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General labour market and litigation trends

Overtime Rule

The Department of Labor ("DOL") updated the Fair Labor Standard Act's ("FLSA") overtime and minimum wage exemptions for executive, administrative and professional ("EAP") workers by raising the standard salary threshold to $35,568 per year, or $684 per week. This means that, in addition to meeting the duties test for one of the three exemptions, employers must pay their employees at least $35,568 per year in order to consider the employee exempt from the overtime requirements of the FLSA. This latest iteration of the rule took effect on January 1, 2020, and represents about a $12,000 increase in the salary threshold established in 2004 ($455 per week, $23,660 annually). This threshold will also apply to employees who fall under the computer employee exemption. Additionally, the "Highly Compensated Employee" exemption threshold will rise from $100,000 to $107,432 annually. Press Release, Wage and Hour Division, *U.S. Department of Labor Issues Final Overtime Rule*, Department of Labor, (Sept. 24, 2019), https://www.dol.gov/newsroom/releases/whd/whd20190924.

Though the increase represents a long-needed update in the eyes of employee advocacy groups, it falls short of changes proposed by the Obama administration in 2016 ($913 per week, $47,476 annually). The 2016 rules were blocked by an Eastern District of Texas federal court judge and never went into effect. Noam Shneiber, *Judge Suspends Rule Expanding Overtime for Millions of Workers*, *The New York Times*, Nov. 22, 2016, https://www.nytimes.com/2016/11/22/business/obama-rule-to-expand-overtime-eligibility-is-suspended-by-judge.html. The new rule also does not contain a provision proposed in 2016 providing for automatic updating of the salary thresholds. The DOL has committed to updating the salary thresholds more often through traditional rulemaking, but has said they will continue to require notice-and-comment rulemaking and declined to implement a system where the salary thresholds will update automatically based upon a formula. Wage and Hour Division, *Notice of Proposed Rulemaking: Overtime Update*, Department of Labor, Mar. 7, 2019, https://www.dol.gov/agencies/whd/overtime/2019.

To assist with meeting the new threshold, the DOL will allow employers to use nondiscretionary bonuses and incentive payments, including commissions, to satisfy up to 10% of the salary threshold for the executive, administrative, and professional exemptions. Discretionary bonuses cannot be used toward meeting the salary threshold. The Department of Labor will allow employers to make catch-up payments to employees who do not earn enough in nondiscretionary bonuses or incentive payments in a given 52-week period to retain exempt status, provided that the catch-up payment is made within one pay period of

the end of the year. Devin S. Hayes, *New Overtime Rules Go Into Effect January 1, 2020*, The Nat'l L. Rev., Oct. 7, 2019, *available at* https://www.natlawreview.com/article/new-overtime-rules-go-effect-january-1-2020.

Some states with Democratic governors, including Colorado, Michigan, and Washington State, believe the new salary threshold is too conservative, and are pursuing increases to salary thresholds for exempting white-collar and supervisory workers from overtime pay requirements. Washington State represents the largest proposed increase, and finalised a rule to gradually raise its threshold starting July 1, 2020 until the salary threshold reaches $1,603 weekly or $83,356 annually in 2028. News Release, Washington State Department of Labor & Industries, *Changes Made to Washington's Overtime Rules*, https://lni.wa.gov/workers-rights/wages/overtime/changes-to-overtime-rules. Colorado is raising its overtime exemption threshold to $42,500 starting July 1, with gradual increases to $57,500 in 2026. Press Release, Colorado Dept. of Labor and Employment, *Labor Department Adopts New Colorado Overtime And Minimum Pay Standards Rule*, Jan. 22, 2020, https://www.colorado.gov/pacific/cdle/news/labor-department-adopts-new-colorado-overtime-and-minimum-pay-standards-rule. Michigan Governor Gretchen Whitmer has called for agency rulemaking to take place in 2020 that will increase the salary threshold. Worker rights advocates are pushing for New Jersey and Pennsylvania to do the same. Some states, including California and New York, who link their thresholds to the state minimum wage already have thresholds higher than the federal standard. Chris Marr, *State Laws to Take On Gig Workers, Wages, Overtime in 2020*, Bloomberg, Bloomberg Law 2020 Outlook on Labor and Employment, Jan. 20, 2020.

Fluctuating workweek

In November, the DOL proposed a new rule that would allow job creators to offer bonuses or other incentive-based pay to employees whose hours vary from week to week. The proposal would clarify that payments in addition to the fixed salary are compatible with the use of the fluctuating workweek method under the FLSA. Wage and Hour Division, *Notice of Proposed Rulemaking: Fluctuating Workweek Method of Computing Overtime,* Department of Labor, Nov. 4, 2019, https://www.dol.gov/agencies/whd/overtime/fww2019. The fluctuating workweek method provides an alternative method under the FLSA for calculating overtime pay. Under this method, an employer may determine a "fluctuating workweek" and an employee's "regular rate of pay" (and therefore potential overtime pay due) each week based on the employee's hours worked for that week. Under the normal overtime method, an employee's regular rate of pay (the "time" in "time and-a-half") is typically a fixed rate throughout the year based solely on the employee's hourly rate or salary. In order for employers to apply the fluctuating workweek method, the employee must be employed on a fixed salary basis and their hours of work must fluctuate from week to week. There must also be a "clear mutual understanding" between the employer and the employee that the employee's fixed salary is compensation, separate from overtime pay, for all hours worked each workweek, regardless of their number, rather than for a fixed workweek period, such as 40 hours. Finally, the amount of the employee's salary must be sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour in those workweeks in which the number of hours worked by the employee is greatest. 29 CFR § 778.114.

When an employee applies the fluctuating workweek method, an employer may compensate an employee at a rate of one-half of the employee's "regular rate of pay" for any overtime worked that week. This difference from the conventional overtime rate of one-and-a-half times

pay is due to the fact that the employee's fixed salary in such a situation is already intended to compensate the employee at straight-time rates for all hours worked in the week, which may be either greater or fewer than 40 in any given week. David T. Harmon, *Fluctuating Workweek Overtime Method May Be Changed with Proposal from U.S. Department of Labor*, The Nat'l L. Rev., Jan. 2, 2020, *available at* https://www.natlawreview.com/article/fluctuating-workweek-overtime-method-may-be-changed-proposal-us-department-labor. The proposed rule would allow employers to count bonuses, premium payments, and other additional pay when calculating a fluctuating workweek for an employee's regular rate of pay for overtime purposes. The fluctuating workweek rule, if finalised, would replace an Obama-era regulation meant to block businesses from shorting workers by shifting the bulk of their base salaries into bonuses. Instead, this method would potentially permit employers to shift substantial portions of a fluctuating workweek employee's compensation structure to bonus and other incentive payments, therefore reducing an employee's fixed weekly salary for other weeks of the year without a corresponding reduction in hours of service to the business.

The DOL separately issued a proposed rule late in the year modifying its stance on how the regular rate should be calculated. News Release, Final Rule: Regular Rate under the Fair Labor Standards Act, Wage and Hour Division, Department of Labor, Dec. 12, 2019, https://www.dol.gov/agencies/whd/overtime/2019-regular-rate.

California "gig economy"/independent contractor test (A.B. 5)

In September 2019, California signed into law the California Assembly Bill 5 ("A.B. 5"), a state statute that codifies and expands the three-prong ABC test that was adopted by the California Supreme Court in its landmark *Dynamex Operations West, Inc. v. Superior Court of Los Angeles* decision. The implementation of this test heavily impacts whether businesses have correctly classified their workers as independent contractors, a classification that includes fewer workplace protections than the classification of "employee". The new statute came into effect on January 1, 2020.

Under the test articulated in Dynamex, an employer can only classify workers as independent contractors if it shows each of three things: that the workers are free from their hiring entity's control, work outside its "usual business" and "customarily" do the work they do for their alleged employer as part of an "independent business". The bill inserted §2750.3 to the California Labor Code, and generally shifted the burden of proof on employers to show that a worker is properly classified as an independent contractor. The Dynamex case, determined in April 2018 replaced the 11-point standard set by the Borello test. *Dynamex Operations W. v. Superior Court*, 4 Cal. 5th 903, 913 (2018), reh'g denied (June 20, 2018). The bill explicitly puts the new test to the side in certain situations, including for a specified list of occupations (including doctors, dentists, psychologists, insurance agents, stockbrokers, lawyers, accountants, engineers, and real estate agents) and certain professional, business-to-business, and construction services. Under the excluded areas, the Borello test continues to apply. The law also gives cities in California the right to sue companies for violating the law, where previously they could not. The California Attorney General's office and local prosecutors can also sue companies.

In November 2019, the California Trucking Association filed suit in the United States District Court for the Southern District of California, representing about 70,000 truck drivers in the state and challenging both the California Supreme Court Dynamex ruling and A.B. 5. The Association argues that many of the represented drivers had opted to be independent contractors after having been employed drivers, as this allows them to set their own schedules and otherwise profit from owning their own vehicle. Enforcement of A.B. 5 would force

them to be treated as employees and lose these benefits, the Association argued. The Association won a preliminary injunction on January 16, 2020 barring A. B. 5 from being enforced against motor carriers and owner-operators in the trucking industry. California and the International Brotherhood of Teamsters have filed an appeal to the ninth circuit, hoping to lift the injunction. Linda Chiem, *Calif. Truckers Rip Teamsters Bid To Pause AB 5 Injunction,* Law 360, Feb. 6, 2020, https://www.law360.com/articles/1241113/calif-truckers-rip-teamsters-bid-to-pause-ab-5-injunction. The American Society of Journalists and Authors, the National Press Photographers Association (*American Society of Journalists et al. v. Becerra*)**,** Uber and Lyft (*Olson v. California*) all filed similar suits to each other in December 2019, challenging that the law denies equal protection due to the what types of jobs were exempted or not. Gary M. McLaughlin, *et al.*, *Court Denies Preliminary Injunction in Uber Lawsuit Arguing that California's AB 5 is Unconstitutional; Other Challenges Continue*, Lexology, Feb. 11, 2020, https://www.lexology.com/library/detail.aspx?g=b04eddb2-9a6b-4d10-81f1-0a0afa0d7511.

New Jersey and New York are expected to take similar steps toward classifying more workers as employees rather than independent contractors, which would entitle them to legal benefits such as minimum wage, overtime, sick leave, business-expenses and unemployment pay. Chris Marr, *State Laws to Take On Gig Workers, Wages, Overtime in 2020*, Bloomberg, Bloomberg Law 2020 Outlook on Labor and Employment, Jan. 20, 2020.

Business protection and restrictive covenants

Limits on Noncompete Contracts

Over the course of 2019, seven states enacted new statutes designed to limit the circumstances in which noncompetition agreements may be used, and more states followed in 2020. In May 2019, New Hampshire enacted a statute forbidding employers from utilising noncompete agreements for "low-wage employees". The Act, effective on September 8, 2019, defines low-wage employees as having an hourly wage less than or equal to 200% of the federal minimum wage (i.e., $14.50 or less per hour) or an hourly rate less than or equal to 200% of the tipped minimum wage pursuant to RSA § 279:21 (or, $6.54 or less per hour). The Act defines "noncompete agreements" narrowly as an agreement between an employer and a low-wage employee that restricts the employee from working for another employer for a specified period, working in a specific geographical area or working for another employer in a similar position. N.H. REV. STAT. ANN. § 275:70-a (2020). The statute does not address other forms of restrictive covenants, such as nonsolicitation or confidentiality agreements. Maryland enacted a similar law, which became effective on October 1, 2019. MD. CODE ANN., LAB. & EMPL. § 3-716 (2020). Effective on September 18, 2019, the Act to Promote Keeping Workers in Maine imposes extensive restrictions on the use of noncompetes in-state. The statute prohibits employers from requiring, or even permitting, an employee earning wages less than 400% of the federal poverty level to enter into a noncompete agreement. ME. REV. STAT. ANN. tit. 26 § 599-A (2020).

This year has continued the trend and new restrictions took effect January 1, 2020 in Washington State, and January 15, 2020 in Rhode Island. The Rhode Island Noncompetition Agreement Act prohibits employers from entering into noncompetition agreements with certain types of workers, including "low wage workers" and specifically exempts certain types of restrictive covenants, including: nonsolicitation agreements; sale-of-business noncompetes; confidentiality agreements; and noncompete agreements made in connection with a separation from employment, as long as the employee receives seven business days

to rescind acceptance. R.I. GEN. LAWS §§ 28-59-1–3 (2020). The new Washington law places significant and highly detailed restrictions on the use of noncompetes. Under this law, noncompetes are unenforceable against an employee: unless the employer discloses the terms of the noncompete in writing no later than the time the offer of employment is accepted; if the noncompete is entered into after employment begins; unless the employer provides independent consideration; unless the employee's earnings exceed $100,000 annually; and if the employee is terminated through a layoff, unless enforcement of the noncompete includes compensation equivalent to the employee's base salary for the period of enforcement. The Washington Act also limits the use noncompetes with independent contractors. WASH. REV. CODE §§ 49.62.005–900 (2020).

The District of Columbia is considering a similar move, with a pending council measure which would ban noncompetes for workers making less than three times the minimum wage. D.C.'s wage floor rises to $15 on July 1, 2020, meaning the noncompete ban threshold would be $45 hourly, or the equivalent of $93,600 annually for a full-time worker. Both Illinois and Pennsylvania have considered similar laws. Meaghan Clayton, Raphael Coburn, Chuck Knapp, *Top 10 Noncompete Developments of 2019*, JDSupra, Jan 14, 2020, https://www.jdsupra.com/legalnews/top-10-noncompete-developments-of-2019-85961/.

In general a few trends seem to be developing: rejection of the use of non-compete agreements for low-income employees; rejection of the use of non-compete agreements for certain categories of employees, such as non-exempt employees and student interns; codified limits on the permissible duration of non-compete agreements; administrative requirements for the disclosure of non-compete obligations; and civil fines and penalties for employer violations, as well as private rights of action. Jennifer Janeira Nagle and Mark D. Pomfret, *2019 Non-Compete Statutes Are Officially In Effect: Are Employers Ready?*, Nat. L. Review, Jan. 21, 2020, https://www.natlawreview.com/article/2019-non-compete-statutes-are-officially-effect-are-employers-ready.

Bipartisan support also seems to be in place to limit noncompetes on a federal level, with new legislation proposed to prohibit employers from entering into, enforcing or threatening to enforce any noncompetition agreements other than those entered into through the sale of a business or through the dissolution of a partnership, and those narrowly designed to protect trade secrets. The bill delegates enforcement to the FTC and the Department of Labor, but also creates a private cause of action through which individuals could proceed with their own civil actions against employers. Workforce Mobility Act of 2019, S. Res. 2614, 116th Cong. (2019).

Employment Arbitration Agreements

While recent headlines concerning the danger of secrecy when adjudicating sexual harassment claims have created a public outcry against forced arbitration in the employment context, the United States continues to favour the use of arbitration, as put forth in the Federal Arbitration Act ("FAA"). Recent court cases, for instance *Epic Systems Corp. v. Lewis* in 2018, in which the Supreme Court, which upheld the enforceability of mandatory arbitration agreements containing class and collective action waivers, have reinforced the power and validity of arbitration agreements. 138 S. Ct. 1612 (2018). The EEOC, in December 2019, rescinded its longstanding policy against the use of mandatory, pre-dispute arbitration agreements for employment-related claims, instituted in 1997, pointing to the consistent Supreme Court case law. News Release, *Recission of Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment*, U.S. Equal Employment Opportunity Commission, https://www.eeoc.gov/eeoc/newsroom/wysk/recission_mandatory_arbitration.cfm. Although

this policy is not legally binding, many courts, investigators, state agencies and attorneys look to such policies for guidance.

Legislation has indicated that while courts are in favour of allowing mandatory arbitration, state representatives are listening to their constituencies and public opinion to limit the practice. The number of states imposing limitations on mandatory pre-dispute arbitration agreements in the employment context has been increasing over recent years and now includes Illinois, New Jersey, New York, Washington, Vermont, and Maryland. The types of limitations vary by state. For example, Vermont's law applies only to claims of sexual harassment, while others, such as New York's, purport to prohibit required arbitration of all claims of discrimination or harassment based on any protected characteristic. Preemption challenges may narrow the scope of these state limitations, given potential conflicts with the FAA. In June of this year, for example, a New York federal court held that the FAA preempted New York's prohibition on mandatory arbitration provisions covering sexual harassment claims. Lauri F. Rasnick, *It's Time to Revisit Your Arbitration Agreements: Limitations on Mandatory Arbitration Agreements Continue to Spread Throughout the Country*, Nat. L. Review, Nov. 22, 2019, https://www.natlawreview.com/article/it-s-time-to-revisit-your-arbitration-agreements-limitations-mandatory-arbitration. Finally, in September 2019, the House passed the Forced Arbitration Injustice Repeal (FAIR) Act, which bans companies from requiring workers and consumers to resolve legal disputes in private arbitration. Though the FAIR Act is unlikely to pass the Republican controlled Senate, it represents a willingness to view mandatory arbitration as a political issue. H.R. 1423, 116th Cong. (2019).

Discrimination protection

Sexual Harassment

Continuing the momentum from 2018, a number of states expanded, enacted or clarified laws inspired by the "Me Too" movement dealing with sexual harassment in the workplace. New York City's Stop Sexual Harassment Act became effective April 1, 2019, and requires all employers with 15 or more employees to conduct annual anti-sexual harassment training for all employees. NYC Local Law 96 (2018), a New York City law, complements a similar law in New York State, which became effective on October 9, 2018, and which also requires employers to conduct annual anti-harassment training. Delaware signed HB 360 into law in 2018, and it became effective January 1, 2019. H.B. 360, 149th Gen. Assemb., Reg. Sess. (Del. 2018). This law creates a new section in the Delaware Discrimination in Employment Act prohibiting sexual harassment in the workplace, requires employers with at least 50 employees to provide interactive anti-sexual harassment training to all employees every two years, requires new employees to be trained within one year of hire and existing employees must have been trained on or before January 1, 2020, requires employers provide sexual harassment training for all supervisors every two years, and requires new supervisors to be trained within one year of assuming a supervisory position, and existing supervisors must have be trained on or before January 1, 2020. Evandro Gigante, Arielle E. Kobetz and Tony S. Martinez, *The Employment Law Landscape in 2019*, Proskauer, Jan. 16, 2019, https://www.lawandtheworkplace.com/2019/01/the-employment-law-landscape-in-2019/.

With regard to confidentiality agreements, New Jersey followed the example of New York and California before it, and on March 18, 2019 signed into law S.-121, which bans nondisclosure provisions that seek to prevent disclosure of the details, including the settlement amount, relating to any type of workplace discrimination, retaliation, or harassment claim, as against public policy. S.B. 121, 218th Leg., 2018 Reg. Sess. (N.J. 2019). Unlike the

New York nondisclosure law, which only applies to the facts underlying claims of sexual harassment, this law encompasses all types of discrimination, retaliation, and harassment claims for all protected characteristics under the New Jersey Law Against Discrimination and refuses to recognise as enforceable a confidentiality provision even if the provision is the employee's preference. Jen Argyle, Lisa Lupion and Jill Rosenberg, *Confidentiality Optional: New Jersey Nixes NDAs and Arbitration for Discrimination and Harassment Claims*, JDSupra, Mar. 25, 2019, https://www.jdsupra.com/legalnews/confidentiality-optional-new-jersey-69618/.

Nevada limits pre-hire drug screens

AB 132, a Nevada law that was enacted on and came into effect on January 1, 2020 now prevents an employer from rescinding a job offer if a job applicant tests positive for marijuana after the offer was made. This represents the first state to ban most employers from utilising pre-employment testing for marijuana in their hiring practices, nationwide, and reflects a general trend towards acceptance of marijuana consumption in the United States. Harry Harrison, Pre-Employment Drug Testing: What Nevada Employers and EPL Insurers Need to Know, Tyson & Mendes, Feb. 3, 2020, https://www.tysonmendes.com/pre-employment-drug-testing-what-nevada-employers-and-epl-insurers-need-to-know/. The Law also provides individuals who test positive for marijuana with the right to, at their own expense, rebut the original test results by submitting an additional drug-screening test within the first 30 days of employment. The new law, notably, does not apply to firefighters, emergency medical technicians, positions that require an employee to operate a motor vehicle and for which federal or state law requires drug screening, or to those positions the employer deems could adversely affect the safety of others. In addition, the pre-employment drug testing restrictions do not apply if they are inconsistent with federal law (such as requirements for federal contractors or positions funded by federal grants) or collective bargaining agreements. A.B. 132, 2019 Ass., 80th Sess. (Nev. 2019). Nevada likely took their cue from New York City, which in April 2019, passed Int. 1445-A, and, as of May 15, 2020 will prohibit employers, labor organisations, and employment agencies and all of their agents from requiring a prospective employee to submit to a marijuana or THC drug test as a condition of employment. Prohibition of drug testing for pre-employment hiring procedures, Int. 1445-A, New York City Council (Feb. 13, 2019). More states are likely to follow Nevada's example, as there are concerns for inconsistencies between new laws nationwide that protect the use of medical and recreational marijuana and common workplace practices. Nathaniel M. Glasser, *et al.*, Nevada Becomes First State to Prohibit Rejection of Applicants Testing Positive for Marijuana, Nat. L. Review, July 1, 2019, https://www.natlawreview.com/article/nevada-becomes-first-state-to-prohibit-rejection-applicants-testing-positive.

Worker consultation, trade union and industrial action

NRLB modifies union election process

In December 2019, the National Labor Relations Board ("NLRB") issued a rule, pursuant to its unilateral authority to make procedural changes to the election process, scaling back an Obama-era regulation that had been intended to streamline and speed up the process for workers to vote on whether they want to be represented by a union, with the labor board relaxing certain deadlines. 84 Fed. Reg. 69524 (Dec. 18, 2019) (to be codified at 29 C.F.R. 102. Business interests had long been wary off the 2014 election rule, dubbed the "ambush" election rule due to the perceived quick turnaround between the petitions to organise and actual union elections. Annual data released by the NLRB shows that union elections before

the 2014 rule were held a median of 38 days after workers petitioned to organise, a number that dropped to 23 days over the past four fiscal years since the Obama-era rule was issued.

The modifications generally lengthened the timeframe for union elections to be held, for example, moving the lead time for pre-election hearings from eight calendar days from the notice of hearing to 14 business days, requiring the Statement of position within eight business days from the notice of hearing instead of no later than one day before the hearing issues a pre-election hearing instead of being postponed to after the election. The new rule also directs regional officials to set elections no fewer than 20 days after approval, unless the parties agree to a shorter timeline. Braden Campbell, NLRB Scales Back Obama Board's Election Regs, Law 360, Dec. 13, 2019, https://www.law360.com/articles/1228022.

Because the regulation is "procedural," the law guiding federal rulemaking does not require the board to issue a notice of proposed rulemaking before making changes, the majority said. On March 24, 2020, the NLRB announced that, in order to facilitate the resolution of legal challenges brought by the American Federation of Labor and Congress of Industrial Organization ("AFL-CIO"), it is postponing, until May 31, 2020, the effective date of its final rule modifying the Agency's Representation Case Procedures, which was initially to go into effect April 16, 2020. Thus, the election-related amendments will not go into effect any earlier than June 1, 2020. Jason R. Stanevich and Maura A. Mastrony, *National Labor Relations Board's Response to COVID-19*, Littler, Mar. 26, 2020, https://www.littler.com/publication-press/publication/national-labor-relations-boards-response-covid-19.

Other recent developments in the field of employment and labor law

COVID-19/Coronavirus

The Coronavirus (COVID-19) has had a significant impact on employment practices in the United States, and in the months of immediate impact, that impact was reflected in many legal developments, from workplace safety, to sick leave and mass layoffs.

OSHA released guidelines on workplace safety that employers should adhere to through the Guidance on Preparing Workplaces for COVID-19, outlining steps employers can take to help protect their workforce. OSHA has divided workplaces and work operations into four risk zones, according to the likelihood of employees' occupational exposure during a pandemic. Occupational Safety and Health Admin., Department of Labor, Administration, OSHA 3990-03, Guidance on Preparing Workplaces for COVID-19 (2020). The concern of workers working in unsafe working conditions has already spurred some class action litigation from workers who claim exposure to the virus without adequate safety gear. Amanda Bronstad, Lawyers Predict a 'Huge Explosion' in Worker Class Actions Over COVID-19, Law.com, Apr. 16, 2020, https://www.law.com/2020/04/16/lawyers-predict-a-huge-explosion-in-worker-class-actions-over-covid-19/.

On March 18, 2020, the government enacted the Families First Coronavirus Response Act ("FFCRA") to be put into effect by April 2, 2020 at the latest. H.R. 6201, 116th Cong. (2020), codified as Pub. L. No: 116-127. The Emergency Paid Sick Leave Act, part of the FFCRA, expands the FMLA. Under this Act, all employers with fewer than 500 employees must provide paid sick leave to all employees (full-time or part-time and regardless of length of employment) when the employee is unable to work (or telework) due to a need for leave because someone they care for has (or suspects they may have) COVID-19, or because they need to stay home to care for children while schools are closed. Another part of the FFCRA, the Emergency Family and Medical Leave Expansion Act, requires that employers with fewer than 500 employees provide at least 12 weeks of job-protected leave to employees (who have

been with the employer for at least 30 days), who are unable to work (or telework) due to a need to care for his/her child whose school or place of care has been closed, or whose child care provider is unavailable because of a COVID-19 emergency. News Release, *Families First Coronavirus Response Act: Employer Paid Leave Requirements*, Wage and Hour Division, Department of Labor, https://www.dol.gov/agencies/whd/pandemic/ffcra-employer-paid-leave. An employee cannot be discharged during or for taking leave under the FFCRA and an employee returning from the 12-week leave under the FFCRA must be restored to his/her original or an equivalent position. However, employers with fewer than 25 employees do not have to comply with this requirement if certain conditions are met, for example, if the employee's old position no longer exists due to the economic impact of the COVID-19 pandemic on the employer and the employer makes reasonable efforts, but fails, to restore the employee to an equivalent position. Robb. W. Patryk, et al., *Options for Workplace Closures As a Result of COVID-19*, MultiJurisdictional Employment Law Resource**,** Hughes Hubbard & Reed, https://www.hugheshubbard.com/news/hughes-hubbard-reed-multi-jurisdictional-employment-law-resource.

The Worker Adjustment and Retraining Notification Act ("WARN ACT") requires that a covered employer provide notification of a "plant closing" or "mass layoff" to affected employees (and certain government agencies) 60 days in advance of the closing/layoff. In the wake of the Pandemic and mandatory shutdowns, many businesses were forced to lay off large portions of their work staff, potentially in violation of the WARN Act. The 60-day notice requirement might be reduced if the employer falls under one potentially relevant exception, the "unforseen business circumstance" exception. Worker Adjustment and Retraining Notification Act of 1988, Pub. L. 100–379, 102 Stat. 890 (1988). California suspended the penalty provisions of California's WARN Act (requiring, *inter alia*, advance notice to employees of mass layoffs and termination of employment) through Executive Order N-31-20, effective as of March 4 and lasting until the end of the emergency. The suspension applies only to employment actions caused by COVID-19-related "business circumstances that were not reasonably foreseeable as of the time that notice would have been required". California directs employers to provide as much notice "as is practicable." Cal. Exec. Order No. 31-20 (Mar. 17, 2020), https://www.gov.ca.gov/wp-content/uploads/2020/03/3.17.20-EO-motor.pdf. Potential violations of the WARN Act are another area that will likely see an increase in employee class-action lawsuits against their employers in the coming months. Jurate Schwartz, *COVID-19: Navigating WARN Act Issues During These Uncertain Times*, Nat. L. Review, Apr. 6, 2020, https://www.natlawreview.com/article/covid-19-navigating-warn-act-issues-during-these-uncertain-times.

The NRLB postponed a number of their processes and implementations. On March 19, 2020, the NLRB announced that it would suspend all representation elections, including mail-ballot elections, immediately through and including April 3, 2020, but as of mid-April has reopened representation elections through the regional offices. News Release, *COVID-19 Operational Status Update*, NLRB, Apr. 17, 2020, https://www.nlrb.gov/news-outreach/news-story/covid-19-operational-status-update. On the same day, the NRLB announced that it was postponing all trials scheduled between then and April 3, 2020 due to the Coronavirus and required all Regional Offices to seek the Judges Division's approval to reschedule. Jason R. Stanevich and Maura A. Mastrony, *National Labor Relations Board's Response to COVID-19*, Littler, Mar. 26, 2020, https://www.littler.com/publication-press/publication/national-labor-relations-boards-response-covid-19. As of mid-April, trials are postponed until at least May 31, 2020.

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- **Energy**
- **Fintech**
- **Fund Finance**
- **Initial Public Offerings**
- **International Arbitration**
- **Litigation & Dispute Resolution**
- **Merger Control**
- **Mergers & Acquisitions**
- **Pricing & Reimbursement**

Strategic partner