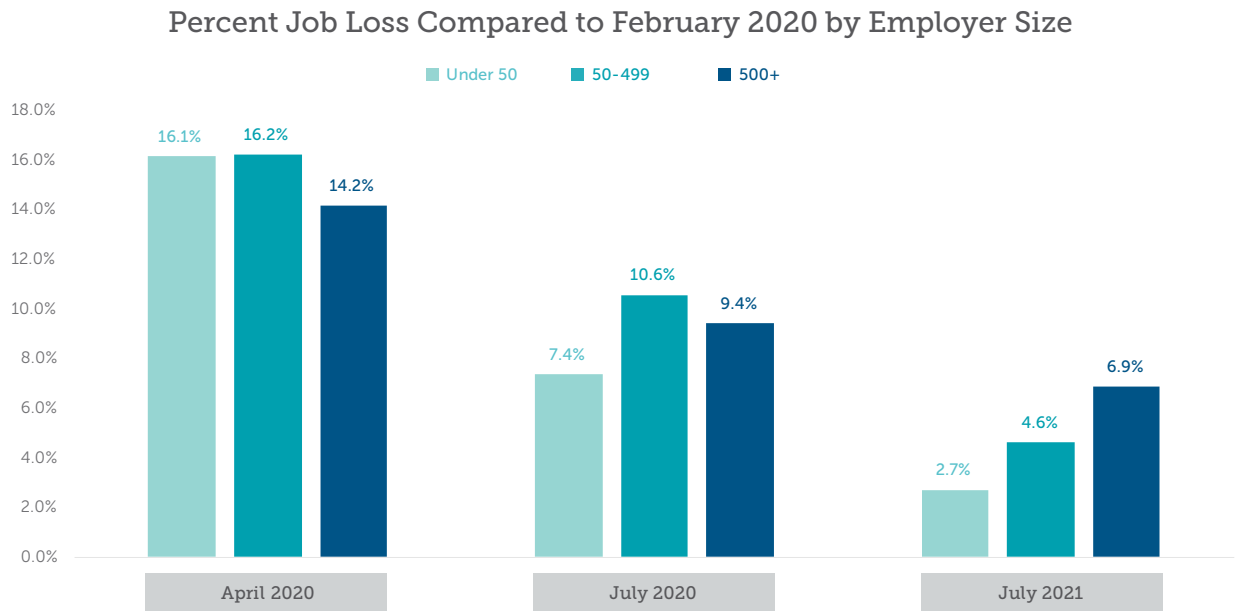
By contrast, the financial services industry was the least affected. In fact, as of June 2021, employment in the management and financial sectors and in the construction industry had surpassed pre-pandemic employment levels by 1% and .1%, respectively.[1]



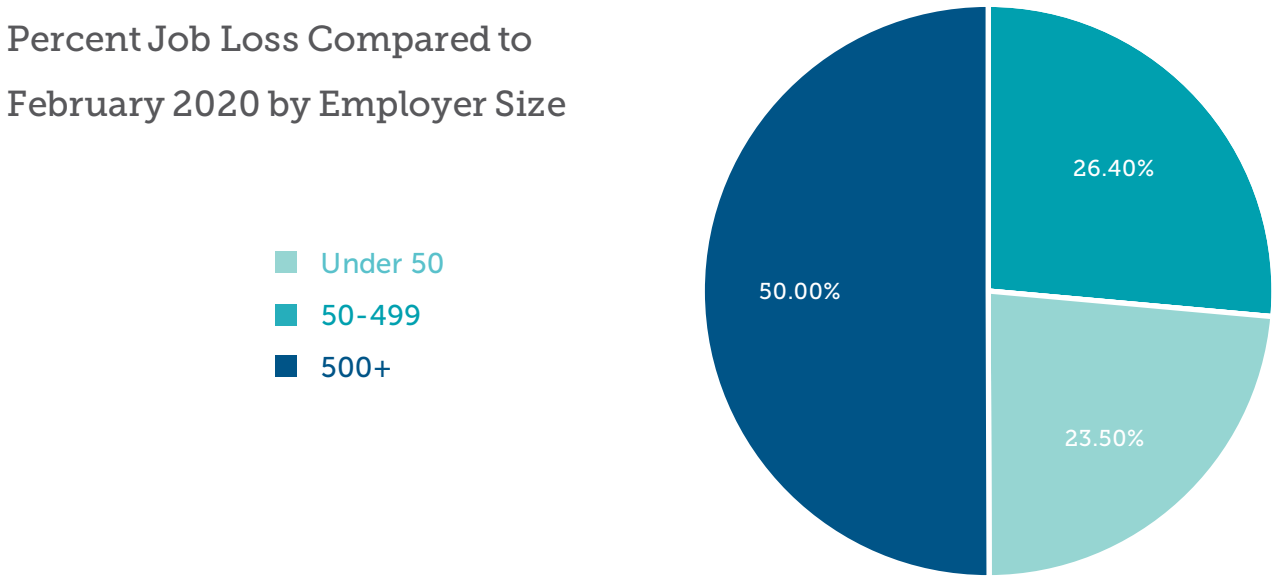
Source: U.S. Bureau of Labor Statistics, Employment Situation Reports (monthly) at www.bls.gov.

1 In June 2021, there were 28.2 million jobs in the management/financial services sector, compared to 27.9 in February 2020. In the construction industry, there were 8.16 million jobs in June 2021, compared to 8.15 million in February 2020. U.S. Bureau of Labor Statistics, Monthly Employment Situation Reports, at https://www.bls.gov/webapps/legacy/cpsatab13.htm.

In terms of size, every company experienced job loss, but small businesses—those with fewer than 50 workers—experienced the best recovery, with a level of employment of only 2.7% below the pre-pandemic benchmark in July 2021.



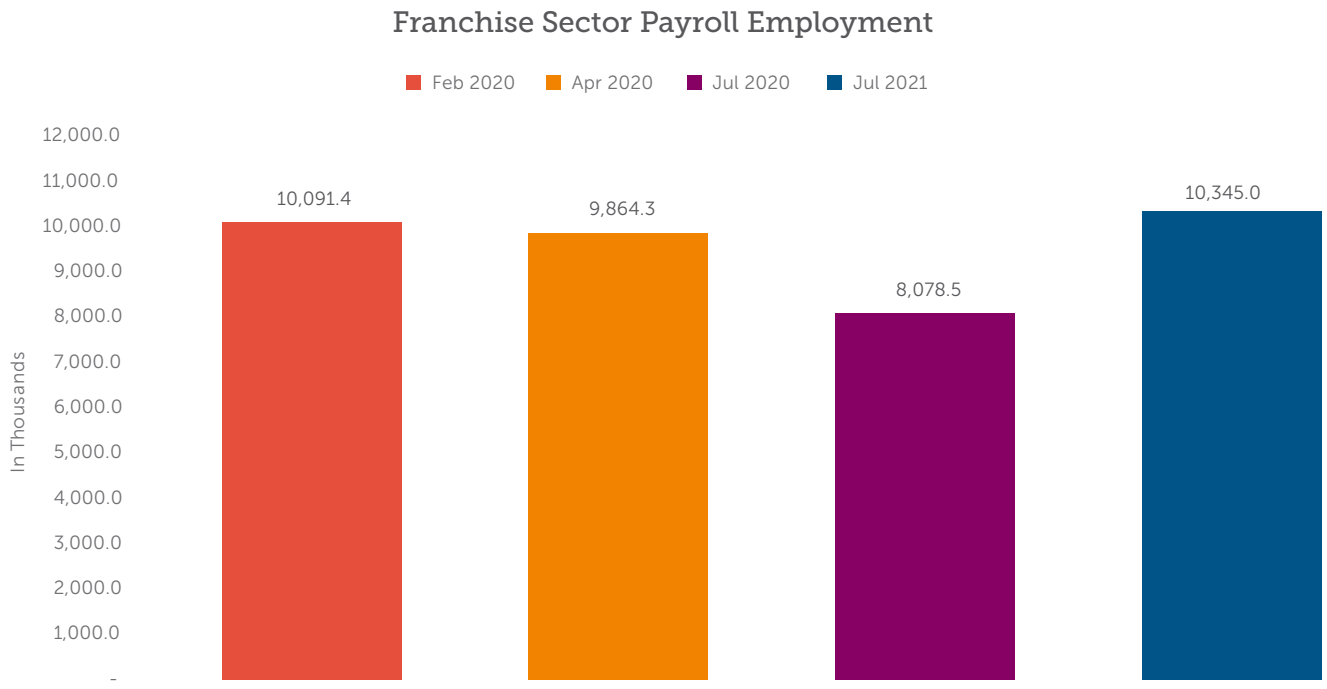
These small businesses currently make up about a quarter of all private-sector employment.



In addition, the franchise sector continues to be a leading source of job growth. Franchise sector employment has steadily increased more rapidly than employment overall over the past 10 years. In February 2020, before the pandemic onset, franchise employment had reached a record of 10.1 million jobs, 7.8% of private sector, non-farm payroll employment. The initial impact of the pandemic saw franchise employment fall by 227,100 payroll jobs, but because non-franchise private employment fell relatively more, the franchise share of total employment actually *rose* to 9%.

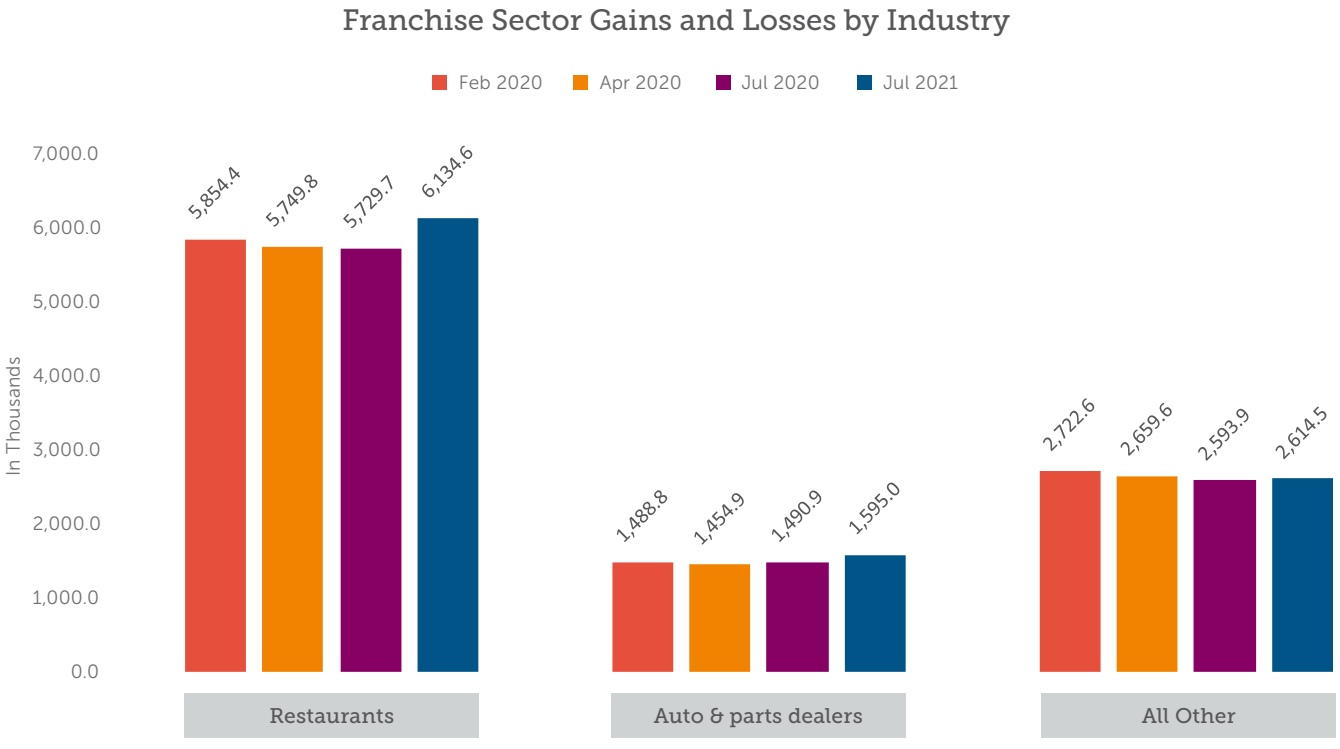
Franchise employment continued to fall in May, June and July 2020, however, as employment in other sectors rose. For example, the job gains in online retail, fulfillment warehousing and delivery services boosted total employment even though job losses lingered elsewhere in the non-franchise sector.

Franchise employment reached a low point of 8.1 million in July 2020, but has recovered steadily most months since. In May 2021, franchise employment surpassed the February 2020 benchmark of 10.1 million. By July 2021, employment in the franchise sector had exceeded 10.3 million, with franchise workers accounting for 8.4% of all non-farm private payroll employees.



Source: ADP National Franchise Report© ADP Research Institute, July 2021

Restaurants and auto supply dealers are the two largest industries within the franchise sector, and both had employment in July 2021 surpassing the February 2020 benchmark. Only one other franchise industry sector—building material and garden supplies—had surpassed the February benchmark by July 2021.



Source: ADP National Franchise Report© ADP Research Institute, July 2021

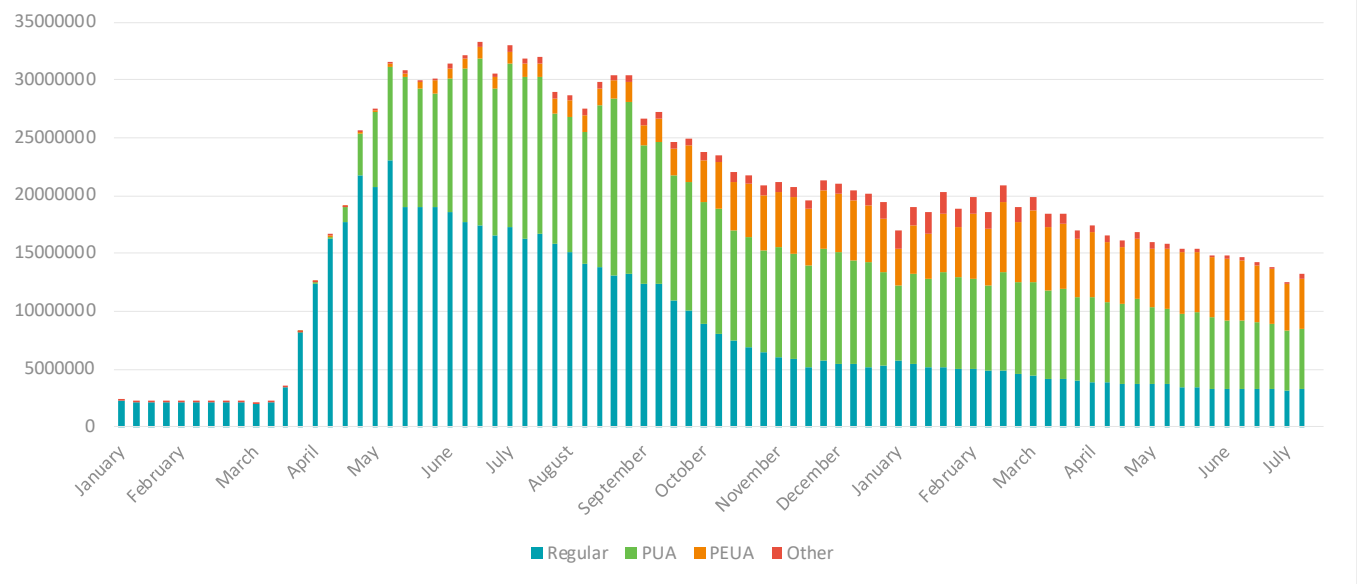
One takeaway from these numbers is that laws or regulations that could stifle franchise industry growth could have a significant impact on overall economic recovery. As discussed in Part II of this Report, rules and proposed legislation governing joint employment, for example, would significantly affect how franchisors operate.

Unemployment Insurance

Labor Day marked the end of certain emergency unemployment insurance benefits that had been provided to millions of unemployed workers. The Pandemic Emergency Unemployment Compensation (PEUC) program, which provided additional weeks of federally funded unemployment benefits to individuals who had exhausted their regular state benefits, ended on September 6. So, too, did the Pandemic Unemployment Assistance (PUA) program, which provided unemployment benefits to individuals who were unable to work because of a COVID-19-related reason but were not eligible for regular or extended unemployment benefits. PUA provided emergency relief to the self-employed, gig workers, and others in non-traditional employment.

Although several states had already ended the supplemental UI benefit, reports indicate this measure had little impact on labor force participation.[2] Workers receiving UI benefits peaked at 33.2 million in June 2020, but there were still 13.2 million individuals receiving benefits in July 2021. As of mid-August, approximately 12 million individuals were still receiving some form of UI benefit.[3] Regular program benefits peaked at 23 million in May 2020 and have fallen most weeks since.

UI Benefits Paid Weekly from January 2020 to July 2021



The vast majority of those receiving benefits were those in the retail and hospitality industries.

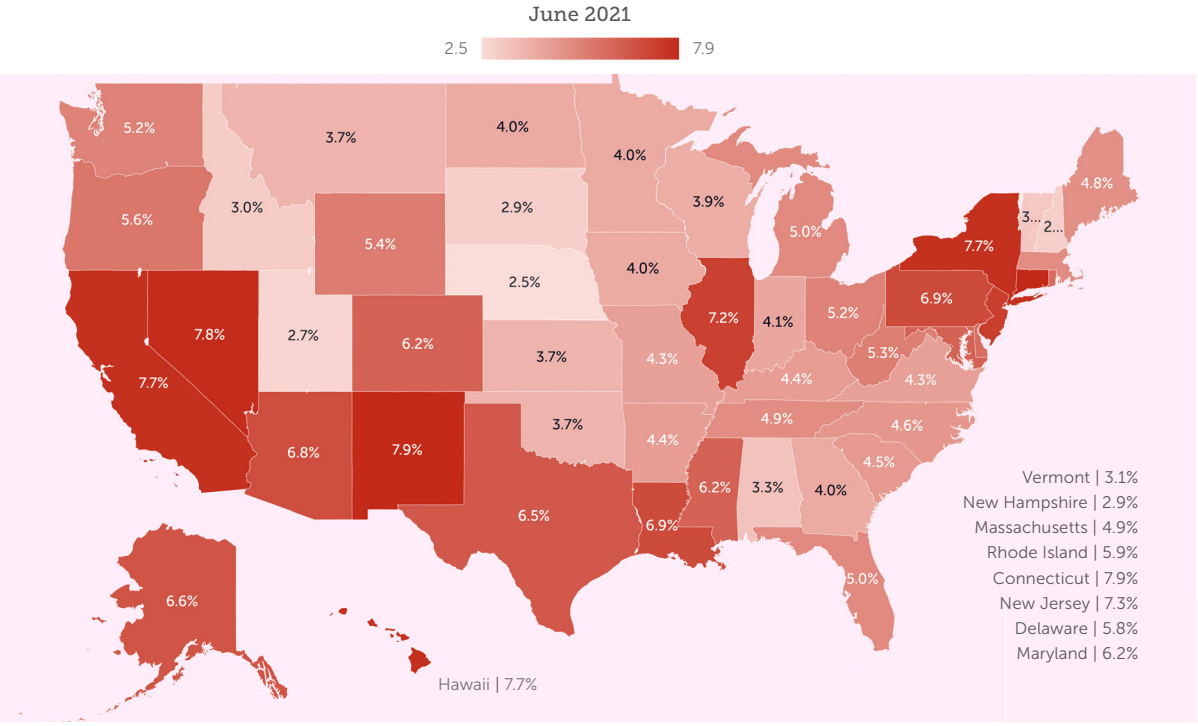
2 Howard Schneider, *U.S. states ending federal unemployment benefit saw no clear job gains*, Reuters (July 21, 2021).

3 News Release, BLS, *Unemployment Insurance Weekly Claims* (Aug. 19, 2021).

Unemployment varied by state as well. The current state-level unemployment rates seem to loosely reflect urbanization and population density. Rates are generally lower in more rural and less densely populated states. Some of the states where unemployment is lowest are also states where fewer economic restrictions were adopted in response to the pandemic. Some of those states also have had lower vaccination rates, and the current resurgence of the Delta variant is hitting them severely, suggesting that worse economic disruption may be in the future for some of them.

State Unemployment Rates Vary Widely

Percent of Labor Force Without a Job, Seeking Work & Available, June 2021



Which People were Affected the Most?

Certain demographic groups were hit harder than others over the past year and a half. Notably, women continue to be disproportionately affected by the pandemic. Women in the labor market have experienced relatively greater increases in the level and the percent rate of unemployment. In February 2020, when the labor market was at its pre-recession best, there were 2.7 million women who were unemployed, representing 46.6% of all unemployed workers. By April, the number of unemployed women had risen by 9.2 million to 11.9 million, while the number of unemployed men had risen 8.1 million to 11.2 million. At that time, women comprised 51.4% of total unemployed.

Over the course of the pandemic, women's unemployment fell faster than men's—by July 2021, women's unemployment rate was 5.2% versus 5.6% for men—but this is not because more women are working, but rather, in part, because more women have dropped out of the labor force completely and are no longer actively looking for work.

A number of studies indicate this is likely due to women's increased caregiving responsibilities. According to the U.S. Census data, the two most cited reasons for the decline in women's employment are:

- Mothers are more likely to work in service and other jobs heavily impacted by pandemic closures.
- Mothers carry a heavier burden, on average, of unpaid domestic household chores and childcare, which, during a pandemic that draws everyone into the home, disrupts parents' ability to actively work for pay.[4]

Over a third of all mothers living with school-age children in the United States were not working in January of this year.[5] In addition, approximately 1.4 million more mothers with school-age children were not actively working in January 2021 compared to the year prior.[6] Even women who were able to telework still bore the brunt of childcare duties.[7]

During phase 3.1 of the U.S. Census Bureau's Household Pulse Survey (from June 23-July 5, 2021), of adults living in households with children, 8.3% were in households where children were unable to attend daycare or other childcare arrangement because of COVID-19 during the previous four weeks.[8] As updated in phase 3.2 of the survey (July 21-August 2), this number climbed to 29% for those households with children under age five.[9] During this same period, the survey indicated women were more likely than men to report that they had left a job in the past four weeks in order to care for a young child—6.8% of women versus 4.5% of men.[10]

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4 Misty L. Heggeness, Jason Fields, Yazmin A. García Trejo and Anthony Schulzetenberg, *Tracking Job Losses for Mothers of School-Age Children During a Health Crisis*, U.S. Census Bureau (Mar. 3, 2021).

5 *Id.*

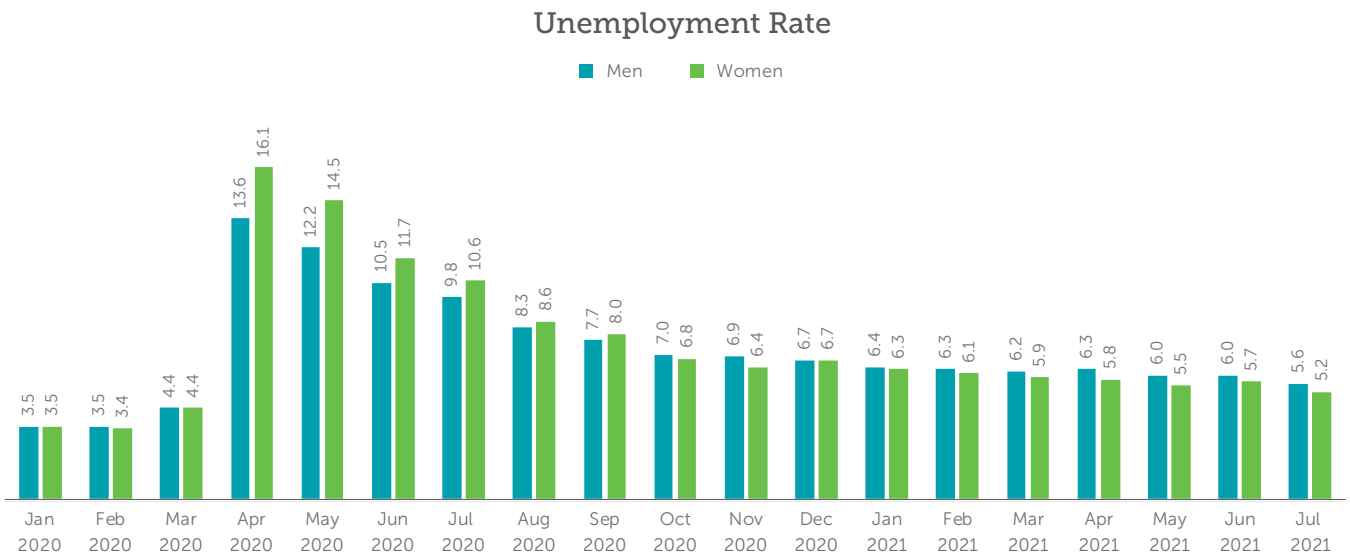
6 *Id.*

7 See, *e.g.*, Titan Alon, Sena Coskun, Matthias Doepke, David Koll, Michèle Tertilt *From Mancession to Shecession: Women's Employment in Regular and Pandemic Recessions*, Northwestern (June 2021).

8 U.S. Census Bureau, Week 33 Household Pulse Survey: June 23 – July 5, 2021, Table 6. Childcare Arrangements in the Last 4 Weeks, by Select Characteristics, available at *https://www.census.gov/data/tables/2021/demo/hhp/hhp33.html*.

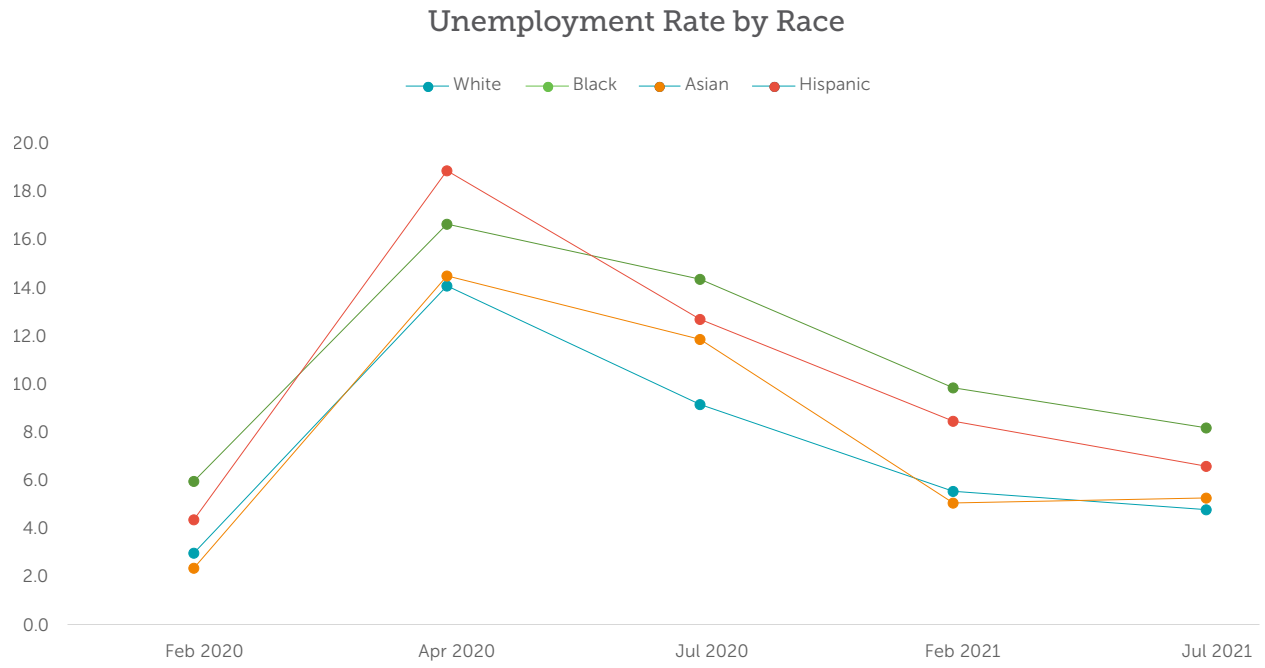
9 U.S. Census Bureau, Week 34 Household Pulse Survey: July 21-August 2, 2021, Table 2. Childcare Arrangements in the Last 4 Weeks for Children Under 5 Years Old, by Select Characteristics, available at *https://www.census.gov/data/tables/2021/demo/hhp/hhp34.html*.

10 *Id.*



Source: U.S. Bureau of Labor Statistics, Employment Situation Reports (monthly) at www.bls.gov

Looking at race as a factor, Black workers suffered a greater rate of unemployment (8.2%) in July 2021 compared to 4.8% for White workers, and 5.3% for Asian workers. For Hispanic workers, the unemployment race as of July 2021 hovered around 6.6%.



Members of the LGBT community also suffered disproportionately during the pandemic. The latest version of the Census Household Pulse Survey found, among other things, that 19.8% of LGBT adults lived in a household with lost employment income in the past four weeks, compared to 16.8% of non-LGBT adults.[11]

11 Thom File and Joey Marshall, *Household Pulse Survey Shows LGBT Adults More Likely to Report Living in Households With Food and Economic Insecurity Than Non-LGBT Respondents*, U.S. Census Bureau (Aug. 11, 2021).

Education level also impacted which workers have been able to find work since the COVID-19 crisis began. From July 2019 to when the pandemic hit in the spring of 2020, the employment of workers without any college education had declined by 10.2 million (22.9%), and 96.8% of the decrease happened in March and April 2020. The jobs contraction was less drastic for those with higher levels of education. Less than one in ten previously employed workers with some college education experienced complete job loss in the immediate period following the pandemic economic contraction. Recovery over the past year saw gains of employment for those age 25 and older among each educational attainment group (less than a high school degree, high school degree, some college, four-year college degree or higher), but only the four-year college or above group has surpassed the February 2020 pre-pandemic benchmark. For other groups, a jobs deficit remains.

As will be discussed in Part III of this Report, the jobs of employees with lower levels of education are more susceptible to automation.

Part II: Federal and State Policies

Throughout most of 2020 and 2021, federal, state and local lawmakers focused their efforts on the pandemic and boosting the economy. At the federal level, President Biden's first major piece of legislation signed into law, the American Rescue Plan Act of 2021, extended tax credits for private employers with 499 or fewer U.S. employees that voluntarily decide to provide emergency paid sick and/or family leave according to the otherwise-expired standards in the Families First Coronavirus Response Act (FFCRA), and extended the federal "add-on" of $300 in extra weekly unemployment benefits through September 6, 2021, among other provisions. The pending $1 trillion bipartisan infrastructure bill seeks to spur economic growth by funding over $550 billion in infrastructure projects.

Many new labor and employment changes have been spurred by the new administration. The following sections discuss current and likely changes in federal labor and employment law expected as the Biden administration and key presidential personnel assume their positions.

The National Labor Relations Board Has Officially Flipped

As a candidate, now-President Joe Biden promised that he would be "the strongest labor president" organized labor had ever seen. While he has already made good on that promise in a number of ways, as the balance of the power of the National Labor Relations Board ("NLRB" or "the Board") has shifted, we expect to see significant NLRB activity in the months and years to come.

Among his first acts on Inauguration Day, President Biden asked for the resignation of NLRB General Counsel Peter Robb. Robb, a Republican, was slated to serve in his appointed term through November of this year. When Robb declined to resign, he was fired by the White House that same day, marking the first time a sitting general counsel was removed from office prior to the conclusion of their term. The legality of Robb's termination continues to be litigated in numerous courts, potentially leaving the fate of actions taken by an acting general counsel from January to July, when a new general counsel was confirmed by the Senate and sworn in, in legal limbo.

On July 21, 2021, the Senate confirmed Jennifer A. Abruzzo as general counsel; she assumed office on July 22, beginning a four-year term. In early August, Abruzzo laid out her priorities for the general counsel, and the areas on which she will ask her regional attorneys to focus, discussed further below.

Equally significant, the balance of power on the Board has shifted from Republican to Democratic control. At the end of August, when Republican Board Member William Emanuel's term expired, he was succeeded by Democrat David Prouty,

who previously served as the general counsel of the New York City Service Employees International Union (SEIU) Local 32BJ, and is now serving in a five-year term expiring in 2026. The Senate previously confirmed Democrat Gwynne Wilcox to a vacant seat on the Board, filling a term that expires in 2023. Wilcox was formerly a senior partner at a labor-side labor and employment firm and served as assistant general counsel to the SEIU Local 1199 Health Care Workers East in New York. The Board continues to be chaired by Democrat Lauren McFerran, whose term expires in December 2024. The two Republican members of the Board, former Chairman John Ring and Member Marvin Kaplan, continue to serve in terms expiring in December 2022 and August 2025, respectively.

We predict that over the next three years, the Board may take action to reverse its position in a number of cases decided during the prior administration, but that process takes time—it can be months or even years before an unfair labor practice charge is processed and heard before an administrative law judge, and is ultimately presented to the Board for adjudication. But for better (or possibly worse), we do have strong indicators of those cases and topics that are likely to be revisited by a Democratically controlled Board.

Among the most important duties of the general counsel is choosing which cases to present to the Board. As noted above, General Counsel Abruzzo gave us a clear look at the issues she will focus on during her term, when on August 12, 2021 she issued Memorandum 21-04,[12] instructing the NLRB's regional directors on her litigation priorities. Pursuant to this directive, regional directors are required to submit cases relating to these matters to the general counsel's Office of Advice, "to reexamine these areas" so as to determine "whether change is necessary to fulfill the Act's mission."

Abruzzo identified specific areas in which she would like to weigh in, including: employee handbook rules, the validity of confidentiality provisions in separation agreements, what constitutes protected concerted activity, and an employer's right to remove agents from their premises. She has made clear that she is interested in revisiting key Trump-era Board decisions, including:

- *The Boeing Co.,* 365 NLRB No. 154 (2017), which set a new standard for analyzing employers' workplace policies and handbooks. GC Abruzzo wants to reconsider application of Boeing to employer rules governing employee confidentiality, non-disparagement, social media, media communication, civility rules, respectful and professional manner rules, offensive language rules and no-camera rules in the workplace. Employers may well face a return to the Obama Board's "War on Handbooks," where handbooks were closely scrutinized for any provision that potentially implicated the NLRA.

12 NLRB Office of the General Counsel, *Memorandum GC 21-04* (Aug. 12, 2021).

- *SuperShuttle DFW, Inc.,* 367 NLRB No. 75 (2019), which changed the legal standard for employment status by creating a new framework which applied the common-law agency test with consideration of the individual's "entrepreneurial opportunity." Reversal of this decision could have a major impact on employers that rely on independent contractors as part of their business model, potentially reclassifying contractors as employees covered by the NLRA and eligible to form and join unions.
- *Rio All-Suites Hotel and Casino,* 368 NLRB No. 143 (2019), which held that employers can lawfully limit employees' personal use of company email, including for union purposes. GC Abruzzo has specifically requested the submission of cases dealing with use of internal electronic communication systems, including platforms like Discord, Slack, and Groupme. We expect she will attempt to expand employees' right to use company communications systems for union organizing and other conversations related to working conditions.
- *Baylor University Medical Center,* 369 NLRB No. 43 (2020), which held that an employer could lawfully include confidentiality and no-disparagement clauses, as well as clauses prohibiting employees from participating in claims brought by any third party against the employer in a separation agreement, in exchange for severance payments.

Reversals of these decisions would impact union and non-union employers alike. Beyond the predictable intent to overturn many of the decisions issued during the prior administration, Abruzzo is expected to revisit longstanding Board policy, most notably the Board's 52-year-old standard for obtaining a representation election. Since *NLRB v. Gissel Packing Co.,* 395 U.S. 575 (1969), an employer presented with an alleged majority of signed union authorization cards does not have to take them at face value and recognize the union. Rather, it may insist on an election to determine the employees' wishes and need not make any independent inquiry into the validity of the cards. Abruzzo's memo suggests that she may seek to upend the decades-old representation election status quo by returning to the standard that existed prior to *Gissel* in *Joy Silk Mills*, 85 NLRB 1263 (1949). *Joy Silk* required the employer to have a good-faith doubt regarding majority status in order to refuse a demand for recognition and move to a Board election. If, after refusing a demand for recognition, the employer could not establish a good-faith doubt for its denial of the union's majority status or it committed any unfair labor practices that demonstrated the employer's "rejection of the collective bargaining principal or . . . desire to gain time within which to undermine the union," the employer faced a bargaining order.

Other notable areas highlighted in the GC Memorandum include:

Duty to Bargain. Among the largest categories of cases to be referred to Advice are bargaining cases. These cases include an apparent desire to (1) abrogate the "contract coverage" and "sound arguable basis" standards for considering whether an employer's unilateral action is permitted by a collective-bargaining agreement and return to the "clear and unmistakable waiver" standard; (2) overturn the standard permitting employers to unilaterally modify terms and conditions of employment provided that the modifications were a continuation of a past practice; (3) lower the standards for an "inability to pay" claim during collective bargaining negotiations that would trigger an obligation for a company to provide its financial records to the union; (4) require employers to provide post-contract expiration increases to wages and benefits under the "dynamic status quo" theory; and (5) a return to the requirement that employers have a duty to bargain pre-contract discretionary discipline, in first contract negotiations.

Elections/Duty to Recognize. Currently, if an employer has evidence that the union has lost majority status, it may withdraw recognition from the union up to 90 days prior to contract expiration. If the union contests the employer's withdrawal of recognition, the union may request a representation election within 45 days from the withdrawal of recognition. Abruzzo appears to seek to eliminate this framework, and presumably return to the standard that existed prior to the Trump Board where the "last in time" proof of majority status controlled the employer's ability to ultimately withdraw recognition.

Right to Strike and/or Picket. The general counsel seeks to limit employer power to withstand strikes and pickets while expanding employee power to engage in activity disruptive to an employer's business. The Advice cases for referral to the GC include cases (1) where the employer's hiring of permanent replacements had an alleged unlawful motive; (2) involving intermittent strikes; (3) involving alleged secondary object picketing; and (4) involving employers unilaterally setting the terms and conditions of replacement employees in excess of striking employees.

Section 7 Rights. In an expansion of prior Acting General Counsel Peter Suing Ohr's Memorandum on protected concerted activity,[13] GC Abruzzo also seeks to alter the landscape of Section 7 rights. Cases to be examined include (1) cases calling into question the definition of "protected concerted activity"; (2) cases related to the definition of "mutual aid or protection"; (3) the definition of "inherently concerted activity"; and (4) the difference between solicitation and mere "union talk." Other changes GC Abruzzo seeks to establish include preventing employers from explaining during a campaign that employee access to management will be limited if employees are represented by a union; presuming dissemination of employer threat of plant closure; and precluding employers from promulgating mandatory arbitration agreements in response to employee collective action.

Employers should not expect the change in priorities to end with this memo, as the general counsel indicates that this list is just a beginning, and the "memo will be supplemented at some point in the future to include other important issues, as well as refinements." What is clear, however, is that the next three and a half years (at least) promise to be rocky ones for employers at the NLRB.

13 *See* Alan I. Model, Michael J. Lotito, Maury Baskin, and Kevin E. Burke, *Peter Sung Ohr has Cemented the Biden NLRB's Direction Despite Challenges to his Interim Appointment and Prosecutorial Authority*, Littler Insight (Mar. 17, 2021).

The Protecting the Right to Organize Act

Lest the prospect of an aggressive, union-friendly Board and general counsel be not enough to keep employers awake at night, employers also have Congress—and the so-called "PRO Act"—to keep them from the arms of Morpheus.

The Protecting the Right to Organize Act of 2021 encompasses more than 50 significant changes to current law and seeks to overhaul the NLRA for the first time in more than 70 years.[14] This sweeping legislation, which initially passed the House in February 2020, extends well beyond union organizing. Non-union and unionized employers alike should understand the scope of its proposed changes, and the practical impact those changes would have on their relationship with employees, and their operations, should it ultimately become law.

The U.S. House of Representatives again passed the PRO Act in March of this year, on a largely party-line vote of 225-206. One Democratic Representative voted against the bill; five Republicans voted for it. The bill's language includes provisions that would:

- Effectively overturn state right-to-work laws;
- Codify the "ABC test" for determining independent contractor or employee status under the NLRA;
- Limit employers' ability to contest union election petitions and allow unions to engage in secondary boycotts, long held to be unlawful;
- Restrict the ability of employers to obtain labor relations advice;
- Facilitate union organizing of micro-units;
- Redefine the definition of "supervisor" to include more frontline leaders as "employees" covered by the NLRA;
- Change the definition of "joint employment," forcing businesses to alter their structures or face liability;
- Give employees the right to utilize an employer's electronic systems to organize and engage in protected concerted activity;
- Prohibit employers from using mandatory arbitration agreements with employees;
- Force parties into collective bargaining agreements via interest arbitration; and
- Expand penalties for violations of the NLRA.

14 *See* Alan I. Model, Kevin E. Burke, Maury Baskin, and Michael J. Lotito, *PRO Act Would Upend U.S. Labor Laws for Non-Union and Unionized Employers Alike*, Littler Insight (Feb. 10, 2021).

During debate on the bill, the House adopted a series of Democratic amendments, including provisions requiring the NLRB to develop a system for electronic voting in union organizing campaigns; strengthening whistleblower protections; clarifying that the bill's definition of "employee" does not impact state wage and hour laws; and directing studies and reports on the impact of the bill's test for independent contractor status, definition of joint employer, and sectoral bargaining in other countries. The House rejected Republican amendments that would have, among other things, struck provisions in the bill codifying the "persuader" rule; overturned state right-to-work laws; and banned the use of striker replacements. The House likewise rejected a Republican attempt to amend the Labor Management Relations Act to prohibit "neutrality agreements" in organizing campaigns.

The PRO Act is currently pending in the Senate, where its fate is uncertain. Under current filibuster rules, a supermajority of 60 votes is required to pass the bill and move it to President Biden's desk for signature. To date, no Senate Republican has indicated they would support the bill. There will be significant pressure on Senate Democrats to advance the legislation and calls to change the filibuster rules to allow for passage with only 50 votes. While the Senate is evenly split, it is not clear whether the bill could advance in its present form, or if moderate Democrats will make efforts to address some of the bill's most glaring problems for employers.

Most recently, PRO Act supporters have concentrated their efforts on trying to attach parts of the bill to the upcoming "budget reconciliation" package, which will require only a simple majority of the Senate to pass. The rules governing what can be attached to budget reconciliation bills are arcane, and it is unclear what if any parts of the bill may be permitted to be included in that package. It appears the most likely part of the bill supporters may seek to advance are the civil penalty provisions. This would reverse 85 years of precedent and impose civil penalties on employers embroiled in labor disputes that could range from $50,000 to $100,000 per violation. Such an effort would be a dramatic revision of the statute. When Congress passed the NLRA in 1935, it deliberately avoided punitive measures, such as civil penalties and fines, against either labor or management; the U.S. Supreme Court recognized this in *Republic Steel v. NLRB*,[15] holding that Congress intended the NLRA to be a *remedial* law to make employees whole, not a *punitive* one.

Task Force on Worker Organizing

The new administration has shown its support for organized labor in other ways. For example, on April 26, 2021, President Biden issued an executive order that seeks to increase union organization and strengthen the hand of organized labor.[16] The order, which notes that the federal government in recent decades has "not used its full authority to promote and implement this policy of support for workers organizing unions and bargaining collectively with their employers," establishes a Task Force on Worker Organizing and Empowerment. Chaired by Vice President Kamala Harris and vice-chaired by Secretary of Labor Marty Walsh, the Task Force will bring together the heads of numerous federal agencies to identify executive branch policies, practices, and programs that could be used, consistent with applicable law, to promote the Biden administration's "policy of support for worker power, worker organizing, and collective bargaining." The Task Force is also charged with identifying statutory, regulatory, or other changes that would advance policies and programs to achieve the same end. Notably, the White House's budget proposal includes $2.1 million for programs to inform workers about their rights under the NLRA, and a 10% increase for NLRB funding overall.[17]

15 311 U.S. 7 (1940).

16 Executive Order 14025 of April 26, 2021, *Worker Organizing and Empowerment,* 86 Fed. Reg. 22829 (Apr. 29, 2021).

17 The White House, Office of Management and Budget, *Budget of the U.S. Government, Fiscal Year 2022.*

Arbitration and Noncompete Agreements

The new administration has also aggressively flexed its muscle in workplace matters by way of executive orders.

In addition to an increased minimum wage for federal contractors (discussed in detail below), the president is said to be presently contemplating an executive order that would ban federal contractors from requiring their employers to resolve workplace disputes by way of binding arbitration. In June of this year, 40 House Democrats called on President Biden to issue such an order. Legislation to widely prohibit private-sector employers from using arbitration agreements has been introduced in Congress and has passed the House in prior years, ultimately to die in the Senate.[18] Given that any legislative effort would likely meet a similar fate in the current Senate, proponents of banning workplace arbitration have urged the White House to bypass a gridlocked Congress, and instead ban the use of arbitration agreements by private-sector employers that are federal contractors. While he has yet to do so, it would be very surprising if President Biden does not address this issue by way of order in some form or fashion.

Noncompete agreements are also in President Biden's sights. On July 9, 2021, he issued Executive Order 14036, *Promoting Competition in the American Economy*.[19] The order creates a new White House Competition Council and directs federal regulators to address a range of issues, from broadband cable access to prescription drug prices. Notably for employers, the order directs the Federal Trade Commission (FTC) to pursue a rulemaking process that would ban or limit the use of noncompete agreements as a matter of federal law. At this time, it is unclear whether the FTC will propose very broad limitations that could potentially ban all employee noncompete agreements, or whether the agency will take a more targeted approach, limiting regulation to restrict the use of noncompetes with lower-income employees (as several states have done), or certain employment sectors. As discussed in Littler's analysis of the order,[20] there are numerous legal questions as to the authority of the FTC to regulate in this area, as well as the scope of the president's power to unilaterally adopt such policy.

18 A current version of the Forced Arbitration Injustice Repeal (FAIR) Act, *H.R. 963*, 117th Cong., 1st Sess. (2021), was introduced in February.

19 Executive Order 14036 of July 9, 2021, *Promoting Competition in the American Economy*, 86 Fed. Reg. 36987-36999 (July 14, 2021).

20 Scott McDonald, Michael Lotito, Melissa McDonagh, Jim Paretti and Jim Witz, *President Biden Seeks to Regulate (and Potentially Ban) Non-Competes*, Littler ASAP (July 9, 2021).

Equal Employment Opportunity Commission

With the change in administration came change in leadership at the Equal Employment Opportunity Commission ("EEOC" or "the Commission"). On January 21, 2021, President Biden designated Commissioner Charlotte A. Burrows (D) as chair of the agency, and Commissioner Jocelyn Samuels (D) as vice chair. While a nomination to serve on the Commission must be confirmed by the Senate, the president may unilaterally designate which commissioners serve as chair and vice chair.

While the Commission is now chaired by a Democratic member, the majority of the five-member agency is Republican and is likely to remain so until at least next summer. Absent any departures, the makeup of the Commission is currently:

- Chair Charlotte A. Burrows (D), whose term expires on July 1, 2023
- Vice Chair Jocelyn Samuels (D), whose term expires on July 1, 2026
- Commissioner Janet Dhillon (R), whose term expires on July 1, 2022
- Commissioner Keith Sonderling (R), whose term expires on July 1, 2024
- Commissioner Andrea Lucas (R), whose term expires on July 1, 2025

As seen with the National Labor Relations Board, President Biden did make one key, and unprecedented, personnel move at the agency early in his term. In March, the president fired the EEOC's general counsel, Sharon Fast Gustafson (R), who had been appointed by President Trump for a four-year term that was set to expire in August 2023. Her removal marked the first time in the agency's history that a sitting general counsel was removed prior to the end of their term. The position is currently filled in an acting capacity by career deputy Gwendolyn Reems.

The chair of the Commission exercises significant control over the administration and operations of the agency and its 53 offices around the country. The vast majority of day-to-day operations of the Commission and its field staff largely proceed apace, irrespective of which party holds the chair. The chair also has broad discretion in setting the Commission's agenda—what items the agency will consider and vote upon, and which it will not, as well as scheduling meetings of the Commission to examine issues or vote on disputed matters (the agency has held a number of telephonic public meetings throughout the course of the COVID-19 pandemic). That said, with Burrows and Samuels in the minority, the ability of the Commission to move forward on significant policy matters that do not enjoy bipartisan support, issue new guidance or regulations, or revisit policies and priorities of the prior administration may be limited, at least for some time.

Delegation of Litigation Authority. One important policy that remains in effect (at least until a Democratic-controlled Commission repeals or modifies it) is the limitation adopted in January 2021 on the general counsel's authority to file suit without the approval of the Commission. The delegation of authority now provides that the full Commission must vote to approve all:

- cases involving an allegation of systemic discrimination or a pattern or practice of discrimination;
- cases expected to involve a major expenditure of agency resources, including staffing and staff time, or expenses associated with extensive discovery or expert witnesses;
- cases presenting issues on which the Commission has taken a position contrary to precedent in the circuit in which the case will be filed;
- cases presenting issues on which the general counsel proposes to take a position contrary to precedent in the circuit in which the case will be filed;
- other cases reasonably believed to be appropriate for Commission approval in the judgment of the general counsel, including but not limited to, cases that implicate areas of the law that are not settled and cases that are likely to generate public controversy; and
- all recommendations in favor of Commission participation as *amicus curiae*.

Perhaps more notable, even where cases do not fall within the above criteria, the revised delegation provides that before filing *any* case, the general counsel must circulate it to all commissioners for a period of five business days. If during that period a majority of the commissioners notifies the general counsel and the other commissioners that the case should be submitted to the Commission for a vote, the litigation may not be filed without approval of the majority of the Commission. This means, as a practical matter, that any bloc of three commissioners can effectively "veto" the filing of a case (first by requiring that it be presented for a Commission vote, then by voting to disapprove the recommendation to file suit). Employers facing potential litigation by the EEOC (*e.g.*, after a failed conciliation) should consult with counsel to determine if these new procedures may provide an opportunity to avert litigation.

Conciliation Regulations. Where the Commission has been unable to act on prior administration policy, Congress has stepped in to fill the void. One notable example was the Commission's final regulations updating its conciliation procedures issued at the end of the Trump administration (by way of background, "conciliation" refers to the statutory requirement that, after the EEOC has found reasonable cause to believe discrimination occurs, the agency must "endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion" prior to filing suit).[21] The regulations were designed to ensure that employers were provided a minimum amount of baseline information regarding the Commission's findings and proposed conciliation offer so as to meaningfully be able to assess and respond to the Commission's proposal, and were widely well-received by employers. With Democratic control of both chambers of Congress, these regulations were repealed pursuant to the Congressional Review Act in June of this year. Having been repealed in this fashion, the Commission is prohibited from adopting "substantially similar" regulations without explicit congressional approval. That said, it seems unlikely that a Democratic administration would seek to regulate conciliation in any manner more favorable to employers.

21 EEOC, *Update of Commission's Conciliation Procedures*, 86 Fed. Reg. 2974-2986 (Jan. 14, 2021).

What to Expect from a Biden EEOC

Upon attaining a Democratic majority, it is likely that the Commission will revisit some of the above matters, potentially limiting or repealing them entirely. The agency will also then be able to begin advancing new initiatives. A number of issues seem ripe for consideration in a Democratically controlled EEOC.

LGBTQ Employees. In June, the agency updated its website's landing page,[22] and issued a "technical assistance document"[23] regarding issues relating to LGBTQ workers, and what the EEOC is now terming "SOGI (Sexual Orientation/ Gender Identity) Discrimination." This is the first substantive update of EEOC guidance in this area since the Supreme Court's decision in *Bostock v. Clayton County,* in which the Court held that Title VII's prohibition on sex discrimination extends to include discrimination on the basis of sexual orientation and gender identity. Most notably, the document makes clear the EEOC's position that where an employer maintains separate restrooms for men and women, Title VII requires employers to allow employees to use the facility that corresponds to their gender identity, rather than assigned sex at birth. Employers navigating these issues in their workplaces should consult with counsel to ensure that legal and practical considerations are adequately met.

Compensation Data Collection. During the Obama administration, the EEOC revised its Form EEO-1 to require employers to report detailed information about employee compensation and hours worked, broken out by race, ethnicity, and gender. The Trump administration discontinued this collection (although a federal court ultimately found the suspension of the collection unlawful and ordered the agency to collect two years of pay data). A National Academy of Sciences panel was recently formed to evaluate the compensation data collected by the EEOC to determine its utility, and potentially make recommendations regarding future data collection. We predict it is likely that a Biden EEOC will attempt again to require employers to submit employee compensation data to the agency; whether the collection mirrors what was previously done, or adopts a different approach, remains to be seen. The EEOC suspended collection of all EEO-1 data in spring 2020,[24] but is now collecting "component-1" data (including calendar years 2019 and 2020) due in the fall of this year. Moreover, as discussed in greater detail in the Federal Contractors section of this Report, the OFCCP has announced it will examine the compensation data the EEOC collected for calendar years 2018 and 2019 for investigation and enforcement purposes.

22 EEOC, *Sexual Orientation and Gender Identity (SOGI) Discrimination*.

23 EEOC, OLC Control No. NVTA-2021-1, *Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity*, (June 15, 2021).

24 *See* Jim Paretti and David Goldstein, *EEOC Will Not Collect EEO-1 Data This Year*, Littler ASAP (May 7, 2020).

Wellness Regulations. In January 2021, the Commission unveiled proposed regulations[25] regarding permissible incentives for workplace wellness plans under the Americans with Disabilities Act and Genetic Information Non-Discrimination Act (the rules were previously approved by the Commission, and under review by the Office of Management and Budget until early this year). The proposed regulations set forth the circumstances under which employers could incentivize (or potentially penalize) employee participation in workplace wellness plans that include medical examinations or disability-related inquiries, and set limitations on the size of incentives employers could offer, depending upon the nature of the plan. The January regulations were not published in the *Federal Register* prior to the change of administration, and at the direction of the new administration, Chair Burrows withdrew them from consideration. The proposed regulations offered greater leeway to employers with respect to incentivizing employees' participation in workplace wellness programs. We predict that if the Commission revisits the issue under Democratic control, it is likely that any regulations will take a more restrictive approach, and broadly protect the rights of workers (notably, workers who may have disabilities) to decline to participate without penalty.

Artificial Intelligence and Big Data. The increased use of artificial intelligence and "big data" in employment decisions had started prior to the COVID-19 pandemic. Many predict, however, that the pandemic will serve only to speed that trend. Increasingly, we have seen discussion of what the civil rights and non-discrimination implications of this increased use of data and technology may be. The EEOC last examined the use of "big data" in employment in an October 2016 public meeting.[26] More recently, in February 2020, the U.S. House Education and Labor Committee's Subcommittee on Civil Rights and Human Services held a hearing to explore these issues, including testimony from former Obama administration EEOC Chair Jenny Yang.[27] We expect this to continue to be an increasingly important issue, and one that is likely to generate keen EEOC interest going forward.

COVID-19 Challenges. EEOC has, throughout the pandemic, maintained updated guidance as to employers' and employees' rights and responsibilities with respect to the pandemic and federal civil rights laws prohibiting discrimination on the basis of disability, religion, genetic information, and pregnancy.[28] Most recently, the agency updated its FAQs regarding vaccinations, making clear that an employer's merely asking for proof of vaccination is not a "medical examination" and does not implicate ADA concerns. Employers should be aware however, that asking *why* an employee is not vaccinated (or engaging in pre-vaccination questions where the employer or a third party with whom it contracts is vaccinating workers) likely do implicate the ADA insofar as they are questions that are likely to elicit information about a disability. Moreover, employees who are unable to get vaccinated due to a disability, or who have religious objections to taking the vaccine, may also be entitled to "reasonable accommodation" where that does not impose an undue hardship on the employer.[29]

25 EEOC, Press Release, *EEOC Provides Proposed Wellness Rules for Review* (Jan. 7, 2021).

26 EEOC, *Meeting of October 13, 2016 - Big Data in the Workplace: Examining Implications for Equal Employment Opportunity Law*.

27 U.S. Education & Labor Committee, Civil Rights and Human Services Subcommittee hearing, *The Future of Work: Protecting Workers' Civil Rights in the Digital Age* (Feb. 5, 2020).

28 EEOC, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws* (updated Dec. 16, 2020).

29 Littler has made a wide variety of tools designed to assist employers in addressing COVID and return-to-work issues free of charge, available *here*.

We expect that the agency will continue to update its COVID-19 guidance, and employers contemplating mandatory vaccination as a condition of returning to work, or incentivizing employees to get vaccinated, should consult with counsel to ensure they are compliant with state and federal non-discrimination laws. As of this writing, states have adopted vastly different approaches to the employee vaccination issues, ranging from requiring employers to obtain vaccination status from employees (California, Washington, Oregon) to prohibiting any consideration of vaccination status (Montana). Moreover, in many states, public-facing employers such as retailers and restaurants may be prohibited under state law from denying access to customers and patrons based on COVID-19 vaccine status.

Going forward, it remains to be seen what the long-term legal effects of the pandemic on EEO law will be. For example, pre-pandemic, many courts looked skeptically at an employee's request for telework as a reasonable accommodation, often finding that "attendance" is an essential function of a job, and that the burden of accommodating remote workers was too great for an employer to have to undertake. Now, with countless employers in myriad industries having operated remotely for 18+ months of the pandemic, it may be difficult to argue, irrespective of COVID-19, that telework for employees is an "undue hardship" under the ADA or Title VII. Other thorny legal issues are likely to emerge, as well. Employers that have "hybrid" workforces, with some workers present and others working remotely (perhaps due to a disability or religious belief), will want to ensure that those who are not working onsite are not discriminated against or otherwise penalized (the "B-Team" scenario). Employers will also want to ensure that where they permit some workers to continue to work remotely, they do so in a non-discriminatory fashion, being mindful that even a facially-neutral return-to-work policy may have a disparate impact on employees in protected classes.

Occupational Safety and Health Administration

As the political leadership of the Occupational Safety and Health Administration (OSHA) takes shape and the COVID-19 pandemic continues to significantly impact workplace safety and health, we expect a very active OSHA in the coming months. The primary focus of the agency will continue to be initiatives related to COVID-19. However, employers should anticipate and prepare for an active *non-COVID regulatory agenda*, as well, and stepped-up enforcement.

A Senate-Confirmed Political Leader of OSHA?

Perhaps the most significant development with OSHA is the expected confirmation of Doug Parker, the former head of California OSHA (Cal/OSHA) as assistant secretary of the agency. Throughout the administration of President Trump, there was never a Senate-confirmed head of the agency. That should change shortly, as we expect Doug Parker to be confirmed by the Senate in the fall of 2021.

As the head of Cal/OSHA, Mr. Parker has overseen the agency's response to COVID-19, including enhanced enforcement activities and the development and implementation of California's Emergency Temporary Standard (ETS) related to COVID-19.[30] That standard imposes numerous requirements on *all* California employers, including employer-funded testing requirements in certain scenarios, to mitigate the hazard of COVID-19 transmission in the workplace.

30 *See* Alka Ramchandani-Raj, Nicholas McKinney, Karen Charlson, and David Dixon, *Cal/OSHA Standards Board Passes Revised Emergency Standard Regulation for COVID-19*, Littler ASAP (June 17, 2021); Kennell M. Sambour, Eric L. Compere, Melissa Peters, and Alka Ramchandani-Raj, *Cal/OSHA Releases Latest Revised Proposal for Re-adoption of COVID-19 Emergency Temporary Standards*, Littler ASAP (June 14, 2021).

Under Mr. Parker's leadership dealing with the pandemic, Cal/OSHA also focused on coordinated enforcement with other state agencies, such as the California Department of Public Health. Cal/OSHA has also conducted weekend enforcement sweeps of essential businesses to ensure compliance with the ETS. To date, Cal/OSHA's enforcement of workplace safety during the pandemic has been one of the most, if not *the most*, aggressive in the nation. Cal/OSHA has issued citations against agriculture, food processing, textiles, correctional facilities, grocery markets, and skilled nursing and acute care facilities, with penalties exceeding $100,000 per inspection in some cases.

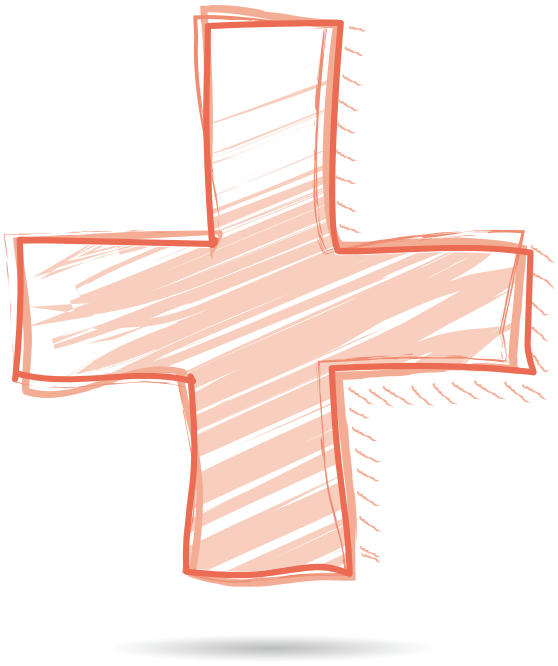
As noted above, if confirmed, Mr. Parker would be the first Senate-confirmed federal OSHA chief since January 2017.

COVID 2.0

Since the inauguration of President Biden, OSHA has been aggressive in implementing initiatives designed to address COVID-19 in the workplace. On March 12, OSHA released a National Emphasis Program (NEP) targeting industries where workers are at a high risk of contracting COVID-19.[31] The NEP increased OSHA's emphasis on COVID-19-related hazards by formalizing components for planned/programmed and follow-up inspections in workplaces where employees have a high frequency of close contact. The NEP outlined various policies and procedures to identify and reduce or eliminate exposure to COVID-19 through inspection targeting, outreach, and compliance assistance.

On June 10, OSHA released an ETS related to COVID-19, establishing new mandatory requirements generally applicable to the healthcare industry.[32] The rule applies to all settings where healthcare services or healthcare support services are provided, with certain enumerated exceptions. The ETS requires healthcare employers to take certain precautions to protect employees from the transmission of COVID-19 in the workplace and, in particular:

- Develop and implement a COVID-19 plan meeting certain parameters;
- Screen patients and limit access to settings where direct patient care is provided;
- Follow CDC guidelines related to transmission-based precautions;
- Provide personal protective equipment (PPE) and ensure appropriate use by employees;
- Limit exposure to aerosol-generating procedures on a person with suspected or confirmed COVID-19;
- Enforce indoor physical distancing requirements and install physical barriers at fixed work locations in non-patient care areas; and
- Comply with CDC guidelines regarding cleaning and disinfecting of surfaces.



31 OSHA DIR 2021-01 (CPL-03), *National Emphasis Program – Coronavirus Disease 2019 (COVID-19)* (Mar. 12, 2021).

32 *See* Brad T. Hammock, Yvette V. Gatling, and Sarah M. Martin, *Federal OSHA Issues Emergency Temporary Standard for Health Care*, Littler ASAP (June 10, 2021).

On August 13, OSHA issued new guidance to summarize the CDC's "substantial or high transmission" guidance and assist employers in recognizing and abating COVID-19 hazards in the workplace.[33] In the guidance's preamble, OSHA "strongly encourages" employers to provide paid time off to workers for the time it takes to get vaccinated and recover from side effects, and to consider working with local public health authorities to provide vaccinations in the workplace. OSHA also suggests that employers "consider adopting policies that require workers to get vaccinated or to undergo regular COVID-19 testing — in addition to mask wearing and physical distancing — if they remain unvaccinated."We expect OSHA will continue to actively monitor the pandemic and issue updated guidance to align with CDC recommendations going forward. Moreover, with the rise in cases due to the Delta variant, we will be watching closely if OSHA takes steps to expand the coverage of the ETS to other employers outside of healthcare and healthcare support services.

Anything But COVID?

While there is no doubt that OSHA will be focused on COVID-19-related issues for the foreseeable future, we also anticipate an aggressive OSHA with respect to *non-COVID issues*. There are several issues that we expect will be of particular interest to OSHA under the leadership of Doug Parker.

The most significant potential rulemaking for OSHA outside of the COVID-19 context relates to heat illness. Some OSHA state-plan states (including California) have adopted standards to protect workers from extreme heat. The issue of heat exposure has been growing in significance due to several episodes of high heat in certain parts of the country. Congress has also been pushing OSHA to issue a heat illness rule. We anticipate OSHA moving forward with some regulatory initiative related to heat illness within the next year.

We also expect OSHA to proceed with some broader Airborne Infectious Disease Rule, which while not specifically related to COVID-19, could impose a range of obligations on employers outside of the healthcare industry to protect employees from exposure to certain airborne pathogens.

And under the Biden administration, we have already seen a re-emergence of "enforcement through press release." OSHA has reinvigorated its practice — widely used in the Obama administration — of issuing press releases for various enforcement actions. These press releases are published at the time of the issuance of citations and reflect only the agency's position. They are just OSHA's views of the circumstances of the inspection and thus can be misleading. OSHA very rarely issues press releases at the conclusion of proceedings that follow the issuance of citations.

Department of Labor

On March 22, 2021, the Senate confirmed Marty Walsh as the new labor secretary. Walsh formerly served as the mayor of Boston and president of the Boston Metropolitan District Building Trades Council, a union umbrella group. Walsh is an avid supporter of the $15 minimum wage, and is expected to help the new administration push for policy changes at the DOL. For example, Walsh has made a number of public statements indicating that the Department will look very closely at questions of worker misclassification and suggesting that many workers—particularly those in the gig economy—may be misclassified as independent contractors.

33 *See* Alka Ramchandani-Raj and Karen Charlson, *OSHA Publishes Updated COVID-19 Guidance in Light of Rising Delta Variant Cases*, Littler Insight (Aug. 17, 2021).

Rise of the Independent Contractor

An increasing number of employers are turning to independent contractors to carry out their operations. The July BLS Employment Situation Report notes that over 10.2 million individuals are listed as self-employed.[34] A recent *Forbes* article stated the gig economy as a whole experienced a 33% growth in 2020, and that approximately 35% of U.S. workers are involved in the on-demand gig economy in some fashion.[35] In terms of how many people this involves, one survey conducted by a contractor management company reports that 64.8 million workers in the United States performed at least some freelancing work in 2020, a number that is expected to increase to 90 million by the year 2028.[36] The vast majority (90%) of senior managers participating in that survey indicated they have worked with 10 or more non-payroll employees over the past 12 months, and expect to increase their reliance on freelancers and independent contractors.[37]

Whether a worker is properly classified as an independent contractor or employee is a significant issue for employers, as the liability for misclassification can be quite steep. On January 6, 2021, the Department of Labor under the prior administration published in the *Federal Register* a long-awaited rule clarifying the standard for classifying workers as employees or independent contractors under the Fair Labor Standards Act (FLSA). This rule reaffirmed an "economic reality" test to determine whether individuals are in business for themselves (independent contractors) or are economically dependent on a potential employer for work (FLSA employee). The rule identified two "core factors" that would be most probative of such economic dependence: (1) the nature and degree of control over the work; and (2) the worker's opportunity for profit or loss based on initiative and/or investment, as well as other factors to serve as guideposts in this analysis. The rule was slated to take effect on March 8, 2021.

34 U.S. Bureau of Labor Statistics, *The Employment Situation Report* (July 2021).
35 Marcin Zgola, *Will The Gig Economy Become The New Working-Class Norm?*, Forbes (Aug. 12, 2021).
36 *How Are Companies Leveraging the Freelance Economy?*, StokeTalent.com (March 2021).
37 *Id.*

As was expected, however, shortly after taking office, President Biden directed federal agencies to consider delaying effective dates of rules that had not yet taken effect so that the new administration would have an opportunity to evaluate them. To that end, the DOL initially pushed off the rule's effective date until May 7, 2021. The DOL then formally withdrew the rule the day before it was set to take effect. Both the initial delay of the independent contractor rule and its subsequent withdrawal are the subject of legal challenge in the U.S. District Court for the Eastern District of Texas.[38] Any revised rule will need to undergo additional notice and comment once issued.

President Biden's selections for key leadership roles have signaled his position with respect to independent contractors. Notably, Dr. David Weil—who served as administrator of the Department's Wage and Hour Division during the Obama administration—has been tapped by President Biden to serve in that position a second time. Weil has repeatedly expressed his view that gig workers are being misclassified, and as head of the Wage and Hour Division in 2015, issued an Administrator's Interpretation (withdrawn during the Trump administration) that interpreted the definition of employee under the FLSA exceedingly broadly.[39] Specifically, Administrator's Interpretation No. 2015-1 took the view that "most workers are employees under the FLSA's broad definitions," essentially creating a presumption of employment for workers. If confirmed, he is expected to take that view once again.

While employers had hoped for a workable national standard, many states have established various tests for worker classification. For example, in 2018, the California Supreme Court held in *Dynamex Operations West, Inc. v. Superior Court* that the "ABC test" was the appropriate standard for determining whether a given worker was an employee or an independent contractor for purposes of the California wage orders. Under the ABC test, a worker is considered an employee unless the hiring entity can demonstrate that: (a) the worker is free from the company's control and direction in how they perform their work, (b) the worker is performing a job that is outside the normal business activities of the company, and (c) the worker is typically engaged in independent work of the same type they are performing for the company. This standard was codified through Assembly Bill 5. Some exceptions have been added over time, most notably through the ballot initiative Proposition 22.[40] On August 20, 2021, however, a California Superior Court judge held the initiative unconstitutional, so its fate remains uncertain. The Massachusetts Attorney General's Office has certified a similar ballot initiative that would ask voters whether ride-share drivers should remain independent contractors. Additional signatures are still needed to qualify this measure for the November 2022 ballot.

Despite these changes, the ABC test is viewed as a gold standard by labor and employee advocates in protecting workers' rights. In fact, as part of his campaign, President Biden expressed his desire to see a "federal standard modeled on the ABC test for all labor, employment, and tax laws" implemented across the United States. As noted, the proposed PRO Act would establish the ABC under the NLRA.

Several federal agencies also intend to participate in a multi-year effort to combat worker misclassification.[41] How this will fully unfold over the course of the new administration remains to be seen.

38 *Coalition for Workforce Innovation v. Walsh*, No 1:21-cv-00130, filed in the E.D. Tex. on Mar. 26.

39 See Michael J. Lotito, Missy Parry and Brendan Fitzgerald, *How Broad is Broad? New DOL Guidance Determines "Most Workers Are Employees"*, Littler Insight (July 22, 2015).

40 *See, e.g.*, Bruce Sarchet, Jim Paretti and Michael Lotito, *Independent Contractor Issues in California: Summer 2020 Update*, WPI Report (Sept. 1, 2020); *California's Proposition 22: Impacts in the Golden State and Beyond*, Littler Insight (Nov. 4, 2020).

41 *See, e.g.*, EEOC, Fiscal Year 2022 Congressional Budget Justification (May 28, 2021), *available at https://www.eeoc.gov/fiscal-year-2022-congressional-budget-justification.*

Joint Employment

The DOL has reversed course on other issues of significant importance to many employers. On July 29, 2021, the DOL announced it was formally withdrawing the FLSA joint employer rule that had set forth a four-factor balancing test for assessing joint-employer status under the Act. Under the rule, the determination of whether a second company is a joint employer of another business's worker examines whether the putative joint employer:

- Hires or fires the employee;
- Supervises and controls the employee's work schedule or conditions of employment to a substantial degree;
- Determines the employee's rate and method of payment; and
- Maintains the employee's employment records.

The now-rescinded rule made clear that no single factor was dispositive in determining joint-employer status, and the weight of each of the factors may vary based on the facts of each case.

Courts are now likely to return to the application of various (and not always consistent) multi-factor tests derived from the cases interpreting the Department's outdated 1959 standard. This in turn means less certainty for employers as to when they may be liable for wage and hour violations under the FLSA as a "joint employer" of an unrelated company's employees.

Significant portions of the joint employer regulations had previously been struck down by a federal court. In February 2020, a coalition of state attorneys general filed suit in the U.S. District Court for the Southern District of New York, claiming that the final regulations were arbitrary and capricious, and violated the Administrative Procedure Act (APA). In September 2020, the court found in favor of the plaintiffs, and vacated most of the final regulations on a nationwide basis. That decision is currently on appeal to the U.S. Court of Appeals for the Second Circuit. The Department has not yet asked the court to dismiss the appeal, which raises significant state standing issues beyond the merits of the joint employer regulations. The Second Circuit previously rebuffed a request from the DOL to stay the appeal pending a decision on whether to withdraw the regulations.

Many employers are concerned about what will replace the rescinded rule. During the Obama administration, the DOL's Wage and Hour Administration, led by David Weil, issued (now rescinded) guidance that established new standards for determining joint employment under the FLSA and the Migrant and Seasonal Agricultural Worker Protection Act (MSPA). In the WHD Administrator's Interpretation No. 2016-01 issued in January 2016,[42] the DOL took the position that "[t]he concept of joint employment, like employment generally, should be defined expansively under the FLSA and MSPA." In addition, for the first time, the WHD differentiated between "horizontal" joint employment and "vertical" joint employment.

As previously noted, President Biden has nominated Dr. Weil to assume the same role during his administration. Whether the DOL under his leadership—should he be confirmed—will issue similar guidance or a rule that incorporates the substance of those rescinded Administrator's Interpretations, is uncertain.

What is more certain is that a rule that does not focus on whether the purported joint employer exercises direct and immediate control over another entity's employees could once again leave employers—particularly those in the franchise industry—open to significant liability under federal employment laws, as they could be held jointly responsible for any violations.

42 *See* Tammy McCutchen and Michael J. Lotito, *DOL Issues Guidance on Joint Employment under FLSA*, Littler ASAP (Jan. 20, 2016).

Federal Contractors: Minimum Wage, COVID-19 Vaccination, and Other Changes

Federal contractors have seen changes to workplace requirements in 2021, with more signaled in the coming months. The current administration has consistently pressed toward more robust enforcement of federal contractors' affirmative action and equal employment opportunity obligations, bolstering agency staffing and implementing new requirements, including a COVID-19 vaccination mandate and steep minimum wage increase.

We enumerate, below, some key updates regarding federal contractor obligations and changes underway.

Repeal of Executive Order 13950 Concerning Diversity, Equity and Inclusion Training

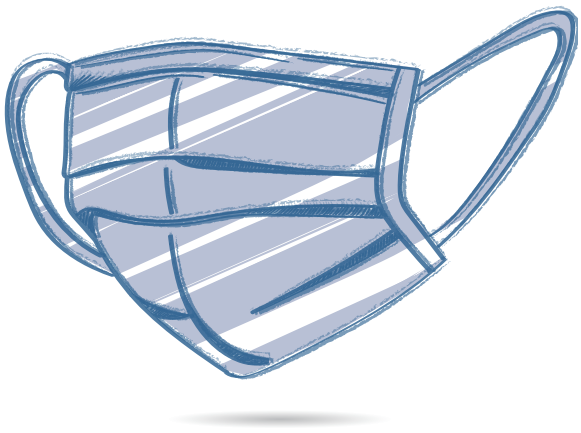
Immediately after taking office, President Biden issued Executive Order 13985, *Advancing Racial Equity and Support for Underserved Communities Through the Federal Government*.[43] Biden's order repealed Executive Order 13950, the Trump-era order prohibiting "Race and Sex Stereotyping," which, among other things, prohibited federal contractors and subcontractors from providing workplace diversity, equity, and inclusion training programs that included "un-American" and "divisive concepts" such as "assigning fault, blame, or bias to a race or sex." Under Biden's order, Executive Order 13950 was revoked, and the Office of Federal Contract Compliance Programs (OFCCP) was directed to take actions necessary to reverse and rescind enforcement efforts.

COVID-19 Protections: Mask and Vaccine Mandates

On his first day in office, President Biden issued Executive Order 13991, requiring federal workers, federal contractors, and persons in federal buildings and lands to comply with CDC guidelines concerning wearing masks, physical distancing, and adherence to other public health measures.

In July, the president announced new requirements for federal employees and onsite federal contractors regarding vaccination status, masking, and social distancing.[44] While a formal executive order had not yet been published at the time of this Report's publication, the White House issued a fact sheet providing:

> Every federal government employee and onsite contractor will be asked to attest to their vaccination status. Anyone who does not attest to being fully vaccinated will be required to wear a mask on the job no matter their geographic location, physically distance from all other employees and visitors, comply with a weekly or twice weekly screening testing requirement, and be subject to restrictions on official travel.[45]



The fact sheet further indicates President Biden is directing his team to take steps to apply similar standards to all federal contractors and encourages employers across the private sector to follow this strong model.

43 *See* Jim Paretti and David Goldstein, *Biden Revokes Trump Executive Order on Diversity and Inclusion, Adopts Policies "Advancing Racial Equity" and Extending LGBT Protections*, Littler ASAP (Jan. 25, 2021).

44 *See* Jim Paretti, Michael J. Lotito, Maury Baskin, David Goldstein, and Meredith Shoop, *Biden Announces Vaccine Requirements for Federal Employees, Contractors*, Littler ASAP (July 30, 2021).

45 The White House, *FACT SHEET: President Biden to Announce New Actions to Get More Americans Vaccinated and Slow the Spread of the Delta Variant* (July 29, 2021).

It is not yet clear what the scope of an executive order will entail for federal contractors. While it appears that onsite contractors will be required to either be fully vaccinated for COVID-19 or continue to wear masks and engage in social distancing, it is not yet clear whether the order will attempt to require employers with federal contracts to engage in these protocols in their own workspaces (for example, at the headquarters of a company that has federal contractors in place on other federal worksites).

A plateauing vaccination rate, increasing infection and transmission numbers, and the severity of the COVID-19 Delta variant continue to drive federal policy in this area, and guidance is changing on an almost daily basis.

Use of Contractor Pay Data

On September 1, 2021, the OFCCP announced that it was rescinding its prior decision to not use EEO-1 compensation data collected by the EEOC for calendar years 2018 and 2019 (the so-called "Component 2" data).[46] By way of background, in 2016 the EEOC published a final rule requiring employers to report certain compensation data of their workforce sorted by race, sex, ethnicity, salary range, and job category. In 2017, the agency announced that it was suspending this effort and would not move forward with this collection. Ultimately, a federal district court ruled that the agency's suspension of the collection was unlawful and required the EEOC to collect pay data for calendar years 2018 and 2019. That collection was completed in early 2020, but the OFCCP announced in November 2019 that it would not request, accept, or use Component 2 data, as it believed it would not find significant utility in this information given the agency's limited resources and the aggregated nature of the data. Reversing course, the OFCCP now believes that decision was premature because, at that time, OFCCP had little information about the response rate of the collection, how the data was submitted and assembled, or the completeness of the data. Nor did the agency have the opportunity to review and analyze the data.

OFCCP claims it will now use information gathered in the prior Component 2 data collection to assess its utility for providing insight into pay disparities across industries and occupations, with the stated purpose of "strengthening Federal efforts to combat pay discrimination." Specifically, the agency indicates that it will evaluate the data's utility, "because the joint collection and analysis of compensation data could improve OFCCP's ability to efficiently and effectively investigate potential pay discrimination." OFCCP's position is that compensation data, in conjunction with other available information such as labor market survey data, could help OFCCP identify neutral criteria to select contractors for compliance evaluations.

Given the aggregated nature of the data, it is likely to be of limited use in proving pay discrimination, which usually involves a very close examination of the work and compensation of a specific individual vis-à-vis others. In addition, this decision could expose contractor pay data to public disclosure through FOIA requests. While an individual employer's Component 2 data that has been provided to the EEOC is clearly protected from further disclosure by the EEOC, the FOIA protections that apply to EEO-1 data that is in OFCCP's possession has been a subject of prior litigation.

46 OFCCP, *Intention Not to Request, Accept or Use Employer Information Report Component 2 Data; Rescission*, 86 Fed. Reg. 49394 (Sept. 2, 2021).

Executive Action Mandates $15 Contractor Minimum Wage and Eliminates Tip Credit

President Biden finished his first week in office with an announcement that he would increase the federal contractor minimum wage rate to $15 within his first 100 days. He delivered on April 27, 2021, with Executive Order 14026.[47] The Department of Labor proposed a rule implementing the order in July.[48]

Under the proposed rule, beginning January 30, 2022, the standard minimum wage for covered federal contractors will be $15.00 per hour, raising the minimum wage for federal contractors by $4.05. And, beginning January 1, 2023, the secretary of labor will determine the minimum wage on an annual basis based on the Consumer Price Index at least 90 days before any new minimum wage is to take effect.

For tipped federal contract workers, the proposed rule provides that beginning January 30, 2022, the standard hourly cash wage will be $10.50 per hour and beginning January 1, 2023, the standard hourly cash wage for tipped federal contractors will be 85% of the standard minimum wage for federal contractors. Beginning January 1, 2024, the standard hourly cash wage for tipped federal contractors will be 100% of the standard minimum wage for federal contractors – effectively eliminating a contractor's ability to claim a tip credit. When a federal contractor is using a tip credit to meet a portion of its wage obligations prior to January 1, 2024, the amount of tips received must equal at least the difference between the required cash wage paid and standard minimum wage for federal contractors. If the employee does not receive sufficient tips, the contractor must increase the cash wage paid so that the cash wage in combination with the tips received equals the standard minimum wage for federal contractors.

President Biden will likely issue additional executive orders affecting federal contractor employment over the coming months.

COVID-19 Policies and Immigration: Updates on Visa Guidance, Policies, and Restrictions

As the pandemic shows no signs of abating, sweeping U.S. international travel restrictions remain in place and are expected to continue to limit global mobility, business travel, and hiring of international employees throughout the remainder of the summer and into the fall, particularly as the Delta variant becomes of increasing concern. Most notably, the geographic COVID-19 presidential proclamations, which implement entry restrictions on travelers from certain specified countries with significant COVID-19 infection rates, remain effective and in full force, prohibiting entry of most foreign nationals physically present in Europe, the United Kingdom and Ireland, Brazil, South Africa, China, India, and Iran.[49]

While there has been an upsurge in employers and employees wishing to carry out in-person business travel plans and cross-border meetings as vaccines become more widespread, both employers and employees should keep in mind the continuing border restrictions. Such restrictions bar many visa holders and foreign nationals from easily returning to the United States after travel abroad and limit the entry of newly hired visa holder employees at a popular time for new hiring as the summer winds down. In certain fields, particularly technology, employers are facing a hiring shortage and a restricted ability to hire highly skilled foreign workers given the continued U.S. entry restrictions and consulate closures impacting prospective workers currently abroad.

47 *See* Jim Paretti, Michael J. Lotito, and Celeste Yeager, *Biden Increases Minimum Wage and Phases Out Tip Credit for Federal Contractors*, Littler ASAP (Apr. 28, 2021).

48 *See* Carroll Wright, David Goldstein and Michael Lotito, *DOL Releases Proposed Rule on Increasing the Minimum Wage for Federal Contractors*, Littler Insight (July 23, 2021).

49 These restrictions were originally issued by former President Trump in March 2020, and were and continued by President Biden in January 2021. The White House, *Proclamation on the Suspension of Entry as Immigrants and Non-Immigrants of Certain Additional Persons Who Pose a Risk of Transmitting Coronavirus Disease* (Jan. 25, 2021).

Below, we enumerate some updates on international mobility guidance and COVID-19 travel updates, of which employers should remain aware when considering international hiring or potential business travel for new or current employees.

International Entry Restrictions

Entry Restrictions for Certain Countries. Perhaps the most impactful of the continuing COVID-19-related travel limitations, the COVID-19 presidential proclamations, including Presidential Proclamations 9984, 9992, 10143, and 10199, remain fully in effect and, together, prohibit the entry of any foreign nationals (including visa holders) present within the past 14 days in a number of foreign countries, on the basis of COVID-19 rates in those countries.

Specifically, the U.S. government continues to prohibit the entry of all foreign nationals present in the United Kingdom and Ireland, the European Schengen Area (26 countries), Brazil, South Africa, India, China, and Iran within 14 days prior to entry into the United States. While there are limited exceptions that apply to certain individuals, including spouses of U.S. citizens and lawful permanent residents, parents of U.S. citizen minor children, diplomats, and air and sea crew, these widespread travel restrictions effectively prohibit most sought-after business travel for visa holders, along with blocking prospective travel for many international business partners who seek to enter the U.S. on short-term business visitor visas. The restrictions are expected to remain in effect for the foreseeable future, limiting major international travel between the U.S. and Europe and other popular points of departure for business travelers abroad.

Generally, visa holders and other foreign nationals must either obtain an approved "National Interest Exemption" after applying with their local consulate in order to enter the U.S. directly from a restricted country. Alternatively, subject individuals may spend 14 full days in a country not subject to restrictions, prior to entering the United States.

International Test Requirement. In addition to the basic travel restrictions, all international passengers (even U.S. citizens) must provide proof of a negative test result in order to board an international flight to the United States.[50]

In January 2021, the U.S. Centers for Disease Control issued "an Order requiring all air passengers arriving to the US from a foreign country to get tested no more than 3 days before their flight departs and to provide proof of the negative result or documentation of having recovered from COVID-19 to the airline before boarding the flight." This requirement for proof of a negative test also applies to those who have already been fully vaccinated and continues to remain in effect for international passengers.

National Interest Exemption Updates

On May 27, 2021, the U.S. Department of State issued a revised and more expanded definition regarding individuals who potentially qualify for National Interest Exemptions (NIEs) (*i.e.*, travel waivers) in employment cases, allowing workers to overcome the continued travel bans impacting travelers from the United Kingdom, Ireland, the European Schengen Area, China, India, Iran, Brazil, and South Africa. NIEs, if granted, enable visa holder employees to travel directly to the U.S. from these restricted countries.

50 U.S. Centers for Disease Control and Prevention, Media Statement, *CDC Expands Negative COVID-19 Test Requirement to All Air Passengers Entering the United States* (Jan. 12, 2021).

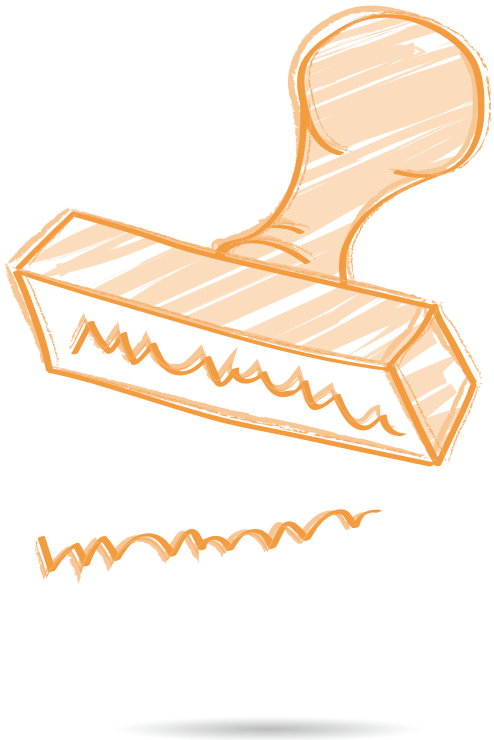
Specifically, travelers subject to the COVID-19 presidential proclamations who are prohibited from entering the U.S. due to their presence in the aforementioned countries may apply for and receive U.S. NIEs if they "provide vital support or executive direction for critical infrastructure; [are] traveling to provide vital support or executive direction for significant economic activity in the United States; [or are] journalists; students and certain academics covered by exchange visitor programs."[51]

This guidance significantly expands the range of employees who can successfully obtain NIEs, now allowing those in positions of leadership for significant economic activity, such as executive and managerial positions. Previously, these individuals needed to apply only on the basis of vital support to "U.S. critical infrastructure" through daily work and operations, a higher bar that was not directly aligned with the needs of many employers' professional or managerial employees present in restricted countries.

The validity of NIEs, once received, have also been extended. Previously, NIEs were granted to applicants and employees for a single use within a time period of 30 days. On June 29, 2021, the Department of State "extended the validity of National Interest Exceptions . . . for travelers subject to restrictions under Presidential Proclamations (PPs) 9984, 9992, 10143, 10199, and similar subsequent PPs related to the spread of COVID-19." This means that once applicants have obtained an NIE, they can continue to use them for multiple entries for a duration of 12 months, so long as the purpose of the travel entry is consistent with the initial application (for example, employees traveling to advance U.S. critical infrastructure work, or provide significant direction for economic activity).

Student Visa and National Interest Exemption Updates

In positive news for universities as the new school year begins, the U.S Department of State has issued guidance relieving academic students from needing to apply with the U.S. consulates for approved NIEs prior to travel. The Department of State confirmed that "[s]tudents with valid F-1 or M-1 visas traveling to begin or continue an academic program do not need to contact an embassy or consulate to seek an individual NIE to travel. They may enter the United States no earlier than 30 days before the start of their academic studies."[52] This automatic eligibility for NIEs for students "present in Brazil, China, India, Iran, or South Africa applies only to programs that begin on or after August 1, 2021."



Students that need to apply for new F-1 or M-1 visas still must obtain a visa stamp appointment and will need to consult on possible visa services at the nearest embassy or consulate. If those applicants are qualified for an F-1 or M-1 visa, they will automatically be considered for an NIE to travel for their academic program.

51 U.S. Dept. of State, Bureau of Consular Affairs, *National Interest Exceptions for Certain Travelers from China, Iran, India, Brazil, South Africa, Schengen Area, United Kingdom, and Ireland* (May 27, 2021).

52 *Id.*

U.S. Consular and U.S.-Mexico and U.S.-Canada Border Closures

U.S. consular closures abroad remain widespread and have significantly hampered employee mobility, particularly in countries where vaccination rates are low. Most notably, the closures have impacted the ability of new visa holder employees to obtain needed visa stamps, in many cases necessitating alternative employment plans in cases where they are unable to obtain a visa stamp appointment. In most foreign countries, U.S. consulates continue to operate on an "emergency only" basis, with emergency appointments available for physicians and medical personnel, or related to other significant or unique business or humanitarian reasons.

In addition, employers should keep in mind that the increased backlog from the past year has led to a dramatic rise in wait times for available appointments to obtain new employee visa stamps for U.S. employment. Employers should note that some consular posts are now booked through 2022 for new routine visa stamp appointments, which are required for most new visa holders. This limited availability will continue to inhibit new hiring from foreign countries (or the ability of new international hires to enter to begin work). In cases where a new visa stamp is needed (such as in the case of a new employee with a newly approved visa *or* an employee with an expiring visa stamp who seeks to travel internationally), employers should make sure to evaluate possible options and potential visa plans strategically prior to approval of international travel plans and start dates.

U.S. Immigration Legislative Reform and Employer Impact

In January 2021, shortly after President Biden was sworn in, the new administration launched a renewed governmental effort at immigration reform in the form of a comprehensive legislative reform proposal, which provides a broad pathway to citizenship for undocumented immigrants living in the United States. Notably, the Act includes the Dream Act (Section 1103), a section that would permit the direct adjustment of status of certain noncitizens brought to the United States as children to lawful permanent resident (LPR) status, with a more streamlined procedure for existing Deferred Action for Childhood Arrivals (DACA) recipients.

In the employment context, President Biden's proposed Act would eliminate per-country caps for employment-based immigrants (allowing certain nationals to avoid the lengthy queues for immigrant visas now in place, particularly for China and India) and increase the number of employment-based third-preference visas for "other workers," while creating a pilot program for a new visa category dedicated to regional economic development (10,000 visas) for individuals with employment essential to local development strategies. The proposed plan would provide work authorization for H-4 visa holders (H-1B dependents) and provide further protections for H-4 children who would otherwise age out of potential visa options. The reform proposal remains pending and has not yet made any headway in Congress despite bipartisan negotiations.

In late July 2021, the Biden administration published a new presidential fact sheet to provide a "blueprint for a fair, orderly, and humane immigration system."[53] The blueprint for reform reiterates measures from President Biden's initial reform plan, including redirecting U.S. Customs and Border Patrol budgets towards smarter border security measures (such as border technology and modernization of land ports of entry), investing in Central America to address root causes of migration, expanding access to temporary work visas for Latin American workers, and reducing the backlog of immigrant visas. The blueprint references President Biden's proposed bill, the U.S. Citizenship Act (H.R. 1177) (which remains under consideration by the U.S. House of Representatives), in addition to the Dream and Promise Act (H.R. 6)[54] and Farm

53 The White House, *FACT SHEET: The Biden Administration Blueprint for a Fair, Orderly and Humane Immigration System* (July 27, 2021).
54 American Dream and Promise Act of 2021, *H.R. 6*, 117th Cong., 1st Sess.

Workforce Modernization Act (H.R. 1603).[55] The latter two bills take a more piecemeal approach to reform and were passed by the U.S. House of Representatives in March 2021, but have not cleared the U.S. Senate. The bills face an unreliable future in the Senate as they require the unlikely support of ten additional Republicans to avoid a filibuster. The Dream and Promise Act, as mentioned above, would provide a streamlined procedure for individuals who have been granted DACA and who meet the requirements for renewal (under the terms of the program in effect on January 1, 2017) to apply for conditional lawful permanent residence (green cards).

The DACA program remains in flux and has come under further threat as a Texas federal court in July found DACA unlawful[56] and ruled that the Department of Homeland Security may not approve new applicants for the program (which provides work authorization and protection from deportation from the U.S. for certain individuals brought to the United States as children).

There are currently 643,560 active DACA recipients in the United States, and an estimated 1.3 million DACA-eligible individuals. The individuals play a key role in the professional economy, especially in the food service, sales, office and administrative support, healthcare, education, and computer systems occupations and industries.

The new presidential blueprint calls on Congress to pass President Biden's immigration reform proposals through budget reconciliation. This plan is consistent with previous remarks by President Biden on the possibility of using the budget reconciliation process to pass immigration reform efforts.[57] Democrats in Congress have also indicated plans to include these immigration proposals in the 2022 budget reconciliation package, in a bid to end years of immigration reform deadlock.[58]

The chances of success remain unclear, as control of the Senate remains split at 50-50 (with Vice President Kamala Harris serving as the swing vote). It is also unclear whether the bill would have sufficient budgetary impact to comply with Senate guidelines on reconciliation bill content, which prohibit terms that have a "merely incidental" impact on overall budget.

What's Next for Immigration?

As we move into the fall and winter, employers should remain mindful of the continuing impact of consular closures and global travel restrictions, particularly when planning for new employee start dates, international transfers, or surveying prospective business travel or visa holder travel. In many cases, the COVID-19 restrictions remain in play, and are expected to limit global mobility for the foreseeable future, although evolving U.S. Department of State guidance has, in some cases, made NIEs more feasible depending on the nature of the prospective employee travel. We continue to monitor the state of potential reform legislation impacting employers and employees and its prospective effects on international hiring.

55 Farm Workforce Modernization Act of 2021, *H.R. 1603*, 117th Cong., 1st Sess.

56 Sabrina Rodriguez and Josh Gerstein, *Federal judge finds DACA unlawful, blocks new applicants*, Politico (July 16, 2021).

57 Nandita Bose, *Biden calls for big budget bill to include immigration*, Reuters (July 30, 2021).

58 Suzanne Monyak, *Menendez: No path forward on immigration without reconciliation*, Roll Call (July 29, 2021).

State and Local Activity Increases

At the state and local levels, since the pandemic began over 500 new COVID-19-related laws, rules and ordinances have been enacted, although many were implemented as temporary emergency measures. States and municipalities have been busy with non-pandemic matters as well, enacting over 300 new employment-related laws and rules since January of this year. The following provides an overview of some of these new efforts.

Right to Recall

Notably, a handful of states and municipalities enacted so-called "right of recall" laws during the pandemic. These laws, which impose stringent recall and retention obligations on employers, have typically applied to those in the hospitality industry, airports, event centers, and janitors, maintenance and security at commercial buildings, who lost their jobs as a result of COVID-19 closures and downsizing. As explained in Part I of this Report, these industries were the hardest-hit during the pandemic. California, Connecticut, Nevada, and at least 18 cities and counties—most in the Golden State—have enacted some form of right-of-recall law.

These laws eliminate a business' discretion to decide which employees to recall from a layoff, or not to recall any prior workers at all. Instead, they give to workers the right to be recalled, usually in order of seniority. Generally, the most senior qualified employee has a right to be recalled first to their former job. Some but not all of these laws include "right to cure" provisions, stipulating that before bringing a lawsuit to enforce rights under the right-to-recall law, a worker must notify the employer of the alleged violation. The employer then has a period in which to cure any violation.

Some of these right-to-recall laws apply even if there is a change in control of the business and provide employees with a private right of action to enforce the law.

Paid Leave

The pandemic has brought the necessity of more flexible leave policies to the fore. Many people, although a greater percentage of women, left the labor force during the past year for caregiving responsibilities. According to data from the U.S. Census Bureau, over 2 million people reported they were not working because they were caring for someone who was sick with coronavirus symptoms, or they were sick themselves.[59] Another 7 million individuals reported they were out of work because they were caring for children not in school or daycare, and approximately 1.7 million others were home caring for an elderly person.[60]

During the height of the pandemic, the FFCRA required employers with fewer than 500 employees to provide emergency paid sick and caregiving leave. Those provisions expired, although the American Rescue Plan Act of 2021 extended until September 30, 2021 tax credits for those employers that voluntarily continue providing emergency paid sick and/or family leave according to the otherwise-expired FFCRA standards.[61]

59 U.S. Census Bureau, Week 34 Household Pulse Survey: July 21 – August 2, Employment Table 3. Educational Attainment for Adults Not Working at Time of Survey, by Main Reason for Not Working and Source Used to Meet Spending Needs, available at *https://www.census.gov/data/tables/2021/demo/hhp/hhp34.html*.

60 *Id.*

61 *See* Alexis Knapp, Jim Paretti, Michelle Falconer, and Sebastian Chilco, *Latest COVID-19 Relief Package Provides Tax Credits for Voluntary Paid Sick and Family Leave*, Littler ASAP (Mar. 18, 2021).

Now that the FFCRA requirements have lapsed, a national paid leave law remains elusive. Although Rep. Rosa DeLauro (D-CT) and Sens. Kristen Gillibrand (D-NY) and Patty Murray (D-WA) have reintroduced the Family and Medical Insurance Leave (FAMILY) Act[62] and the Healthy Families Act,[63] both of which would provide paid leave at the national level, both bills are unlikely to advance this session.

Paid leave in some shape or form remains a Democratic legislative priority, however. Notably, Senate Democrats plan to move a $3.5 trillion budget bill unilaterally by way of the reconciliation process, which only requires a 50-vote threshold for passage. While text of the package has not yet been released, the framework[64] of the reconciliation package includes a call to invest in paid family and medical leave, potentially by way of increased incentives under the Internal Revenue Code. Ultimately, the Senate Parliamentarian would have to rule on which provisions of the proposal could be included if the package were to pass. The reconciliation process is expected to go on for several months.

In the meantime, states have filled the gap. There are dozens of state and municipal laws requiring some form of paid leave for employees in the United States. Some, but not all, are applicable only if an employee has worked in a particular jurisdiction for a defined period of time; others confer rights to employees immediately. Each has its own covered uses, accrual rates, and carryover provisions. Moreover, an employee may be entitled to paid time off for one reason in one city, and not entitled to the same if they move elsewhere, even in-state—or vice versa.

New Mexico is the most recent state to enact a paid sick and safe leave law. Under the Healthy Workplaces Act (HB 20), starting July 2022, private employers must provide paid leave to employees that they can use for sick time, safe time, or other reasons for themselves or to care for or assist specified family members. Eligible employees earn an hour of paid leave for every 30 worked.

Meanwhile, at least nine states and the District of Columbia have mandatory paid family and medical leave programs, which provide for paid time off funded through employer contributions and/or payroll taxes. Additionally, in 2021, New Hampshire enacted the Granite State Paid Family Leave Plan (HB 2). This new law allows private employers to *voluntarily* participate in a paid family leave program (the program is mandatory for all permanent state employees). Private employers may choose to offer coverage under the plan at no cost to their employees, or on a contributory or partially contributory basis. Private employers receive a tax credit of 50% of the premiums paid if they sponsor the plan for their employees.

62 FAMILY Act, H.R. 804, S. 248, 117th Cong., 1st Sess. (2021-2022).

63 Healthy Families Act, H.R. 2465, S. 1195, 117th Cong., 1st Sess. (2021-2022).

64 Memorandum to Democratic Senators, *FY 2022 Budget Resolution Agreement Framework* (Aug. 9, 2021).

And not to be forgotten, COVID-19 spurred another round of paid leave lawmaking, even if temporary. Since the beginning of the pandemic, at least 9 states, 24 municipalities, the District of Columbia, and Puerto Rico have enacted emergency laws and ordinances providing for protected paid leave related to the pandemic, or extending existing protected paid leave programs to cover pandemic-related absences. For example, in May, Massachusetts enacted an emergency paid sick leave law, which allows every full-time employee up to 40 hours (prorated for part-time employees) of job-protected, emergency paid sick leave for certain COVID-19 reasons, including to obtain the COVID-19 vaccination or to recover from symptoms arising from the vaccination.[65] The law also created a $75 million COVID-19 Emergency Paid Sick Leave Fund to reimburse eligible employers for providing their employees with this additional emergency paid sick leave.

California enacted a COVID-19 supplemental paid sick leave law that provides employees with supplemental paid sick leave for various COVID-19-related absences in addition to non-COVID paid time off benefits employees already receive. Washington State amended its Paid Family and Medical Leave law to permit additional workers to use its benefits in response to the COVID-19 pandemic.

Unless and until a more uniform federal paid leave law is enacted, employers with employees working in multiple jurisdictions—which has become more common in the era of remote work—will continue to contend with multiple leave law compliance obligations.

Pay Equity and Wage Transparency

As noted, at the federal level, there is a renewed interest in pay data collection to evaluate potential pay discrimination. At the state level, efforts to increase pay transparency and prohibit inquiries into an applicant's salary history have been underway for some time. At least 21 states and the District of Columbia have laws preventing an employer from banning salary discussions in the workplace. At least 17 states have limits on obtaining or using salary history information. In recent years, some states have gone a step further, requiring employers to provide job applicants and employees with salary ranges for positions either upon request or at the outset of the hiring process.

A new law enacted this year in Rhode Island, for example, will require employers, upon an applicant's request, to provide the wage range for the position.[66] This requirement applies to current employees as well. Starting January 1, 2023, an employer must provide an employee with the wage range for the position both at the time of hire and when the employee moves into a new position.

Similarly, a new law in Connecticut requires employers to disclose to applicants and employees the salary ranges for their jobs.[67] The law, which takes effect on October 1 of this year, also expands Connecticut's prohibition of gender-based pay discrimination to require equal pay for "comparable," as opposed to "equal," work. Another law that takes effect October 1, this time in Nevada, will prohibit an employer from seeking salary history information, and require an employer or employment agency to provide an applicant who has completed an interview for the employment position the wage or salary range or rate for the position, and the wage or salary range or rate for a promotion or transfer to a new position if certain conditions are satisfied.[68]

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65 *See* Alice A. Kokodis, *Massachusetts Enacts Legislation Providing COVID-19 Emergency Paid Sick Leave to All Employees*, Littler Insight (June 1, 2021).

66 *See* Jillian Folger-Hartwell, Gregory Henninger, and Maureen Lavery, *Rhode Island Enacts Comprehensive Pay Equity Law*, Littler Insight (July 28, 2021).

67 *See* Maura A. Mastrony, *Connecticut Passes Law Requiring Disclosure of Wage Ranges to Applicants and Employees*, Littler ASAP (June 24, 2021).

68 *See* Roger Grandgenett, Holly Stewart, and J.T. Washington, *Pandemic-Born Rules: Nevada's Newest Employment Laws*, Littler ASAP (June 21, 2021).

Colorado's Equal Pay for Equal Work Act took effect on January 1 of this year, requiring an employer with even one Colorado employee to inform all Colorado employees of promotional opportunities worldwide. In addition, if an employer posts a job to be performed in Colorado, or one that can be performed remotely from anywhere, that employer must include in the posting the compensation range for the position and descriptions of incentive compensation and benefits.[69]

Illinois also made significant amendments to its equal pay statute in 2021.[70] Employers that currently file EEO-1 reports will eventually need to submit similar reports to the state of Illinois. The amendments will also require employers in Illinois, like those in California, to collect and submit employee pay data and certifications to the state.

This legislative trend will likely continue.

Wage Theft

States and localities have also been targeting wage theft by expanding an employee's ability to sue their employer for pay violations. In June, Chicago enacted a new ordinance that makes an employer liable for wage theft when it fails to timely pay a covered employee. Wage theft includes the non-payment of any wages required for work performed, as well as paid time off (including Chicago paid sick leave) and contractually required benefits.[71]

More recently, New York enacted the "No Wage Theft Loophole Act," which seeks to close a purported loophole to enable employees to bring private lawsuits under the New York Labor Law against their employers when an employer withholds an employee's pay entirely (and not just a portion of it).[72]

69 *See* Josh Kirkpatrick and Jennifer Harpole, *Colorado Issues Final Rules on Equal Pay for Equal Work Act with Significant Job Posting Requirements for All Employers with Colorado Workers*, Littler Insight (Nov. 13, 2020).

70 See Barry Hartstein, Jennifer Jones, and Paul Newendyke, *Illinois Equal Pay Certificate Requirements Amended*, Littler Insight (Aug. 24, 2021); Meg Karnig, Paul Newendyke, and Barry Hartstein, *Illinois Will Require EEO-1 Transparency and Equal Pay Data*, Littler Insight (Mar. 29, 2021).

71 *See* Stephanie Mills-Gallan and Meg Karnig, *Chicago Amends Paid Sick Leave Ordinance and Implements New Wage Theft Protections*, Littler ASAP (July 1, 2021).

72 *See* Paul R. Piccigallo and Matthew R. Capobianco, *New York Amends Labor Law to Expand Employees' Ability to Bring Wage Claims*, Littler ASAP (Aug. 23, 2021).

Emerging State and City Trends

As discussed, many recent state and local laws and ordinances have centered around the pandemic. A host of new laws were enacted to provide expanded leave entitlements, implement vaccine mandates, and impose safety obligations, among others. But there are some other state-level trends of which employers should be aware.

States have continued to grapple with and modify laws relating to independent contractor status. In California, Proposition 22, the initiative overwhelmingly approved by voters in 2020, which created a modified independent contractor status for transportation network and delivery network drivers, was recently held unconstitutional by a Superior Court judge in Alameda County. Appeals are anticipated. Changes to independent contractor tests were also made recently in Arkansas, Iowa, Montana, Virginia, and West Virginia.

New York City adopted a "for cause" law, applicable to fast food establishments with at least 30 locations nationwide. The law prohibits employee termination or reduction in hours without just cause or a bona fide economic reason. The employer has the burden of proof, and any layoffs must be conducted in reverse order of seniority.

During the pandemic, many localities adopted "hazard pay" ordinances for grocery store workers. By way of example, such laws were adopted in Los Angeles, Long Beach, and Oakland, California, and in Seattle, Washington.

In the area of employment discrimination, states continue to make procedural changes. In Maryland, the statute of limitations for bringing such claims was recently extended from six months to 300 days. In Texas, a new law makes it an unlawful employment practice if an employer knew about prohibited harassment and did not act immediately. And in Indiana, an employer must now respond to an employee's request for a pregnancy accommodation within a "reasonable time frame."

Also in the realm of employment discrimination, states and cities continue to add new protected categories to existing anti-discrimination laws. Pregnancy/childbirth and related medical conditions were added in Arizona. Gender expression/gender identity were added as protected categories in both Colorado and in Greensboro, North Carolina. Traits typically associated with race, including hair texture and hairstyle, were added in Nebraska, New Mexico, Durham and Greensboro, North Carolina. Disability was added in Virginia, and Nebraska passed a law allowing localities to add disability discrimination protections to local anti-discrimination laws. Finally, military status was added as a protected category in Virginia.

Marijuana in the workplace continues to be an area of state activity. New state medical marijuana laws recently were adopted in Mississippi and South Dakota. In New Mexico, a new law permits the use of cannabis, but does not restrict an employer from taking adverse action against an employee for possession or impairment at work or during work hours.[73] Oklahoma adopted a similar new law, permitting an employer to take action against an employee who is a medical marijuana user if the employee uses or possesses the drug at work or during work hours. And in Montana, an employee can now be disqualified from workers' compensation benefits if they fail or refuse a drug test in violation of an employer policy.[74] Medical marijuana use, however, is excepted.

Finally, Indiana recently became the eleventh state to prohibit the practice of employers implanting microchips in employees. Employees are now protected in the Hoosier State from any retaliation for their refusal to be implanted with a microchip by their employer.

Employers operating in multiple jurisdictions—or that have employees working remotely in various states—must be mindful of this increasing state and local regulation of the workplace.

73 *See* Charlotte Lamont, Shaylon Lovell and Jen Chierek Znosko, *New Mexico Will Join the Growing List of States Where Recreational Marijuana is Legal*, Littler ASAP (Apr. 19, 2021).

74 *See* Elizabeth McKenna, Joe Greener, Lauren Marcus, and Michelle Gomez, *Montana Legalizes Marijuana for Recreational Use and Will Protect Lawful Off-Work Use*, Littler ASAP (May 25, 2021).

Part III: The Changing Nature of Work

Even before the pandemic, the shift towards more automation in the workforce had already begun. As noted in the Inaugural Report of Littler's Global Workplace Transformation Initiative,[75] right before the pandemic hit, the World Economic Forum had reported that 43% of the businesses it surveyed were planning to reduce their workforce because of the increased use of technology.[76] According to one market analysis, the global artificial intelligence (AI) market size will increase nearly 40% by the year 2026, growing from $58.3 billion in 2021 to $309.6 billion during that period.[77]

While there will certainly be employment opportunities in this sector, some jobs will necessarily be at risk. The most vulnerable jobs include those in office administration, production, transportation, and food preparation. Such jobs are considered "high risk," with over 70% of their tasks potentially automatable, even though they represent only one quarter of all jobs.[78] Jobs considered the least threatened by automation are those requiring a bachelor's degree and a series of non-routine and "softer" skills.[79]

The service industry continues to be particularly vulnerable. Many businesses, including fast-food chains and hotels, availed themselves of technology during the pandemic to maintain social distancing requirements while keeping their operations running. As noted in a recent *New York Times* article, "[a]n increase in automation, especially in service industries, may prove to be an economic legacy of the pandemic. . . . [T]he difficulty in hiring workers — at least at the wages that employers are used to paying—is providing new momentum for automation."[80]

75 Michael A. Chichester Jr. *et al.*, *Inaugural Report of Littler's Global Workplace Transformation Initiative*, Littler Report (Mar. 30, 2021).

76 The Future of Jobs Report 2020, World Economic Forum (Oct. 20, 2020), available at *https://www.weforum.org/reports/the-future-of-jobs-report-2020/digest.*

77 Markets and Markets, *https://www.marketsandmarkets.com/Market-Reports/artificial-intelligence-market-74851580.html*

78 Mark Muro et al., *Automation and Artificial Intelligence: How Machines are Affecting People and Places*, Metropolitan Policy Program at Brookings Institute, p. 5 (Jan. 2019).

79 *Id.*

80 Ben Casselman, *Pandemic Wave of Automation May Be Bad News for Workers*, *The New York Times* (July 3, 2021).

Food service, customer sales and service, and less-skilled office support roles are especially at risk. A recent study predicts that although the growth in e-commerce and delivery could fuel nearly 800,000 new jobs, customer service and food service jobs "could fall by 4.3 million."[81] Emphasizing this point, a recent survey by FMI-The Food Industry Association and Deloitte found that 48% of responding food retailers believed the rise in online shopping will be the biggest driver of change for their industry.[82] The majority of those polled are seeking to automate their businesses where possible. As a result, the concern is that over the longer term, the increase in AI and automation will ultimately put a downward pressure on wages for low-skilled workers or displace them entirely.[83] A separate report found that up to 25% more workers than previously estimated will need to switch occupations by the year 2030.[84]

Many people viewed the pandemic as an opportunity to reevaluate their careers in general. One study found that "41 percent of the global workforce is likely to consider leaving their current employer within the next year, with 46 percent planning to make a major pivot or career transition."[85] Another survey conducted the first week in August 2021 noted 65% of those polled said they are currently looking for a new job.[86] It comes as no surprise, however, that those with a bachelor's degree or more education are more likely to say they believe they have the education and training necessary to make a career move.[87]

The BLS employment data supports this confidence. When employment numbers plummeted in April 2020, those with less education incurred the most job loss. Specifically, between February and April 2020, the employment level of those with less than a high school decree dropped by nearly a quarter (24.9%), compared to only a 6.3% drop for those with a college degree or higher. The greater the level of education attained, the better the worker fared.[88] As of July 2021, those with college degrees or higher have actually exceeded their February 2020 employment numbers by .8%, while those with less education are still experiencing employment deficits.

And as noted, while millions of new job categories are likely to arise from automation, "companies estimate that around 40% of workers will require reskilling,"[89] and unfortunately, the needed training and vocational education programs are far too few and do not properly leverage the educational potential of modern technology.

A recent study by global staffing company Randstad found that 88% of workers, across multiple job types, considered gaining new skills as a high priority. In keeping with this trend, online skilling vendors have seen a surge of up to 80% in subscribers since the pandemic began. Whether currently employed or not, people are taking courses to improve current skills or gain new skills across different job sectors, with technology courses being most popular.

National and local lawmakers, educators, and members of the business community will need to work together to address the skills gap. Randstad, for example, has pledged to upskill and reskill 40,000 U.S. workers through its STEM learning and Corporate Social Responsibility programs: Hire Hope and Transcend.

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81 Susan Lund et al., McKinsey Global Institute, *The future of work after COVID-19* (Feb. 18, 2021).

82 Barb Renner, Kimberly Betts, and Justin Cook, *Future of work: The state of the food industry*, Deloitte Insights (July 26, 2021).

83 *See, e.g.,* Tahsin Saadi Sedik and Jiae Yoo, *Pandemics and Automation: Will the Lost Jobs Come Back?* IMF Working Paper (Jan. 15, 2021).

84 Susan Lund et al., McKinsey Global Institute, *The future of work after COVID-19* (Feb. 18, 2021).

85 The Next Great Disruption Is Hybrid Work—Are We Ready?, Microsoft, 2021 Work Trend Index: Annual Report (Mar. 22, 2021).

86 PwC US Pulse Survey: Next in work, *available at* https://www.pwc.com/us/en/library/pulse-survey/future-of-work.html?utm_source=newsletter&utm_medium=email&utm_campaign=newsletter_axiosmarkets&stream=business.

87 Kim Parker, Ruth Igielnik and Rakesh Kochhar, *Unemployed Americans are feeling the emotional strain of job loss; most have considered changing occupations*, Pew Research Center (Feb. 10, 2021).

88 The employment level dropped by 21.9% for those with a high school degree, and 15.8% for those with some college.

89 The Future of Jobs Report 2020, World Economic Forum (Oct. 20, 2020), available at https://www.weforum.org/reports/the-future-of-jobs-report-2020/digest.

At the state level, Illinois recently enacted H.B. 645 into law,[90] establishing the Illinois Future of Work Task Force. The task force will be charged with assessing emerging technologies that have the potential to significantly affect employment in Illinois. In addition, the task force will develop a set of job standards and working conditions to ensure a "vibrant middle class" in the state while also producing recommendations to expand workforce development, training, education, and apprenticeship programs.

In addition, the Emma Coalition, a non-profit 501(c)(3) corporation, is dedicated to ensuring that workers are provided with the skills, training, and resources necessary to adapt to the technology-induced displacement of employment, or TIDE, by technology and automation. The Emma Coalition seeks to bring together small and large American businesses; the organizations that represent them; representatives of organized labor; nonprofit, research and academic institutions; and federal, state, and local policymakers to address the challenges—and opportunities—presented by the dramatic changes presented by automation, robotics, and artificial intelligence that our workforce is already facing.

Prior to the pandemic, the Emma Coalition was presented testimony to Congress on the challenges automation and AI will bring to the workforce, as well as potential solutions.[91] The recent jobs data shows the economy will not fully recover and thrive without such solutions.

90 Press Release, Illinois Governor's Office, *Gov. Pritzker Signs Legislation Expanding Training and Education Opportunities for Working Families* (Aug. 19, 2021).

91 U.S. House of Representatives Committee on Education & Labor Subcommittee on Higher Education & Workforce Investment, *The Future Of Work: Ensuring Workers Are Competitive In A Rapidly Changing Economy*, Testimony on behalf of the EMMA Coalition (Dec. 18, 2019).



Part IV: Looking Ahead

Although it is always hard to predict with any degree of certainty—particularly during a pandemic—the challenges employers will face in the months to come, some scenarios are more likely than others.

Telework is Here to Stay

According to the Bureau of Labor Statistics, approximately 13.4% of those employed are teleworking because of the pandemic.[92] A worker survey conducted in May 2021 found that many employees are willing to quit rather than give up the right to work from home. The survey of 1,000 U.S. adults indicated that 39% would consider leaving their jobs if their employers were not flexible about working from home.[93] That number increased to 49% for millennials and Gen Z.[94]

Given the persistence of COVID-19 and its variants, employers are increasingly more willing to offer more flexible working hours and/or a hybrid or remote work environment.[95] Littler's Annual Employer Survey Report released in May found that 55% of the employers polled planned to offer a hybrid model (*i.e.*, a mix of remote and in-person work).[96] Only 7% of those polled indicated their employees who are able to work remotely full time can continue to do so if they wish, even though 16% believed most of their employee would prefer this option.

With the rise of the COVID-19 Delta variant, more employers are pushing off their return-to-the-physical-office date until case numbers decline. According to a more recent survey Littler conducted of over 1,630 in-house lawyers, C-suite executives and HR professionals, 40% of all respondents (and 50% of those with over 10,000 employees) have delayed plans to return more employees to in-person work. Many are requiring that face masks be worn in the workplace (except in private offices), either for all individuals (54%) or just for those who are unvaccinated (42%).[97]

As workforces become more decentralized, employers will need to embrace flexibility and educate themselves on the myriad employment issues that remote work brings, including its impact on workers' compensation protections, employment tax considerations, timekeeping responsibilities, data privacy, expense reimbursement, employment agreements, and accommodation concerns.

92 U.S. BLS, *Employment Situation Report* (August 2021).

93 Anders Melin and Misyrlena Egkolfopoulou, *Employees Are Quitting Instead of Giving Up Working From Home*, Bloomberg (June 1, 2021).

94 *Id*.

95 MetLife & U.S. Chamber of Commerce *Special Report on the State of the Workforce*, pp. 3-4 (July 14, 2021).

96 *Littler® Annual Employer Survey Report*, Littler Report (May 12, 2021).

97 *Littler® COVID-19 Vaccine Employer Survey Report: Delta Variant Update*, Littler Report (Aug. 23, 2021).

Vaccine Mandates Will Increase

When vaccines for COVID-19 first rolled out, many employers weighed their options and decided against vaccine mandates. Some did so out of fear of possible disability and religious discrimination accommodation lawsuits. Others wondered whether such policies could be subject to challenge by a union or group of employees. Still others delayed imposing any vaccine requirement out of concern for its effect on employee morale. Add to this uneasiness the ever-evolving and sometimes conflicting federal and state agency and public health guidance, and it is not surprising that many employers opted instead to encourage employees to take the vaccine rather than require vaccination outright. The Delta variant has changed this calculus.

Mid-summer, when the more transmissible coronavirus variant began to take hold, some states and localities began mandating the vaccine for certain "high-risk" workers, including those in health care and law enforcement.[98] Many of these mandates include a "test out" provision, meaning employees who opt not to get vaccinated are subject to additional precautions, such as weekly COVID-19 testing and mask-wearing. Although some jurisdictions have taken the opposite tack, effectively banning proof of vaccination for employees and customers,[99] many private employers have started to implement mandatory vaccine policies in their workplaces.

According to Littler's COVID-19 survey, while most employers polled are encouraging, rather than requiring, vaccination, they are demonstrably more open to mandates than they were at the beginning of the year. Since then, the percentage of employers currently mandating vaccines or planning to in some form has increased dramatically. A similar survey conducted in January found that only .5% of polled employers said they had a vaccine mandate in place. According to the latest survey, 5% said they are currently mandating the vaccine, 4% said they are mandating vaccination for certain members of their workforce (*e.g.*, those who attend meetings/events or interact with customers) and another 4% plan to, and 8% are planning to institute a requirement that workers be vaccinated by a specific date.[100] Only 8% say they have firmly decided not to institute a mandate, down from 48% who responded in January. And note this poll was conducted before the U.S. Food and Drug Administration fully approved the Pfizer-BioNTech vaccine for general use, and before the Delta variant had begun to spread exponentially.

If infection rates continue to go unchecked, this trend towards a vaccine mandate will continue.

98 *See* Littler Insight, *Mandatory Employee Vaccines – Coming to A State Near You?*.

99 *See, e.g.*, Montana House Bill 702, which prohibits employers from mandating the current COVID-19 vaccines and recognizes an individual's vaccination status as a protected category under the Montana Human Rights Act.

100 Littler COVID-19 Vaccine Employer Survey Report: Delta Variant Update, *supra* note 97.

Employers Will Need to Increase Hiring, Retention Incentives

Businesses across the country are struggling to find workers. A recent poll conducted by the U.S. Census Bureau found that 35.7% of responding employers claimed that in the next six months, their business will need to identify and hire new employees.[101] Job hunters are seeking continued flexibility from employers. According to a recent report, approximately 75% of small businesses plan to try new ways of recruiting once the pandemic is over.[102] What will it take find and retain workers?

According to one survey of unemployed individuals not actively seeking work, offering $1,000 hiring bonuses was the most enticing incentive to return to full-time employment.[103] Thirty-nine percent of those polled said this option was the most likely to increase their urgency to reenter the job market. This incentive was most valued among those in the 25-34 age bracket with some college education. About a third (32%) said being allowed to work from home would lure them back quicker. Nearly a quarter (24%) favored a 5% increase in compensation for a position similar to their prior job, while 23% said requiring all workers be vaccinated against COVID-19 would be the best incentive. Only 17% said offering full-time school or daycare centers in their community would be the most likely to increase their willingness to actively search for jobs.

Earlier this summer, *The Wall Street Journal* reported that "[n]early 20% of all jobs posted on job search site ZipRecruiter in June offer a signing bonus."[104] Another recent survey found that to attract workers, employers will need to increase starting wages and benefits. Notably, roughly one in three respondents to this survey identified as minimum wage, hourly or gig, contract, or temporary workers.[105]

Some employers are taking a more non-traditional approach,[106] offering novel health and wellness benefits (including dedicated mental health spaces, home gym equipment raffles, nutritional/diet counseling, concierge medical plans, fertility benefits); child care benefits (child-care referrals, credits and back-up care, on-line academic tutoring, college counseling services, child ride-share credits, tuition reimbursement plans, dependent care flexible spending accounts); financial assistance (student loan reimbursement, financial planning, long-term care insurance); elder care (home health care referrals and support groups) and pet benefits (vet insurance, training classes).

Flexibility and creativity will be key.

101 U.S. Census Bureau, Small Business Pulse Survey, updated July 22, 2021, *available at* https://portal.census.gov/pulse/data/.

102 MetLife & U.S. Chamber of Commerce *Special Report on the State of the Workforce*, pp. 3-4 (July 14, 2021).

103 U.S. Chamber of Commerce, *Hiring Bonuses Show Real Potential to Bring Back America's Workers* (June 29, 2021).

104 Patrick Thomas, *This Summer, Jobs Come With a Hefty Signing Bonus*, The Wall Street Journal, July 1, 2021.

105 Jennifer Tonti, *SURVEY: To Attract Workers, Americans Say Companies Should Boost Wages and Benefits Over the Long Term*, Just Capital (July 15, 2021).

106 *See, e.g.*, Nelson D. Schwartz, *From Appetizers to Tuition, Incentives to Job Seekers Grow*, N.Y. Times, June 8, 2021.

Continued Supply Chain Disruption

In addition to the pandemic, other natural disasters have crippled global supply chains over the past year. From flooding to wildfires, weather emergencies around the globe have hampered both production and transport of needed materials.

Shortly after taking office, President Biden issued Executive Order 14017, *America's Supply Chains*, directing federal agencies to conduct a 100-day assessment of supply chain vulnerabilities for certain key products.[107] Employers, too, will need to take a hard look at their supply chains and assess their vulnerabilities. A recent Gallup poll found that 71% of U.S. adults claimed they were unable to purchase a product they wanted within the past two months because of shortages or had experienced serious delays in receiving a product they ordered. Forty-six percent of those polled said they experienced both issues.[108]

Companies' supply chain difficulties have been steadily increasing. During the final week of Phase 5 of the Census Bureau's Small Business Pulse Survey (July 12-18, 2021), 38.8% of U.S. small business respondents reported domestic supplier delays, and 15.9% experienced foreign supplier delays, up from 30.9% and 12.2%, respectively, reported during Phase 4 of the survey, which ended in April.[109] By business sector, 64.6% of respondents in the manufacturing industry experienced domestic supply chain disruptions, compared to 59.8% in retail, 58.5% in construction, and 51.4% in accommodation and food services.

Delivery and shipping challenges increased during the final survey phase as well, with 22.7% (up from 18.5% in April) of respondents indicating they experienced such lags. Compared to Phase 4 of the survey, the number of businesses claiming they would need to identify new supply chain options in the next six months increased from 14% to 17.7%.[110] This number rose to 39% for the manufacturing sector alone.

As the pandemic rages on and climate change continues to cause extreme weather events, employers need will need to accept that such disruptions impacting their operations are here to stay, and to plan accordingly.

107 *Executive Order 14017 of February 24, 2021*, 86 Fed. Reg. 11849 (Mar. 1, 2021).
108 Lydia Saad, *Most U.S. Consumers Have Felt Supply Chain Problems*, Gallup (Aug. 11, 2021).
109 Jan Callen, *Census Bureau's Small Business Pulse Survey Reveals Delays From Domestic, Foreign Suppliers* (Aug. 9, 2021).
110 *Id.*

Conclusion

Last September we expressed hope that Labor Day 2021 would look very different. To some extent, it does. Effective vaccines are widely available for most of the population. Unemployment claims are falling each week, and the economy is slowly recovering. A new administration is at the helm, creating new rules and standards for employment.

At the same time, the more things change the more they stay the same. The lack of vaccine approval for young children, the emergence of new COVID variants, vaccine hesitancy, and general resistance to adhere to other safety measures, have left many in the same position they were in last year. Many workers—especially those with caregiving duties—are still under enormous pressure to balance work and family responsibilities or have left the labor force entirely. Many companies are still struggling to stay in business or even hire employees in the first instance.

In the employment sphere, there is a pressing need for policymakers to advance laws and regulations that foster economic growth and new jobs, recognize the changing nature of employment, and provide the skills, training, and other support to qualify workers for those jobs. Whether Labor Day 2022 will show improvement will depend, in part, on how well these goals can be achieved.

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At Littler, we understand that workplace issues can't wait. With access to more than 1,600 employment attorneys in 100 offices around the world, our clients don't have to. We aim to go beyond best practices, creating solutions that help clients navigate a complex business world. What's distinct about our approach? With deep experience and resources that are local, everywhere, we are fully focused on your business. With a diverse team of the brightest minds, we foster a culture that celebrates original thinking. And with powerful proprietary technology, we disrupt the status quo – delivering groundbreaking innovation that prepares employers not just for what's happening today, but for what's likely to happen tomorrow. For over 75 years, our firm has harnessed these strengths to offer fresh perspectives on each matter we advise, litigate, mediate, and negotiate. Because at Littler, we're fueled by ingenuity and inspired by you.

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