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# COMPASS

INSIGHTS AND DIRECTION FOR EMPLOYERS

## 20/20 VISION: NEW YEAR'S RESOLUTIONS FOR A THRIVING WORKPLACE IN 2020

Hera S. Arsen, Ph.D., *Editor in Chief*

With the start of a new year, in-house counsel and human resources professionals will want to be aware of what's on the horizon for 2020 and beyond. It's a good time for employers to take a breath and consider what issues they should be watching in 2020.

According to many analysts, several topics come to the fore in terms of booming legislation and litigation. These include independent contractor misclassification (which continues to have both the U.S. Department of Labor's and the National Labor Relations Board's attention), new state and municipal leave laws, class and collective action waivers in arbitration agreements, changes to state marijuana laws, and closer scrutiny of noncompete agreements. Our state and international roundup on page 3 is the tip of the iceberg. This time of year, employers may also want to take note of the many [minimum wage changes](#) that took effect on January 1.



We hope this issue of *Compass* will help you make 2020 a thriving year.

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Quirks About Québec



by James J. Plunkett (Washington, D.C.)

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D.C.

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AN INSIDE LOOK  
AT KEY ISSUES  
FROM CAPITOL HILL



### DOL Issues Tip Proposal

On October 8, 2019, the U.S. Department of Labor's (DOL) Wage and Hour Division (WHD) issued a proposed rule that would allow employers that do not take a tip credit to include employees who don't normally receive tips (e.g., cooks and dishwashers) in a mandatory tip pool. The proposal also addresses the "dual jobs" issue by permitting employers to take a tip credit for time that tipped employees spend doing non-tipped work, as long as the work is performed in a reasonable time immediately before, immediately after, or while performing the tipped duties.

### Expanded Electronic ERISA Disclosures?

On October 23, 2019, the DOL's Employee Benefits Security Administration issued a notice of proposed rulemaking that "would allow plan administrators who satisfy specified conditions to provide participants and beneficiaries with a notice that certain disclosures will be made available on a website." The proposed safe harbor would be in addition to—not replace—the 2002 electronic delivery safe harbor.

### President Rescinds Federal Contractor EO

On October 31, 2019, President Trump rescinded Executive Order 13495 (Nondisplacement of Qualified Workers Under Service Contracts), which requires that successor federal contractors in certain circumstances offer a right of first refusal of employment to workers employed under the predecessor contract. That executive order was one of three labor-related executive orders that President Obama signed on January 30, 2009—just days from the start of his first term. The other two executive orders—which are still in effect—prohibit federal contractors from seeking reimbursement of labor relations costs undertaken to persuade employees to exercise or not exercise their rights to join a union and require federal contractors to post a notice of employees' rights to unionize and participate in protected concerted activity.

### Fluctuating Workweek Proposal

On November 5, 2019, the WHD issued a notice of proposed rulemaking for computing overtime compensation for salaried nonexempt employees whose hours fluctuate from week to week.

### EEOC to Weigh In on Joint Employers?

According to the administration's Fall 2019 Regulatory Agenda that was released on November 20, 2019, the Equal Employment Opportunity Commission stated that by December 2019, it will issue a proposal to "clarify when an entity is covered under the federal EEO laws as a joint employer." It is unclear what, exactly, the EEOC will propose, especially considering that the Commission's rulemaking authority under Title VII of the Civil Rights Act of 1964 is limited to procedural, recordkeeping, and reporting matters.

### House Passes Workplace Violence Bill

On November 21, 2019, the U.S. House of Representatives passed the Workplace Violence Prevention for Health Care and Social Service Workers Act (H.R. 1309). The bill requires the federal Occupational Safety and Health Administration (OSHA) to issue an interim workplace violence prevention standard covering healthcare and social assistance industries. While over 30 Republicans voted in favor of the bill, most Republicans—including the White House—expressed concerns that it undercuts the rulemaking process. The bill is unlikely to advance in the U.S. Senate.

### USCIS to Commence H-1B Preregistration System

On December 6, 2019, U.S. Citizenship and Immigration Services (USCIS) announced that it would implement the electronic H-1B preregistration system for the upcoming 2021 fiscal year cap. The initial registration period will run from March 1, 2020, through March 20, 2020, and employers will be required to submit a \$10 registration fee for each H-1B petition.

STATE  
and  
INTERNATIONALR  UNDRUP

## CALIFORNIA

Governor Gavin Newsom recently signed into law [AB 9](#), which gives employees a two-year extension to file Fair Employment and Housing Act (FEHA) claims. Effective January 1, 2020, employees will have up to three years to file FEHA administrative charges. Employees will continue to have one year to file a lawsuit after receiving a right-to-sue letter from the Department of Fair Employment and Housing.



## CANADA

A recent decision from British Columbia is a reminder of how hard it is to establish just cause to terminate employment without notice in Canada. In [Re Dr. Paula Winsor-Lee](#), the British Columbia Employment Standards Tribunal upheld a finding that an employee's misconduct did not fundamentally undermine the employment relationship. The tribunal's decision made note of the limited history of recorded discipline, and the finding that the single incident of texting during a staff meeting was not so egregious that it justified summary dismissal.



## FLORIDA

The Eleventh Circuit Court of Appeals recently issued a decision that invalidates certain provisions in arbitration agreements in Fair Labor Standards Act wage and hour cases. In [Hudson v. P.I.P. Inc.](#), the court held that a provision requiring an employee to pay half of the arbitration costs was unenforceable. According to the court, "a mandatory 'pay your own' fees and costs clause removes the arbitrator's ability to award a plaintiff what is provided by statute if the plaintiff is successful."



## ILLINOIS

On June 25, 2019, Governor J. B. Pritzker made Illinois the 11th state to approve marijuana for recreational use. The Illinois General Assembly recently amended the act via [SB 1557](#), and on December 4, the governor signed the legislation. The amendments clarify an employer's ability to conduct pre-employment and random drug tests (employers may also conduct reasonable-suspicion and post-accident tests), and to take action due to a failure of a drug test.



## LOUISIANA

In [Heard, McElroy & Vestal, LLC v. John C. Schmidt, et al.](#), the Louisiana Second Circuit Court of Appeal held that a noncompete provision affecting a former member of an accounting firm could be reformed when the scope of the defined business and geographic limitation was overly broad. It also held that an LLC may not prohibit its former members from joining a competing business, though it can prohibit an employee from owning an interest in a competitor.



## MARYLAND

[A new state law in Maryland prohibits employers from requiring low-wage employees to enter into noncompete agreements.](#) SB 328, which took effect on October 1, 2019, prohibits employers from requiring any employee who earns less than \$15 per hour (or \$31,200 per year) to enter into an agreement that restricts the employee's ability to work with a new employer in the same or similar business.



## MASSACHUSETTS

The Department of Paid Family and Medical Leave (DFML) continues to [issue updates concerning compliance with the Massachusetts Paid Family and Medical Leave Law.](#) The DFML's most recent updates address private plan exemptions and how the DFML has reevaluated and revised its internal review process to more efficiently evaluate these applications.



## NEW YORK

Last year, New York State amended its antidiscrimination laws, with many of the changes going into effect on October 11, 2019. The [state recently issued updated FAQ guidance](#) regarding the new requirements. While the guidance leaves unanswered many questions about the amended law, it provides valuable information regarding the new requirements, including clarifying that harassment may now be unlawful even if it is not "severe or pervasive."



## OREGON

[Oregon's new pregnancy accommodation law](#) takes effect on January 1, 2020, and applies to employers with six or more employees. The new law is more explicit in outlining specific accommodations employers must provide and actions they may not take, and it imposes new notice requirements.



## RHODE ISLAND

Beginning on January 15, 2020, the [Rhode Island Noncompetition Agreement Act](#) will prohibit employers in Rhode Island from enforcing noncompetition agreements against four categories of employees: (1) employees who are classified as nonexempt under the federal Fair Labor Standards Act, (2) students who work as interns or as other types of short-term employees while enrolled at educational institutions, (3) minors, and (4) "low-wage employees."



## TEXAS

The [City of San Antonio's Sick and Safe Leave ordinance has been enjoined.](#) The ordinance was originally scheduled to go into effect on August 1, 2019, but on July 24, 2019, a Texas state court delayed implementation until December 1, 2019, pending a ruling on a motion for temporary injunction filed by business groups and the state. On November 22, 2019, the judge issued a letter ruling granting the temporary injunction.



## WASHINGTON

In 2018, the Washington Supreme Court considered the following certified question: "Does the Washington Minimum Wage Act require non-agricultural employers to pay their piece-rate employees per hour for time spent performing activities outside of piece-rate work?" In [Sampson v. Knight Transportation, Inc.](#), the court recently answered this question with a resounding no.



## BOOMERS & BOOMERANGS: RECRUITING FROM OVERLOOKED EMPLOYEE POOLS

by Elizabeth M. Ebanks (Richmond)

# PERSPECTIVES

The unemployment rate in the United States is 3.6 percent—its lowest level since 1969—but the employee turnover rate is roughly 20 percent. In this competitive marketplace, many companies are thinking outside the box in terms of attracting and retaining skilled employees. In this vein, some employers are trying to attract underemployed—but potentially highly effective—workers: (1) retired “baby boomers” and (2) boomerangs (or former employees).

Here are some advantages to hiring from these two groups.

### RETIRED BABY BOOMERS



Seniors are the fastest-growing segment of the U.S. workforce. According to the Bureau of Labor Statistics, individuals 65 years of age and older will account for more than 21 percent of the U.S. population—about 73 million—in 2030. In addition to expanding the pool of eligible employees, seniors can be good for business in the following ways:

#### MARKET INSIGHTS

Older workers may understand the needs of the enormous over-50 market and can help businesses tap into it.

#### AGE DISCRIMINATION CLAIMS

Many companies are turning to tech-based recruiting, but there has been a spike in allegations that companies are attempting to limit the applicant pool to younger workers. Actively seeking older employees may help reduce the likelihood of such claims.

### BOOMERANG EMPLOYEES



Many employers strive to maintain positive relationships with departing employees and often create alumni groups to stay in touch with their former employees. Assuming a former employee's previous experience with a company does not present any red flags, hiring a former employee can provide several benefits to an organization:

#### COST SAVINGS

Companies can save money on recruitment and training, particularly if a candidate approaches the company about returning or if the company reaches out directly to a candidate rather than engaging in the typical hiring process.

#### EASIER ONBOARDING

Former employees are already familiar with the company and its culture and may have an easier time transitioning into the job. Companies already know the skill sets of their former employees and whether they will be a good fit.

#### NEW PERSPECTIVES

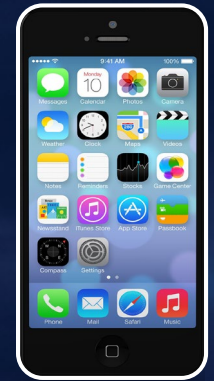
Former employees may bring new skills and insights from their experience working at a different company or in a different industry. They can also provide insights into why they left, why other employees might consider leaving, and whether the company can make changes to help retain employees.

Before implementing any new recruiting programs, employers may want to consider whether the program will reach a diverse pool of candidates and whether it could have any unintended public relations or business consequences.

# NAVIGATIONAL TOOLS



## THERE'S AN APP FOR THAT! Risks and Tips Regarding Digital Workplace Apps *by Evan R. Moses (Los Angeles)*



Imagine a mobile application (app) that can serve as a single portal for all of your employee relations activities and workforce communications. Love the idea? *So does the plaintiffs' bar.* Litigation arising out of workplace apps presents a rapidly growing trend. Here are a few high-risk areas to keep in mind before you roll out a workplace app.

### REIMBURSEMENT OBLIGATIONS

Consider if your expectations regarding the use of a mobile app create a reimbursement obligation. This includes reimbursement for not only the cost of mobile devices but also monthly data plans.

### OFF-THE-CLOCK WORK

In some situations, an employer may expect or even require employees to access a mobile app while off duty. In other situations, an app may allow employees to perform work off the clock even if that was not the employer's intention. Both of these situations can lead to claims for unpaid wages.

### INTERRUPTION OF MEAL AND/OR REST PERIODS

To avoid claims regarding off-the-clock work, an employer may direct employees to check the app only during working hours. However, this can lead to claims of interrupted meal and/or rest periods, as these may be the only times when some employees are able to check their phones.

### CONTENT-BASED CLAIMS

An app allows quick and frequent communication, which can make content screening difficult. This can lead to content-related disputes (e.g., claims involving defamation, harassment, discrimination, privacy, bullying, etc.).

### QUICK TIPS FOR AVOIDING LAWSUITS

- Consider drafting policies that explain your expectations, such as the permissible uses of the app, whether its use is voluntary or mandatory, whether time spent on the app is compensable, and whether there are alternative means for accessing information available through the app. Also consider having employees acknowledge receipt of and accept the terms and conditions of the app before they can begin using it.
- If use of the app is mandatory, consider how to track time employees spend on the app and any expenses related to its use. Consider mechanisms for limiting off-duty use. (For example, consider using a geofence so that the app is accessible only on your premises via your wireless network.)
- If you decide to provide reimbursement, consider creating a detailed policy. If you decide not to provide reimbursement, be sure that you have a good faith basis for that decision in case there is a lawsuit.
- Consider requiring employees to sign periodic attestations stating that, over a defined period of time, they complied with your policies and do not believe they are entitled to reimbursement or wages associated with use of the app.

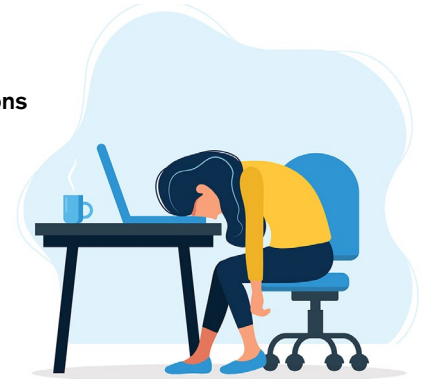


# ON THE RADAR

## WINTER WELLNESS: THE RX FOR EMPLOYEES WHO MAKE EACH OTHER SICK

According to an October 2019 survey, many U.S. workers are going to work sick. Consider the following statistics: 90 percent of polled workers said that, at least sometimes, they go to the office with cold or flu symptoms, and 33 percent of these workers stated that they *always* go to work with these symptoms. The top three reasons for going to work sick?

- 1 They have too much work.
- 2 They don't want to use their sick time.
- 3 They feel pressure from their employers.



Here are some issues to consider when seasonal illnesses spread through your organization.

### Wellness Programs

Over the past several years, employers have turned to wellness programs as an effective way to reduce healthcare costs, promote healthy lifestyles among employees, and proactively stave off lower productivity and absences due to employee illnesses. A wellness program can be something as simple as an informational meeting about healthy nutrition options, or as complex as offering on-site medical care for employees, and anything in between (e.g., flu shots, health/lifestyle coaching, weight loss programs, etc.).



Stephanie A. Smithey (Indianapolis)

### Leaves of Absence

Some seasonal illnesses may constitute “serious health conditions” under the Family and Medical Leave Act and/or its state equivalents. In some situations, employers may want to encourage obviously ill employees to use family medical leave for both the employees’ health and their coworkers’ health. Employers also may want to remind employees of rights they have under state and local paid sick leave laws.



Charles L. Thompson IV (San Francisco)

### Flu Vaccine Programs

Requiring employees to get vaccinations is a common practice among some employers. But vaccination programs can also be voluntary or a hybrid based on employee classification and work setting. Voluntary programs are attractive from the standpoint of avoiding employee objections and accommodation issues, but compliance rates may be inadequate. Employers may want to consult the United States Centers for Disease Control and Prevention’s recommendations, review applicable state vaccination laws, and assess the risks posed in their facilities in coordination with their infection prevention and control programs.



Michael Oliver Eckard (Charleston /Atlanta)

### Tax Implications

Employers should be mindful of the tax implications of their wellness program rewards. A wellness program itself (e.g., a screening or diagnostic test) is generally not taxable to employees, like other health coverage provided by employers. If an employee wins a reward under a wellness program, such as lower medical plan premiums or deductibles or additional employer contributions to a health care flexible spending account, health reimbursement arrangement, or health savings account, the reward likely will be excluded from income and not subject to income tax or payroll tax withholding. Cash rewards or cash equivalents, such as gift cards or gift certificates, however, are included in income and subject to income tax and payroll tax withholding.



Stephanie A. Smithey (Indianapolis)

# ALONG THE ROAD

STATS  
AND  
TRENDS

## 5 QUIRKS ABOUT QUÉBEC: OGLETREE DEAKINS OPENS ITS 54TH OFFICE IN MONTRÉAL

by Lucie Guimond (Montréal) and Ryan Martin (Montréal)

On November 18, 2019, Ogletree Deakins announced the opening of our 54th office, which will be located in Montréal, Québec, Canada. The new office expands the firm's presence in Canada outside of Toronto and allows the firm to continue to provide exceptional service to our Québec-based clients. The Québec office's experienced attorneys are fully bilingual. They frequently provide employment and labor law advice on a myriad of issues, including those related to individual and collective labor relations; occupational health and safety; privacy laws; human rights; workers' compensation dismissals and layoffs; non-competition, non-solicitation, and confidentiality clauses; and employment-related issues in the course of sales and mergers of businesses.

### HERE ARE 5 INTERESTING FACTS ABOUT THE LARGEST OF CANADA'S 10 PROVINCES.

1. Per the Charter of the French Language, the official language of the Province of Québec is French.



2. While other Canadian provinces, similar to most U.S. states and the UK, are governed by both statute and the common law, Québec is governed by the Civil Code of Québec, a body of rules and regulations that applies to all of Québec and acts as the legal foundation for all other adjacent laws.



3. Québec, like the rest of Canada, does not have "employment at will."



4. Non-solicitation and non-competition covenants are legal in Québec, while in other parts of Canada, they are presumed to be illegal.

5. In Québec, an employee with two years or more of service who is dismissed without cause can be reinstated into his or her former job.

2 YEARS

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### January

Jan 8	<b>Webinar</b>	<a href="#">Crunch Time: Practical Guidance for Complying With the CCPA</a>
Jan 29	<b>Webinar</b>	Road Map to Resilience: Strategies for Building an Engaged Workforce

### February

Feb 6	St. Louis	Employment Law Briefing
Feb 18	Spartanburg	Employment Law Briefing

### March

Mar 4-7	Napa	<a href="#">Navigating California Employment Law</a>
Mar 11	Philadelphia	<a href="#">Employment Law Briefing</a>
Mar 26	Birmingham	<a href="#">Employment Law Briefing</a>

### April

Apr 3	Las Vegas	<a href="#">Managing a Workforce in 2020</a>
Apr 3	New York	<a href="#">Managing a Workforce in New York, New Jersey, and Connecticut</a>
Apr 20	Franklin, TN	<a href="#">Employment Law Briefing</a>
Apr 21-23	Chicago	<a href="#">Employee Benefits and Executive Compensation Symposium</a>

### May

May 13-16	Austin	<a href="#">Workplace Strategies</a>
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### October

Oct 1-2	Austin	<a href="#">Immigration Insights Symposium</a>
Oct 29	Birmingham	<a href="#">Employment Law Briefing</a>

### November

Nov 11-14	Phoenix	<a href="#">Corporate Labor and Employment Counsel Exclusive</a>
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### December

Dec 2-4	Las Vegas	<a href="#">Workplace Safety Symposium</a>
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