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CLASS ACTION TRENDS REPORT

A pandemic resurgence, without WARN-ing

When the unprecedented COVID-19 pandemic reached the United States earlier this year, employers had little warning of the catastrophic disruptions to the nation's economy and workplaces. Facing an economic downturn, statewide stay-at-home orders, and other restrictions, many employers acted quickly, making difficult decisions to abruptly close worksites or lay off large segments of their workers.

In the initial months, employers struggled to predict the depth and scope of the pandemic's impacts, both on the country and on their businesses. Much surrounding COVID-19 and potential ramifications was still unknown, including how infectious the novel coronavirus would be, the duration of the stay-at-home orders and other restrictions, and how federal and state governments would respond to the health and economic crisis.

Indeed, many believed the U.S. economy would ramp up again after only a short freeze, allowing businesses to cautiously reopen and call back employees. As a result, many organizations elected to "furlough" employees instead of terminating them. Under the federal Worker Adjustment and Retraining Notification (WARN) Act, and many of its state counterparts, if the shutdowns or furloughs lasted less than six months and employees were recalled, the statutory notice requirements would not be triggered.

But months have passed since COVID-19 first reared its ugly head, and there is no clear end in sight. Many medical experts predict a potentially devastating resurgence, inevitably leading to further economic impacts. If these predictions come to fruition, businesses that implemented what they intended to be temporary measures will have to revisit these, facing the grim reality that business will not be "as usual" anytime soon. Others that were able to maintain their workforces in the initial months may be abruptly forced to implement shutdowns or layoffs as the impact of the pandemic wears on.

In our Summer 2020 issue, Jackson Lewis attorneys discussed class action litigation trends arising in the wake of the COVID-19 crisis, including employers' WARN Act obligations. As employers continue to adapt to the ongoing pandemic crisis and prepare for a possible second wave, Jackson Lewis attorney Michael Jakowsky, a Principal in the firm's New York City office, takes a deeper dive into the compliance challenges and liability risks presented by the WARN Act and its state-law counterparts.

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A WORD FROM DAVID AND ERIC



DAVID GOLDER

As the COVID-19 pandemic continues to alter work lives in profound ways, employers are confronted with additional liability risks. The pandemic has created a wave of litigation that is unlikely to ebb until well after the unprecedented public health crisis recedes.



ERIC MAGNUS

Jackson Lewis has launched an essential resource for employers to track lawsuits related to the ongoing pandemic. With the COVID-19 Employment LitWatch, users can observe data on COVID-19 complaint filings by state, industry, and type of claim. Updated continuously,

the COVID-19 Employment LitWatch uses the latest available court data to show how new filings are trending. Having ready access to this information makes it easier for employers to assess their own risk of facing a lawsuit, and where those risks may lie.

Thus far, many of the pandemic-related lawsuits involve single plaintiffs and claims that are typically individual in nature: retaliation, whistleblower actions, and cases involving disability and leaves of absence. However, as we keep a watchful eye on COVID-19-related complaints,

we anticipate more class action lawsuits. COVID-19-related wage and hour suits are proliferating, and about half of these claims brought in federal court are putative or collective actions.

In this issue of the *Class Action Trends Report*, we turn our attention to the Worker Adjustment Retraining and Notification (WARN) Act. As of yet, there have not been a substantial number of COVID-related WARN Act complaints, but most suits filed thus far have been brought as class actions. As the pandemic persists and employers are forced to make difficult decisions in response to the business challenges that arise, they must be prepared to address potential WARN Act class actions as well. We offer some guidance on how best to mitigate the risk. We also look at the wildly varying standards for conditional certification of Fair Labor Standards Act collective actions and argue for a more uniform standard — one more akin to the level of rigor required by courts in certifying a class under Rule 23 of the Federal Rules of Civil Procedure.

We hope this issue finds you, your workforce, and your business healthy and thriving, and successfully meeting the challenges posed by this difficult time.

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About the *Class Action Trends Report*

The Jackson Lewis *Class Action Trends Report* seeks to inform clients of the critical issues that arise in class action litigation practice, and to suggest practical strategies for countering such claims. Authored in conjunction with the editors of Wolters Kluwer Law & Business *Employment Law Daily*, the publication is not intended as legal advice; rather, it serves as a general overview of the key legal issues and procedural considerations in this area of practice. We encourage you to consult with your Jackson Lewis attorney about specific legal matters or if you have additional questions about the content provided here.

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MICHAEL JAKOWSKY

Mitigating risk

Under normal circumstances, certain large workforce adjustments trigger advanced written notification obligations under federal and state WARN laws. With the swift arrival of the pandemic, however, many of the government-imposed occupancy

and business operations restrictions were implemented with little to no notice, leaving many businesses struggling with how to rapidly respond and adjust their workforce levels. Many employers did not have time to provide the required 60-day written notice under the federal WARN Act, and the sudden onset of the pandemic and its consequences on business left them vulnerable to potential claims.

“Unfortunately for business operators, we suspect their actions in the early days of the pandemic will be judged and the response taken will be second-guessed or challenged,” Jakowsky warns. “Businesses that conducted large termination programs at the onset of the pandemic, but did not issue WARN Act notices, might be particularly vulnerable. Equally as vulnerable will be employers that furloughed large numbers of employees but did not send notices,” Jakowsky added, “based on the belief that the workforce adjustments would be temporary.”

Federal and state WARN laws have a number of exceptions that permit shortened notice in limited circumstances. The most heavily relied upon exception in the wake of the pandemic has been the federal WARN Act’s “unforeseeable business circumstances” exception. If it applies, businesses are excused from providing the full 60 days’ notice so long as they provided “as much notice as is practicable.”

Assessing the best course of action. As employers continue to navigate the COVID-19 crisis, it is imperative that they be proactive in evaluating their workforce demands. If workforce adjustments are deemed necessary, they must send WARN Act notices as soon as possible. Or, where appropriate, businesses should carefully evaluate their workforce needs and instead begin to return employees to work in sufficient numbers.

Has the WARN Act been triggered?

The federal WARN Act applies to employers with at least 100 employees (excluding part-time employees) or 100 full-time and part-time employees who work an aggregate of at least 4,000 hours a week. It requires 60 days’ advance written notice of a plant closing or mass layoff to affected non-union employees, union representatives, and certain government officials if at least 50 full-time employees comprising at least one-third of the full-time workforce at a single site suffer “an employment loss.”

The federal statute defines an “employment loss” as:

- An employment termination, other than a discharge for cause, voluntary departure, or retirement;
- A layoff exceeding 6 months; or
- A reduction in hours of work of more than 50 percent during each month of any 6-month period.

State “mini-WARN” laws

Even if the federal WARN Act does not apply or is not triggered, employers must be cognizant of various state mini-WARN statutes that impose similar requirements, but often are more stringent than the federal law and contain oddities that need to be carefully considered. In particular, there has been significant litigation concerning mini-WARN laws in California, Illinois, New Jersey, and New York.

Illinois has an unforeseeable business circumstances exception but requires that the Illinois Department of Labor (DOL) first determine the exception applies before an employer may issue notices based on the exception. This is an issue for employers also covered by the federal WARN Act since it may mean delaying notice until the state DOL provides permission. Some state mini-WARN laws impose different restrictions on how long an employee can be furloughed before the employee is deemed to have suffered an employment loss.

Additionally, some states’ WARN laws have specific anomalies in their “unforeseeable business circumstances” exception. A recent amendment to New Jersey’s mini-WARN statute contains a national emergency exception that was expressly enacted to address terminations due

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to the COVID-19 pandemic. The New Jersey law also was amended to increase the notice requirement from 60 to 90 days and require payment of severance equal to one week of pay for every year worked to impacted employees, among other changes.

Furloughs

A furlough is another term for a temporary layoff. When a furlough is involved, the federal WARN Act will not be implicated if:

- (a) The employer has communicated to employees that the furlough is temporary and that the intent is for them return to their jobs on a definite date; and
- (b) The furlough does not extend beyond 6 months.

However, if plans change and the furlough will be expected to extend beyond six months or the layoff will become permanent, then WARN Act requirements would apply if an employment loss occurred and the employer did not provide the required notices — either at the time of the initial decision or, if the unforeseeable business exception applies, as soon as practicable.

An employer may not be completely out of the woods, however, if a state mini-WARN law applies and imposes stricter requirements. For example, California’s law provides that even a temporary furlough can trigger notice obligations.

The limits of the “unforeseeable” exception

If an employment loss occurs, a covered employer may be excused from failing to provide the full 60-day advance notice under the federal WARN Act if it can show “unforeseeable business circumstances.” During the initial months of the COVID-19 pandemic, many employers relied on that exception. However, even if the exception applies, they are only excused from sending the full 60-day notice and must show they sent notices “as soon as practicable.”

Be proactive. In determining whether an event meets the exception’s unforeseeable threshold, courts evaluate whether there was a point in time in which the organization should have known the event was going to

States with WARN statutes

Currently, the following U.S. states and territories have their own WARN laws in effect:

- California
- Delaware
- Hawaii
- Illinois
- Iowa
- Louisiana
- Maine
- Maryland
- Massachusetts
- Michigan
- Minnesota
- New Hampshire
- New Jersey
- New York
- North Dakota
- Pennsylvania (Philadelphia only)
- Tennessee
- Vermont
- Wisconsin
- Puerto Rico
- U.S. Virgin Islands

In addition to WARN laws, a number of states have other notification requirements for mass separations or closures, including provisions under unemployment insurance statutes and other state laws and agency regulations.

occur. Therefore, to avoid class-wide WARN Act liability, an employer that has laid off workers or shut down operations without initially providing statutory notices must proactively monitor the situation and provide notice as soon as practicable after a sudden and dramatic event. Employers simply cannot wait around until the end of the six-month period to decide what to do with furloughed employees, Jakowsky explains.

Event triggers notice. Now that several months have passed since the COVID-19 crisis began, certain events may be viewed as alerting businesses that expected

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reopenings will be delayed, triggering the WARN Act's "as soon as practicable" notice requirements. To provide a defense to liability, employers should continuously evaluate the economic landscape and craft decisions based on any new circumstances that make it become

Even if a business has already temporarily laid off the threshold number of workers due to the COVID-19 crisis, it would be prudent to revisit those decisions with counsel.

foreseeable that shutdowns, layoffs, or work-hour reductions that were once anticipated as temporary will become long-term or even permanent.

This issue is likely to become a subject of increased litigation if the economic repercussions of the global pandemic are viewed as becoming less unpredictable. For instance, if there is a resurgence of the novel coronavirus during flu season, causing new business restrictions in a state where the employer has operations, the need to send a notice to furloughed workers may be triggered if these new circumstances makes a delay in reopening appear likely.

Due diligence. An employer must be diligent in monitoring world and local events and its workforce needs. "It's not just the second wave that is critical; it's what happens in response to that wave," Jakowsky explains.

Courts will consider whether the circumstances warranting a WARN Act notice went from being unforeseeable to foreseeable. One consideration may be whether there has been another round of pandemic-related government closures or other government-related restriction. If so, was a WARN Act notice sent as soon as possible after that event?

For example, if a gym that shut down due to state-ordered restrictions did not send furloughed workers a WARN Act notice because it expected to stay closed for only four months and reopen once the state was placed in "Phase 4," but the governor later announces that gyms would be excluded from reopening in that phase, that employer could show due diligence by timely providing a WARN Act notice based on the change in circumstances.

Conditional notice. Providing notice once an employment loss is no longer unforeseeable is different than providing a conditional WARN Act notice, which is permitted when an employer is still unsure as to whether layoffs will be necessary and must spell out what the conditional event is that must occur for the layoff or shutdown to occur.

Putting a condition on such a potential future event can be tricky in the context of the COVID-19 crisis, Jakowsky warns, since a business may be deemed

to have articulated that the event was foreseeable, thereby undercutting its ability to later claim "unforeseeable business circumstances." Employers should consult with counsel as they navigate these thorny issues.

Best defense is an offense

WARN Act notices are required only if one of the three types of employment losses occur as result of a covered plant closing or mass layoff. To avoid potential WARN Act vulnerability, employers should be proactive in working with counsel to "carefully construct restructuring and return to work programs that meet their business-related needs and mitigate against risk," Jakowsky explains.

Even if a business has already temporarily laid off the threshold number of workers due to the COVID-19 crisis, it would be prudent to revisit those decisions with counsel. Particularly in the current environment of uncertainty, employers can minimize their legal risk by understanding federal and state WARN law requirements, including the effect of rolling layoffs and the "aggregate rule." Be mindful of what actions will trigger notice obligations and consider personnel actions that can be taken to break the six-month chain before an employment loss ever occurs.

Additional challenges

The continuing COVID-19 pandemic may raise other novel WARN Act questions and concerns. These include:

Who is liable? Disputes increasingly arise as to liability in the context of the sale of failing businesses. Typically, the key issue is whether the transaction and any resulting consolidation will trigger WARN Act requirements and

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if so, which party is responsible for providing statutory notice and subject to liability for failing to do so.

Another issue is whether there may be individual liability under the federal statute and related state laws, with the outcome still unclear.

Remote workers. Another complicated issue that continues to evolve is the application of the “single site” analysis to regular onsite employees who have been forced

to work remotely for increasingly longer periods of time. The issue of whether WARN Act requirements apply to telework is far from settled. However, even if the statutory notice requirements apply, there are steps employers can take with the assistance of counsel to show that remote workers are still assigned to the physical site, despite teleworking during the pandemic.

Vulnerable industries. As a practical matter, industries that cannot resort to remote work to weather the COVID-19 storm (such as hospitality, retail, and airline) are being hit hardest and will be especially vulnerable to WARN Act liability in the coming months. These businesses also face the additional complication of having unionized workforces in many locations, since unions have standing to bring WARN Act lawsuits.

Multiple-vendor sites. Airports, for example, are facing unique litigation relating to “single site” issues due to the variety of types of workers they employ, including baggage handlers, security guards, parking lot attendants, and concession stand operators. Complicated issues are arising as to whether the vendors — which may have contracts with more than one of the airlines — are on one site (which will make it easier to reach the statutory threshold) or different sites.

Beyond the WARN Act

As with all layoffs, there are compliance considerations beyond the WARN Act. Employers must ensure that reductions-in-force do not adversely impact a protected category of employees or are not designed with the specific goal of reducing employee benefit obligations; that severance agreements are properly drafted and executed; that collective bargaining obligations are satisfied; and that COBRA notice is provided to benefits-eligible employees. Managing these legal requirements are vexing enough in the midst of a business disruption. When the disruption is caused by an unprecedented pandemic and accompanied by a host of other COVID-19-related operational challenges, it may be essential to partner with counsel that can provide guidance through every stage of the reorganization. ■

Providing guidance through a RIF

Jackson Lewis attorneys provide advice and counsel on issues arising before, during, and after a reduction-in-force or reorganization. Our goal is to minimize the potential for individual or class action litigation and to ensure a positive employee relations environment for remaining and future employees.

Our attorneys assist both union and non-union employers in reduction-in-force and reorganization planning and execution, including:

- Preparation of severance and release agreements;
- Compliance with WARN Act requirements;
- Negotiations with unions; and
- Impact analysis for protected groups.

The firm also defends employers in state and federal courts and administrative agencies against discrimination, breach of contract, and other claims arising from reductions-in-force and reorganizations.

Our in-house resources, along with decades of combined experience, assist employers as they navigate the organizational changes brought on by the effects of the COVID-19 pandemic or by the restructuring of operations to meet other business needs.

Certifying a FLSA collective—or stirring up litigation?

The U.S. Supreme Court has been asked to fill a gaping hole in our Fair Labor Standards Act (FLSA) jurisprudence: What, precisely, is meant by “similarly situated,” as set forth in 29 U.S.C. 216(b)? The request comes in a petition for *certiorari* of a decision by the U.S. Court of Appeals for the Second Circuit in a wage-hour collective action against Chipotle Mexican Grill. As this issue of the *Class Action Trends Report* went to press, the high court has not indicated whether it would take up the question (*Chipotle Mexican Grill, Inc. v. Scott* (No. 20-257), [petition](#) for *certiorari* filed August 28, 2020).

Without such direction, some courts essentially “rubberstamp” motions for conditional certification, thus allowing FLSA plaintiffs essentially to conduct a court-sanctioned solicitation of opt-in plaintiffs.

The Supreme Court has issued clear guidance on when courts should certify a class action under Rule 23 of the Federal Rules of Civil Procedure. The standard is sufficiently demanding to ensure that the class action mechanism is not abused and the due process rights of defendants are protected. However, the Court has been less clear as to when a FLSA collective action should be conditionally certified, triggering court-authorized notice of the litigation to potential opt-in plaintiffs.

Without such direction, some courts essentially “rubberstamp” motions for conditional certification, thus allowing FLSA plaintiffs essentially to conduct a court-sanctioned solicitation of opt-in plaintiffs based on little more than an allegation of an unlawful practice. The modest showing these courts require for plaintiffs to establish that potential opt-in litigants are “similarly situated” forces employers to settle meritless claims or engage in costly discovery and disruptive class-wide litigation.

The *Chipotle* case involved the latter, and the Second Circuit decision addressed the *decertification* of a collective action that had been conditionally certified by the district court; it did not tackle the more problematic issue of whether a collective action should be conditionally certified in the first instance.

A “hybrid” action

The lawsuit against Chipotle — a FLSA collective action and Rule 23 class action under various state wage and hour laws — was brought by assistant managers (or “apprentices”) who contend that they were misclassified as exempt executive employees and improperly denied overtime pay. The seven plaintiffs sued on behalf of themselves and 516 additional employees who had opted in to a FLSA collective action; they also represented six putative classes, approximately 1,600 employees in six states, under Rule 23(b)(3).

In a June 2013 ruling, the district court conditionally certified a nationwide FLSA collective action. Subsequently, in a March 29, 2017, decision, the court denied Rule 23

certification, finding the plaintiffs could not satisfy the predominance and superiority requirements. The court also decertified the FLSA collective action, concluding the plaintiffs did not show the opt-in plaintiffs were similarly situated.

Conflating the standards

However, in an April 1, 2020, decision, a divided Second Circuit panel found the district court erred in decertifying the FLSA collective. According to the majority, the court below had gotten the “similarly situated” analysis wrong. It said the district court had conflated the Section 216(b) standard for certification of a *collective* action with the more demanding Rule 23 criteria for *class* certification.

By design, the Rule 216(b) hurdle is lower, the appeals court explained, because the FLSA provision serves a “fundamentally different purpose[]” than Rule 23: it is “tailored specifically to vindicating federal labor rights.” According to the majority, Section 216(b) plaintiffs have a “substantive ‘right’ to proceed as a collective,” unlike Rule 23 litigants, and a collective action should be certified so long as the potential opt-in plaintiffs “share a similar issue of law or fact material to the disposition

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of their FLSA claims,” notwithstanding any “dissimilarities in other respects.”

Inconsistent approaches

The text of Section 216(b) does not define “similarly situated.” In the absence of a meaningful definition in the statute or express guidance from the Supreme Court, lower courts have fashioned their own tests for evaluating whether a group of employees satisfy the “similarly situated” criteria for purposes of certifying a FLSA collective action.

Most federal circuits have adopted multifactor or “ad hoc” approaches, starting with the U.S. Court of Appeals for the Third Circuit. Along with the Sixth, Eighth, and Eleventh Circuits, courts in these jurisdictions take into account

“The lack of consistency among district courts and circuits courts has led to unclear guidance to companies and encourages plaintiffs to forum shop their cases.”

— David R. Golder

the ways in which putative plaintiffs are *dissimilar* as well as similar, along with fairness and procedural concerns, available defenses, and other considerations. The Tenth Circuit has condoned, but not required, the multifactor approach to the “similarly situated” analysis. The Seventh Circuit pulls directly from standard Rule 23 factors (predominance, most significantly). The Second Circuit, however, followed the Ninth Circuit in imposing a low hurdle for FLSA certification.

“The lack of consistency among district courts and circuits courts has led to unclear guidance to companies and encourages plaintiffs to forum shop their cases,” said David R. Golder, Co-Leader of the Jackson Lewis Class Action and Complex Litigation Practice Group. It also breeds unpredictability for litigants defending such claims, he notes, as “courts have reached wildly inconsistent results on similar fact patterns.”

Should the 216(b) bar be lower?

The majority in *Chipotle* found the ad hoc approach taken by most federal circuits has “imported through the back door” Rule 23’s more demanding “hurdle for certification.

The majority reasoned that there is no basis in the FLSA for imposing Rule 23-level rigor to the “similarly situated” analysis. However, Judge Richard Sullivan, dissenting in *Chipotle*, argued that Section 216(b) is *not* so “fundamentally different” in purpose from Rule 23 as to warrant reducing the required “similarly situated” showing to a “mere formality.” (The dissent’s view aligns with the Seventh Circuit which, in its 2013 decision in *Espenscheid v. DirectSat USA LLC*, rejected the notion that there is a meaningful rationale for adopting a distinct approach to the Section 216(b) inquiry.)

The Supreme Court’s 1989 decision in *Hoffmann-La Roche Inc. v. Sperling* is cited frequently by courts as defining the framework for FLSA collective actions. There, the high court instructed district courts to facilitate notice

to potential plaintiffs “in a manner that is orderly [and] sensible” and made clear that a trial court’s discretion to certify a collective action is for “case management purposes,” which is “distinguishable in

form and function from the solicitation of claims.” Despite this guidance, “the case law at the district court level has developed as though the Supreme Court instructed courts to do the exact opposite,” Golder said. “Most federal courts grant FLSA conditional certification with nothing more than boilerplate allegations that the putative class members have similar claims under the FLSA.”

Certify now, ask questions later

In certain jurisdictions, one plaintiff’s allegation of a FLSA violation at a single employer location is enough to win conditional certification of a nationwide collective action — even when the defendant has evidence that contradicts the allegation. Some courts simply refuse to consider the merits of the plaintiff’s allegations at the conditional certification stage, and will not look at any contradictory evidence, such as affidavits from current employees. These courts do not make credibility determinations or resolve factual disputes.

Many courts put off any substantive evaluation of the claims until the second stage of the widely used two-stage certification framework for certification of collective

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actions. As a result, FLSA conditional certification is almost guaranteed, and notice goes out to potential opt-in plaintiffs — effectively “stirring up litigation,” as Justice Antonin Scalia warned in his dissent in *Hoffman-LaRoche*. Yet the Supreme Court in *Hoffman-LaRoche* never directed trial courts weighing conditional certification to turn a blind eye to any evidence that might refute the plaintiff’s allegations.

Shifting standards?

However, there are promising developments for FLSA defendants in the Fifth Circuit. On August 11, 2020, an appellate panel heard oral argument in *Swales v. KLLM Transport Services*, a case that addresses head-on the extent to which a district court may examine the factual circumstances of whether potential opt-in plaintiffs are similarly situated before conditionally certifying a collective. The Fifth Circuit has the opportunity to usher in a more workable framework for evaluating whether potential opt-in plaintiffs are similarly situated *before* conditional certification is granted.

Ultimately, it will be up to the Supreme Court to clarify where *Hoffman-LaRoche* interpretation has gone astray and raise the bar for certification of FLSA collective actions. “It is time the Supreme Court provide courts with specific guidance as to FLSA conditional certification to ensure the law is given a ‘fair reading’ and applied consistently across our courts,” Golder said.

Retiring *Hoffman-LaRoche*

David R. Golder, Co-Leader of the Class Action and Complex Litigation Practice Group, has written about the tenuous origins of the lax standard for conditional certification of FLSA collective actions. He argues that the lower bar for conditional certification is *not* a feature of the FLSA and, in fact, results from a misreading of the Supreme Court’s landmark decision 30 years ago in *Hoffmann-La Roche Inc. v. Sperling* — a collective action brought under the Age Discrimination in Employment Act (ADEA), which borrowed the collective action framework set forth in FLSA, Section 216(b).

Golder makes the case in [Happy 30th Birthday *Hoffman-LaRoche*: It’s Time for a Change](#).

For now, employers and their counsel seeking to avoid defending class-wide claims should mount a robust challenge to conditional certification *regardless* of the approach commonly applied by courts in their jurisdiction. Be prepared to present evidence refuting the plaintiff’s allegations and to strenuously urge the court to consider it. The ground is shifting on the issue, and it ought not be presumed that conditional certification of FLSA collective actions will be a *fait accompli*. ■

2020 election: looking past the Beltway

While most pundits focus on Washington, D.C., as a November election draws near, there are a number of significant matters up for consideration at the state and local levels that warrant attention. These pending measures have potentially far-reaching implications for businesses and for class action employment litigation.

California Proposition 22

California voters will decide whether to give rideshare companies and other app-based “gig economy” businesses a special exception to AB 5, the recent legislation that recasts, clarifies, and expands exemptions to California’s independent contractor law.

The classification of service providers as independent contractors has been a contested and evolving issue in California. The California Supreme Court set a new and more stringent “ABC test” for classifying workers in the state as independent contractors rather than employees, and the legislature subsequently codified that test with passage of AB 5. However, the classification of service providers in the gig economy has been adjudicated mostly through litigation.

Most recently, a California state court of appeals on October 23, 2020, upheld a preliminary injunction, sought by the

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state in a civil enforcement action, restraining rideshare companies from classifying their drivers as independent contractors. The appeals court noted that AB 5 expressly empowered the California attorney general and other state legal officials to seek injunctive relief against entities that misclassify employees as independent contractors.

Proposition 22 would grant app-based transportation and delivery companies a special exception to AB 5 by allowing them to classify their drivers as independent contractors, thereby exempting them from providing benefits and certain state-law protections to the drivers. If

If Proposition 22 is passed, other industries may seek similar changes to allow for expanded classification of workers as independent contractors, such as food delivery personnel and couriers.

Proposition 22 is passed, other industries may seek similar changes to allow for expanded classification of workers as independent contractors, such as food delivery personnel and couriers.

“Regardless of the outcome of Prop 22, there likely will be a flood of class action litigation related to gig economy companies,” warns Michael D. Thomas, a Principal in the Los Angeles office of Jackson Lewis P.C. “If the measure passes, we can expect to see class litigation regarding compliance with the labor and wage policies specific to those workers. If it fails, there will likely be class litigation involving issues related to drivers being employees, including but not limited to meal and rest breaks, expense reimbursement issues, off-the-clock work, and WARN-related issues if the companies leave California.”

Other ballot measures

Also on the ballot are additional measures in California and elsewhere that can spur class litigation:

- California Proposition 16 would allow for consideration of race, sex, color, ethnicity, or national origin as a factor

in public employment, education, and contracting decisions. This practice has been illegal in the state since 1996, with the passage of Proposition 209 banning affirmative action. Proposition 16, if passed, would directly affect universities and government offices (including states, counties, and other political subdivisions or governmental instrumentalities), and would change how contracts with state governmental agencies and universities are awarded.

- California Proposition 24, The California Privacy Rights Act, would create additional obligations for companies and organizations processing personal information, including responding to consumer’s right to correct personal information, right to know data retention policy, and right to opt out of advertisers using precise geolocation. While Assembly Bill 1281 recently amended the California Consumer Privacy Act to extend the exemption on employee personal information until January 1, 2022, Proposition 24 would further extend the exemption to 2023. The measure also would allow consumers to limit the use and disclosure of newly defined “sensitive personal information,” including government-issued identifications, account credentials, financial information, biometric information, precise geolocation, and more.
- Florida’s Amendment 2, “the \$15 Minimum Wage Initiative,” would raise the state’s hourly minimum wage rate incrementally to \$15.00 per hour by September 2026. The wage floor would increase to \$10.00 per hour effective September 30, 2021, and increase by \$1.00 each September thereafter until 2026, when the \$15.00 rate is reached.
- Question A, a citizen petition on the ballot in Portland, Maine, would raise the minimum wage to \$15.00 per hour, over a three-year period, for employees working in the city. In addition, the measure would require tipped employees to be paid at least 50 percent of the minimum wage rate, and provide that employees must be paid 1.5 times the minimum wage rate for work performed during an emergency (as declared by the state or the municipality). ■

An education climate survey can reduce risk



MONICA KHETARPAL

The nation continues to face challenges regarding issues of race, gender, and sexuality, and educational institutions are often on the front lines of the rapidly evolving conversation about diversity, equity, and inclusion.

Colleges, universities, and primary and secondary schools confront lawsuits on a daily basis, including class actions arising from students, faculty, staff, or senior administration. These lawsuits can be devastating to an institution's reputation and to its fiscal health. Particularly in our current climate, it is critical for educational institutions to examine their campus culture and proactively address any systemic issues before they lead to unrest or litigation.

Taking the temperature. We all know when something just is not right within a department, school or college. When such concerns arise, a climate survey can take

the temperature of an institution, department, or division. A skillfully executed survey can elicit candid feedback from interested constituents to uncover latent problems before they rise to the surface — and to get in front of potential complaints. Or, when a latent problem *does* reach the campus community or the media, institutions can respond to the outcry by retaining professionals to conduct a climate survey and identify concrete measures to move toward resolution.

Climate surveys are different from investigations in that they do not focus on analyzing precise facts to determine

liability or culpability for particular instances of alleged wrongdoing. Instead, they examine the perceptions of employees, students, alumni, and administrators about what is right or wrong within an institution. They identify not only areas of potential legal liability, but also instances where stakeholders feel the climate lacks inclusion and cohesiveness. In this way, climate surveys are an important tool to improve equity and inclusivity on campus. This, in turn, improves cooperation, innovation and productivity, and limits potential liability.

The Jackson Lewis difference. The [Jackson Lewis Higher Education Group](#) assists institutions in identifying issues that may be brewing beneath the surface and helps address problems before they start.

Jackson Lewis understands the need for sophisticated, nuanced, and practical advice to help navigate this important but often challenging area. Our diverse team of experienced education and diversity and inclusion experts can examine a variety of issues across an institution to gauge how students, faculty, staff, alumni, and other community members feel about various issues the school may be facing. Significantly, our team of attorneys has experience structuring climate surveys in a way that maximizes the application of attorney-client privilege when tasked with investigating specific concerns and potential areas of legal liability.

Our team then delivers privileged reports to the institution and offers innovative approaches to address issues of concern. We also help to craft effective and sensitive communications with students, alumni, faculty, and the general public. In this way, we can assist educational institutions in demonstrating a commitment to diversity, equity, and inclusion, while limiting legal liability.

The Jackson Lewis Higher Education Group brings decades of experience working within education at all levels and applies not just legal acumen, but interpersonal savvy to interviews and their subsequent analysis. ■

Other class action developments

Important developments in class litigation since our last issue:

EEOC narrows its approach to Sec. 707 suits. The Equal Employment Opportunity Commission (EEOC) issued an opinion letter clarifying its authority to bring Title VII “pattern and practice” lawsuits, stating that an alleged “pattern or practice of resistance” is not an independent reason for it to sue an employer absent an underlying allegation of discrimination or retaliation. The agency also announced it must engage in pre-suit procedures before bringing such a claim, thereby holding itself to the same

This is the first time a circuit court of appeals has expressly invalidated incentive awards as a matter of law.

procedures it must follow when pursuing allegations on behalf of individual claimants under Section 706. This is a significant step back from the agency’s prior expansive view of its own authority to challenge employer practices without citing a specific alleged violation of discrimination, as well as its authority to do so without first attempting to resolve the matter informally.

Incentive awards for class plaintiffs unlawful. In a suit brought under the Telephone Consumer Protection Act, a divided federal appeals court panel ruled that “incentive” or “service” awards to lead plaintiffs in Rule 23 class actions are unlawful. The majority noted that the U.S. Supreme Court prohibited the award of incentive payments to plaintiffs more than a century ago, while acknowledging that those opinions seem to have since gone unheeded and that incentive awards are routine features of class settlements today. This is the first time a circuit court of appeals has expressly invalidated incentive awards as a matter of law. A critical question remains as to whether the majority’s rationale will be applied in the context of collective actions brought under Section 216(b) of the FLSA, or to the settlement of hybrid claims under both Rule 23 and Section 216(b).

National statistics didn’t support challenge to hiring policy. A divided federal appeals court panel affirmed the dismissal of a putative class action brought by two African American job applicants against a global IT company that

withdrew their job offers upon learning of their felony convictions. In arguing that the company’s alleged policy not to hire persons with certain criminal convictions had a disparate impact on black applicants, the plaintiffs relied on national statistics showing that African Americans are more likely to be arrested and incarcerated than whites. However, “the fact that such a disparity exists among the general population does not automatically mean that it exists among the pool of applicants qualified for the jobs in question — what is true of the whole is not necessarily true of its parts,” the majority said.

FLSA collective excludes out-of-state workers. A federal district court declined to conditionally certify a

nationwide collective action brought by employees of a cellphone retailer under the FLSA, ruling that it did not have personal jurisdiction over the claims of employees who lived and worked outside of Pennsylvania. Choosing sides in a hotly disputed question that has created a split amongst district courts around the United States, the court applied the U.S. Supreme Court’s 2017 *Bristol-Myers Squibb v. Superior Court* decision, and its limitations with regards to specific personal jurisdiction over out-of-state employees, to claims under the FLSA. The plaintiffs’ motion for conditional certification was granted only for employees who lived or worked in Pennsylvania.

Denied certification of 21K rest-period class upheld. An employee of an auto parts retailer could not establish that 21,000 employees across some 520 of the company’s California stores were similarly harmed by the company’s written break policy, which purportedly violated California law requiring rest periods. A divided federal appeals court panel affirmed the district court’s denial of class certification, finding that there was no evidence the employer actually implemented the unlawful policy and that “the existence of a facially defective policy was not enough, standing alone, to show that common questions predominated.”

Drivers get second chance at class certification. A divided panel of the Third Circuit reversed the district

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 court’s denial of class certification, holding that the court not only misapplied the Third Circuit’s ascertainability standard, but also inappropriately demanded that the plaintiffs identify the class members at the certification stage. The panel found the documents provided by the plaintiff — though incomplete — were sufficient, reliable, and a feasible mechanism to ascertain class members at the certification stage. Here, the records included large samples of driver rosters, gate logs, and pay statements, so much so that the gaps did not challenge the conclusion that the plaintiffs, a putative class of full-time drivers, could

The court held the use of the word “right” in the OWBPA’s prohibition against waivers referenced only a “substantive right” under the ADEA, while the right to proceed by collective action is procedural rather than substantive.

be reasonably ascertained. The panel held that the district court improperly focused on the gaps in the evidence, despite that those gaps were created by the defendant-employer’s own recordkeeping (records the employer was not legally required to keep, it should be noted). Relying on, and citing, prior Supreme Court decisions such as *Anderson v. Mt. Clemens* and *Tyson Foods, Inc. v. Bouaphakeo*, the Third Circuit also ruled that a failure to keep records should not act as a roadblock to certification. This holding creates a new route to class ascertainability in the Third Circuit.

Collective action waiver enforceable despite OWBPA. A federal district court dismissed an action brought by laid off employees seeking declaratory and injunctive relief preventing their former global employer from enforcing a collective action waiver in their severance agreements. The employees, who were all over 55 when they were discharged as part of a reduction-in-force, claimed the waivers were not “knowing and voluntary” under the Older Workers Benefit Protection Act (OWBPA). Siding with the employer, the court held the use of the word “right” in the OWBPA’s prohibition against waivers referenced only a “substantive right” under the ADEA, while the right to proceed by collective action is procedural rather than substantive.

Challenges to Illinois BIPA lawsuits rejected. Two former employees of a national pizza delivery chain advanced

a putative class action alleging violations of the Illinois Biometric Information Privacy Act (BIPA), despite the employer’s submission of sample screenshots it claimed showed that one of the employees retroactively consented to use of its biometric time clock system to collect fingerprint data six months after she was hired. A federal court held that while BIPA did not forbid the employer from attempting to obtain retroactive consent, it failed to identify any legal theory under which the consent barred her BIPA claim as a matter of law at the pleadings stage. In a separate BIPA lawsuit challenging a different employer’s use of a fingerprint timekeeping scanner, a federal court held the employees’ claims were not preempted by the Illinois Workers’ Compensation Act.

Truck drivers’ wage suit ends for \$16.5M. A federal district court granted final approval

of a settlement agreement resolving class and collective wage claims brought by a group of truck drivers who contended they were shorted on compensation for “sleeper berth” time, among other claims. The \$16.5 million settlement resolved four years of litigation on behalf of 16,000 truck drivers alleging the transportation company violated the FLSA and state minimum wage laws. The deal will be split between 16,000 drivers, \$5.5 million of which will go to class counsel in fees, along with \$600,000 in costs.

Pilot wins partial certification of USERRA class. A federal district court granted in part a former airline pilot’s motion for class certification of his Uniformed Services Employment and Reemployment Rights Act (USERRA) claims against two airlines, ruling his allegations that the airlines’ military leave policies led to active servicemembers being demoted met the requirements for class adjudication under Rule 23(a) and 23(b). The court narrowed the proposed classes, however, noting that because the employee no longer worked for the airlines and pilots were subjected to different leave policies than other employee categories, his claims were not typical of all employees of the two airlines.

Retailer pays \$20M to end suit over physical ability test. Settling a nationwide sex-based hiring discrimination case brought by the EEOC, a major retailer

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agreed in a court-approved consent decree to pay \$20 million and stop using a pre-employment test, amongst other things. According to the EEOC, the retailer conducted a physical ability test (PAT) as a requirement for applicants to be hired as order fillers at its 44 grocery distribution centers nationwide, which disproportionately excluded female applicants from jobs as grocery order fillers.

[A] federal district court denied the employees' request for pre-certification discovery, finding it "manifestly implausible" that 5,000 black employees suffered a common injury that could be resolved on a class basis.

Pre-certification discovery of evaluation system

denied. In a putative class action brought by two employees alleging their company's performance review process discriminated against African American employees, a federal district court denied the employees' request for pre-certification discovery, finding it "manifestly implausible" that 5,000 black employees suffered a common injury that could be resolved on a class basis. Under the facts alleged in the operative complaint, the evaluation system contained "so many levels of subjectivity" that it could not feasibly be said to operate in like manner across the company's entire workforce or even a subgroup. Moreover, individualized inquiries would predominate over common questions, especially given the broad class definition proposed.

ALJ rejects OFCCP's \$400M unfair pay complaint. A DOL Administrative Law Judge (ALJ) recommended the dismissal of an Office of Federal Contract Compliance Programs (OFCCP) complaint accusing a major tech company of engaging in "systemic gender and racial discrimination" in paying women and minority employees less and steering them into lower-level positions. After an eight-day hearing, the ALJ issued a 278-page decision recommending that the complaint seeking \$400 million

in wages be dismissed. Among the judge's key findings were that the statistical evidence did not support an inference that the company engaged in the alleged intentional compensation discrimination

and there was no direct evidence of a policy or practice of relying on salary history data, in a systemic way, when setting employee salaries.

Insurer sued for not defending COVID-19 class action.

In a move that could signal an emerging trend, a fast food restaurant chain and two of its franchises have sued the franchisees' insurance provider for declaratory judgment and breach of contract in failing to defend them against a class action lawsuit alleging they failed to protect workers from COVID-19. The employees in the underlying class action alleged, amongst other things, that the restaurants failed to implement social distancing protocols, refused to disclose a coworker's COVID-19 diagnosis, and provided inadequate hand sanitizer, gloves, and masks. ■

On the JL docket

Mark your calendars for these timely and informative Jackson Lewis events:

November 17	<u>CALPELRA 45th Annual Training Conference: They Posted What? Social Media, Employee Discipline, and The First Amendment</u>
November 18	<u>Focus on Connecticut: Non-Supervisor Training for Compliance with New Connecticut Harassment Requirements</u>
November 19	<u>CALPELRA 45th Annual Training Conference: Peace Officer Investigations and Discipline: Tips and Best Practices</u>
December 11	<u>2020 Virtual Symposium for the Reimagined Workplace</u>

COVID-19 Employment LitWatch

The COVID-19 pandemic continues to alter the reality of how we live and work. What will never change is our commitment to provide you with the practical guidance you need to minimize legal risk while simultaneously reimagining your workplace. To help you interpret how the various challenges presented by the pandemic affect your business and your employees, we are pleased to share our [COVID-19 Employment LitWatch](#) tool.

LitWatch was developed to provide you with an ongoing summary and overview of pending COVID-19 labor and employment cases filed nationwide. LitWatch gives users a snapshot of COVID-19 related litigation categorized by areas of workplace law, including:

- Disability and Leave Accommodation
- Retaliation/Whistleblower
- Workplace Safety
- Wage and Hour
- Discrimination/Harassment
- Contract[s]
- Traditional Labor
- WARN Act

[Click here](#) to access the COVID-19 Employment LitWatch.

Visit our [Coronavirus/COVID-19 Resource Center](#) to sign up for Jackson Lewis' [COVID-19 Need to Know](#) email list and receive notice of new Jackson Lewis COVID-19 publications and upcoming webinars.

COMING UP Whatever the outcome of the November elections, the impact on the employment litigation landscape will be significant. In the next issue of the *Class Action Trends Report*, we will offer a 2020 year in review and look at what lies ahead — depending on which party wins the White House and Congress.