JacksonLewis

THE YEAR AHEAD FOR EMPLOYERS

2021

Introduction

In 2020, COVID-19 collided with a presidential election, forever altering the workplace as we knew it. In 2021 employers are faced with reimagining the employer/employee relationship while simultaneously trying to keep pace with the evolution of workplace law.

2021: The Year Ahead for Employers details trends, legislation, regulation and litigation nationwide to help employers know what to expect in the coming months. We hope the report will prove to be a useful resource as you consider employment issues and navigate the coming year.

Highlights

- Diversity, equity and inclusion initiatives are on the rise in number and complexity, spanning the public and private sectors and addressing issues like pay equity, corporate board composition and diversity and anti-discrimination training;
- Class action litigation is increasing dramatically in the areas of higher education, biometric and other COVID-related data and worker classification as the workplace has gone remote;
- Investigations and enforcements of fraud and abuse have come into sharp focus with the allocation of billions of federal dollars;
- Benefits and leave policies were greatly expanded to accommodate the realities of COVID-19 and work/life balance;
- Dramatic shifts in immigration policy are anticipated as President-elect Joe Biden campaigned on reversing travel bans, caps on the number of immigration and refugees, reinstating DACA and more;
- Restrictive covenants and other tools to prevent unfair competition may disappear at the federal level; and
- There may be an increase in the federal minimum wage.

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Affirmative Action, OFCCP and Government Contract Compliance

As with any incoming administration, significant changes in federal contractor obligations and Office of Federal Compliance Programs (OFCCP) enforcement priorities in 2021 can be expected. However, implementation will take time. In the meantime, OFCCP and its career officials will continue to implement the many initiatives of outgoing Director Craig E. Leen.

Combating Race and Sex Stereotyping – Executive Order 13950

President Trump issued an executive order (EO) "On Combating Race and Sex Stereotyping" on September 22, 2020, covering government contractors and certain grant recipients and prohibiting the use of divisive concepts in diversity training. The EO triggered multiple First Amendment lawsuits, including one by the NAACP and another by LGBTQ+ rights advocates. A federal district court entered a nationwide preliminary injunction stopping the administration from enforcing EO 13950. The district court ruled that the EO violates the Free Speech Clause of the First Amendment "because it impermissibly chills the exercise of the Plaintiffs' constitutionally protected speech, based on the content and viewpoint of their speech." The court also ruled that parts of the EO are so vague that they violate the Fifth Amendment Due Process Clause because "it is impossible for Plaintiffs to determine what conduct is prohibited."

Prior to the court's preliminary order, the OFCCP had taken action to enforce the EO through the advent of a hotline to accept complaints and also issued a voluntary information collection. While the court order is preliminary in nature and may be reversed, for now, OFCCP and other federal government agencies will not enforce the EO, as stated on OFCCP's website.

In addition, rescission of EO 13950 may be high on President-elect Joe Biden's priority list, but that too will take time.

Religious Exemption – Executive Order 11246

In August 2018, OFCCP issued a directive to incorporate into its practices recent U.S. Supreme Court decisions regarding religious freedoms and their impact on exemptions from the anti-discrimination provisions of EO 11246. A year later, OFCCP published a proposed rule regarding the scope of the religious exemption contained in section 204(c) of EO 11246 and codified in OFCCP's regulations.

On December 7, 2020, OFCCP published the 156-page final rule clarifying that the religious exemption allows both a preference for religious federal contractors to employ individuals who share their religion but also to condition employment on acceptance of or adherence to religious tenets as understood by the employing contractor. The final rule likely will have a significant impact on which employers may be entitled to a religious exemption, and how the exemption impacts EO 11246's prohibitions of employment discrimination based on sexual orientation and gender identity.

Procedures to Resolve Potential Employment Discrimination

The OFCCP published a detailed final rule on November 11, 2020, codifying the procedures the agency must follow to resolve potential discrimination and other material violations of EO 11246, Section 503 of the Rehabilitation Act and Vietnam Era Veterans' Readjustment Assistance Act. It also clarified the types of evidence OFCCP must have to support disparate treatment (including pattern and practice) and disparate impact discrimination allegations. This rule codifies procedures the agency previously published as directives, making it harder for any subsequent administration to change them.

In summary, the final rule:

- Defines and establishes the terms qualitative and quantitative evidence to describe the type of evidence OFCCP must identify in support of a Pre-Determination Notice (PDN) or Notice of Violation (NOV) replacing the previous references to nonstatistical and statistical evidence;
- Codifies the agency's required consideration of practical significance in assessing potential violations;

- Identifies and differentiates the procedures and burdens for disparate treatment versus disparate impact cases, requiring OFCCP to provide qualitative evidence for all disparate treatment cases and identify a specific policy or practice causing the impact with factual support for disparate impact cases. Previously, qualitative (or anecdotal) evidence was required only in cases where the standard deviation was less than three. The final rule removes that threshold;
- Requires OFCCP to explain the basis for its discrimination findings (including pay discrimination), and upon request of the contractor, to provide the model, variables used and an explanation for why variables were excluded from its pay analysis;
- Provides the framework for contractors and OFCCP to explore early resolution procedures currently in use by OFCCP; and
- Clarifies the evidentiary standards OFCCP must meet for issuance of a PDN.

In effect, these amendments provide federal contractors with a clear understanding of OFCCP procedures related to, and a roadmap for responding to, allegations of discrimination.

Annual AAP Certification

The OFCCP may require the annual certification of AAP development — and potentially the upload of some portion of the AAPs for Agency review — of federal contractors. OFCCP's September 2020 notice seeking approval for annual certification is short on details but has been on OFCCP's radar since at least 2016. If approved, the certification process may compel federal contractors to dedicate more attention to promptly completing their AAPs each year.

Promotion and Accommodation Focused Reviews

During fiscal year 2020, OFCCP's audit focus turned to evaluating compliance efforts for protected veterans and individuals with disabilities. In its most recent Courtesy Scheduling Announcement Lists (CSAL), OFCCP initiated the focused review for promotions, which despite its title appears to be broad. Although the agency has yet to initiate any of these audits, OFCCP has stated it will pay close attention to analysis of federal contractor promotional activity to identify significant disparities in promotional opportunities and pay raises for women and minorities.

According to OFCCP's website:

"Each promotions focused review will consist of a desk audit followed by an on-site investigation which will include, but is not limited to, a review of policies and procedures, employee personnel files and interviews with managers responsible for promotions decisions as well as affected employees. For example, OFCCP may evaluate hiring and compensation data, as appropriate, to help determine if women of color are being limited from advancing professionally."

OFCCP also intends to conduct reviews focused on accommodation practices. While the accommodation focused reviews appear, to an extent, duplicative of the Section 503 focused reviews, the accommodation reviews also will include religious beliefs and practices, including undue hardship defenses. OFCCP will "review documentation relating to accommodation requests and dispositions, with a particular emphasis on denial(s) of accommodation. The review also will include interviews with managers responsible for or involved in the accommodation process as well as with affected employees and applicants."

Federal contractors should take a closer look at both their competitive and non-competitive promotion policies, practices and data as well as accommodation policies, procedures and records to prepare.

Pre-Referral Mediation Program

The OFCCP issued Directive 2020-03 in April 2020 dictating or suggesting the nuts and bolts for a voluntary OFCCP/contractor mediation process. The directive's objective is "to provide the best opportunity for resolving matters before significant time and resources are spent in the enforcement process" and before referring the case for enforcement to the Office of the Solicitor. The Pre-Referral Mediation Program has proven to be a useful avenue for some federal contractors, primarily because it fosters open and frank discussions of the merits of discrimination allegations.

Pay Data Reporting and Analysis

While the Equal Employment Opportunity Commission (EEOC) will not be collecting federal contractor pay data for the immediate future, the prospect of pay data reporting is not dead, especially for California employers. The EEOC has announced that it will continue an independent study of the quality and utility of the 2017 and 2018 EEO-1 Component 2 data it collected in 2019 as the result of a court order. The agency expects the study to be complete by the close of 2021.

The EEOC has also continued its efforts to modernize its EEO data. In December 2018, the EEOC created the Office of Enterprise Data and Analytics (OEDA). Since its inception, the OEDA has been working on modernizing EEO data availability. On December 2, 2020, the EEOC launched "EEOC Explore," a data analytics tool that aggregates publicly available EEO-1 data into a series of interactive dashboards, and public portal that allows users to download the EEOC's complete EEO-1 data sets for 2017 and 2018.

EEOC Explore represents a significant first step toward the agency's vision of building "a 21st century data and analytics organization" and demonstrates the EEOC's commitment to data analytics. It also signals the importance employment data and data analytics will have on the EEOC's investigative and enforcement activities.

In the meantime, California's Senate Bill 973 has stepped into the void by requiring resident employers to provide similar pay data by March 31, 2021. The California Department of Fair Employment and Housing (CDFEH), which will oversee the data collection, recently issued guidance stating that it is "endeavoring to create a system that closely resembles the EEOC's system." The guidance details many of the requirements, but it also leaves open key questions for future explanation.

Senate Bill 973 requires employers with 100 or more employees to report to CDFEH pay and hours-worked data by job category and by sex, race and ethnicity. When determining the 100-employee threshold, employers must include both employees residing/working in California as well as employees outside California. However, for pay reporting, employers need only include employees assigned to a California establishment, including any employees outside of California, whether teleworking, and any other California employee, including those teleworking from California but assigned to an establishment outside of California. The guidance says employers "may" but are not required to report other employees. CDFEH will regularly update this guidance.

An administrative law judge (ALJ) issued a lengthy decision in an OFCCP pay discrimination case in September 2020. The case was initiated in early 2017 under the prior OFCCP administration, and the decision is a significant setback to OFCCP's approach to pay analyses. In summary, the ALJ ruled that OFCCP had not established a disparate treatment (pattern or practice) pay discrimination claim because:

- The statistical evidence, alone, was insufficient to establish a case;
- The agency had not met its burden to provide anecdotal evidence of intentional discrimination; and
- The agency did not identify a specific pay practice or policy sufficient to support a disparate impact claim.

Notably, these holdings follow the Final Rule discrimination regulations discussed above.

Because OFCCP has elected not to appeal, a new OFCCP administration will need to reconcile this decision with its efforts to address allegations of systemic pay discrimination.

Class Actions and Complex Litigation

COVID-19

Class and collective action litigation continues to evolve alongside the ever-changing workplace. Although companies have faced an onslaught of employment claims related to COVID-19 and its operational and financial impact, relatively few of these were class filings. As November 2020 drew to a close, 1,073 COVID-related employment complaints were filed in federal and state courts; 59 of those complaints were class or collective actions.

However, multi-plaintiff lawsuits will likely pick up steam in early 2021 as the nation contends with the most recent surge and the continuing economic fallout. The logistical challenges of initiating litigation in the middle of a pandemic resulted in a measurable drop-off in both class action and single-plaintiff employment claims in 2020, according to Lex Machina (along with other types of lawsuits), the emergence of practical workarounds should hasten the queue once COVID-19 vaccines restore a sense of normalcy.

Colleges and Universities

Colleges and universities, however, have been inundated with class action complaints directly related to COVID-19. Last spring, institutions of higher education were forced to abruptly shutter their residence halls and transition to online instruction for the safety of students, faculty and staff. Students filed suit alleging they were entitled to partial reimbursement of tuition, room and board. These lawsuits typically assert claims of breach of contract and/or unjust enrichment, arguing that the schools improperly benefited by retaining their full tuition and housing costs despite shutting down mid-semester. New class action cases are being filed almost daily, with novel theories of liability continuing to emerge, and some of the initial suits have avoided early dismissal. As the state of the pandemic and on-campus instruction are likely to remain in flex, at least through the remainder of this academic year, it is virtually certain that new pandemic-related tuition claims will be filed well into 2021.

Wage and Hour

We anticipate an uptick in wage and hour class actions arising in part from the dramatic spike in telecommuting in 2020. We can also expect an increase in off-the-clock claims by nonexempt employees as well as suits seeking expense reimbursements for their home office costs. It is critical for employers to mitigate the risk by revisiting their timekeeping practices and policies, including strict prohibitions against working off the clock without prior approval, and ensuring compliance with state law reimbursement mandates, particularly for employees in California and Illinois.

Healthcare, hospitality/restaurant and retail employers will be particularly vulnerable to wage and hour class actions by onsite employees. Employers may face the prospect of class-wide overtime or off-the-clock suits by nonexempt essential workers who must wait in line for temperature scans, exempt managers who perform a disproportionate amount of nonexempt work in an effort to control payroll costs and healthcare staff working extended shifts.

In addition, the U.S. Supreme Court may grant certiorari to weigh in on a critical issue related to the conditional certification of collective actions under the Fair Labor Standards Act (FLSA), perhaps fundamentally reshaping how these cases are litigated. Imminently, the Court will decide whether it will provide guidance this term on the standard required to establish that a putative class of workers are "similarly situated" for purposes of proceeding as a collective under the FLSA. Some federal courts have applied a comparatively low bar in granting conditional certification under FLSA, Section 216(b), as compared to the more rigorous showing required to proceed as a class under Rule 23 of the Federal Rules of Civil Procedure. The modest threshold to establish that potential opt-in plaintiffs are "similarly situated" often forces employers to settle meritless claims or engage in costly discovery and disruptive class-wide litigation.

Notably, the petition before the High Court involves decertification of a collective action rather than the initial-stage certification. But the petitioners argue that the case at hand "presents an ideal vehicle for the Court to break its decades-long silence on the issue." There is reason for optimism that the Justices will take up the case in 2021 and will demand more rigor by the courts in conditionally certifying FLSA collectives.

Arbitration

A big question in 2020 was whether "gig" transportation workers could be forced to arbitrate their claims alleging they were misclassified as independent contractors and thus improperly denied overtime pay and other benefits. The Federal Arbitration Act (FAA) has sent many would-be class litigations into individual arbitration in recent years. However, the FAA's transportation worker exemption which applies to workers engaged in interstate commerce, has arisen as a potential obstacle thwarting attempts by some companies to enforce their arbitration agreements in lieu of judicial resolution of disputes. The critical question is whether the FAA exemption (which the Supreme Court has held covers both statutory employees and independent contractors) applies to "last mile" delivery drivers that companies contend are not engaged in the interstate commerce that the exception was intended to cover.

In a July 2020 decision, the U.S. Court of Appeals for the First Circuit held that an online retailer's independent contractor drivers, who perform the last leg in the intrastate transport of goods purchased online by customers, were covered by the exemption and so could not be compelled to arbitrate their misclassification claims. The appeals court reasoned that although the drivers did not themselves transport goods across state lines, they were an integral part of the interstate flow of goods. Weeks later, in a decision authored by now-Supreme Court Justice Amy Coney Barrett, the Seventh Circuit Court of Appeals rejected the notion that local drivers for a restaurant delivery app fell under the FAA exemption. Although these drivers argued they carried goods that had moved across state lines, the appeals court hewed to a narrower interpretation of the exemption, saying it applied solely to individuals who are themselves "engaged in the channels of foreign or interstate commerce."

The scope of the FAA exemption impacts transportation workers beyond the gig driver context. The Fifth Circuit ruled on the exemption in a 2020 case involving an airline ticket agent at the Houston airport who was seeking to avoid arbitrating her discrimination and retaliation claims. Other cases are pending in other Circuit Court of Appeals as well.

The U.S. Supreme Court also has been asked to take up the question. Currently pending is a petition for review of a divided Ninth Circuit decision that held that third-party "last mile" delivery drivers for an online retailer could not be compelled to arbitrate their independent contractor misclassification claims under the FAA.

California

As we reported last year, California Labor Code §432.6, originally due to take effect on January 1, 2020, prohibits employers from conditioning employment or some other employment-related benefit on an employee's consent to waive rights, forums or procedures, including a waiver of court as a forum in favor of arbitration, for alleged violations of the California Fair Employment and Housing Act (FEHA) or California Labor Code. It also prohibits employers from threatening, terminating or otherwise retaliating or discriminating against employees or applicants because of their refusal to waive any rights, forums or procedures for alleged FEHA or California Labor Code violations. The law makes clear that even voluntary opt-out clauses (as opposed to affirmative opt-in clauses) in arbitration agreements are insufficient to escape the new law's restrictions. The law applies only to agreements executed, modified or extended on or after January 1, 2020. The law also explicitly carves out arbitration agreements that are otherwise enforceable under the Federal Arbitration Act (FAA).

On February 7, 2020, a federal district court in California preliminarily enjoined the enforcement of California Labor Code section 432.6 with respect to arbitration agreements governed by the FAA.

In *Chamber of Commerce of United States v. Becerra*, the court found that California Labor Code section 432.6 is likely preempted by the FAA because the law:

1. Singles out arbitration agreements and puts them on unequal footing compared to other contracts by placing uncommon barriers, including special consent rules, on arbitration agreements; and
2. Interferes with the FAA's goal of promoting arbitration by subjecting employers who require arbitration agreements to civil and criminal liability.

The ruling in *Becerra* is now before the U.S. Court of Appeals for the Ninth Circuit. The court heard oral argument on December 7, 2020, during which the three-judge panel had sharp questions for both sides, including questions about whether California intended to impose criminal liability on employers who implement mandatory arbitration agreements and whether arbitration could be treated the same as other non-negotiable terms of employment. The court is unlikely to render a decision for several months, with a subsequent petition for certiorari to the U.S. Supreme Court likely. The ultimate outcome of the case will have a tremendous impact on California employers as well as employers in other states where similar laws have been passed or are under consideration.

Privacy

Over the past few years, businesses have been the target of an avalanche of class action lawsuits alleging violations of the Illinois Biometric Information Privacy Act (BIPA), which is the most stringent biometric privacy statute in the United States. We anticipate that the steady rise of privacy-related class actions will persist in 2021. In all, more than 700 putative class action lawsuits alleging violations of the BIPA have been filed in state and federal courts, primarily in Illinois.

At its core, the BIPA, which became effective in 2008, provides a number of technical mandates relating to the collection, storage, use and destruction of biometric data. The use of biometrics by businesses has become increasingly prevalent over the past several years as a result of biometric technology that has become more mainstream. Commonly, businesses use biometrics for time management (*e.g.,* requiring employees to scan a finger or hand to clock in and out each day), security access, safety and in conjunction with employee wellness programs. However, novel claims continue to emerge based on companies' use of biometric devices beyond just time clocks. Employers must consider BIPA compliance, for example, among other privacy laws, when using thermal scanners and other measures to control the spread of COVID-19 at the workplace.

In addition, a number of notable BIPA cases that are currently the subject of appeals in state and federal court could dramatically shape the legal landscape for biometric litigation and provide guidance regarding various unresolved issues that likely will be decided by the courts in the coming year, including the applicable statute of limitations for claims under the BIPA. And, like the California Consumer Privacy Act (CCPA), another state privacy law that can ensnare employers in class-wide litigation, plaintiffs' counsel often argue that the BIPA applies to entities even outside the jurisdiction that collect, store or use information about individuals within the state.

Moreover, employers must watch for the possible enactment of biometric laws in other jurisdictions in 2021, at the federal, state and local levels. For example, in September 2020, the City of Portland, Oregon became the first city in the United States to altogether ban the use of facial recognition technologies in the private sector, and similar measures are afoot in New York and elsewhere. Also, depending on which party holds power in the Senate, 2021 may well usher in a federal biometric privacy statute that closely mirrors the Illinois law. Thus, it is critical for companies to consider their biometric compliance on a national level in order to stay ahead of the curve as it relates to this rapidly evolving area of the law.

Also on the privacy front, the federal Telephone Consumer Protection Act (TCPA) and CCPA—also nationwide in its reach—will continue to spur class litigation against businesses that fail to heed the growing expectations and challenges related to consumer and employee privacy.

ADA ACCOMMODATION CLAIMS

Businesses have faced a dramatic increase in class action claims challenging the accessibility of websites for individuals who are blind or vision-impaired as well as allegations that websites are not accessible to deaf or hard-of-hearing patrons under Title III of the Americans with Disabilities Act (ADA). These cases, invariably brought as class actions, are most frequently filed in federal courts in New York. However, businesses across the country, large and small, are subject to suit. Reaching full compliance with website accessibility protocol can be daunting.

Corporate Diversity Counseling

2020 saw several noteworthy shifts in corporate emphasis on diversity, equity and inclusion (DEI), foreshadowing a variety of new and continuing areas of focus in 2021.

George Floyd, Black Lives Matter and Aftermath: New Era of DEI

The deaths of George Floyd, Breonna Taylor and others, with ensuing demonstrations and social protests by Black Lives Matter and related organizations, precipitated an unprecedented corporate focus on workplace DEI. Sparked by employee activism, concerns over racial equity and external pressure, many prominent companies announced new commitments to strengthen DEI in the workplace and beyond, including such areas as:

- Rapidly improving minority representation, especially by African Americans, throughout the company, with special focus on leadership positions;
- Establishing new and often exclusive programs such as mentorship, sponsorship and high-potential career development for underrepresented minorities;
- Creating diversity scholarships and intern programs;
- Revamping selection processes to ensure inclusion of underrepresented minorities;
- Strengthening or creating DEI programs, including establishment of diversity councils and committees, employee resource groups and designation of a chief diversity officer;

- Developing partnerships with external civil rights and economic justice organizations to improve diverse recruiting and enhance good corporate citizenship and reputation; and
- Engaging corporate diversity counseling/data analytics experts to assess workplace DEI programs and performance and provide recommendations for improvement.

Diligent companies should consider the legal and practical aspects of all DEI initiatives, including those listed above. Title VII, Section 1981, Equal Employment Opportunity Commission regulations and guidelines, state law and related judicial precedent must be taken into account in managing the competing risks of action vs. inaction.

Given the depth and breadth of corporate commitments in this area and the expansion of the social justice movement, we anticipate this heightened focus on DEI continuing throughout 2021.

Changing Demographics Cannot Be Ignored

The U.S. Census Bureau projects that the country will become a "minority-only" nation by 2042, with no racial or ethnic group constituting a majority. In addition, due to the impending retirement of Baby Boomers and the fact that minority populations are growing at a faster rate than non-minorities, changes in workforce demographics will accelerate, rapidly increasing workforce diversity. Securing the best available talent requires recruiting, hiring, developing, promoting and retaining racial and ethnic minorities.

CEO Action and Other Examples of Corporate Leadership

Many companies are embracing and publicizing their DEI commitments and efforts, and they increasingly endeavor to collaborate with peers — and even competitors — to encourage DEI. Rather than risk exposure of their lack of progress or hoard their best ideas, companies are joining peer-to-peer efforts to advance DEI in the workplace, often in industry-specific groups. Perhaps the wide-reaching and best known of these efforts is CEO Action for Diversity and Inclusion (CEO Action). Spearheaded by PwC Chairman Tim Ryan, CEO Action launched in June 2017 and, as of December 4, 2020, has more than 1,500 signatories, including Jackson Lewis.

By signing the CEO Action Pledge, CEOs commit themselves and their organizations to four activities:

1. Make workplaces trusting places to have complex and often difficult conversations about diversity and inclusion;
2. Implement and expand unconscious bias education;
3. Share best — and unsuccessful — practices; and
4. Create and share strategic inclusion and diversity plans with boards of directors.

Diverse Candidate Slates

Diverse slates have been a hot topic in 2020. The National Football League instituted the Rooney Rule in 2003, requiring pro football teams to interview at least one minority candidate for head coaching positions and, since 2009, senior football operations positions, regardless of title. In 2020, the NFL extended the Rule to include consideration of at least one minority for offensive, defensive and special teams coordinator positions and to require consideration of minorities and/or women for senior executive positions, including team president. While the Rooney Rule has become shorthand for this type of requirement, most employers tailor the approach to apply to their unique workplace (*e.g.*, including women as well as minorities for all covered positions and including a broader range of senior management positions). Defining the range of positions to which these types of rules applies accounts for much of the variation among corporate practices.

The following are some important considerations for employers in creating a diverse candidate slate rule:

- **Characteristics to Be Considered:** As noted above, such rules typically apply to female and minority candidates. Some have advocated applying the rule to other characteristics, such as people with disabilities and members of the LGBTQ+ community, but those groups are harder to identify and define — and doing so creates its own risks. Because most employers are required to identify employees by race and gender for purposes of EEO-1 reporting, this information is ordinarily available for internal candidates.

- **Positions Covered by the Rule:** Organizations typically identify a range of mid- to senior-level executive positions, but some apply the rule to all positions. Companies looking for a limiting principle should exclude those positions that already have adequate representation of minorities and/or women.
- **Required Minimums:** Corporate diverse slate policies typically require that at least one minority and at least one female candidate be interviewed for all positions that have an interview pool of at least five candidates. This may effectively exempt positions at both the bottom and top of the hierarchy, where large interview slates are not typical. Most but not all employers specify that the one woman, one minority rule requires two separate individuals — a minority woman may satisfy the requirement for a minority or a woman, but not both.
- **Progressive Rules:** Some employers that interview a large number of candidates for a position (*e.g.*, filling multiple low- to mid-level manager positions) adapt the rule to these larger candidate pools by increasing the minimum numbers of women and minority candidates based on the number of candidates to be interviewed. For example, if the interview pool is expected to be five to nine candidates, some employers require at least two women and two minorities; for pools from 10 to 14 candidates, three each, and so on.

Pay Equity

Pay equity continues to be a priority, both as a corporate initiative and a legislative concern. Recent surveys show that most private employers are voluntarily conducting workforce pay equity analyses to identify and address disparities, and this trend is likely to continue. The reasons cited are to build a culture of trust, eliminate bias in pay policies and because it makes business sense to do so. Additionally, states continue to propose and enact a variety of pay equity laws with specific requirements, such as salary history bans and wage discussion protections. Companies must be vigilant not only in following federal law but staying abreast of these rapidly evolving state and local requirements that affect their pay practices and analytical methodologies.

Corporate Governance and Internal Investigations

Pandemic Whistleblower Actions

The COVID-19 crisis has progressed at a dizzying pace, leaving even the most prudent and proactive employer scrambling to keep up with new legislation, evolving agency guidance and needed safety protocols.

With these new requirements come new opportunities for employees to become whistleblowers. According to Jackson Lewis' COVID-19 Employment LitWatch tracker, approximately 300 retaliation/whistleblower lawsuits related to COVID-19 have been filed in state or federal courts.

At the federal level, Senator and now Vice President-Elect Kamala Harris introduced the COVID-19 Whistleblower Protection Act (S. 3963). A report by the U.S. Department of Labor Office of Inspector General (OIG) noted that from February 2020 through May 2020, the Occupational Safety and Health Administration's (OSHA) whistleblower program received approximately 1,600 COVID-19 whistleblower complaints. Further, there may be an attempt to report alleged wrongdoing under the federal False Claims Act, including alleged misuse of government funds from the CARES Act Paycheck Protection Program.

On the state and local level, employees may have whistleblower protection due to legislation in their jurisdiction. The Philadelphia Code was amended to add a chapter entitled "Employee Protections in Connection with COVID-19 Emergency Health Order," making it unlawful for employers to fire or otherwise retaliate against employees who speak out against unsafe health conditions amid the COVID-19 pandemic. Similarly, within a day of New Jersey Governor Phil Murphy publicizing a hotline phone number to lodge complaints against employers in New Jersey that may be violating a COVID-19-related Executive Order (EO 107), the hotline became overloaded.

These examples serve as a reminder to employers that whistleblowing is prevalent, and COVID-19 whistleblowing is no exception. Given the varied potential areas for employer missteps, we expect pandemic-related whistleblower claims to continue to grow in 2021.

SEC Whistleblower Program

The pandemic did not stop the Securities and Exchange Commission (SEC) from announcing several significant whistleblower awards in calendar year 2020. Five of the top 10 whistleblower awards (by award amount) are now from calendar year 2020. In October 2020, the SEC announced an award to a whistleblower of over $114 million.

Further, in September 2020, the SEC voted to adopt numerous amendments to the rules governing its whistleblower program. As set forth in the SEC's press release, "The amendments to the whistleblower rules are intended to provide greater transparency, efficiency and clarity, and to strengthen and bolster the program in several ways." Notably, then-SEC Chairman Jay Clayton stated the "rule amendments will help us get more money into the hands of whistleblowers, and at a faster pace." Then-Chairman Clayton further stated, "Experience demonstrates this added clarity, efficiency and transparency will further incentivize whistleblowers, enhance the whistleblower award program and benefit investors and our markets."

The SEC's press release noted, "For purposes of retaliation protection, an individual is required to report information about possible securities laws violations to the Commission 'in writing.' As required by the Supreme Court's decision, to qualify for the retaliation protection under Section 21F, the individual must report to the Commission before experiencing the retaliation."

Board Governance During COVID-19

As the pandemic continues to impact companies of various sizes and industries, we anticipate that the directors of company boards, of both publicly traded and privately held organizations, will continue to consider the corporate governance implications of this worldwide crisis. The governance implications will likely include an assessment of the board's role in addressing, managing through and disclosing the impact of the pandemic on the company's ongoing operations, as well as the company's financial results and general sustainability, and cyber security with an increasingly remote workplace.

Internal Investigations Go Remote

Internal investigations went remote this year due to the pandemic, representing a major shift in the way investigations are typically conducted. Remote-based investigations by way of intranet video conference tools presented opportunities for efficiency as well as challenges. The travel and logistics of witness interviews were significantly more facile in a remote setting. However, investigators grappled with some notable aspects of any fact-finding interview, including assessing the credibility of a witness over video conference, sharing and discussing documents, building rapport with the witness and other challenges. Given the significant cost savings, however, we anticipate that remote-based investigations will continue into 2021, with in-person interviews limited to those situations where travel can be justified.

Board Diversity Remains a Priority

In 2020, California Governor Gavin Newsom signed a bill into law requiring publicly held domestic or foreign corporations with principal executive offices in California to have at least one director from an underrepresented community on their boards of directors by the close of the 2021 calendar year, with increases the following year for boards of certain sizes. Under the law, "'[d]irector from an underrepresented community' means an individual who self-identifies as Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian or Alaska Native, or who self-identifies as gay, lesbian, bisexual, or transgender." The bill states that a corporation may increase the number of directors on its board to comply with the law. Washington State also passed legislation in 2020 which contemplates board diversity (see Substitute Senate Bill 6037).

Given the focus on board diversity in recent years, as well as the recent Black Lives Matter and related social justice movements, we anticipate there will be added political pressure on states beyond California to introduce similar legislation in 2021.

Disability, Leave and Health Management

Mandated Employer Leave – Paid and Unpaid

State and local paid sick leave

The steady increase in new state and local paid leave laws is expected to continue in 2021. Colorado's new paid sick leave law goes into effect on January 1, 2021. Employees in New York State will be able to begin using paid sick leave on January 1, 2020, after that state's paid sick leave law took effect on September 30, 2020. Eligible employees in Maine can begin taking paid leave on January 1, 2021, for any reason under that state's law. The fate of paid sick leave laws in Dallas, San Antonio and Austin, Texas, is still in flux due to pending legal challenges. The next Texas state legislative session resumes in early 2021, so there is the possibility of state legislative action.

State paid family and medical leave laws

The trend of new state paid family and medical leave laws continues to slowly rise. A successful November 2020 ballot measure in Colorado enacted a state-based paid family and medical leave program to take effect on January 1, 2024. Under this program, employees can take leave for their own or a family member's serious health condition, to care for a new child, for reasons of a family member's military deployment or for safe leave. Leave is up to 12 weeks, with an additional four weeks for pregnancy or childbirth complications. Several more paid family and medical leave bills are pending in various states, including Illinois, Pennsylvania, Ohio and others. Under the Connecticut Paid Family and Medical Leave program, wage deductions must begin on January 1, 2021, with payment of benefits to eligible employees slated to begin on January 1, 2022. Benefit payments under the Massachusetts Paid Family Medical Leave program will become available on January 1, 2021. The period of leave under the New York Paid Family Leave law will increase from 10 weeks to 12 weeks on January 1, 2021.

Federal paid family and medical leave for private employers

A federal paid family and medical leave law might gain traction after failed attempts in prior administrations with a new incoming administration in 2021, especially with increasing bipartisan support.

COVID-19-specific state and local leave and leaves after FFCRA sunset

In the midst of the ongoing COVID-19 pandemic, state and local leave laws have cropped up to provide paid leave for specific COVID-19-related reasons to eligible employees. For example, California (as well as local laws in Los Angeles, Sacramento, Long Beach, Oakland, San Diego, San Francisco, San Jose, San Mateo, Santa Rosa and Sonoma County); Colorado; the District of Columbia; Nevada; New York; Philadelphia and Pittsburgh, Pennsylvania; and Washington State (as well as Seattle) have all passed some form of legislation. Further, many states and local jurisdictions have expanded existing paid sick leave laws to include COVID-19-related reasons for leave under those existing laws.

Many of these laws will continue to be in effect in 2021. With the sunset of the Families First Coronavirus Response Act (FFCRA) on December 31, 2020, and the ongoing state of the COVID-19 pandemic, the trend of additional state and local COVID-19 leave laws may continue into 2021. Current states with pending bills include Massachusetts, Minnesota, New Jersey, New York and Pennsylvania.

As of the end of November 2020, there were 45 pending state bills that call for private employers to provide paid sick leave or other forms of paid time off to employees. The dizzying pace of new bills being introduced at the state level to provide paid sick leave and other paid time off is expected to continue in 2021.

COVID-19 Vaccination Policies

With the FDA's approval of the Emergency Use Authorization (EUA) for the COVID-19 vaccine, employers are facing decisions on whether to implement COVID-19 vaccination policies that either encourage or mandate employees to receive the vaccination. Early indications are that the new administration will not mandate the COVID-19 vaccine on a national level, but state and local jurisdictions could take a different approach. The Equal Employment Opportunity Commission (EEOC) issued Technical Guidance in December 2020 differentiating COVID-19 Emergency Use Authorization (EUA) approval from regular approval under FDA vaccine licensure. Accordingly, mandating the COVID-19 vaccine may pose risk while it is still in EUA status, and this issue is expected to evolve in 2021. However, until we receive further guidance, employers will be faced with complex legal issues surrounding encouraging versus mandating COVID-19 vaccination policies. Such issues include workers' compensation issues, particularly in context of EUA status; on-site availability and related HIPAA/ACA issues; confidentiality; disparate treatment claims; and requests for accommodations or exemptions from employees based on medical conditions, pregnancy and religious beliefs.

Title III Accessibility

The Online Accessibility Act was introduced on October 2, 2020, to alleviate the lack of clarity concerning how companies are supposed to make websites accessible to vision impaired individuals. There is currently no law or regulations under the Americans with Disabilities Act (ADA) directly addressing technical or legal standards for website accessibility. The Online Accessibility Act intends to remedy many of these issues and concerns by creating a new Title VI for the ADA devoted entirely to consumer facing websites and mobile applications. The Act requires substantial compliance with WCAG 2.0 A, AA, an exhaustion of administrative remedies with the Department of Justice and that plaintiffs plead "with particularity each element of the plaintiff's claim, including the specific barriers to access." Each of these additional components is important because they narrow the claims that can be brought by plaintiffs, create a framework and standard by which website accessibility claims are evaluated and, most importantly, put the onus on the plaintiff to identify the specific links and precise areas of the web page that are inaccessible. This in turn makes it easier for a website to be remediated that benefits all vision-impaired users. In addition, it makes it easier for a court to determine whether there is a violation.

For 2021, we anticipate an increase in lawsuits alleging inaccessibility of mobile apps, an increase in lawsuits alleging that healthcare providers failed to provide medical services on an equal basis in violation of Title III of the ADA, Section 504 of the Rehabilitation Act and Section 1557 of the Affordable Care Act and an increase in class action lawsuits alleging violations of Title III due to the failure to maintain aisle width in stores because of the occurrence of merchandise displays, stocking carts, boxes and similar equipment.

Pregnancy Workers Fairness Act

The U.S. House of Representatives passed the Pregnant Workers Fairness Act (PWFA) in September 2020. The bill eliminates discrimination and promotes women's health and economic security by ensuring reasonable workplace accommodations for workers whose ability to perform the functions of a job are limited by pregnancy, childbirth or a related medical condition. The PWFA clarifies the standards for analyzing claims under the Pregnancy Discrimination Act established by the U.S. Supreme Court in *Young v. UPS*[1] and subsequent EEOC guidance. The bill is currently in committee in the U.S. Senate, and we anticipate this bill to be a subject of discussion and further action in 2021.

Parental Leave and Child Care in the Ongoing COVID-19 Pandemic

The COVID-19 pandemic brought to the forefront ongoing issues related to employees teleworking with childcare needs due to virtual schooling, remote learning and unavailability of childcare. Employees were also faced with caring for parents and older family members and those with underlying medical conditions. The FFCRA filled in some gaps with its Emergency Paid Sick Leave and Emergency FMLA Expansion provisions, but these only apply to employers with less than 500 employees, and the sunset date was December 31, 2020, with no apparent extension contemplated at this time.

The EEOC's 2007 enforcement guidance and 2009 best practices guidance on workers with caregiving responsibilities is likely to garner a fresh read. That guidance notes that federal EEO laws do not prohibit discrimination against caregivers. However, it states that there are circumstances in which discrimination against caregivers might constitute unlawful disparate treatment.

With COVID-19 surges across the U.S. in late 2020 and the resulting rollbacks and shutdowns, we anticipate these issues will continue in 2021. To retain and attract employees, employers may need to look beyond strict compliance and develop creative methods to support employee balance of job and family demands, including more permanent telework roles, enhanced flexible scheduling, expansion of onsite childcare and tutoring benefits and temporary unpaid leave programs.

California Family Rights Act 2021 Expansion

One of the biggest changes facing California employers in 2021 will be the expansion of the California Family Rights Act (CFRA). Beginning January 1, 2021, CFRA applies to employers employing five or more employees. The CFRA, similar to the Family Medical Leave Act, previously authorized eligible employees of employers with 50 or more employees to take up to 12 weeks of job-protected leave.

In 2021, in addition to current reasons, eligible employees may use CFRA leave to take time off to care for a grandparent, grandchild or sibling with a serious health condition or because of a qualifying exigency related to the employee's call to active duty or the call to active duty for certain family members.

To complement this expansion of the CFRA, the California legislature added qualifying exigency leave as a reason for receiving wage replacement benefits from the California Paid Family Leave Program. Employees are currently eligible to receive wage replacements benefits if they were on approved leave to care for a grandparent, grandchild or sibling.

Drugs and Alcohol

Support for Marijuana Legalization Remains Steady

Sixty-eight percent of Americans are in favor of legalizing marijuana, according to a November 2020 Gallup poll. While this is only a slight increase over last year, Gallup's data shows that support for legalizing marijuana has increased by 10 percent since 2015 and more than 20 percent since 2010.

Marijuana Status Under Federal Law

Despite public support for legal marijuana, it is still an illegal drug under the federal Controlled Substances Act. However, the "Marijuana Opportunity Reinvestment and Expungement Act of 2019" or the "MORE Act of 2019," which was first introduced in July 2019, was passed by the U.S. House of Representatives on December 4, 2020. The MORE Act of 2019 would remove marijuana from the Controlled Substances Act, provide a process for expungement of federal cannabis arrests and offenses and impose a five percent tax on cannabis products, among other things. However, the bill is not likely to pass in a Republican-controlled Senate.

Hemp and CBD Products

There was little change with respect to hemp and CBD products in 2020. Although the Federal Agriculture Improvement Act of 2018 declassified industrial hemp (defined as cannabis with tetrahydrocannabinol [THC] levels of 0.3 percent or less) as a controlled substance under federal law, the Food and Drug Administration (FDA) has approved only one cannabis-derived and three cannabis-related drug products (Epidiolex, Marinol, Syndros and Cesamet). Each requires a prescription.

Despite the lack of FDA approval or regulation regarding CBD products for medical or therapeutic use, CBD products are widely available and often marketed for such purposes. These products can cause an individual to test positive for marijuana, creating more uncertainty for employers. In recognition of the unregulated sale of CBD products for purported medical and therapeutic purposes, the FDA warns consumers against using such products. The agency has also identified potential health consequences and side effects associated with using CBD products, including liver damage, adverse interaction with other drugs, damage to fertility and changes in alertness. However, the FDA encourages businesses interested in manufacturing and selling CBD for medical purposes to follow of the FDA's drug approval process. To that end, in July 2020, the FDA published draft guidance entitled "Cannabis and Cannabis-Derived Compounds: Quality Considerations for Clinical Research" highlighting available resources related to drug development and clinical trials.

State Marijuana Laws to Take Effect in 2021

As recently reported, marijuana ballot initiatives were approved in five states in 2020. Effective July 1, 2021, both recreational and medical marijuana will be legal in South Dakota. Under that state's medical marijuana law, medical marijuana cardholders are entitled "to all the same rights under state and local laws" as though they were prescribed a pharmaceutical medication as it relates to:

1. Any interaction with a person's employer;

2. Drug testing by a person's employer; and

3. Drug testing required by any state or local law, agency or government official.

A medical marijuana user may be disciplined for ingesting marijuana in the workplace or working under the influence of marijuana. However, an employee may not be considered to be under the influence of marijuana solely based on a positive marijuana test if the drug appears in insufficient concentration to cause impairment. There is no universally accepted concentration of marijuana that proves impairment, which may create challenges for South Dakota employers.

Mississippi voters also approved a medical marijuana initiative, which requires the Mississippi State Department of Health to issue final rules and regulations regarding medical marijuana by July 1, 2021. Recreational marijuana measures also passed in Arizona (effective upon proclamation by Governor Doug Ducey), Montana (partially effective October 1, 2021) and New Jersey (effective January 1, 2021). None of these laws specifically imposes restrictions on employers but may create practical dilemmas in hiring and retention.

Rights of Medical Marijuana Users

Both state and federal courts in Pennsylvania determined that the state's Medical Marijuana Act creates a private cause of action for medical marijuana users to sue their employers. In June 2020, the New York City Commission on Human Rights issued a final rule regarding exceptions to the city's ban on pre-employment marijuana tests. Among the exceptions are positions that involve regular work on an active construction site, regular operation of heavy machinery, positions that require operation of a motor vehicle on most shifts, regular work on or near power or gas utility lines, certain tasks related to aircrafts and positions where impairment would interfere with the employee's ability to take adequate care in the carrying out of his or her job duties and would pose an immediate risk of death or serious physical harm to the employee or to other people.

DOT Update

Like many aspects of business operations, drug testing was impacted by the COVID-19 pandemic. The Department of Transportation (DOT) took steps to provide flexibility to employers that were impacted by the pandemic. For example, the Federal Motor Carrier Safety Administration (FMCSA) issued a Notice of Enforcement Discretion regarding random drug testing. Although covered employers that were capable of meeting random drug and alcohol testing requirements for 2020 were required to do so, the agency indicated it could exercise discretion not to enforce the minimum annual percentage random testing rates if appropriate. Employers were required to document the basis for any noncompliance. The FMCSA also provided leeway regarding the timing of certain pre-employment drug tests, including tests that could be triggered by furloughs. The DOT similarly permitted flexibility regarding requalification timelines for service agents (collectors, medical review officers, screening test technicians/breath alcohol technicians and substance abuse professionals) and allowed substance abuse professionals to conduct remote assessments and evaluations.

Oral Fluid Testing Update

In October 2019, the U.S. Department of Health and Human Services (DHHS) issued its Mandatory Guidelines for Federal Workplace Drug Testing Programs Using Oral Fluid, which took effect on January 1, 2020. The DOT has not yet implemented regulations to adopt the oral fluid testing guidelines. Although DOT typically adopts regulations that follow the DHHS guidelines, it has not yet proposed such regulations, and it is unclear when it will do so.

In August 2020, DHHS issued Guidance for Using the 2020 Federal Custody and Control Form (CCF) for Urine Specimens. The federal CCF is required for federally mandated drug testing and must be used for oral fluid specimens. However, the Office of Management and Budget granted an extension through August 30, 2021, for using the 2017 Federal CCF for urine specimens only. DOT issued guidance regarding the 2020 federal CCF, recommending that, in an effort to avoid confusion about the use of oral fluid testing in DOT programs, laboratories continue providing the 2017 federal CCFs to DOT-regulated clients and their service agents until June 1, 2021, or supplies of the old CCFs have been depleted.

Hair Testing Guidance on the Horizon

In September 2020, DHHS issued proposed Mandatory Guidelines for Federal Workplace Drug Testing Programs using Hair (HMG). The comment period ended in November 2020, and the final rule is likely to be issued in 2021. The proposed guidelines would permit federal agencies to collect and test a hair specimen for pre-employment and random drug testing purposes. An alternate specimen would be required in the event the donor is unable to provide a sufficient amount of hair due to medical or faith-based reasons or due to an insufficient amount or length of hair.

The benefits to conducting hair drug testing include:

- A longer window of drug detection than urine;
- Easily collected, transported and stored; and
- Difficult to substitute and/or adulterate than urine because collections are performed under direct observation.

However, drugs generally are not detectable in hair for five to seven days after ingestion, so hair testing is not appropriate for reasonable suspicion testing and post-accident testing (hence DHHS's proposal to limit hair testing to random and pre-employment purposes). DHHS requested comments as to whether hair testing may be used for return-to-duty or follow-up testing.

Drug Testing Update

A Quest Diagnostics study found a 16-year high in positive workplace drug test results for 2019. Although the Quest study based on 2019 results showed a decline in opiate positivity rates, a more recent Quest study revealed a surge in the misuse of fentanyl, heroin and nonprescribed opioids during the pandemic. Quest reported a drop in the rate of orders for clinical lab tests by about 70 percent weekly. However, the rate of overall misuse held steady.

EEOC Guidance on Opioid Crisis

In August 2020, the Equal Employment Opportunity Commission (EEOC) issued two technical assistance documents for employees and healthcare providers addressing accommodation issues under the Americans with Disabilities Act for employees who use opioid medications or may be addicted to opioids. The documents are in a question-and-answer format. Although the technical assistance documents were created for employees and healthcare providers, they are worth a close reading by employers. The documents provide insight into how the EEOC envisions the information exchange and necessary accommodation efforts related to opioid-related disabilities.

ERISA Complex Litigation

Application of the Supreme Court's Decision on Standing

During 2021, the impact of the U.S. Supreme Court's seminal standing decision in *Thole v. U.S. Bank N.A.*[2] should become more clear.

In a 5-4 decision in *Thole*, the U.S. Supreme Court held that participants and beneficiaries in defined benefit plans lack Article III standing to sue asserting fiduciary breach claims under the Employee Retirement Income Security Act (ERISA) of 1974, as amended, for alleged fiduciary mismanagement of the plan's assets because they suffered no injury in fact and there was no injury that could be redressed by the requested judicial relief.

Writing for the majority, Justice Kavanaugh emphasized that the dispute arose in the context of a defined benefit plan, an issue of "decisive importance," because under a defined benefit plan, retirees receive a fixed payment each month that does not vary based upon the value of the plan or the fiduciaries' good or bad investment decisions.

Thole will affect various areas of ERISA litigation. Many cases attacking mismanagement of defined benefit plan assets likely will become more challenging to pursue. In addition, several employers defending retirement plan litigation contend that *Thole* also limits the standing of 401(k) participants to challenge funds they do not hold. Although an early district court decision declined to extend *Thole* in that manner, it indicated that this inquiry might be appropriate at the class certification stage. *Boley v. Universal Health Servs.*[3] It is likely that, during 2021, other courts also will weigh in on the scope of *Thole*.

"Actual Knowledge" Requirement in Three-Year Statute of Limitations

In 2021, the U.S. Supreme Court's recent decision interpreting the actual knowledge requirement of ERISA's three-year statute of limitations could begin to have a major impact on class certification.

ERISA requires plaintiffs with actual knowledge of an alleged fiduciary breach to file suit within three years of gaining that knowledge rather than within the six-year period that would otherwise apply.[4] In a unanimous decision in 2020, the U.S. Supreme Court held that actual knowledge means "what it says," noting the three-year limitation "begins only when a plaintiff actually is aware of the relevant facts, not when he should be." *Intel Corp. Inv. Policy Comm. v. Sulyma*.[5]

In that case, the Court concluded that the plaintiff did not necessarily have actual knowledge of information contained in disclosures that he received but did not read or could not recall reading, and it affirmed the Ninth Circuit's reversal of the grant of summary judgment.

More State Laws Regulating Pharmacy Benefit Managers

In 2021, more state laws regulating pharmacy benefit managers (PBMs) and that impact other health law issues could be enacted in the wake of the U.S. Supreme Court's recent decision holding that ERISA does not preempt an Arkansas law regulating PBM's generic drug reimbursement rates. *Rutledge v. Pharm. Care Mgmt. Assn*.[6]

The Court unanimously held that Arkansas' law is simple rate regulation and that "ERISA does not pre-empt state rate regulations that merely increase costs or alter incentives for ERISA plans without forcing plans to adopt any particular scheme of substantive coverage." The Court explained that the Arkansas law only sets a floor for pharmacy reimbursements by PBMs. It is not directed at ERISA plans, and the fact that PBMs may pass their increased costs onto ERISA plans is not ERISA's concern. Moreover, a focal point during oral argument and in briefing was whether the proscribed appeal procedures improperly infringed on central matters of plan administration, but the Court found that administrative burdens and operational inefficiencies do not meet that standard. At bottom, nothing in Arkansas' law required ERISA plan administrators to structure their plans in a certain way, so the law survives.

Although Arkansas law was at issue in *Rutledge*, the reach of the Court's decision goes beyond Arkansas. Many state statutes like the Arkansas law are the subject of suits pending in the lower courts, and approval of this type from the Court may prompt additional states to draft similar legislation or amend current laws in place.

Dramatic Increase in Class Actions Challenging 401(k) Plan Fees

There has been a dramatic spike in proposed class actions challenging 401(k) plan fees, and this trend shows no sign of abating in 2021. While only 20 of these cases were filed in 2019, more than 90 of them were filed in 2020, with more expected in 2021. The increase has been driven by copycat-style complaints filed by a handful of plaintiffs' law firms. Generally, these complaints include claims targeting:

- Excessive administrative fees (based on the use of more than one recordkeeper, the absence of competitive bidding, the use of asset-based fees and revenue sharing instead of or in addition to fixed-dollar fees, the failure to monitor fee payments to recordkeepers and/or occasionally including kick-back allegations);
- Excessive management fees and performance losses (duplicative investment options for each asset class, which underperformed and charged higher fees than lower-cost share classes of certain investments); and
- The failure to monitor and evaluate appointees.

In addition, recent actions challenging the inclusion of affiliated funds include claims that the funds charge excessive fees; are imprudent investment options because, net of fees, they offer inferior performance to available alternatives; and the payment of fees to an affiliate constitutes a prohibited transaction.

In 2020, the outcome in fee cases was mixed. Some district courts rejected these claims, while others denied motions to dismiss or for summary judgment in full or in part. Some of these cases settled in 2020, in amounts ranging from several million dollars to almost 40 million. Going forward, we expect that the law will smooth down in defendants' favor, tracking what occurred in the past when plaintiffs challenged employer stock funds held in 401(k) plans.

COBRA Notice Class Action Litigation

More than 24 proposed class actions alleging Consolidated Omnibus Budget Reconciliation Act (COBRA) notice deficiencies were filed in 2020, and this trend is likely to continue in 2021.These actions typically allege that the COBRA notices are missing details required by the Department of Labor's model notice, such as the name and contact information of the plan administrator. These lawsuits seek statutory penalties of $110 per day for each class member who was sent a defective COBRA notice. We expect additional filings from the plaintiffs' bar in these class actions as well.

To mitigate the risk of being a target in such litigation, employers should ensure they understand what is required, including knowing what notices are needed and when. Employers also should scrutinize their notices and administrative practices. This examination will frequently involve discussions with the third-party vendors who handle COBRA notification for employers.

Health and Retirement

Health Plan Issues

In addition to requiring all health plans to cover COVID testing and all costs of FDA-approved vaccines, the CARES Act of 2020 also includes changes to the definition of qualified medical expenses allowed to be reimbursed by Health Savings Accounts (HSA), Health Flexible Spending Accounts (FSA) and Health Reimbursement Arrangements (HRA). Specifically, the cost of menstrual care products is now reimbursable. In addition, over-the-counter products and medications are again reimbursable without a prescription. IRS Notice 2020-29 temporarily allows High Deductible Health Plans (HDHP) to fully cover the cost of any telehealth and other remote care service without jeopardizing a participant's eligibility to contribute to an associated HSA. This change applies to services provided on or after January 1, 2020, with respect to plan years beginning on or before December 31, 2021. Employers need to amend all Section 125 cafeteria plans to memorialize these modifications in FSA coverages by this deadline as well. Employers also need to consider whether to amend health plans and other benefit plan arrangements to ensure all plan documents adequately address coverage issues when employees are on employer-approved leaves of absences when previous plan documents required a minimum number of weekly hours of service to maintain coverage under the plan.

Annual Premiums

The average annual premium for employer-sponsored health insurance in 2020 was $7,470 for single coverage and $21,342 for family coverage, with employees on average contributing 17 percent of the premium for single coverage and 27 percent for family coverage. According to Kaiser, both increased 4 percent, while average employee wages increased 3.4 percent and inflation increased 2.1 percent. Kaiser acknowledges the survey was mostly complete before the full impact of the pandemic was felt in the United States. The perfect storm of the pandemic (including the pent-up demand for services during a time in which COVID cases continue to stress hospital and health care resources), the election results and the ACA case before the U.S. Supreme Court makes it difficult to predict what lies ahead for 2021 and beyond.

Health FSAs

In 2021, employees can contribute up to $2,750 to a health flexible spending arrangement, no change from 2020. FSAs provide employees a way to use tax-free dollars to pay medical expenses not covered by other health plans. Plans that have a carry-over option that allows participants to carry over unused funds will see an increase in the maximum carryover amount to $550 for 2021. This increase is in response to the concerns that participants would have more unused funds due to restrictions imposed because of COVID-19. As was the case in 2020, we may see additional guidance from the IRS allowing additional flexibility to change elections and extend deadlines to carryover amounts in 2021 as a result of the ongoing nature of the pandemic.

Health Savings Accounts

In 2021, the annual limit on contributions to an HSA for eligible enrollees covered under a high deductible health plan (HDHP) is $3,600 for self-only coverage (an increase of $50) and $7,200 for family coverage (an increase of $100), regardless of whether the contributions are made by the employee, the employer or a combination of sources. HDHP enrollees who are at least 55 years old can contribute an extra $1,000 catch-up contribution to their HSAs (no change from 2020).

COBRA

On April 29, 2020, the Department of Labor (DOL) and Internal Revenue Service (IRS) issued a Joint Notice extending certain timeframes affecting a participant's right to continuation of group health plan coverage under COBRA after employment ends. The Joint Notice provides that the period from March 1, 2020, through 60 days after the end of the National Emergency (the

Outbreak Period) must be disregarded when calculating timeframes and deadlines for certain actions connected to an employee's benefits. This significantly extends the period for which an individual is able to elect COBRA and also restricts an employer's ability to terminate COBRA coverage for nonpayment of coverage until the end of the outbreak period. The DOL issued a news release including updates and clarifications for employee benefits, including updates to model COBRA notices, frequently asked questions and an extension of certain statutory deadlines intended to minimize the possibility of participants and beneficiaries losing benefits during the COVID-19 pandemic. More information can be found here.

Retirement Plan Amendments in the Year Ahead

The Bipartisan Budget Act of 2018 (BBA), the SECURE Act of 2019 and the CARES ACT of 2020 all contain provisions applicable to qualified retirement plans. Some of these changes were optional and some required. The BBA includes changes to 401(k) hardship withdrawal provisions for plans that offer them. The deadline for all plans required to adopt an amendment incorporating required and any optional provisions is December 31, 2021. The IRS released Rev. Proc. 2020-9 in December 2019 clarifying the deadline for adopting the two required and any discretionary provisions by either a pre-approved plan or an individually designed plan. Previously the two plan types had different adoption deadlines. The SECURE Act and the CARES Act have the same deadline for adoption of any necessary amendments: the last day of the plan year, which begins on or after January 1, 2022, or 2024 for governmental plans (December 31, 2022 or 2024 for calendar year plans).

The SECURE Act

Even though amendments are not required until the end of 2022 at the earliest, certain provisions are effective for 2021 plan years. Expanded access to retirement plans for certain part-time employees means employers need to begin tracking hours of service for part-time workers over the next three years. Employees who average 500 or more hours a year over the next three years would be eligible during the 2024 plan year. We expect further guidance related to these provisions well before the amendment deadline.

Determination Letter Fee Changes

In August 2020, the IRS published Announcement 2020-14 to provide advance notice of increases to the user fees associated with determination letter submissions and other requests. Effective January 4, 2021, the user fee associated with the applications for a determination letter are increasing:

Type of User Fee	Current User Fee	User Fee Effective January 4, 2021
Form 5300 (Application for Determination for Employee Benefit Plan)	**$2,500**	**$2,700**
Form 5307 (Application for Determination for Adopters of Modified Volume Submitter Plans)	**$800**	**$1,000**
Form 5310 (Application for Determination for Terminating Plan)	**$3,000**	**$3,500**

ACA Reporting Deadlines for Applicable Large Employers (ALE) to Report to the IRS to Verify Compliance with the Shared Responsibilities Rules

Forms 1094-B and C and 1095-B and C must be filed with the IRS by February 28, 2021, or March 31, 2021, if filed electronically. The employer must provide Forms 1095-B and C to individuals by March 2, 2021. The IRS recently released the final versions of Forms 1094 and 1095, and the instructions. The deadlines to provide IRS Forms 1095-B and 1095-C to individuals, as required under the Affordable Care Act, are:

- **February 28, 2021:** Deadline to file 1094-C/1095-C schedules to the IRS for 2020 if paper filing;
- **March 2, 2021:** Deadline to furnish 1095-C schedules for 2020 to individuals (extended from January 31, 2021); and
- **March 31, 2021:** Deadline to file 1094-C/1095-C schedules to the IRS for 2020 if electronic filing.

The IRS also states in the published relief that it will not enforce a penalty against reporting entities for failing to furnish Forms 1095-B to individuals if the reporting entities satisfy two conditions set out in IRS Notice 2020-76:

- The reporting entity must prominently post a website notice with contact information for individuals' use to request their Form 1095-B; and
- Reporting entities must fulfill any individual's request for their Form 1095-B within 30 days of the date of the request receipt. gazine

However, there is no such relief available to self-insured applicable large employers that would allow them to avoid providing their full-time employees with Forms 1095-C on a timely basis. In Notice 2019-63, the IRS requested comments as to whether an extension of the due date for furnishing statements to individuals would be necessary for future years and if so, why. Very few comments were submitted, which indicates that this relief may no longer be necessary. In this year's published relief, the IRS is renewing the request for comments with the caveat that without comments explaining why this relief continues to be necessary, no relief will be granted in future years.

401(k) and 403(b) Plan Contribution Limits

In 2021, employees who participate in a 401(k) or 403(b) plan can contribute up to $19,500 plus a catch-up contribution of $6,500 for employees who are at least 50 years old in 2021. While the contribution limits for employees remain the same in 2021 as they were in 2020, the total annual additions limit increased $1,000 to $58,000. A chart below contains these and other cost of living adjustments released by the IRS on October 26, 2020.

Defined Benefit Plans

The per-participant flat premium rate that single-employer pension plans must pay to the Pension Benefit Guarantee Corporation (PBGC) will increase to $86 for plan years beginning in 2021, up from $83 in 2020.

Frozen Defined Benefit Plans

For 2020, the IRS issued an extension, IRS Notice 2019-60, through the last plan year beginning before 2021 for the nondiscrimination testing flexibility relief for frozen defined benefit plans that satisfy specific requirements.

The SECURE Act provides a permanency to the prior nondiscrimination testing relief for closed and frozen Defined Benefit Pension plans. The SECURE Act also expands the relief to certain Defined Contribution-Defined Benefit (frozen) combinations with the satisfaction of specific requirements.

Multiemployer Plans

The economic difficulties of 2020 are well known, and the impact on multiemployer pension plans was acknowledged by Congress throughout the year. Although each side of the aisle offered different proposals, ultimately no assistance has been passed to date. The PBGC program for multiemployer plans is still predicted to become insolvent by 2026. PBGC Director Gordon Hartogensis says alarms are ringing, and legislation is needed now.

Type of Limitation	2021
Elective Deferrals (401(k) and 403(b) Plans; not including catch-ups)	**$19,500**
457(b)(2) and 457(c)(1) Limits (not including catch-ups)	**$19,500**
Section 414(v) Catch-Up Deferrals to 401(k), 403(b), 457(b), or SARSEP Plans	**$6,500**
Defined Benefit Plans (annual benefit limit)	**$230,000**
Defined Contribution Plans (annual additions limit)	**$58,000**
Annual Compensation Limit	**$290,000**
Highly Compensated Employee (HCEs) (IRC § 414(q)) The definition of an HCE includes a compensation threshold for the *prior* year. A retirement plan's discrimination testing is based on coverage and benefits for HCEs.	**$130,000**
Key Employee/Officer Compensation Threshold (IRC § 416) The definition of a key employee includes a compensation threshold. Key employees must be determined for purposes of applying the top-heavy rules. Generally, a plan is top-heavy if the plan benefits of key employees exceed 60 percent of the aggregate plan benefits of all employees.	**$185,000**
SIMPLE Retirement Accounts	**$13,500**
SIMPLE Catch-up Limit (IRS §414(v)(2)(B)(ii))	**$3,000**
SEP Minimum Compensation Limit (IRC § 408(k)(2)(C)) The mandatory participation requirements for a simplified employee pension (SEP) includes this minimum compensation threshold.	**$650**
SEP Compensation	**$290,000**
Income Subject to Social Security Tax This threshold is the maximum amount of earned income on which Social Security taxes may be imposed	**$142,800**
Contribution Limit – Health Flexible Spending Account (FSA)	**$2,750**
Carryover Limit – Health Flexible Spending Account (FSA)	**$550**
Contribution Limit – Health Savings Accounts – Single (HSA)	**$3,600**
Contribution Limit – Health Savings Accounts – Family (HSA)	**$7,200**
Qualified Small Employer HRA (QSEHRA) Single	**$5,300**
Qualified Small Employer HRA (QSEHRA) Family	**$10,700**
Dependent Care (DCAP)	**$5,000**

Immigration

U.S. Immigration

Pew Research reports that since 1965, the number of immigrants living in the U.S. has quadrupled, and immigrants make up approximately 13.7 percent of the population. Approximately 800,000 of the 9.2 million immigrants living in the U.S. who were eligible to naturalize did so in FY 2019. As of December 1, 2020, those applying to naturalize will have to take an updated civics test. Applicants now have to answer at least 12 questions correctly out of 20 and study 128 questions to review. It has been reported that the new test may be more difficult to pass.

State Immigration Statistics

Forty-five percent of immigrants in the U.S. live in California (24 percent), Texas (11 percent) and Florida (10 percent). Looking at the total immigrant population by region, Pew reports that 34 percent live in the West, 34 percent in the South, 21 percent in the Northeast and 11 percent in the Midwest. In 2018, documented and undocumented immigrants lived primarily in 20 metropolitan areas.

Limit on Refugees

While the number of refugees around the world is at its highest levels ever, the number of refugees allowed in the U.S. was at its lowest limit in decades in 2020. The number of refugees was capped at 18,000. About 70 percent of Americans believe that levels of immigration should be increased. President-elect Joe Biden has said that he plans to raise the cap to 125,000.

International Travel Restrictions

Businesses continue to feel the effects of international travel restrictions. U.S. Embassies and Consulates abroad have been closed for routine visa processing since March 2020 due to COVID-19 and are only beginning to open. Further, President Donald Trump instituted multiple, temporary COVID-19 related travel restrictions by proclamation. Individuals who have spent time in China, Iran, the 26 European countries in the Schengen Zone, the United Kingdom, Ireland and Brazil within the 14 days prior to applying for admission to the U.S. have been barred due to health concerns. Certain individuals applying for immigrant visas (family-based or employment-based) and nonimmigrant visas (H, L or J) are being barred due to economic concerns. As of December 28, 2020, due to the new strain of COVID-19 identified in the United Kingdom, all individuals flying from the United Kingdom, including U.S. citizens, are barred from entering the United States unless they have proof of a negative COVID test within three days of boarding. Not to mention President Trump's original travel ban has, for the past two years, applied in various ways to block individuals from Iran, Libya, Yemen, Syria, North Korea, Somalia and Venezuela (Muslim Ban) and individuals from Eritrea, Kyrgyzstan, Myanmar, Nigeria, Sudan and Tanzania (Africa Ban) due to security concerns. Most of these restrictions have exceptions, and it is also possible to apply for waivers based primarily on national interest concerns but there is no consistency around the adjudication of these waivers. On December 31, 2020, President Trump extended immigrant and non-immigrant visa bans until March 31, 2021. It is not clear how long these or other restrictions will continue. President-elect Joe Biden, however, has indicated that he will end the Muslim and African bans.

H-1B Visas

Since 2007, during the first week of April, employers have had to file full petitions to participate in the lottery for the limited number of available H-1B visas. But last year the USCIS instituted a new process. For $10 each, in March, employers or their attorneys registered online for the lottery by providing only a limited amount of corporate and beneficiary information. Only those selected had to file full petitions. Although not without problems, overall, the process worked. The USCIS however is now proposing to change the lottery again. Rather than being a random selection process, a new rule will prioritize the selection of cases based on the highest wage levels for SOC codes in the area of intended employment. This is just one of a trio of recently proposed rules that could dramatically change the H-1B process. The first, issued by the Department of Labor, raised prevailing wages. The second would change the definitions of "specialty occupation" and the "employer-employee relationship." These changes could significantly limit employers' ability to effectively utilize the H-1B program, particularly for entry level employees. To date, several courts have determined that two of the rules were issued in violation of the Administrative Procedures Act (APA). The Administration is likely to re-issue those rules soon.

I-9s and COVID-19

During COVID-19, Immigration and Customs Enforcement (ICE) has had to be flexible. ICE has been allowing employers with remote workforces to conduct Form I-9 document inspections of Section 2 documents remotely (*e.g.* over video link, by fax or by email). This policy applies only to employers with workplaces that are operating remotely with no employees at the workplace. Once the employer's normal operations resume or once an employee is physically present at the work location, there must be an in-person reverification within three business days. How ICE will react to employers who may have skeleton staffs on site is yet to be seen. ICE flexibility currently extends to January 31, 2021, but will likely be continued in the face of the new spike in COVID-19 cases. Check the ICE website for updates.

Long-Pending EAD Applications

USCIS is also allowing flexibility with regard to long-pending Employment Authorization Document (EAD) applications. Due to the USCIS's inability to keep up with the demand for EAD cards, the USCIS announced that certain individuals may continue to present Form I-797, Notices of Approval, for I-9 purposes until February 1, 2021. New employees and those needing to reverify their employment authorization may continue to present Form I-797 EAD approval notices instead of EAD cards if:

- The Form I-797 indicates that the EAD has been approved for at least three months;
- The Form I-797 has a Notice Date between December 1, 2019, and August 20, 2020; and
- The employee can present (or has previously presented) an acceptable List B identity document.

Absent any further extensions, by February 1, 2021, the employee will need to present either a List A or a new List C document.

Deferred Action for Childhood Arrivals

In June 2020, the Supreme Court of the United States ruled that the Trump Administration had not properly terminated Deferred Action for Childhood Arrivals (DACA), leading many (including DACA recipients themselves) to believe that DACA would remain intact and that individuals who were eligible but had not previously applied would be able to apply. Although the Supreme Court decision left the door open to the Administration to terminate DACA through proper administrative processes, the belief was that everything would revert to the "status quo ante" in the meantime. But the Administration saw the Supreme Court opinion differently and issued a memo stating that while it reviewed its options, the Department of Homeland Security (DHS) would not accept applications for initial DACA applications, renewals of DACA for current beneficiaries would be limited to one year rather than the usual two years and Advance Parole would be issued only for urgent humanitarian reasons or for the sake of a significant public benefit. In response to another suit, a federal judge held that the DHS's memo was invalid and that DACA should be fully implemented. On December 4, 2020, that court determined that the DHS had to post notice of its compliance with the original DACA regulations, extend one-year EADs to two years and provide the court with a status report on adjudications by December 31, 2020. There may be further litigation, but in any case, President-elect Joe Biden has pledged to reinstate DACA and attempt to pass a long-term legislative solution.

Temporary Protected Status

Temporary Protected Status (TPS) allows individuals to remain in the U.S. because of disease, natural disaster or conflict in their home countries. Approximately 400,000 nationals from 10 countries have been granted TPS status. Many of those beneficiaries have been in the U.S. for years and have children who are U.S. citizens. The Trump Administration and the DHS have been announcing the termination of TPS status for most of these individuals. While current TPS work authorization is set to expire January 4, 2021, as a result of ongoing litigation, termination of TPS for most categories will not terminate prior to March 2021 or, by separate agreement between the US and El Salvador, November 2021 for Salvadorans with TPS status. President-elect Joe Biden has pledged to review TPS status for those in vulnerable populations who cannot safely return to their home countries.

Public Charge Rule

In February 2020, the Trump Administration's new Public Charge Rule became effective. The new rule expanded the definition of what constituted a public charge and thereby made it more difficult for immigrants and nonimmigrants to obtain visas. Based upon guidance issued in 1999, an individual classified as a public charge would be someone who required long-term dependence on government support. Under the new rule, even a temporary resort to supplemental noncash benefits could make an individual inadmissible. The new rule was controversial from the start and was characterized by immigration advocates as a "wealth test." The rule has been the subject of litigation in various jurisdictions, which has led to injunctions, stays of injunctions and more injunctions. Then, in early December 2020, the Ninth Circuit Court of Appeals issued an injunction that would prevent the USCIS from enforcing the new Public Charge Rule in D.C. and 18 states, but that injunction will not go into effect before January 26, 2021.

REAL ID

Due to COVID-19, the REAL ID deadline has been postponed until October 1, 2021. Once it goes into effect, most people will not be able to board even a domestic air flight in the U.S. without either a REAL ID-compliant driver's license or passport. All 50 states can issue REAL ID-compliant driver's licenses, but not everyone with a driver's license has a compliant one. To determine whether your license is compliant, check the upper right- or left-hand corner of the card for a star. Other forms of ID may also be acceptable. Check the TSA website for the list of other acceptable documents and exemptions to the requirements.

USCIS Premium Processing Fees

Premium processing fees have gone up, and premium processing will be available for more types of cases. The changes are meant to provide additional funding to USCIS to bolster its operations and improve adjudication times and customer service. The premium processing fee for cases that are currently eligible for the service has increased from $1,440 to $2,500, except for H-2B and R (religious worker) petitions, which are set at $1,500. The new benefit types subject to premium processing include EB-1 petitions for multinational managers and executives and EB-2 petitions for those seeking national interest waivers. Applications to change nonimmigrant status to F, J or M; applications to change or extend status as a dependent of an E, H, L, O, P or R visa holder; and applications for employment authorization (EAD cards) will also be included. The new fees and the processing times that will be guaranteed for the new benefit types will vary and have not yet been set by the USCIS.

Chinese Graduate Students

In addition to the COVID-19-related travel restrictions and consular closures, Chinese graduate students and postdoctoral researchers will now face another hurdle in coming to the U.S. On June 1, 2020, President Donald Trump's "Proclamation on the Suspension of Entry as Nonimmigrants of Certain Students and Researchers from the People's Republic of China" became effective.

The Proclamation bans the entry on F or J visas of nationals of the People's Republic of China (PRC) who wish to study or conduct research if they receive funding from, are currently employed or study at or have in the past conducted research on behalf of an entity in the PRC "that implements or supports the PRC's 'military-civil fusion strategy.'" The ban expressly exempts Chinese undergraduate students and provides other exemptions, including for spouses of U.S. citizens and legal permanent residents and members of the U.S. Armed Forces and their immediate family members.

Approximately 360,000 Chinese nationals study in the United States. In mid-September 1,000 had their visas revoked based on the new Proclamation. Also, in response to China decreasing Hong Kong's autonomy, the Department of State announced it will limit U.S. travel for any Chinese nationals (and their family members) who are members of the Communist Party by issuing only short-term single-entry visitor visas (B-1/B-2 visas). Because party membership may be necessary for career advancement in many sectors, the new restriction could further disrupt academic exchanges.

Hong Kong

Hong Kong is no longer being treated differently than the PRC for immigration (and other purposes), according to President Donald Trump's July 2020 Executive Order on Hong Kong Normalization. This means that Hong Kong nationals will now be subject to the same Green Card backlogs as those applicants born in mainland China. They have gone from often being current to having years-long waits. In addition, they will no longer be eligible to apply to the Green Card Diversity Lottery.

International Employment

The workplace is in many ways the epicenter of our battle to contain and defeat COVID-19. Employers across the globe continue to identify the most effective and current measures to protect employees while maintaining enterprises that generate revenue to support the needs of our society. While there seems to be some light at the end of the tunnel, these workplace challenges will continue well into 2021 and beyond.

COVID-19 Screening Programs

The Americas

The U.S. Equal Employment Opportunity Commission issued an update expressly recognizing that employers may implement temperature screening programs in response to the COVID-19 pandemic, which has also been mandated by states and localities across the country. Likewise, in Mexico, the Federal Labor Law allows employers to implement mandatory screening programs.

Europe

The European Data Protection Board has confirmed that the General Data Protection Regulation (GDPR) provides legal grounds for employers to implement screening programs. This, however, is subject to limitations of national law (*e.g.*, in France, the CNIL (federal Data Protection Authority of France) informed organizations that they should not collect body temperature of their employees or visitors, while in Germany, the federal Data Protection Authority's guidance made clear that such screening is permissible).

Asia

Most countries throughout the Asia-Pacific region have implemented GDPR-like data privacy legislation that would treat temperature data as sensitive. Nevertheless, and despite the concerns over privacy, several countries and regions (*e.g.,* China, Hong Kong Special Administrative Region, Japan and Singapore) have, to some extent, either mandated or recommended temperature monitoring during the COVID-19 pandemic.

Mask Wearing in the Workplace

United States

The U.S. federal government promotes wearing masks in public as a voluntary measure only, but notwithstanding this, several states have mandated the use of mask and face coverings in certain industries. In Ohio, for example, all employers must provide masks for their employees and require the employees to wear them or provide written justification for not doing so.

Germany

While it is mandatory to wear face masks in retail stores and when using public transportation, there is no official obligation for employers to require employees to wear face masks in the workplace. An employer can independently mandate their employees to wear masks in the workplace, however the work's council must be involved in the employer's decision. If no work council exists, the employer must at least inform the employees of health hazards as well as any proactive measures in place to counter the dangers posed by COVID-19.

Australia

Similar to the U.S., wearing face masks is voluntary on the national level. However, several states have adopted more stringent mandates. For example, the Victorian state government recently mandated the use of face masks in public spaces in the metropolitan area of Melbourne and Mitchell Shire, with particular emphasis on preventing the spread of COVID-19 in the workplace.

Telework

Belgium

In Belgium, telework was mandatory until May 11, 2020, when businesses reopened but still remained a recommended practice. Then, in November 2020, following the deepening of the COVID-19 pandemic, the Belgian government promulgated new rules, notably regarding telework, effective from November 2 at least through the beginning of 2021. Telework is now mandatory and imposed, with exception for situations where the nature of the position involved makes it impossible as well as for essential workers.

Brazil

Teleworking is permissible under the Brazilian Labor Code and requires amendments to the employment contract, workplace health and safety guidelines and agreement by the parties with respect to infrastructure and costs. Guidelines by some states and cities advise employers to continue to keep the workforce at home where possible, at least during the period decreed by the Brazilian government as a "state of calamity" through December 31, 2020 (which may be extended into 2021).

China

Telework raises challenges for Chinese employment regulatory regimes because they are written in such a way that does not specifically distinguish between work environments. Moreover, in emerging economies such as China and India, only a small percentage (12-20 percent) of work can be done remotely without losing productivity. That said, where an employer has allowed for telework, general rules for working hours, employees' data and health protections still apply in teleworking. Even if employees have flexible work arrangements when working from home, comprehensive or flexible working hour systems would not automatically apply, and an employer must still provide overtime pay.

As we enter 2021, despite the promise of an effective vaccine in curbing the COVID-19 pandemic, many of these issues will continue to impact and even reshape the workplace across the globe long-term. For an in-depth look at COVID-19 related global workplace issues, visit L&E Global's COVID-19: Back to Work – Special Report.

Invalidation of the EU-U.S. Privacy Shield

On July 16, 2020, the Court of Justice of the European Union (CJEU) published its decision in the matter of *Data Protection Commissioner v. Facebook Ireland and Maximillian Schrems* (*Schrems II*). The matter, arising from the transfer of Schrems' personal data by Facebook Ireland to Facebook Inc. in the United States, presented questions concerning the transfer of personal data from the European Economic Area (EEA) to a third country without an adequacy determination. The decision declares the EU-U.S. Privacy Shield program invalid and affirms the validity of standard contractual clauses (SCCs) as an adequate mechanism for transferring personal data from the EEA, subject to heightened scrutiny.

The CJEU invalidated the Privacy Shield program on grounds that it fails to provide an adequate level of protection to personal data transferred from the EEA to the U.S.

In support, it points specifically to three U.S. national security laws: FISA 702, E.O. 12.333 and PPD 28. The CJEU found the breadth of these bulk surveillance and monitoring laws violates the basic minimum safeguards required by the GDPR for proportionality: the U.S. government's processing of EEA personal data is not limited to what is strictly necessary. The CJEU further noted these surveillance programs fail to provide EEA data subjects with enforceable rights and effective legal review comparable to applicable EU law. As of the date of the decision, data exporters and U.S. data importers can no longer rely on EU-U.S. Privacy Shield certification as an adequate mechanism to transfer personal data from the EEA to the U.S. There is currently no grace period. The CJEU affirmed the validity of controller-processor standard contractual clauses (SCCs) as an adequate mechanism for transferring personal data from the EEA to a third country lacking an EU adequacy decision.

While the CJEU's decision has and will continue to have a significant impact on transatlantic trade, various stakeholders appear committed to addressing and resolving issues arising out of the transfer of personal data from the EEA to the U.S. The U.S. Department of Commerce is working with the EU to resolve this issue. In November 2020, the European Data Protection Board (EDPB) adopted recommendations on supplementary measures to help ensure compliance with EU levels of protection of personal data. The recommendations aim to assist controllers and processors acting as data exporters with their duty to identify and implement appropriate supplementary measures where needed to ensure an essentially equivalent level of protection to the data they transfer to third countries. Further, in December 2020, the Senate Commerce, Science and Transportation Committee held a hearing titled "The Invalidation of the EU-U.S. Privacy Shield and the Future of Transatlantic Data Flows." During the hearing, both Chairman Roger Wicker (R-MS) and Ranking Member Maria Cantwell (D-WA) highlighted the necessity of determining how U.S. businesses can confidently conduct data transfers in compliance with EU laws as negotiations continue to replace the EU-U.S. Privacy Shield agreement.

Labor Relations

NLRB Composition

The current Republican majority on the National Relations Board (NLRB) likely will continue until the end of August 2021. At the end of 2020, the NLRB consisted of four members, one short of capacity. President-elect Biden likely will fill the open position with a Democrat, resulting in a 3-2 Republican majority. Republican appointee Emanuel's term ends on August 27, 2021, and he likely will be replaced by a Democrat, creating a 3-2 Democratic majority on the NLRB. A new majority almost certainly will get to work overturning decisions issued by the previous majority.

Off-Duty Employee Access to Employer Private Property

In a footnote in *Southern Bakeries*,[7] the Board noted it is prepared to "reconsider … in a future appropriate case" the third prong of the Board's test in *Tri-County Medical Center*[8] for determining the validity of off-duty employee access rules. Under *Tri-County*, an employer must show the rule applies to off-duty employees seeking access to the employer's property for "any purpose." That prong of *Tri-County* has been vexing for employers because it bars them from maintaining a rule that would allow an employee to return to the workplace for innocuous reasons (*e.g.*, to pick up a paycheck). Additionally, NLRB General Counsel Peter Robb issued a memorandum[9] on December 1, 2017, listing the types of cases he would like to present to the Board with the goal of convincing it to reverse or modify current law. A change in the third prong of *Tri-County* should be welcome news to employers, because the current "for any purpose" rule is very difficult to enforce strictly. Any change in the third prong, however, may be short-lived once a Democratic Board majority is in place.

Witness Statements

Currently, an employer has an obligation to provide the union representing its employees with witness statements taken in connection with a workplace investigation if it is appropriate to do so under a balancing test established by the U.S. Supreme Court.[10] However, a change may be on the horizon in 2021 for two reasons. The NLRB's General Counsel indicated in Memorandum 18-02 "Mandatory Submissions to Advice" (December 1, 2017) that he wants to seek a change in the law. In addition, in *Smith Food and Drug Centers, Inc.*,[11] the NLRB "note[d] [its] … concerns regarding the duty to disclose witness statements [that] … warrant careful consideration in a future appropriate case." In 2021, the NLRB could decide that these statements are confidential and do not have to be disclosed. That would be good news for employers because the inability to ensure employees who could provide valuable witness statements in connection with an investigation is an impediment to employees speaking freely and openly. However, any change may be short-lived once a Democratic Board majority is in place.

Mail Ballot Elections Standards in Representation Cases

NLRB elections can occur by manual ballot, by mail ballot or by manual and mail ballot simultaneously. The majority of elections are by manual ballot conducted by the NLRB on the employer's premises. Employees vote in person by secret ballot in a room designated for the election. In some situations, especially where voters are scattered at different locations, the NLRB may order a mail ballot election. The NLRB mails ballots to eligible employees, who must return the ballots to the NLRB within a certain amount of time (generally, 14 days) and almost always through the U.S. Postal Service system. Sometimes the NLRB conducts a mixed manual-mail ballot election. In several unpublished decisions, the NLRB has expressed an interest in possibly changing the criteria for mail balloting in a future "appropriate proceeding."[12] Mail balloting generally favors the union by, for example, giving the union an opportunity to visit employee homes to influence how they vote. Under the National Labor Relations Act (NLRA), employer representatives are prohibited from visiting employee homes in connection with representation elections. Employers have long disfavored mail ballot elections because of the potential for union abuse, usually lower turnout and the unreliability of the postal system. The conventional wisdom is that a higher voter turnout benefits the employer. Indeed, numerous NLRB cases have chronicled irregularities involving mail ballot elections. Stricter limitations on when mail ballot elections may take place and imposition of stringent criteria about how those elections should be conducted may make mail ballot elections slightly more palatable to employers, although still disfavored.

Bargaining Unit Determinations

When a union files a petition seeking to represent a group of employees, the employer has the right to challenge whether that group is an "appropriate unit" at the NLRB and seek to expand the group to include additional employees or groups of employees. In 2017, the NLRB restored the long-standing "community of interest" standard by which an employer may make this challenge and which generally favors broader, more inclusive bargaining units over "micro-units." Micro-units are still possible. The decision overruled the extremely difficult *Specialty Healthcare*[13] micro-unit bargaining unit determination standard, which required an employer to prove that employees it wishes to be added to a petitioned-for unit shared an "overwhelming" community of interest with the petitioned-for group.[14] Smaller units favor unions, so a new NLRB majority likely will favor the overwhelming community of interest standard. To be prepared for this likely change, employers should determine what bargaining units are most favorable to them and create an overwhelming community of interest among the employees in that bargaining unit prior to the advent of the new NLRB majority.

Revision of Trump Board Representation Case Rulemaking

The Trump NLRB has promulgated, through the rulemaking process, a number of employer-friendly rules impacting representation cases. Many of the rules that were changed were part of the Obama-era NLRB's "quickie election" rules, which were designed to assist in increasing unionization by significantly speeding up the union election process and placing burdensome requirements on employers facing a union organizing campaign. In 2020, the NLRB implemented substantial changes to its representation case rules, many of which undid aspects of the quickie election rule, making the rules more employer-friendly. Most important, the new rules create more time between the date of the union's filing of the petition and the conducting of the NLRB election, giving employers more time to communicate with their employees about unionization. Many aspects of the new rules were effective on May 31, 2020. Others have been placed on hold by a federal court. The NLRB also issued a Final Rule modifying three aspects of its election procedures:

- Its blocking charge policy;
- The voluntary recognition bar doctrine; and
- Its rule regarding NLRA Section 9(a) recognition in the construction industry.

During 2021, once a new Board majority is in place, employers should expect the NLRB to begin working toward issuing representation case rules that reinstate the rules that existed prior to the Trump Board's representation case rulemaking. The changes likely will not occur until 2022, however, and they likely will be challenged in court by business groups.

Employer Work Rules and Policies

In 2017, after the composition of the Board shifted to a Republican majority, the NLRB issued *Boeing Co.*[15] In *Boeing*, which overruled *Lutheran Heritage Village-Livonia*,[16] the Board held that determining whether an employer rule is unlawful involves a balancing test that measures the rule's impact on employee rights against an employer's legitimate business interests in maintaining the rule. Since the decision, the Board has reviewed numerous employer rules, including those regarding cellphones, confidentiality, civility, non-disclosure and others. In many instances, the Board has found rules lawful that would have been determined to be unlawful under the Obama Board review standard. In 2021, the Board may return to the *Lutheran Heritage* standard under which many seemingly innocuous workplace rules were found to violate the NLRA because they could be reasonably construed by an employee to prohibit the exercise of NLRA rights. To meet that possibility, in early 2021, employers should review their rules to determine whether they would comply with the *Lutheran Heritage* standard.

Joint Employers

In 2020, the NLRB published its final rule governing determination of joint employer status under the NLRA, restoring the standard that was applied for several decades before the NLRB's decision in *Browning-Ferris*.[17] Under the final rule, to be found a joint employer, a business must possess and exercise substantial direct and immediate control over at least one essential term and condition of employment (such as discipline or discharge) of another employer's employees on more than an isolated or sporadic basis. The final rule became effective April 27, 2020. In 2021, the new NLRB majority may attempt to return to the standard set forth in *Browning-Ferris* to include employers who affected employees' terms and conditions of employment only indirectly, sweeping many more entities under the joint employer canopy and increasing labor union bargaining power accordingly. Businesses that rely on nontraditional workforces (*i.e.*, independent staffing services, subcontractors, distributors and franchisees) will be exposed to unfair labor practice liability, collective bargaining obligations and economic protest activity, including strikes, boycotts and picketing, based on working relationships with other companies with whom they have no ownership ties whatsoever.

Notice and an Opportunity to Bargain a Unilateral Change/Past Practice Defense

In 2017, the NLRB restored the right of unionized employers to implement changes that are consistent with past practice as long as the changes do not materially vary in kind or degree from past changes, even if that past practice developed under a management rights clause in a CBA that has expired and whether the changes are discretionary. *Raytheon Network Centric Systems*.[18] *Raytheon* has ensured that unionized employers retain the ability to run their businesses by making the same kinds of decisions they always have made, even when a CBA is not in effect. A return in 2021 to the pre-*Raytheon* standard will substantially limit employers' flexibility to make changes.

Notice and an Opportunity to Bargain a Unilateral Change/Contract Coverage Defense

In 2019, the NLRB adopted a second means by which a unionized employer can lawfully make a unilateral change without bargaining by adopting a "contract coverage" analysis in unilateral change cases. That analysis required employers to prove that the unilateral change is within the "scope" or "compass" of the CBA language relied upon by the employer for the unilateral change. The analysis replaced the more-difficult-to-meet "clear and unmistakable waiver" test under which the employer was found to have violated the NLRA unless a provision of the CBA "specifically refers to the type of employer decision" at issue "or mentions the kind of factual situation" the case presents.[19] Under the contract coverage analysis, if the NLRB finds the language in the CBA covers the employer's unilateral act, it will hold the CBA "authorized the employer to make the disputed change unilaterally" and, therefore, lawfully. The new NLRB majority likely will use an appropriate case to eliminate the contract coverage standard and reinstate the clear and unmistakable waiver defense. Unionized employers that will be negotiating contracts in 2021 and beyond should assume the more difficult standard will be reinstated, and, for every right the employer wants to retain, they should negotiate CBA language specifically mentioning that right.

Pre-First Contract Employee Discipline

In *800 River Road Operating Company, LLC d/b/a Care One at New Milford*[20] *(Care One)*, the NLRB overruled *Total Security Management Illinois 1 LLC*.[21] As a result, where employees are newly represented by a union but a first collective bargaining agreement has not been negotiated, an employer may impose discipline that is consistent with its past practice without notice to or bargaining with the union, even if the employer exercises discretion in imparting the discipline. In 2021, the NLRB may return to the *Total Security* standard and require bargaining with the union regarding discre¬tionary serious discipline such as suspension, demotion or discharge it intended to impose. That standard was onerous for employers because they had to delay legitimate discipline and even discharges for an undetermined period of time to satisfy their bargaining obligations.

Union Dues Withholding Upon Contract Expiration

In 2019, the NLRB overruled *Lincoln Lutheran of Racine*,[22] holding that an employer continues to have an obligation to deduct union dues from employee paychecks despite the expiration of a collective bargaining agreement containing a dues check-off provision on which the deductions were based. *Valley Hospital Medical Center*.[23] That decision shifted the balance of power to employers because the right to stop deducting dues is a powerful economic weapon in bargaining. In 2021, a return to the *Lincoln Lutheran* standard will shift an important aspect of the balance of power in collective bargaining negotiations back to unions.

Confidentiality of Workplace Investigations

The NLRB held in 2019 that investigative confidentiality rules are lawful Category 1 rules under *The Boeing Company*,[24] where, by their terms, the rules apply for the duration of any investi¬gation. *Apogee Retail LLC d/b/a Unique Thrift Store*.[25] However, if the employer's rule extends the confidentiality requirement beyond the closing of the investigation, the rule is a Category 2 rule under *Boeing*, and the employer must show some justification for extending the confidentiality requirement that outweighs Section 7 rights. The *Apogee Retail* decision overruled *Banner*

Estrella Medical Center,[26] in which the NLRB placed the burden on the employer to take a case-by-case approach to confidentiality "to first determine whether in any give[n] investigation witnesses need[ed] protection, evidence [was] in danger of being destroyed, testimony [was] in danger of being fabricated, or there [was] a need to prevent a cover up." Workplace investigations have become commonplace. Employers find it necessary to conduct sophisticated investigations on a variety of issues, including theft, substance abuse and harassment. The conventional wisdom is that investigations are more effective if they are treated as confidential; witnesses are likely to be more willing to share what they know, and co-conspirators are less able to coordinate their stories. If the NLRB returns to the Banner Estrella standard in 2021, an employer will have to evaluate every investigation separately to determine whether special circumstances warranted requiring employees to maintain confidentiality. Moreover, the burden will be on the employer to prove the reasons for requiring confidentiality were valid and serious enough to outweigh employee interests in discussing workplace issues.

Independent Contractor Status

In 2019, the NLRB returned to the more employee-friendly traditional common-law test for determining whether an individual is an employee or an independent contractor under the NLRA, overruling *FedEx Home Delivery*[27] and *SuperShuttle DFW, Inc.*[28] In that case, the Obama Board decided that, in determining whether an individual is an independent contractor or an employee, "entrepreneurial opportunity represents merely 'one aspect of a relevant factor that asks whether the evidence tends to show that the putative contractor is, in fact, rendering services as part of an independent business.'" In *SuperShuttle*, the NLRB decided that its *FedEx Home Delivery* decision had incorrectly considerably limited the significance "of entrepreneurial opportunity by creating a new factor ('rendering services as part of an independent business') and then making entrepreneurial opportunity merely 'one aspect' of that factor." The NLRB decided "the *FedEx* Board impermissibly altered the common-law test and longstanding precedent, and to the extent the *FedEx* decision revised or altered the Board's independent-contractor test," it was overruled. The NLRB "return[ed] to the traditional common-law test that the Board applied prior to *FedEx*." No matter what the test eventually will be used for independent contractor status, employers will have a difficult row to hoe in proving an individual is an independent contractor rather than an employee. As always, employers hoping for a finding of independent contractor status with respect to an individual or individuals should imbue those individuals with as many indicia of such status as possible. The more such indicia exist, the more likely a finding of such status.

Use of Employer Email for Personal Reasons

In *Caesars Entertainment Corp. d/b/a Rio All-Suites*,[29] the NLRB overruled *Purple Communications, Inc.*,[30] which required employers who give their employees access to their email system to allow those employees to use that email system for personal reasons, including union organizing and protected concerted activity, on nonwork time. *Caesars Entertainment* held that employees do not have a statutory right to use company email for union or other protected activity, except in "those rare cases where an employer's email system furnishes the only reasonable means for employees to communicate with one another." The NLRB also reaffirmed that "there is no Section 7 right to use employer-owned televisions, bulletin boards, copy machines, telephones, or public-address systems." In 2021, the NLRB may return to the *Purple Communications* standard and even broaden it to include other employer electronic and traditional communications systems, such as public-address systems. That standard will make it more difficult for employers to control productivity and make it easier for employees to engage in union organizing using the employer's electronic systems.

Student Workers

The NLRB repeatedly has shifted its position on the status of student-workers under the NLRA. In *Columbia University*,[31] the most recent NLRB decision on the issue, the NLRB determined that an employment relationship can exist under the NLRA between a private college or university *and* its employee, even when the employee is simultaneously a student. The NLRB said an individual "may be both a student *and* an employee; a university may be both the student's educator *and* employer." However, a proposed rule promulgated by the current NLRB states, "Students who perform any services, including, but not limited to, teaching or research assistance, at a private college or university in connection with their undergraduate or graduate studies are not employees within the meaning of Section 2(3) of the Act."

The comment period closed on February 28, 2020. A final rule has not been issued. If the final rule is issued before there is a Democratic majority on the NLRB, that majority likely will begin the process of amending the final rule to make it easier for a union to prove that student workers are employees covered by the NLRA.

Employee Abusive Conduct During Section 7 Activity

In 2020, the NLRB decided that it would no longer apply setting-specific standards for determining when an employee's abusive conduct loses the protection of the NLRA. *General Motors LLC*.[32] The NLRB modified its standard for determining whether an employee has lost the protection of the NLRA and been lawfully disciplined or discharged after making abusive or offensive comments in work-related situations. Employers now are subject to the *Wright Line*[33] test, under which they must demonstrate that an employee engaging in unacceptable behavior would have been terminated or disciplined regardless of their engaging in any Section 7 activity. *General Motors* was a victory for civility in the workplace. A return to the previous standard, under which employees were afforded significant leeway to use profanity and engage in abusive conduct in connection with Section 7 activity without losing the protection of the NLRA, will make it more difficult for employers to control their workplaces.

Protected Concerted Activity

In 2019 the NLRB narrowed what conduct can be considered protected concerted activity and thus protected by the NLRA. Those cases rejected a broadening by the Obama Board of what constitutes protected concerted activity that included, among other pronouncements, a *per se* rule that a complaint made by an individual employee in a group setting is concerted activity and a decision that statements about certain subjects are "inherently" concerted without consideration of whether the individual making the statement was authorized to act on behalf of others or attempting to initiate or induce group action. *Alstate Maintenance, LLC*.[34] Instead, the NLRB embraced a fact-specific analysis to determine whether an employee's actions actually are protected concerted activities. Employers should expect a Biden Board to return to a broader definition of protected concerted activity, making it even more important that employers lawfully determine whether protected concerted activity is involved and to weigh employment decisions that may involve protected concerted activity carefully.

Access to Property by Non-Employee Organizers and Off-Duty Employees of On-Site Contractors

In 2019, the NLRB held an employer must allow non-employee organizers access to its property if it allows access to other non-employees for activities that were similar in nature. *Kroger Limited Partnership*.[35] The Board found the union protest and boycott activities at issue were not sufficiently similar in nature to the charitable, civic or commercial activities the employer allowed on its property in the past. The NLRB also established a new standard for evaluating employer rules limiting off-duty contractor employees' access to an employer's property. *Bexar County Performing Arts Center Foundation*.[36] Overruling NLRB precedent, the Board held that a property owner lawfully may prohibit the off-duty employees of its on-site contractors or licensees from accessing its private property to engage in Section 7 activity under the NLRA, unless:

- The off-duty employees regularly and exclusively work on the property, and
- The owner of the property cannot show the off-duty employees do not have one or more reasonable non-trespassory alternative means to communicate their message.

The current NLRB's position that, when non-employees are involved, private property rights are sacrosanct, except in extremely limited circumstances likely will be challenged by a Biden Board in 2021.

Application of *Weingarten* to Nonunion Employees

The right of union members to have a representative present at any investigatory meeting with their employer that reasonably could result in the employee being disciplined arises out of a 1975 U.S. Supreme Court decision, *National Labor Relations Board v. J. Weingarten, Inc*.[37] Section 7 of the NLRA gives employees the right to act together for mutual aid and protection. Failure to grant *Weingarten* rights is a violation of the NLRA. The NLRB has seesawed back and forth about whether employees in a nonunion workplace have *Weingarten* rights as well — the right to have a coworker present during any investigatory interview which the employee reasonably believes might result in disciplinary action. Currently, nonunion employees do not have *Weingarten* rights. In *IBM Corp.*,[38] the most recent NLRB decision on the subject, the NLRB overruled *Epilepsy Foundation of Northeast Ohio*,[39] holding that *Weingarten* rights do not apply in a nonunion setting. Since nonunion managers and supervisors will not be familiar with the right to representation, if *IBM* is overruled in 2021, employers will have to be alert to that decision and the impact it will have on employment practices concerning investigations and the imposition of disciplinary action.

Litigation

Sexual Orientation and Gender Identity

In June 2020, the U.S. Supreme Court ruled that Title VII of the Civil Rights Act of 1964 prohibits discrimination based on sexual orientation and gender identity. The Court issued its decision in three consolidated cases: *Bostock v. Clayton County, Georgia*, No. 17-1618; *Altitude Express Inc. v. Zarda*, No. 17-1623; and *R.G. & G.R. Harris Funeral Homes Inc. v. EEOC*, No. 18-107. *See Bostock v. Clayton County, Georgia.*[40] By finding that Title VII bars workplace discrimination on the basis of sexual orientation and gender identity, the Court's decision provides support for LGBTQ+ individuals seeking protection under state gender antidiscrimination laws that were silent on the topic.

The Ministerial Exception

In July 2020, the U.S. Supreme Court expanded the scope of the "ministerial exception," which precludes the application of Title VII employment discrimination laws to questions involving "the employment relationship between a religious institution and its ministers." In *Our Lady of Guadalupe School v. Morrissey-Berru*, No. 19-267 and *St. James School v. Biel*, No. 19-348,[41] the Court held that two teachers were barred from suing their school-employers for age and disability discrimination because the ministerial exception applies to employees who are performing vital religious duties, regardless of the employees' official titles or religious training. The fact that the teachers were not ministers and did not have significant formal religious training did not matter. The Court's new test appears to be less rigid and significantly more deferential to the employer's definition of vital religious duties. Further, the Court appears willing to apply the "ministerial exception" to a wider range of employers and employees, not simply those working at houses of worship or explicitly religious organizations or schools. These issues will need to be clarified in future cases/litigation.

There are indications that several Supreme Court Justices remain strongly opposed to measures they see as eroding religious liberty. In a case denying the appeal of Kim Davis, the Kentucky county clerk who refused to issue marriage licenses at odds with her religious beliefs, Justices Thomas and Alito penned an 1,100-word statement supporting the appeal's denial but generally criticizing what they view as erosions of religious liberty.

With the solidification of a conservative majority on the Court following the elevation of Justice Amy Coney Barrett, it is likely the Court will take a very critical view of what it views as encroachments on religious liberty in the workplace. Indeed, the Court's opposition to erosions of religious liberty was displayed during the November 4 oral arguments in *Fulton v. City of Philadelphia*, 19-123, a case in which a Philadelphia social services agency affiliated with the Catholic Church declined to work with same-sex couples as foster parents. Even the Court's more liberal justices asked questions that seemed to indicate unease over trampling on the agency's religious freedoms. A decision is not expected in the case until early 2021.

EEOC and Other Agency Action

On November 17, 2020, the Equal Employment Opportunity Commission (EEOC) released its Proposed Updated Compliance Manual on Religious Discrimination for public comment through December 17, 2020. The proposed guidance draws upon several U.S. Supreme Court opinions issued since the agency's last significant update to its guidelines in 2008. Among other things, the EEOC makes clear that the agency will continue to broadly define religion under Title VII so that an individual is protected under Title VII if their religious beliefs, practices or observances are sincerely held. Further, this protection applies regardless of whether the employer views the work requirement in question as implicating a religious belief. The EEOC's proposed guidance serves as a reminder of potential Title VII liability for religious discrimination and failure to accommodate.

Going forward, it is likely that the EEOC and other federal agencies will continue to closely scrutinize alleged encroachments on religious liberty. In a November 3, 2020, Memorandum of Understanding, the EEOC, the U.S. Department of Labor, Office of Federal Contract Compliance Programs and Department of Justice agreed to coordinate and consult with each other on enforcement and compliance efforts. Representatives of the various agencies will meet on an ongoing basis to share information, increase efficiency and reduce competition. The representatives "will also discuss approaches to recognizing, accommodating, and enforcing civil-rights and conscience protections afforded under federal law, including 42 U.S.C. §§ 2000e-2(e) and 2000bb–2000bb-4; E.O. 11246 § 204(c); and 41 C.F.R. §§ 60-1.5(5)–(6) and 60-50.1–.5, consistent with the Attorney General's October 6, 2017 memorandum on federal protections for religious liberty."

COVID-19 Litigation

In addition to the health and business challenges associated with COVID-19, employers across the country face a variety of COVID-related lawsuits. Some of the more common claims include:

- Retaliation against an employee who raised health/safety concerns or requested time off or accommodations;
- Failure to accommodate an employee's alleged disability (or serious medical condition);
- Violations of family and medical leave laws; and
- Discriminatory treatment based on age, disability, gender, pregnancy, as well as race and national origin.

Lawsuits will likely increase dramatically in 2021. COVID-19 is also causing backlogs in the court system by limiting physical access to the courts and disrupting the ordinary practice of law. Indeed, many employers who were involved in litigation prior to COVID-19 saw their cases ground to a halt in 2020 as courts closed for several months in response to the pandemic and legal proceedings like depositions and motion hearings were forced to adopt to pandemic-related restrictions. The speed with which lawsuits move forward in 2021 will likely depend on COVID-19.

Equal Pay and Wage Transparency Laws

Over the past 24 months, several states, counties and cities have passed wage transparency laws that prohibit employers from asking job applicants about their compensation history and make it illegal for employers to retaliate against employees who discuss their salaries with coworkers and others. Some jurisdictions also make it illegal for employers to disclose a current or former employee's compensation information without the employee's consent. These laws are part of a broader, continuing push to end pay discrepancies based on gender. States that have passed these laws include, but are not limited to, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Massachusetts, New York, Oregon and Vermont. Numerous cities and counties in New York, as well as cities like San Francisco, Chicago and Pittsburg have also passed similar ordinances. Employers in these jurisdictions may need to update their job applications to remove questions about pay history or change the way they set compensation. Rather than negotiate salaries based on applicants' pay history and current demands (which, at times, results in male applicants receiving significantly higher salaries than their female peers), employers may choose to set a salary range for a given position and negotiate a final number within that range. Employers in these jurisdictions should also train their managers on the requirements and nuances of these laws.

On a related note, the incoming Biden Administration is likely to push for pay equity legislation at the federal level. Legislation passed the U.S. House of Representatives in 2019 and is now under consideration in the U.S. Senate.

Natural Hair Laws and Grooming Requirements

New York, California, New Jersey, Colorado and Washington, Virginia and Maryland as well as several city governments have passed laws making it illegal for employers to discriminate against black hairstyles like natural, braids, twists and locks. These laws are generally referred to as Creating a Respectful and Open World for Natural Hair or CROWN Acts. Several other states as well as the federal government are considering variations of these laws. The federal CROWN Act passed the U.S. House of Representatives in September 2020 and is currently under review in the U.S. Senate's Committee of the Judiciary. These laws reflect a growing trend to do away with grooming requirements that may have a disparate impact on protected group and result in claims of discrimination based on race or religion. Employers with strict grooming policies regarding hair length, facial hair, tattoos, etc. may wish to revisit their policies and assess how and why they are being implemented and enforced.

Various City and Local Ordinances

Numerous cities and localities across the U.S. continue to pass laws that directly impact employers' hiring, firing, training and supervising practices. Some of the more significant issues include legalizing marijuana, employee use of paid sick leave/time-off, predictive scheduling, increases to minimum wage and equal pay and wage transparency laws. These changes will create a variety of challenges in and out of court for all employers, but especially employers operating in multiple states.

Privacy, Data and Cybersecurity

COVID-19

COVID-19 presented privacy and security considerations in the workplace that employers never before had to consider, at least on such a large scale. While a vaccine may certainly limit the spread of the coronavirus, privacy- and security-related workplace precautions will remain intact well into 2021 and beyond.

COVID-19 Screening, Testing and Vaccinations Programs

Early on in the pandemic, federal, state and local government and public health authorities across the country recommended and/or imposed health screening requirements in an effort to identify persons at risk of being infected and stopping them from infecting others. Whether mandatory or recommended, screening employees and visitors continues to play an important role in curbing the spread of COVID-19. As testing capacity has increased, many organizations set up programs for testing their workforce, in some cases mandating testing for groups of employees and contractors. As 2021 commences, vaccination programs are already being considered. Questions such as whether to mandate or incentivize vaccination, how to track who has been vaccinated and when and handling information about side effects from the vaccine currently are being explored. Screening, testing and vaccinations programs raise a range of privacy and security issues organizations need to be aware of, in particular regarding the confidential and secure collection, storage and, if necessary, transmission of medical and related data. For employee medical information, the Americans with Disability Act (ADA) requires confidentiality be maintained. Additionally, numerous state data breach notification laws generally require notification if an individual's medical information is accessed or acquired by an unauthorized person. While the Equal Employment Opportunity Commission (EEOC) and California have softened their positions on the kinds medical-related questions employers may ask employees, appropriate safeguards should be in place to protect individually identifiable medical information collected as part of a screening program, which may also be applicable to testing and vaccination programs. These safeguards should include clear guidelines on the circumstances under which such information may be disclosed.

COVID-19 Related Phishing Attacks

The COVID-19 pandemic gave rise to an increasing concern over the influx of phishing attacks by informed hackers trying to capitalize on fears employees have about the COVID-19 crisis and what their employers are doing to respond. In April 2020, the United States Department of Homeland Security (DHS) and the United Kingdom's National Cyber Security Centre (NCSC) issued a joint alert warning of a substantial increase in phishing attacks. The alert noted that the surge in teleworking has increased the use of potentially vulnerable services, such as virtual private networks (VPNs), amplifying the threat to individuals and organizations. As we enter 2021, many companies are still instructing their workforce to telework, and as a result, organizations remain particularly vulnerable to such attacks.

COVID-19-Related Technologies

As organizations prepare to return to work, they meet the myriad challenges for providing safe environments for their workers, customers, students, patients and visitors. Chief among these challenges are screening for COVID-19 symptoms, observing social distancing, contact tracing and wearing masks. Fortunately, innovators are rising to meet this need, developing a range of technologies — wearables, apps, devices, kiosks, AI, etc. — all designed to support these efforts. While the advantages of these technologies are substantial, they must be implemented in a compliant manner that minimizes legal risk. Some key issues to consider include:

- Notice/consent requirements under the California Consumer Privacy Act (CCPA) or GDPR;
- Numerous laws may be implicated when data is collected, shared, secured and stored, including the ADA, Genetic Information Nondiscrimination Act, CCPA, GDPR and state laws. In addition to statutory or regulatory mandates, organizations may have to consider existing contractual agreements regarding data collection; and
- Contracts/agreements with vendors must include confidentiality, data security and similar provisions.

California Consumer Privacy Act

On January 1, 2020, the CCPA, considered the most expansive U.S. privacy legislation, took effect. A troubling aspect of the CCPA for employers is that it authorizes a private cause of action against a covered business if a failure to implement reasonable security safeguards results in a data breach. Perhaps more concerning is that plaintiffs need not show actual harm from the breach to recover. If successful, a plaintiff can recover statutory damages in an amount not less than $100 and not greater than $750 per consumer per incident or actual damages, whichever is greater. Thus, in addition to notification obligations a covered business may have under the state's breach notification law, class action lawsuits brought pursuant to this provision of the CCPA could be very costly. The CCPA also ushered in a range of new rights for consumers:

- The right to request deletion of personal information;
- The right to request that a business disclose the categories of personal information collection and the categories of third parties to which the information was sold or disclosed; and
- The right to opt-out of sale of personal information.

The CCPA exempted employment-related personal information from most of the CCPA's obligations until December 31, 2020, however, two critical provisions remained for businesses covered by the CCPA with respect to this information.

- A requirement to notify employees, applicants and contractors of the categories of personal information collected by the business and the uses of those categories, and
- Exposure to the private right of action for businesses that experience a data breach affecting certain employment-related information caused by a failure to implement "reasonable safeguards" to protect that personal information.

In addition, less than a year since its effective date, the CCPA had already been subject to an overhaul, including expansion of both compliance obligations for companies and consumer rights. On Election Day, a strong majority of California voters supported Proposition 24, also known as the California Privacy Rights Act (CPRA), a ballot measure that aims to expand and enhance the CCPA. The CPRA becomes effective on or after January 1, 2022 (other than for access requests), but will not be operative until January 1, 2023. The CPRA also extended the limited exemption for employment-related personal information through December 31, 2022. As we enter 2021, clients should be monitoring CCPA/CPRA developments and ensure their privacy programs and procedures remain aligned with current compliance requirements.

Biometric Privacy Litigation

There was a continued influx of biometric privacy class action litigation in 2020 that shows no sign of slowing. In early 2019, the Illinois Supreme Court handed down a significant decision concerning the ability of individuals to bring suit under the Illinois's Biometric Information Privacy Act (BIPA).

In short, individuals need not allege actual injury or adverse effect beyond a violation of his/her rights under BIPA to qualify as an aggrieved person and be entitled to seek liquidated damages, attorneys' fees and costs and injunctive relief under the Act.

Consequently, simply failing to adopt a policy required under BIPA, collecting biometric information without a release or sharing biometric information with a third party could trigger liability under the statute. Potential damages are substantial as BIPA provides for statutory damages of $1,000 per negligent violation or $5,000 per intentional or reckless violation of the Act. There continues to be a flood of BIPA litigation, primarily against employers with biometric timekeeping/access systems that have failed to adequately notify and obtain written releases from their employees for such practices.

Like many aspects of 2020, biometric class action litigation has also been impacted by COVID-19. Screening programs in the workplace require collection of biometric data, whether by a thermal scanner, facial recognition scanner or other similar technology. In late 2020, plaintiffs' lawyers filed a class action lawsuit on behalf of employees concerning their employer's COVID-19 screening program, which is alleged to have violated the BIPA. According to the complaint, employees were required to undergo facial geometry scans and temperature scans before entering company warehouses, without prior consent from employees as required by law. More class action lawsuits of this nature are likely on the horizon.

The law in this area is still lagging behind the technology but starting to catch up. In addition to Illinois's BIPA, Washington and Texas have similar laws, and states including Arizona, Florida, Idaho, Massachusetts and New York have also proposed such legislation. In California, the CCPA also broadly defines biometric information as one of the categories of personal information protected by the law. Additionally, states are increasingly amending their breach notification laws to add biometric information to the categories of personal information that require notification, including 2020 amendments in California, D.C. and Vermont. Similar proposals across the U.S. are likely in 2021.

Federal Consumer Privacy Law

In recent years many, states have debated consumer privacy laws similar in kind to the CCPA and GDPR (*e.g.* Maryland, Hawaii, New York) to fill the gap left by a lack of federal legislation in this area. That could change in 2021. COVID-19 has signaled the federal legislature's prioritization of data privacy and security issues. In March 2020, Senator Jerry Moran (R-Kansas) Chairman of the Senate Commerce Subcommittee on Consumer Protection, introduced the Consumer Data Privacy and Security Act of 2020, (CDPSA), which joined several other comprehensive federal consumer privacy law proposals from late 2019.

If passed, the CDPSA would provide consumers with a broad set of rights over their personal information as well as significant privacy and security compliance obligations for companies.

The bill, still working its way through the legislative process, was shaped by the now infamous Senate hearings that addressed the data privacy and security issues of large-scale technology companies.

Though more narrow in scope, last spring U.S. Senator Roger Wicker (R-Miss), Chairman of the Senate Committee on Commerce, Science, and Transportation, introduced the COVID-19 Consumer Data Protection Act. The bill aims to provide consumers with greater "transparency, choice, and control" over their health, geolocation and proximity data. Further, the bill would impose data privacy and security requirements on businesses that handle personal data related to COVID-19. Although the bill focuses exclusively on data related to the spread of COVID-19, its consumer protections are similar in kind to those provided for in CCPA, including, for example, notice requirements, a consumer's right to opt out, data security obligations and more.

And most recently, in November 2020, the House of Representatives and Senate passed the Internet of Things (IoT) Cybersecurity Improvement Act of 2020, signed into law by President Trump in mid-December. The Act requires the National Institute of Standards and Technology (NIST) to publish standards and guidelines on federal government agencies' use of IoT devices. The Act states that the Office of Management and Budget is to review government policies to ensure they are in line with NIST guidelines. Federal agencies would be prohibited from procuring IoT devices or renewing contracts for such devices if they do not comply with the security requirements.

TCPA

There were two back-to-back significant Telephone Consumer Privacy Act (TCPA) class action litigation rulings in 2020. Both the Eleventh and Seventh Circuit Courts held that the TCPA's definition of automatic telephone dialing system (ATDS) only includes equipment that is capable of storing or producing numbers using a random or sequential number generator, excluding most smartphone age dialers. Each court expressly rejected the Ninth Circuit's more expansive interpretation from a ruling in 2018, concluding that the TCPA covers any dialer that calls from a stored list of numbers automatically. These decisions were significant because most technologies in use today only dial numbers from predetermined lists of numbers.

Then, in July 2020 the U.S. Supreme Court weighed in on the constitutionality of the TCPA, addressing:

- Whether the government-debt exception to the TCPA's automated-call restriction violates the First Amendment; and
- Whether the proper remedy for any constitutional violation is to sever the exception from the remainder of the statute.

The Supreme Court concluded that Congress impermissibly favored government debt collection speech over political and other speech in violation of the First Amendment and thus must invalidate the government debt collection exception of the TCPA and sever it from the remainder of the statute. Despite concerns that the Court would address the constitutionality of the TCPA in its entirety, the Court left untouched the TCPA's general restriction on calls made with an ATDS.

And finally, in November 2020, federal courts in both Louisiana and Ohio ruled that in light of the Supreme Court's July ruling, the TCPA provision[42] — which prohibits calls (and messages) made using an ATDS to any cellular telephone number — is unenforceable retroactively for the five-year period between November 2015, when Congress amended the TCPA to include an exemption for government debt, until July 2020, when the Supreme Court ruled the government debt exception was unconstitutional.

In 2021, the Supreme Court will weigh in on another petition it accepted for review in July 2020, addressing the Ninth Circuit ruling on the issue of whether the definition of ATDS in the TCPA encompasses any device that can store and automatically dial telephone numbers, even if the device does not "us[e] a random or sequential number generator." The Supreme Court's decision should help resolve the circuit split and provide greater clarity and certainty for parties facing TCPA class action litigation.

OCR HIPAA Enforcement Actions and Guidance

The Office of Civil Rights (OCR) at the U.S. Department of Health and Human Services was active in enforcing HIPAA regulations in 2020. In particular, there have been 12 settlements under the OCR's Right to Access Initiative, which enforces patients' rights to timely access of medical records at reasonable cost. In September 2020 alone, the OCR announced settlements with five providers under the Right to Access Initiative. OCR settlements have impacted a wide array of health industry-related businesses, including hospitals, health insurers, business associates, physician clinics and mental health/substance abuse providers. Furthermore, 2020 saw more than $13.3 million recorded by OCR in total resolution agreements.

In addition, there was a significant amount of OCR-issued guidance relating to HIPAA in 2020. In March OCR issued back-to-back guidance on COVID-19-related issues, first regarding getting protected health information (PHI) of COVID-19 exposed individuals to first responders, and next providing FAQs for telehealth providers. In July, the director of the OCR issued advice to HIPAA subject entities in response to the influx of recent OCR enforcement actions: "When informed of potential HIPAA violations, providers owe it to their patients to quickly address problem areas to safeguard individuals' health information." Finally in September, the OCR published best practices for creating an IT asset inventory list to assist healthcare providers and business associates in understanding where electronic protected health information (ePHI) is located within their organization and improve HIPAA Security Rule compliance, and shortly after it issued updated guidance on HIPAA for mobile health technology.

Restrictive Covenants, Trade Secrets and Unfair Competition

COVID-19

The COVID-19 pandemic will continue to impact how courts might analyze the facts when asked to enforce non-compete agreements in 2021. The distinction between a temporary furlough and a permanent layoff might impact an action seeking to enforce a restrictive covenant, depending on the language of the agreement. Employers may find themselves grappling with the question of whether a pandemic-related layoff was a permanent termination or a temporary interruption in an employment relationship. The answer could impact not only the enforceability of restrictive covenants but also the application of certain common law obligations, like the duty of loyalty.

Further, in assessing the propriety of injunctive relief, courts are taking into account the severe impact the pandemic and related government orders have had on the labor market. Although unemployment figures have improved substantially, similar arguments may be made while the United States economy continues to recover in 2021.

CFAA

The U.S. Supreme Court is poised to issue a landmark decision on the Computer Fraud and Abuse Act,[43] (CFAA), a federal statute that imposes civil and potentially criminal liability on individuals that access computers without authorization. In *Van Buren v. United States*,[44] the Court will resolve a circuit split over the meaning of the phrase "unauthorized access" in the statute. As we discussed earlier this year, the issue is whether it is a violation of the CFAA when an individual with legitimate authority to access a computer for one purpose (such as in furtherance of an employer's business interests) accesses that computer for an improper or unauthorized purpose. The decision may have a significant impact in certain unfair competition cases, where departing employees are sometimes caught using company computers to transfer sensitive information to private accounts without authorization.

State and Local Regulatory Activity

Previous years saw an increase in state-level regulation of non-competes, as seen in Maryland, Massachusetts, Oregon, Virginia and Washington, for example. This trend will continue into 2021. On December 1, 2020, the D.C. Council passed legislation that effectively would ban non-competes entirely. Similar bills are pending in other jurisdictions.

Federal Regulatory Activity

2021 may see the first significant federal restrictions in the restrictive covenant area. President-elect Joe Biden recently published a plan to eliminate "all non-compete agreements, except the very few that are absolutely necessary to protect a narrowly defined category of trade secrets, and outright ban on all no-poaching agreements." The details of this plan are unclear, but the message is not. Several non-compete restriction bills have been proposed in recent sessions of Congress, such as the bipartisan Workforce Mobility Act introduced in October 2019, which essentially would have banned all non-competes except in limited circumstances, such as the sale of a business or the dissolution of a partnership. While the Workforce Mobility Act failed to gain traction, employers should continue to monitor any proposed new legislation in this area that might come with the backing of the incoming president.

Similarly, the Federal Trade Commission hosted a workshop in January 2020 "to examine whether there is sufficient legal basis and empirical economic support to promulgate a Commission Rule that would restrict the use of non-compete clauses in employer-employee employment contracts." The FTC has taken no public action to date, but it may consider new rule-making regarding this issue in 2021.

Enforcement

Between the novel issues posed by the COVID-19 pandemic and increased scrutiny from regulatory authorities, enforcing non-compete agreements may become more difficult in 2021. However, employers still have several other tools at their disposal to protect their legitimate business interests.

Other restrictive covenants can provide employers with substantial protection against unfair competition while generally being easier to enforce. These include non-servicing, non-solicitation, no-poaching, non-disclosure and garden leave agreements, among others. Employers and counsel should continue to collaborate and draft creative and properly tailored agreements that strike the best balance between protection and enforceability.

Increased remote work also demands renewed commitment in having strong data protection policies, procedures, agreements and technology. With many employees needing to access and transfer confidential information and trade secrets from home, companies must invest in effective safeguards against data breach and misappropriation.

Employers who rely heavily on non-compete or no-poaching agreements to protect their businesses should consider using a blend of alternative protections in the event there is substantial federal regulation of these agreements imposed in 2021.

Wage and Hour

Proposed Independent Contractor Rule

In September 2020, the DOL issued a new proposed regulation setting forth the standard for determining a worker's status as an independent contractor under the FLSA. The proposed regulation identifies two "core factors" of five that are the most probative and should be afforded greater weight in the analysis:

1. The nature and degree of the individual's control over the work; and
2. The worker's opportunity for profit and loss.

The courts and the DOL historically have developed varying standards to determine employee vs. independent contractor status. The standards developed seek to reveal the economic reality of the relationship between the employer and the individual and are derived from six nonexclusive factors originally presented by the U.S. Supreme Court in two cases on the same day, *United States v. Silk*[45] and *Rutherford Food Corp. v. McComb*.[46] Those factors are:

(1) The employer's versus the individual's degree of control over the work;

(2) The individual's opportunity for profit or loss;

(3) The individual's investment in facilities and equipment;

(4) The permanency of the relationship between the parties;

(5) The skill or expertise required by the individual; and

(6) Whether the work is part of an integrated unit of production.

Federal courts and the DOL have applied these factors inconsistently, sometimes reaching opposite conclusions when applying what appear to be essentially the same facts.

Whether the proposed independent contractor rule survives under the Biden Administration is questionable. Quite possibly, the DOL under the new administration will withdraw the proposed rule, which, as of the time of this publication, has not been finalized by the current administration. If the rule is finalized before the end of the Trump Administration, the Biden DOL may initiate new rulemaking to then rescind it or, if challenged in court, not defend it.

Regular Rate Regulations

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

- Clarifies that payments for paid time off (PTO), when not worked, as well as payouts for unused PTO need not be included in the regular rate because this is pay for non-working time;
- Addresses an apparent contradiction in the current regulations surrounding whether pay for bona fide meal periods is excludable from the regular rate. The

DOL proposes to amend the regulations to remove the reference to lunch periods in 29 C.F.R. § 778.218(b) to eliminate any uncertainty about its relation to [Section] 778.320 concerning the excludability of payments for bona fide meal periods from the regular rate;

- Removes the word "solely" from the current regulations to clarify that an employee's reimbursable business expenses are excludable if they are incurred in the furtherance of the employer's interests, even if they might also benefit the employee to some extent;
- Clarifies what constitutes a reasonable expense within the meaning of 29 C.F.R. § 778.217(b) and excludable from the regular rate;
- Adds a number of additional examples to the nonexhaustive list in the existing regulations of benefits excludable from the regular rate to include:
  - Conveniences furnished to the employee, such as on-site chiropractic treatment, massage therapy, physical therapy and personal training services;
  - Gym, fitness and recreational classes and memberships;
  - Modern wellness programs such as health screenings, vaccinations, smoking cessation support and nutrition classes;
  - Discounts on employer-provided retail goods and services; and
  - Tuition benefits.
- Clarifies that recent state and local laws that require reporting pay for employees who are unable to work their scheduled hours because the employer subtracted hours from a regular shift before or after the employee reports to duty will be treated as show-up pay under existing regulations. The DOL refers to proposed laws in Arizona, Connecticut, Illinois, Massachusetts, Maryland, New York and Chicago;
- Eliminates the requirement that call-back payments be received only on an infrequent or sporadic basis for the exclusion to apply, although they cannot be so regular that they are essentially prearranged. Similarly, the proposed regulations provide that predictability/ scheduling pay (for failing to provide a certain minimum advance notice of the work schedule) and clopening pay (for failing to provide a certain minimum break between working a closing shift and the subsequent opening shift) — something recently enacted or proposed in several states — may be excluded from the regular rate of pay, so long as they too are not so regular that they are essentially prearranged;
- Elaborates on the types of bonuses that are and are not discretionary and therefore excludable from the regular rate calculation;
- Adds more examples of the types of modern benefit plans that may be excludable from the regular rate of pay; and
- Removes language from the existing regulations to clarify when employers may exclude from the regular rate certain overtime premium payments made for hours of work on special days or in excess or outside of specified daily or weekly standard work periods.

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

Joint Employer Standard Under the FLSA

In January 2020, the DOL released its Final Rule updating regulations governing joint employer status under the FLSA. The new regulations seek to provide a more uniform interpretation that gives employers greater certainty and reiterates the DOL's longstanding position that a business model — such as the franchise model — does not itself indicate joint employer status under the FLSA. Derived from the decision of the U.S. Court of Appeals for the *Ninth Circuit in Bonnette v. California Health & Welfare Agency*,[47] the DOL has adopted a four-factor balancing test assessing whether the purported joint employer:

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

The new test focuses on whether the purported joint employer exercises substantial control over the terms and conditions of the employee's work. The Final Rule abandons prior interpretations that subjected employers to the risk of being liable as joint employers if they were not completely disassociated from a worker.

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

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

A federal district court in New York already has struck down a significant portion of the Rule. *State of New York v. Scalia.*[48] The head of the DOL's Wage and Hour Division has stated that, notwithstanding the court's decision, the Department believes that its joint employment interpretation is correct. Whether the DOL will appeal the court's decision and how other federal courts may view the Final Rule remain to be seen.

Fluctuating Work Week Pay Method

Under DOL regulations, if certain conditions are met, an employer may pay an employee who works fluctuating hours a fixed salary for all hours worked and then an additional half-time for all hours over 40, a number that decreases as the number of hours increases. Although DOL regulations expressly permit employers to use it, uncertainty regarding its requirements and the potential for litigation (particularly during the last 10 years) has limited employer use of the pay method. In May 2020, the DOL issued a Final Rule expressly permitting employers to provide additional pay, such as bonuses, commissions or premiums, to employees when utilizing the fluctuating workweek (FWW) pay method under the FLSA without jeopardizing the use of that pay method. The Final Rule, which went into effect in July 2020, incorporates examples of how to properly calculate pay under the FWW method when such additional compensation is involved as well as several other clarifications that should enable employers to better understand and potentially implement the FWW pay method.

Some of the more notable clarifications include:

- The FWW pay method's requirement that an employee's hours fluctuate from week to week does not require fluctuation both above and below 40 hours per week, as some courts have held. On the contrary, "the regulation does not require that an employee's hours must sometimes fluctuate below forty hours per week so long as the employee's hours worked do vary."
- The use of the FWW pay method is "not invalidated by occasional and unforeseeable workweeks in which the employee's fixed salary did not provide compensation to the employee at a rate not less than the applicable minimum wage so long as the fixed salary was reasonably calculated to compensate the employee at or above the applicable minimum wage in the foreseeable circumstances of the employee's work." The Final Rule cautions, however, if the employer could have foreseen that the salary would not at least equal the applicable minimum wage in all workweeks or if this requirement does not occur with some degree of frequency, either the employer and the employee must reach a new understanding as to the number of expected work hours or the amount of fixed salary (or both), or the employer must use a different pay

method. And of course, under the FWW method, during any week that the fixed salary failed to meet the applicable minimum wage, the employer must make up the difference.

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

Changes to the Commissioned Salesperson Exemption Analysis

Also in May 2020, the DOL withdrew its interpretative rules setting forth the types of businesses either not qualifying or only possibly qualifying as retail or service establishments when determining whether a commissioned salesperson may be exempt from overtime under Section 207(i) of the FLSA. Rather than rely on the long lists, which were internally inconsistent as acknowledged by the courts, the DOL will apply a uniform standard to all businesses in determining whether a business qualifies as a retail or service establishment and thus potentially excluding from overtime commissioned employees who work in that business. The now-abandoned lists were developed nearly 60 years ago and likely no longer accurately reflected the nature of the modern workplace. On the contrary, noted the DOL, "an industry may gain or lose retail characteristics over time as the economy develops and modernizes, or for other reasons" and therefore "a static list of establishments that absolutely lack a retail concept cannot account for such developments or modernization, which could have caused confusion for establishments as they tried to assess the applicability and impact of the list." The withdrawal was effective immediately.

Minimum Wage

Federal

Previously, President-Elect Joe Biden has called for a $15 federal minimum wage, as well as eliminating the reduced minimum wage for tipped employees (i.e., the tip credit). The administration may also seek to increase the minimum salary required to qualify as an exempt employee under the FLSA. With both houses of Congress now in Democratic control – albeit narrowly in the Senate – the chances of any of these proposals becoming law has improved, but they still face an uphill political battle.

As of the publication of this report, ultimate control of the Senate remains to be determined by the outcome of the runoff elections in Georgia, scheduled for January 5, 2021. Regardless, President-elect Joe Biden's administration will face an uphill battle in getting these changes through Congress.

State

By way of voter referendum, Florida joined the list of states in 2020 that eventually will implement a $15.00 minimum wage rate, more than double the current federal rate of $7.25, which has remained stagnant for more than a decade. The Florida minimum wage will increase twice in 2021, first to $8.65 in January and then to $10.00 in September, following by annual $1.00 increases every September until 2026.

Virginia also joined that list, albeit by legislative action. By contrast, Virginia's law guarantees tiered increases to $13.00 per hour by January 2023, with subsequent annual increases to $15.00 only if approved by the state legislature no later than July 2024.

White Collar/ Government Regulatory Enforcement

COVID-19 Government Aid

During the course of the COVID-19 pandemic, more than $4.2 trillion in federal government aid — the largest economic stimulus package in history — flowed to or was otherwise made available to U.S. businesses large and small, privately held and publicly traded companies, nonprofits and ordinary citizens to combat the serious economic damage to the economy. These historic programs provided fast, direct and generous economic assistance to American businesses, workers and families in an effort to preserve jobs and livelihoods.

The combination of four different federal programs enacted in March and April 2020 — the *Coronavirus Preparedness and Response Supplemental Appropriations Act* (CPRSA); the *Families First Coronavirus Response Act* (FFCRA); the *Coronavirus Aid, Relief and Economic Security Act* (CARES), and the *Paycheck Protection Program and Healthcare Enhancement Act* (PPP/HEA) — appropriated $2.59 trillion in budgetary resources. Tax relief legislation also enacted mandated the government defer/reduce payroll and Social Security tax obligations for businesses for up to two years, resulting in over $902 billion in tax relief. In addition, Congress appropriated funding for extended credit, loans and loan guarantees to American businesses — $800 billion to date — with another $3.0 billion accessible in the coming years.

Considering the enormity of this recent federal stimulus, federal government subsidy programs must be extraordinarily vigilant to the threat of a potential federal audit and investigation (criminal and civil) and related regulatory enforcement of the company's request for and utilization of the subsidy, grant or loan program in which the company participated. Management decisions made yesterday about where and how to spend necessary government subsidies will be carefully scrutinized tomorrow by government regulators and, inevitably, company whistleblowers.

Relevant Federal Programs

Paycheck Protection Program

To prevent layoffs and business closures, Congress appropriated $600 plus billion in federal aid for small businesses (500 employees or less) to maintain company payroll, and paid mortgage interest, rent, etc. for up to eight weeks. Qualifying businesses can earn 100 percent loan forgiveness in the future for PPP subsidies properly administered.

Hospitals and Health Care

Over $200 billion was appropriated by Congress to support domestic health care providers to enhance PPE stockpiles, expand COVID-19 testing and fast-track needed Medicare/Medicaid subsidies. More than $100 billion was earmarked for front-line hospitals fighting COVID-19 to help pay for costly therapeutic treatments and support hospital bottom lines facing lost revenue from cancelled elective and routine medical procedures.

Families First Coronavirus Response Act

$17 billion was appropriated by Congress to provide tax credits to businesses with employees forced to take up to two weeks of paid sick leave under The Emergency Paid Sick Leave Act or 12 weeks of expanded family medical leave (10 weeks paid) leave under The Emergency Family and Medical Leave Expansion Act for reasons related to COVID-19. With proper documentation, employers are entitled to dollar-for-dollar tax credits with each quarterly tax filing for all costs incurred from company sick and family leave expenses between April 2, 2020 and December 31, 2020.

Corporate Relief

A $500 billion set aside by Congress for loans and loan guarantees to prop-up critical industries (including airlines, automakers, oil & gas) as well as corporations shouldering large workforces was also contained in the CARES Act. However, loan terms include obligatory repayment within five years (no forgiveness) and strict compliance oversight by the Treasury Department Inspector General.

Unemployment/Payroll Tax Relief

The CARES Act afforded states $250 billion to cover unemployment benefits through July 31, 2020 — in other words, $600 in weekly federal subsidies beyond state unemployment assistance.

Expected Government Oversight

Each of the different subsidy programs pose complex and demanding compliance obligations now and into 2021. For example, audits conducted by the SBA for PPP loans in excess of $2.0 million are a given and will examine company declarations and other statements/data included in the PPP application as well as how/where PPP funds were spent by the business during the allowable eight-week period PPP funds were usable. Evidence of PPP funds used for purposes not defined by the program could result in fines and penalties or, at a minimum, void some or all loan forgiveness PPP afforded small businesses.

Health care organizations that received CARES Act subsidies will be expected to have used government funds for critical health care/medical purposes during the pandemic. PPE inventory, therapeutic treatments and other medications, and critical supplies need to operate ICUs are some examples of how DHHS and other agencies expect hospitals to have used their CARES Act subsidies. Audits and government oversight that discover misuse or waste of healthcare grants will trigger fines, penalties and likely repayment of CARES Act subsidies.

The FFRCA's generous tax credits are, likewise, obligated to keep precise records of employees who took sick or family leave during the relevant period and the number of days the employees were out and possess evidence confirming that COVID-19 was the cause of the employee's absence. Absent records confirming these and other data points for each employee, the government is unlikely to allow the generous tax subsidies under this federal program.

Waste, Fraud and Abuse

The mammoth government subsidies wrought by the CARES Act and related legislation will also, unfortunately, be accompanied by waste, fraud and abuse in businesses and industries able to take advantage of this unprecedented funding. Companies able to secure CARES Act and/or other government relief must prepare themselves, some experts believe, for a decade of government investigations and audits of government COVID related grants, loans and subsidies.

Robust COVID Compliance

Disciplined reliance on your existing in-house compliance program can and will protect the company if subject to an investigation or audit of government funds that the company received/used over the past six to eight months. Robust internal compliance means protection from the risk of future government investigations and related whistleblower claims of fraud in the future. Should the company not have a compliance program, it should designate a compliance officer and then work to implement a program quickly.

Heightened Government Enforcement

In addition to the DOJ and U.S. Attorney Offices' inherent investigative authority and extensive resources to pursue COVID-related fraud, companies need to be cognizant of even broader oversight and enforcement authority that Congress has vested in other government agencies. For example, CARES Act legislation created the Bipartisan Congressional Oversight Commission; the Pandemic Response Accountability Committee, comprised of nine Inspector Generals (IG) across different government agencies; and a Special Inspector General for pandemic recovery (SIGPR).

Companies should expect each of these Congressional Commissions, among other federal agencies monitoring CARES Act subsidies, to coordinate closely with DOJ to identify, investigate and prosecute fraud and abuse wherever its discovered. The government has discretion to pursue either criminal or civil violations of the False Claims Act[49] based, for example, on false information contained in a PPP application that later triggered a government subsidy. The Health Care Fraud statute[50] will also be an enforcement priority should the government uncover evidence that medical suppliers, hospitals, nursing homes or physicians defrauded the government securing CARES Act aid, purportedly, for vital medical supplies or Medicare or another healthcare benefit program but used the funds for undisclosed illegal purposes. Should the government discover company employees using CARES Act or related program funds to pay or receive illegal kickbacks to outside vendors doing business with the company, it faces significant monetary fines and penalties and even temporary/permanent debarment from future government subsidy programs.

Evident from the myriad government funding opportunities that continue to be available to employers to address the COVID crisis, there is significant temptation for employee self-dealing, false claims or outright theft of COVID relief funds. Risks attendant to the receipt of bailout funds and their honest, prudent use and administration are inextricably linked to the government's keen interest of ensuring taxpayer money is spent properly. Companies need to be on the lookout for these issues. When identified, they need to be addressed promptly and effectively.

Workplace Safety and Health

OSHA Leadership

President-elect Joe Biden nominated Boston Mayor Marty Walsh for Secretary of Labor, but he has not named a nominee for Assistant Secretary of Labor for Occupational Safety and Health as of this report's publication. President-elect Biden promised to be "the strongest labor president you have ever had," so appointments for the Occupational Safety and Health Administration (OSHA) and the Mine Safety and Health Administration (MSHA) may also include individuals with a background in organized labor.

Emergency Temporary Standard for COVID-19

Rarely have presidential candidates campaigned on promulgating an OSHA standard. President-elect Joe Biden did just that, making it all but certain that he will fulfill a campaign pledge to enact an Emergency Temporary Standard to address COVID-19 in early 2021. Expect to see the standard enjoined in federal court, especially if it follows a standard similar to the one enacted in California, which requires employer-funded COVID testing during work hours, mandates paid leave and potentially brings unsuspecting employers into the Respiratory Protection standard. That standard is currently being challenged in the California courts by several industry groups and employers adversely impacted by the rule. Employers on a national scale may soon need to prepare Infectious Disease Preparedness and Response Plans and train employees accordingly.

Several of the 28 State Plan states (Virginia, Oregon, Michigan and California) that operate their own partial or comprehensive workplace safety and health programs have enacted state-based Emergency Temporary Standards for COVID-19, and others may follow. Expect to see a similar standard promulgated by MSHA.

OSHA Safety Incentive Program Guidance

Expect to see quick changes in OSHA guidance, possibly including a more prohibitive view of workplace safety and health incentive programs and post-incident drug testing under OSHA's 2016 Improve Tracking of Workplace Injuries and Illness Rule. OSHA issued a standard interpretation letter in October 2018 clarifying that safety incentive programs are not prohibited so long as they are not implemented in a manner that discourages reporting. It also explained that most instances of post-incident drug testing are permissible under the anti-retaliation rule. A return to the original intent of the 2016 Rule may signal agency intent to view post-incident drug testing and incentive programs as forms of employer retaliation.

OSHA's Top Ten Violations

The 10 most frequently cited OSHA safety and health inspections in FY 2019 were:

1. Fall Protection (Construction – 29 CFR 1926.501)
2. Hazard Communication (29 CFR 1910.1200)
3. Scaffolding (29 CFR 1926.451)
4. Lockout/Tagout (29 CFR 1910.147)
5. Respiratory Protection (29 CFR 1910.134)
6. Ladders (Construction – 29 CFR 1926.1053)
7. Powered Industrial Trucks (29 CFR 1910.178)
8. Fall Protection — Training (Construction – 29 CFR 1926.503)
9. Machine Guarding (29 CFR 1910.212)
10. Eye and Face Protection (29 CFR 1926.102)

Since the onset of the pandemic, OSHA has reported an uptick in its use of its Respiratory Protection standard, Recording and Reporting Occupational Injuries and Illnesses standard, Personal Protective Equipment standard and the General Duty Clause (the catch-all for any hazards not identified in existing OSHA standards), all related to COVID-19 inspections. Consequently, those categories may move up on the list. But that should prove to be a temporary blip once enforcement officers increasingly return to field inspections as the pandemic wanes. Expect to see a post-pandemic return to the ten standards listed above as the most frequently cited.

Enhanced Electronic Recordkeeping

Expect to see a return to [OSHA's 2016 Improve Tracking of Workplace Injuries and Illnesses Rule], which originally required employers to electronically submit information to OSHA from their OSHA Form 300 (Log of Work-Related Injuries and Illnesses) and OSHA Form 301 (Injury and Illness Incident Report) for establishments with 250 or more employees, unless they are exempted from maintaining these documents. Citing the privacy concerns of individual employees whose data would be included in reports that would be published on the agency's website, in 2018, OSHA modified the rule to require employers to electronically submit only summary data on OSHA Form 300A (Summary of Work-Related Injuries and Illnesses).

Labor organizations have pushed for a return to the original policy, which would make information about specific injuries and illnesses publicly accessible to industry competitors, news media, labor organizations and the general public.

Regulations

Once the limitation on new standards under the current administration lifts, expect to see renewed regulatory activity. A renewed push for the Obama-era Infectious Disease Standard may top OSHA's list, especially given the urgency created by the COVID-19 pandemic. This standard may require health facilities and other high exposure workplaces to implement infectious disease control programs. Again, many State Plan states and MSHA may follow suit.

OSHA typically publishes its Unified Agenda of Federal Regulatory and Deregulatory Actions in the spring and fall, so, by May 2021, we should know more definitively what the goals of the Biden administration will be.

MSHA recently announced a proposed rule incorporating national and international voluntary consensus standards related to electric motor-driven mine equipment and accessories, and the agency is accepting comments.

Enforcement

President-elect Joe Biden promised to double the number of OSHA investigators. While a fraction of that number could be hired due to unfilled positions, the remainder would require additional congressional funding, which could prove difficult.

More manageable would be a continuation of recently increased OSHA enforcement of its Personal Protective Equipment, Respiratory Protection and Recordkeeping standards and of the General Duty Clause to protect workers during the current pandemic. There may be a strong desire for vigorous enforcement of a new Emergency Temporary Standard for COVID-19 for the duration of the current pandemic.

While OSHA has not abandoned its practice of publishing news releases about enforcement actions, the current administration reduced such reports significantly. OSHA is expected to return to a more active schedule of publishing releases of issued citations in early 2021.

Workplace Training

A patchwork of legal training obligations applies to many multistate employers. Connecticut, California, Delaware, Illinois, New York, New York City, Maine and Washington by statute require employers to provide sexual harassment training to some or all employees. In 2021, it is likely that more states — and perhaps Congress — will pass similar measures as several bills are at varying stages of their respective legislative processes.

In addition to required harassment training, many employers also must provide COVID-19 training pursuant to state and local COVID-19 reopening guidelines and orders. Required content for COVID-19 training is highly dependent on an employer's industry and geographic location(s). OSHA provides information on recommended and required COVID-19 training, including training for workers who must use PPE and for workers reasonably anticipated occupational exposure to SARS-CoV-2. The CDC also provides recommendations for educating employees on COVID-19 safety and protocols. Importantly, requirements vary as applicable rules vary and states and localities expand and retract COVID-related requirements.

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[48] 2020 U.S. Dist. LEXIS 163498 (S.D.N.Y. Sept. 8, 2020).

[49] 31 U.S.C. §§ 3729–3733.

[50] 18 U.S.C. § 1347.

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