JacksonLewis

WAGE & HOUR DEVELOPMENTS: A YEAR IN REVIEW

2021

INTRODUCTION

As the COVID-19 pandemic reaches the two-year mark, it continues to impact how and where employees work and continues to require employers to address significant issues regarding wage and hour law compliance:

- Do employees have to be paid for the time spent taking a COVID -19 test or getting vaccinated?
- What about the cost of the test and cost of the vaccine? Should employees who are assigned to work in New York, but who have been working remotely in New Jersey due to the pandemic, have to comply with NY or NJ law?
- How do employers monitor and record the time worked by employees who work from home?
- If an employer offers a bonus to employees who receive a vaccine, does that bonus impact their overtime rate? Should employees whose job duties or pay have changed have to be reclassified from exempt to non-exempt?

Government agencies have answered some, but not all, of these questions, and the answers to some of these questions likely will be finally determined by courts in the years to come.

From a wage and hour perspective at the federal level, 2021 could be described as the year of the about-face. Significant regulatory provisions implemented by the former administration were largely undone in the months following the election. The joint employer rule was scrapped, the independent contractor rule was tossed, and the so-called "20% Rule" applicable to tipped employees, which the previous administration expressly had abandoned as unworkable, was dusted off, refurbished, and revived as a new rule. Several opinion letters issued in the waning days of the last administration also were withdrawn.

We again review some of the significant wage and hour developments at both the federal and state level, as well as identify all the new state minimum wage rates. Despite efforts by President Joe Biden and the (barely) Democrat-controlled Congress to increase the federal minimum wage, those efforts, thus far, have failed, beyond implementation of an Executive Order and passage of an infrastructure bill that will require many employers subject to federal contracts to pay their employees at least $15.00 per hour. While the federal minimum wage has not changed since July 2009, the march of state minimum wage increases continues. Tiny Emeryville, California continued to lead all cities nationwide in 2021 with a minimum wage of $17.13 per hour, although Seattle, Washington surpassed it when it reached $17.27 per hour beginning January 1, 2022 (albeit, only for large employers).

NOTABLE FEDERAL COURT CASES

As was the case in 2020, the U.S. Supreme Court did not issue any decisions in 2021 that focused either directly or indirectly on wage and hour issues. Following are a few notable decisions, however, from the circuit courts of appeal addressing wage and hour issues.

Eleventh Circuit Refuses to Defer to DOL Opinion Letter Eliminating '20%' Rule

In late 2020, the U.S. Department of Labor (DOL) issued a Tip Regulations Final Rule that *eliminated* the so-called "80/20," or "20%," Rule under the Fair Labor Standards Act (FLSA). The 20% Rule has been used by the DOL and courts to determine whether a traditionally "tipped employee" devoted a sufficient amount of time (*i.e.*, at least 80 percent) to tip-generating duties so the employer could claim a "tip credit" and pay the employee a reduced cash wage for that work time. The Final Rule was scheduled to become effective in March 2021, but, following the election of President Biden, the DOL first delayed enactment of the portions of the regulation addressing the 20% Rule and then, in October 2021, issued a new Final Rule that *reinstated* and revised an amended version of the 20% Rule (see below), adding a new cousin, the "30-Minute" Rule.

While that rulemaking was unfolding, the U.S. Court of Appeals for the Eleventh Circuit, reviewing a case addressing the DOL's initial elimination of the 20% Rule in an earlier 2018 Opinion Letter, held that the Opinion Letter was not entitled to deference and that the 20% Rule was a reasonable application of the FLSA and its regulations. *Rafferty v. Denny's, Inc.*, 2021 U.S. App. LEXIS 27680 (11th Cir. Sept. 15, 2021). The Eleventh Circuit has jurisdiction over the federal courts in Alabama, Florida, and Georgia.

Plaintiff Lindsay Rafferty, a former server at a Denny's restaurant, filed a collective action under the FLSA. She alleged that Denny's violated the tip credit rule by

making servers spend more than 20 percent of their time performing non-tipped "side work" such as cleaning, food preparation, taking out trash, bussing tables, and other alleged non-tipped duties. The district court denied the plaintiff's motion for conditional certification and granted a subsequent motion for summary judgment filed by Denny's, relying, in part, on the 2018 DOL Opinion Letter that had eliminated the 20% Rule. The trial court concluded that the plaintiff's claims failed because she had not demonstrated her alleged "side work" was not contemporaneous with her tip-related activities.

The plaintiff appealed, and the Eleventh Circuit reversed, expressly rejecting the DOL's elimination of the 20% Rule in the 2018 Opinion Letter. It found the DOL's conclusions in support of the Rule's elimination were unreasonable and unworthy of deference under either of the standards of review established for an agency's informal, sub-regulatory guidance. Absent formal DOL guidance (which did not yet exist at the time the case was before the district court), the court of appeals turned to the FLSA and its regulations themselves to determine whether either placed any limits on the time a tipped worker may spend performing allegedly non-tipped duties.

Despite the absence of any such time limitation in either the statute or its regulations, the Eleventh Circuit nonetheless concluded that a 20-percent-time limitation did indeed apply to the performance of duties "related" to tipped duties. It also held that no tip credit may be taken for performing duties "unrelated" to tipped work. In distinguishing between "related" and "unrelated" tasks, the court of appeals held that "the dividing line between related and unrelated duties falls where untipped duties no longer directly support tipped duties," borrowing, nearly verbatim, language from the DOL's then-proposed Final Rule. As examples of "unrelated duties," the court of appeals listed wiping down microwave ovens and stoves; washing and scrubbing walls; cleaning and scrubbing refrigerators, sinks, trays, and bins; and detailed cleaning on the expediter line.

In summary, the Eleventh Circuit concluded the 20% Rule was an appropriate standard for determining when an employer may take a tip credit. Accordingly, it reversed the district court's grant of summary judgment to Denny's, concluding the plaintiff had established a genuine issue of material fact as to whether, and how often, she performed unrelated, non-tipped work.

Ninth Circuit Reverses $102 Million Pay Stub, Meal Break Judgment Against Walmart

In a significant victory for California employers, the U.S. Court of Appeals for the Ninth Circuit reversed a $102 million award against Walmart in a suit alleging the retailer violated the California Labor Code's wage statement and meal-break provisions. *Magadia v. Wal-Mart Associates, Inc.*, 999 F.3d 668 (9th Cir. 2021).

The Ninth Circuit's opinion is an important clarification of the cognizable harm required to establish Article III standing under the Private Attorneys General Act (PAGA) and the Labor Code's wage statement requirements. The ruling established: (1) an employee does not have standing to bring PAGA claims in federal court for alleged Labor Code violations that the employee themselves did not suffer; and (2) an employer may make lump-sum payments as a retroactive adjustment to employees' overtime rate to factor in bonus payments without identifying a corresponding "hourly rate" for the payment on employees' wage statements.

Performance Bonuses

Walmart provides "MyShare" performance bonuses to certain employees at the end of each quarter. Because the bonus must be included in the regular rate of pay for overtime wages under California law, Walmart makes a retroactive adjustment to employees' overtime pay by calculating the difference between employees' overtime rate over the quarter and the overtime rate that would have been in effect if the MyShare bonus had already been factored in. The employer then reports both the bonus and the adjusted overtime pay as lump sums on the wage statements issued to employees at the end of each quarter.

The Lawsuit and the $102 Million Award

In a California class action and PAGA action that was removed to federal court, the plaintiff alleged Walmart violated Labor Code section 226(a)(9) by failing to identify the hourly rates and hours worked associated with the retroactive overtime payment on employees' wage statements and violated section 226(a)(6) by failing

to identify the start and end dates of these pay periods in its final pay statements. The plaintiff also asserted the employer violated Labor Code section 226.7 by failing to factor the MyShare bonus into the employees' "regular rate of compensation" when paying employees meal break premiums for missed or untimely meal breaks.

After a bench trial, the district court determined the plaintiff did not suffer a meal break violation. And, because the plaintiff could not show his claims were typical of class members who suffered meal-break violations, the court decertified the meal-break class. However, the district court allowed the plaintiff to seek PAGA penalties, based on meal break violations allegedly incurred by other employees. In addition, the trial court held that Walmart's semi-monthly and final pay wage statements violated sections 226(a)(6) and 226(a)(9). In total, the court awarded the plaintiff nearly $102 million for these violations.

The Ninth Circuit reversed the judgment and remanded the wage statement claims with instructions to enter judgment for Walmart. The Ninth Circuit also vacated the judgment and penalties against Walmart on the meal-break claim and remanded with instructions to remand the claim to state court. First, the court of appeals held the plaintiff lacked Article III standing to bring a PAGA claim for meal period violations because he did not personally suffer a meal period injury. The Ninth Circuit rejected the plaintiff's contention that he did not have to suffer an individual injury because PAGA is a *qui tam* statute (in which a private individual sues on behalf of the government to vindicate a public right). Despite numerous similarities, PAGA claims are not traditional *qui tam* actions, the court explained. PAGA claims involve the interests of nonparty individuals (not just the state and the plaintiff) who are entitled to a portion of the penalties and are bound by the PAGA judgment. Also, in a PAGA action, the State of California fully assigns the claims to the employee who is deputized under the statute to bring the claims, the court noted. By contrast, in *qui tam* actions, the government is the real party in interest and merely partially assigns the claim to a private individual acting in the state's interest.

The Ninth Circuit further concluded the plaintiff did have standing to bring his wage statement claims, finding that a violation of section 226(a) creates a cognizable (*i.e.*, "concrete and particularized") Article III injury. In reaching this conclusion, the appeals court undertook a two-part inquiry. It first found that Section 226(a) protects a concrete interest in receiving accurate information about wages in employee pay statements and that Walmart could violate a "concrete interest" if it did, in fact, fail to disclose statutorily required information on the wage statements The court wrote, "Even if Walmart pays its employees every penny owed, those employees suffer a real risk of harm if they cannot access the information required by § 226(a)."

Regardless, the Ninth Circuit concluded Walmart's wage statements and final pay statements provided all of the information required under the statute. Rejecting the district court's holding that the wage statements violated Section 226(a) because they did not include the requisite "hourly rates" and "hours worked" associated with the overtime adjustment, the Ninth Circuit found that there was no "hourly rate in effect" for the bonus-based overtime pay adjustment. Rather, "[i]t is a non-discretionary, after-the-fact adjustment to compensation based on the overtime hours worked and the average of overtime rates over a quarter (or six [semi-monthly] pay periods)." Thus, the Ninth Circuit concluded Walmart's pay statements satisfied the Labor Code requirements.

The court of appeals also determined that Walmart's final pay statements run afoul of the statute. The plaintiff alleged Walmart violated Section 226 because it did not include "the dates of the period for which the employee is paid" on the plaintiff's "Statement of Final Pay," which he received upon being discharged mid-pay period. However, under the plain language of the statute, the Ninth Circuit pointed out, Walmart had the option of furnishing a separate final pay wage statement with the required pay-period dates to terminated employees in the ordinary course of business at the end of the next semi-monthly pay period.

Auto Technicians' Pay Structure May Have Been Convoluted, But It Was Still a Bona Fide Commission Plan, Seventh Circuit Concludes

Although the employer's pay system for its auto repair technicians was complicated and at times redundant, it nevertheless constituted a bona fide commissions compensation method subject to exemption from the overtime pay provisions of the FLSA, the Seventh Circuit

Court of Appeals held. *Reed v. Brex, Inc*., 2021 U.S. App. LEXIS 23573 (7th Cir. Aug. 9, 2021). The Seventh Circuit has jurisdiction over the federal courts in Illinois, Indiana, and Wisconsin.

The Commissioned Salesperson Exemption

The FLSA generally requires that employees be paid overtime, at a rate of at least one and a half times their regular rate of pay for all hours worked beyond 40 in a week. 29 U.S.C. § 207(a)(1). However, this requirement does not apply to employees working in retail or service establishments if their regular rate of pay is at least one and a half times the statutory minimum wage and more than half of their compensation comes from bona fide commissions on goods or services. *Id.* § 207(i). The term "commission" is not defined in the FLSA, and litigation has arisen from time to time about whether employees are truly being paid on a commission basis, particularly when the compensation system is not a straight percentage based on sales. According to DOL regulations, if "commissions vary in accordance with the employee's performance on the job," they may qualify for the exemption, 29 C.F.R. § 779.416(b); whereas, a commission is not "bona fide" if the employee "always or almost always earns the same fixed amount of compensation for each workweek." *Id.* § 779.416(c).

Background

The latest case to grapple with the issue involves Brex, which operates a chain of auto-repair shops in Illinois and Missouri and where the plaintiffs worked as auto repair technicians. Brex's pay system for its technicians is a bit complicated. It begins with calculating total receipts for repairs and sales during a pay period. That number is divided by hours worked to yield an average "hourly production" rate. That rate is then converted to an hourly wage, which typically is about 16 percent to 17 percent of the hourly production rate. The hourly wage may be increased slightly (*e.g.*, by 50 cents), depending on whether the technician has obtained certain repair certifications, and it is then multiplied by the number of hours the technician worked during the week to obtain their base wages. On top of those wages, the technician is paid a set amount for each tire installed during the pay period, an amount that increases if the technician installs a certain minimum number during the pay period. If a technician's production falters in a pay period, the company applies an hourly wage equal to one and a half times the applicable state minimum wage, rounded up, thereby guaranteeing the employee's pay satisfies the first requirement of the commissioned salesperson exemption. Company records undisputedly showed the commissions pay system was applied about 84 percent of the time, with the alternative minimum pay system applying the rest of the time.

The Lawsuit

The plaintiffs alleged the company's pay system is not a bona fide commissions plan because it incorporates the employee's hours worked into so many steps; because the company's description of the pay plan makes reference to "hourly" wages; and because the plan does not discourage the company from requiring its technicians to work long hours, as historically has been a purpose of the FLSA. Following pretrial discovery, the trial court granted summary judgment to Brex, and the plaintiffs appealed. In affirming summary judgment for the company, the Seventh Circuit noted that the undisputed facts show Brex pays each technician, including the plaintiffs, based on their actual sales and therefore the plan is a valid commissions pay system.

As to the pay plan referring to and incorporating what are described as "hourly wages," the Court of Appeals reiterated that "the nomenclature is not determinative." In reality, while "[t]he formula is convoluted, [] it is mathematically identical to paying a straight commission. First multiplying and then dividing by the same number (hours worked) is equivalent to multiplying by one." Furthermore, the fact that technician pay is partially a function of hours worked does not create a triable issue of fact, the Seventh Circuit added. "Obviously, to some extent, technicians who work more hours are likely to have more repair opportunities and therefore make more money." Moreover, as was the case here, "small hourly bonuses for certification do not convert an employee's pay into a standard wage[,] so long as 'more than half his compensation … represents commissions on goods and services.'"

Finally, the Seventh Circuit addressed the plaintiffs' "unusual alternative argument that they were paid too much." In asserting this argument, the plaintiffs relied primarily on the applicable DOL regulations' use of the phrase "a guarantee or draw against commissions," which they read as containing

alternative words with the same meaning. Under their interpretation, the company's alternative wage floor is prohibited "because the regulations define any wage 'guarantee' as a draw against future commissions that requires reconciliation in subsequent pay periods." Therefore, they asserted, because the company did not "claw back" its technicians' guarantee payments in subsequent pay periods, "all compensation up to the guarantee was actually fixed hourly wages even in weeks where the guarantee did not apply" and the company's plan would not satisfy the exemption's requirement that more than half of an employee's income must come from commissions.

Rejecting this argument, the court of appeals noted that, under the statute, a "draw" and a "guarantee" are not in fact one and the same: "The plain meaning of the Act allows employers to implement either a guarantee or a draw, which are two distinct arrangements." DOL regulations permit employers to provide employees with "periodic payments, which are described variously in retail or service establishments as 'advances,' 'draws,' or 'guarantees,'" as a means of offsetting the fluctuations common in commissioned sales arrangements. Those regulations further allow – but do not require – employers to "claw back" such payments if they exceed actual commissions, the court of appeals explained. Moreover, the regulations explicitly provide that such guaranteed payments may operate as an alternative minimum floor within a bona fide commissions system, as long as there is no evidence that, as a means of avoiding overtime pay, the employer has implemented a sham "guaranteed commission" that employees rarely, if ever, can exceed. Adopting the plaintiff's interpretation, the court of appeals noted, would lead to an "improbable, even perverse, outcome," as "[t]he entire point of the [FLSA] is to require or encourage employers to pay their employees more, not less. Yet [the plaintiffs] say that Brex should have paid them less by docking their pay during weeks of plenty to compensate for the lean weeks. The statute and regulations do not require us to find that an employer violates the Act by paying its employees more than necessary. We will not strain to read them to arrive at that odd result".

Bonuses Prompted by Federal Tax Reform and Pay for Charitable Volunteer Time Were Properly Excluded From Employees' Overtime Calculation, Fourth Circuit Holds

Affirming the dismissal of wage and hour claims against "big box" retailer Lowe's, the Fourth Circuit Court of Appeals agreed that company bonuses, provided to employees following 2018 revisions to federal tax law, were rightly excluded from the "regular rate" used to calculate overtime compensation under the FLSA. The Fourth Circuit further agreed that paid leave provided to employees for time spent on voluntary charitable activities likewise was properly excluded from the regular rate calculation. *McPhee v. Lowe's Home Centers*, 2021 U.S. App. LEXIS 18076 (4th Cir. June 17, 2021). The Fourth Circuit has jurisdiction over the federal courts in Maryland, North Carolina, South Carolina, Virginia, and West Virginia.

Generally, the FLSA requires that employers compensate their employees who work in excess of 40 hours per week at a rate one and a half times the regular rate at which they are employed. The regular rate "include(s) all remuneration for employment paid to, or on behalf of, the employee," with some specifically listed exceptions. One such exception is discretionary bonuses, that is, bonuses for which "the employer [] retain[s] discretion both as to the fact of payment and as to the amount until a time quite close to the end of the period for which the bonus is paid." Another exception is "sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency." 29 U.S.C. §§ 207(e)(1) & (3).

Beginning in 2016, Lowe's implemented the "Give Back Time" policy, under which eligible employees are paid at 100 percent of their hourly base rate of pay for up to eight annual hours of time volunteering with the charitable organization(s) of their choice. That policy expressly provides that the time will not be used in calculating overtime hours. Participation in the program is strictly voluntary and while the company does impose some limitations on eligible charities, it does not require that employees volunteer for any specific charity.

Additionally, in early 2018 Lowe's announced that, as a result of federal tax reforms (*i.e.*, the Tax Cuts and Jobs

Act of 2017), it would pay each of its employees a bonus, ranging from $75 to $1,000 and depending solely on full-time or part-time status and years of service. Those bonuses were paid in mid-February 2018 (approximately two weeks after the bonus announcement was first made) and were not included in the regular rate calculation for the pay period in which they were made. Several employees filed suit, claiming Lowe's improperly excluded from the regular rate calculation – and therefore from their overtime pay – both the compensation provided under the Give Back Time policy and for the February 2018 bonuses. The district court dismissed the claims and the employees appealed. The Fourth Circuit affirmed the dismissal.

First, the court of appeals concluded the tax-reform bonuses properly were excluded as either gifts or discretionary bonuses. The bonuses were given in honor of a special occasion, were not made pursuant to a contract or other agreement, were not based upon the hours or wages of the employees and were not so substantial as to have been relied upon by the employees. On the contrary, the only basis for an employee's bonus were years of service and status as either full- or part-time. The court rejected the argument that the bonuses were non-discretionary retention bonuses, given the brief (two-week) period between the announcement of the bonuses and their payment and the lack of any allegation that a particular reason existed to retain employees during this time. The Fourth Circuit likewise rejected the employees' contention that the tax reform wasn't a "special" occasion, adding that the law does not in fact require there to be such an occasion, as the regulation provides Christmas or other "special occasions" as merely examples of when such a bonus might be paid.

Next, the court of appeals agreed that the compensation provided for employee participation in the Give Back Time program likewise was excludable from the regular rate calculation. Rejecting the employees' contention that this claim should not have been dismissed because they pled that the time spent in the program was "work," the court of appeals noted that work has been defined as "physical or mental exertion . . . controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." Here, the employees had not pled any facts suggesting that Lowe's, as opposed to the charitable organization, was the primary beneficiary of the employees' time spent in the program. In addition, Lowe's neither required participation in the program nor determined how long or for whom the employees would donate their time. Instead, this time was comparable to the examples of non-work time in the regulations, such as volunteering as a first responder and donating blood.

Sixth, Eighth Circuits Limit Opt-ins to Those Who Worked in the State Where Collective is Pending

In *Canaday v. Anthem Cos.*, 2021 U.S. App. LEXIS 24523 (6th Cir. Aug. 17, 2021), the U.S. Court of Appeals for the Sixth Circuit held that federal district courts lacked personal jurisdiction over collective actions asserted by individuals who did not work for the employer in the state where the collective action is pending, unless the case is pending in either the state where the employer is incorporated or the state where it has its principal place of business. Accordingly, *Canaday* limits the states where an employer may be subject to a nationwide collective action and prevents plaintiffs from "forum shopping," or seeking out the most favorable federal district court to bring a nationwide collective action. Shortly after *Canaday*, the Eighth Circuit Court of Appeals reached the same conclusion in *Vallone v. CJS Solutions Group, LLC.*, 2021 U.S. App. LEXIS 24601 (8th Cir. Aug. 18, 2021).

DOL AGENCY DEVELOPMENTS

DOL Formally Reinstates '20%' Rule, Adds '30-Minute' Rule Setting Limits on Tip Credit Use

On October 28, 2021, the DOL issued a Final Rule establishing limits on the amount of time tipped employees can spend performing work that is not "tip-producing work" and still be paid at the reduced cash wage applicable to tipped employees under the FLSA.

The DOL under the former administration had issued a final rule on the issue, but the current DOL delayed its effective date and then rescinded and replaced it. The now-rescinded final rule would have eliminated the so-called "20%" Rule.

The new Final Rule not only revived the 20% Rule, with modifications, but also added a "30-Minute" Rule, disallowing the tip credit when a tipped employee spends

more than 30 continuous minutes performing work that is not considered tip-producing work. The new Final Rule is effective as of December 28, 2021.

The new Final Rule essentially creates three buckets of work performed by tipped employees and disallows the tip credit depending on the bucket in which the work falls. The first bucket is work that is classified as "tip-producing work." Under the Final Rule, an employee engaged in "tip-producing work" can be paid using the tip credit without any limitation on the hours engaged in tip-producing work. The second bucket is "work that is not part of the tipped occupation," such as cleaning bathrooms or sweeping the parking lot. An employer may not use the tip credit for any of the time spent performing such tasks.

The third bucket is where issues typically arise. Under the new Final Rule, employers may take the tip credit when an employee is engaged in work that is not "tip-producing" but is "directly supporting" of tip-producing work. However, there are limits. Directly supporting work cannot be performed for a "substantial amount of time," which the Final Rule defines as either (a) more than 20 percent of the hours in the workweek for which the employer has taken a tip credit; or (b) a continuous period that exceeds 30 minutes. Placing a specific task in the correct bucket, and then recording the time spent performing such tasks, will be a challenge even for the most sophisticated employer. The same task, depending on who is performing it and when it is being performed, might be classified as tip-producing or directly supporting. For example, if a bartender cuts a lemon in response to a request from a customer for a lemon slice, the task is tip-producing work, but cutting lemons in anticipation of the arrival of customers would be considered directly supporting work subject to the 20% and 30-minute limitations.

"Tip-Producing" Work

Citing a focus on "customer service [as] a necessary predicate," the Final Rule defines tip-producing work to include "all aspects of the work performed by a tipped employee when they are providing service to customers" and for which they are receiving tips. An employer may take the tip credit for any and all time a tipped employee spends on tip-producing work.

In an effort to provide greater clarity to employers, the Final Rule contains a non-exhaustive list of examples of duties that typically are considered tip-producing. For example, tip-producing duties for servers would include all duties directly associated with providing table service, such as taking orders, making recommendations, and serving food and drink; walking to the kitchen or bar to retrieve prepared food and drink and delivering those items to the customers; filling and refilling drink glasses; attending to customer spills or items dropped on the floor adjacent to customer tables; processing credit card and cash payments; and removing plates, glasses, silverware, or other items on the table during the meal service. Moreover, the Final Rule provides that, while *general* food preparation is not a duty of tipped servers, a server nonetheless may engage in some limited kitchen work that the DOL would consider tip-producing, such as "toasting bread to accompany prepared eggs, adding dressing to pre-made salads, scooping ice cream to add to a pre-made dessert, ladling pre-made soup, placing coffee into the coffee pot for brewing, and assembling bread and chip baskets." The DOL distinguishes these tasks from general food preparation normally assigned to kitchen staff, such as preparing salads and slicing fruits and vegetables.

Similarly, tip-producing duties for bartenders would include preparing drinks; talking to customers seated at the bar; ensuring a patron's favorite game is shown on the bar television; and bringing a highchair and coloring book for an infant seated at a bar-area table. The Final Rule provides comparable additional examples for bussers and service bartenders, who typically receive their tips through the servers and not directly from the customers, as well as for nail salon technicians.

The Final Rule further notes that while there is no limit on the amount of time for which an employer may take a tip credit when a tipped employee is performing tip-producing work, when those duties are being performed outside of the customer service experience, those same duties would be considered directly supporting work instead. For example, when a server is rolling napkins or filling salt shakers while waiting for customers to arrive, those tasks would be considered as directly supporting, while they would be considered tip-producing when performed to fulfill the needs of an existing customer.

"Directly Supporting" Work

The Final Rule defines directly supporting work as "work [] either performed in preparation of or [that] otherwise assists the tip-producing customer service

work," adding that directly-supporting work "is the kind of work that is generally more foreseeable to employers and that employers are more likely to specifically assign." As with tip-producing work, the Final Rule provides an extensive (but non-exclusive) list of examples of duties that generally would be considered as directly supporting work.

Examples of directly supporting work for servers and bussers during customer hours would include those activities commonly performed before or after table service, such as rolling silverware, setting tables, and stocking the busser station; refilling salt and pepper shakers and ketchup bottles; folding napkins; sweeping or vacuuming under tables in the dining area; and setting and bussing tables. Examples of directly supporting work for bartenders during customer hours typically would include wiping down the surface of the bar and tables in the bar area where customers are sitting; cleaning bar glasses and implements used to make drinks for those customers; slicing and pitting fruit for drinks; arranging bottles in the bar; fetching liquor and supplies; vacuuming under tables in the bar area; cleaning ice coolers and bar mats; and making drink mixes and filling up drink mix dispensers. The Final Rule includes comparable examples for parking attendants, bellhops, housekeepers, and nail salon technicians. Again, where these very same duties are performed as part of the service that the tipped employee is providing to the customer, they may be considered tip-producing tasks.

What about idle time, *i.e.*, the time a server is simply waiting for a customer to arrive? The Final Rule addresses this scenario and provides that time spent waiting for a customer is not tip-producing activity but would be considered directly supporting work, subject to the 20% and 30-minute limitations.

What Constitutes a "Substantial Amount of Time"?

As noted above, while there is no limit on the use of the tip credit for *tip-producing work*, an employer may take the tip credit for *directly supporting* work only to the extent such work does not last for a "substantial amount of time." When does the amount of time spent become "substantial"? As set forth in the Final Rule, the amount of time becomes substantial when a tipped employee spends more than 20 percent of their time during a given workweek, or more than 30 consecutive minutes during any shift, engaged in directly supporting work.

The application of this provision can prove to be tricky as well. The 20 percent workweek and 30-consecutive-minute limits apply only to the time an employee has been paid at the tip credit rate. For example, if an employee works 20 hours as a server at the tip credit rate and 20 hours as a cook at full minimum wage during a 40-hour workweek, the 20% Rule is applied only to the 20 hours worked at the tip credit rate. Thus, the employee may perform a maximum of four hours (20 hours x 20 percent) of directly supporting work, subject to the 30-consecutive-minute limitation, at the tip credit rate without violating the 20% Rule. The time worked by the employee at full minimum wage is not included in determining the maximum time devoted to directly supporting work. Additionally, the Final Rule makes clear that if the employee's work exceeds either the 20% or 30-minute limitation, the tip credit is unavailable only for the period in excess of the 20% or 30 minutes, not the entire shift, workweek, or other period during which tip-producing work was performed.

While the expanded examples of tip-producing and directly supporting tasks in the Final Rule provide some additional clarity, questions remain that likely will continue to cause employers to struggle with tip credit compliance. Moreover, the Final Rule will have no impact on those states that do not permit a tip credit at all. Therefore, state law also must be considered.

DOL Issues Tip Regulations Final Rule on Tip Sharing, Civil Monetary Penalties

In a less-controversial tip law development, the DOL issued a Final Rule addressing the conditions under which managers or supervisors may receive or share tips, including whether managers and supervisors who receive tips directly from customers may share those tips with others. The Final Rule also addresses the circumstances under which Civil Monetary Penalties (CMPs) may be assessed against an employer who violates the FLSA's tip regulations, eliminating the requirement that such penalties may be imposed only for "willful or repeated" violations of the new tip-sharing rules. The Final Rule became effective on November 23, 2021.

Tip Sharing

As part of the Consolidated Appropriations Act of 2018, the FLSA was amended to permit traditionally tipped employees (*e.g.*, servers in the restaurant industry) to

pool (share) tips with non-tipped workers (e.g., bussers, cooks, and dishwashers), as long as the employer does not take a "tip credit," that is, pays tipped workers at least the applicable standard minimum wage per hour rather than satisfying the standard minimum wage with a combination of a lower hourly cash wage and the tips received by the employees. On the other hand, if a tip credit *is* taken, the FLSA amendment expressly disallows any tip sharing between tipped and non-tipped employees. Moreover, the FLSA amendment made clear that whether or not a tip credit is taken, managers or supervisors are prohibited from receiving other employees' tips.

However, sometimes managers and supervisors receive tips *directly* from customers. The regulations as first passed following the FLSA amendment clarified that managers or supervisors may retain the tips under these circumstances, but it did not address whether they would be permitted to share those tips with others. The new Final Rule revises the regulations to allow managers and supervisors to keep tips for service they "directly and solely" provide, and further allows them to contribute a portion of those tips to other employees, either directly or as part of a tip pool. For example, a manager who assisted a server with bussing tables would not be permitted to receive a portion of the tips given to the server, but a manager who assumed a shift as a server and received tips directly from customers could share those tips with a busser. In short, supervisors and managers may give a portion of their personal tips to others, but may not receive any portion of the tips given to other employees.

Importantly, some state laws expressly prohibit tip pooling between tipped and non-tipped employees under any circumstances. Whether the 2018 FLSA amendment and the DOL's corresponding tip regulations will be deemed to have preempted these state laws remains to be seen. In the meantime, employers in states with their own tip regulations should proceed with caution when implementing the tip sharing/tip pooling rules now authorized by the FLSA.

Civil Monetary Penalties

The FLSA permits the DOL to issue a CMP of up to $1,100 for each violation of the FLSA. However, as set forth in the new Final Rule, while the Wage and Hour Division (WHD) of the DOL may assess such penalties for violations of the minimum wage and overtime requirements of the FLSA only when it determines the employer's actions were "repeated or willful." This standard does not apply to violations of the tip-pooling provision prohibiting employers, including managers and supervisors, from "keep[ing] employee tips." The DOL concluded that, because the "repeated or willful" language does not appear in the statute, CMPs may instead be awarded "as the Secretary determines appropriate" for violations of the employer tip-retention prohibitions.

In addition, the Final Rule broadens and clarifies the circumstances constituting willful conduct on the part of an employer for purposes of assessing a CMP when the "repeated or willful" standard does apply. To clarify some apparently contradictory language in the existing regulation, the Final Rule provides that the WHD will consider "[a]ll of the facts and circumstances surrounding the violation" when determining willfulness. Furthermore, while an employer's receipt of advice from WHD that its conduct is unlawful is "not automatically dispositive" of a knowing and willful violation, receipt of such advice may in fact "be sufficient" to establish the requisite knowledge and willfulness. Moreover, as set forth in the Final Rule, the WHD will deem an employer's failure to adequately inquire into whether it violated the FLSA when it should have done as "tantamount to reckless disregard." This is not the only means of establishing recklessness and WHD will examine all of the facts and circumstances surrounding the violation.

DOL Formally Withdraws Trump-Era Joint Employer Final Rule

In an action anticipated since early in the Biden Administration, the DOL officially withdrew the Joint Employer Final Rule published during the previous administration. That withdrawal became effective on September 28, 2021.

The Joint Employer Final Rule went into effect in January 2020. It addressed the standard for determining whether an employee may be deemed to be jointly employed by two or more employers. The Rule instructed that joint employer liability was to be guided by four primary, albeit non-exclusive, factors derived from the decision of the U.S. Court of Appeals for the Ninth Circuit in *Bonnette v.*

California Health & Welfare Agency, 704 F.2d 1465 (9th Cir. 1983). Those factors were whether, and to what extent, the proposed employer (1) hires or fires the employee; (2) supervises and controls the employee's work schedules or conditions of employment; (3) determines the employee's rate and method of payment; and (4) maintains the employee's employment records. Unlike the position previously taken by the DOL, and adopted by some federal courts, the Final Rule emphasized that actual, rather than mere theoretical, exercise of control was required to establish a joint employment relationship.

Although at the time of its publication the Joint Employer Final Rule was designated as merely interpretive, rather than controlling, shortly after its issuance, attorneys general for 18 states filed suit in federal court in New York to have the Rule vacated. In that lawsuit, the trial court agreed with the plaintiffs and vacated most of the Rule as violative of the Administrative Procedure Act. The trial court held the Rule improperly relied on the FLSA's definition of "employer" as the sole basis for joint employer liability; it improperly adopted a control-based test for determining vertical joint employer liability; and it prohibited consideration of additional factors beyond control, such as economic dependence. The district court further concluded the Rule was "arbitrary and capricious" because it did not adequately explain why it departed from the DOL's prior interpretations; it did not consider the conflict between the new standards and the existing Migrant and Seasonal Agricultural Worker Protection Act joint employment regulations; and it did not adequately consider its cost to workers.

In support of its decision to withdraw the Joint Employer Final Rule, the current DOL cited the foregoing conclusions by the federal court in New York, along with the fact that the Rule failed to properly account for prior WHD guidance. Although the DOL under the former administration appealed the trial court's ruling, that appeal subsequently was dismissed as moot.

DOL Withdraws Trump-Era Independent Contractor Rule

Also unsurprisingly, on May 5, 2021 the DOL withdrew the Independent Contractor Final Rule that was published in the final days of the previous administration.

That Final Rule, which never took effect, would have established a uniform standard for determining a worker's status as an "independent contractor" under the FLSA. In a foreshadowing of the Final Rule's withdrawal, earlier in the year, the DOL also withdrew two related Opinion Letters as being prematurely issued.

Over the years, both the courts and the DOL have developed similar, yet somewhat varying, standards and factors that should be used for determining whether an individual is an employee or an independent contractor. Those standards sought to reveal the "economic reality" of the relationship between the employer and the individual and were derived from six, non-exclusive factors originally presented by the U.S. Supreme Court in two cases on the same day, *United States v. Silk*, 331 U.S. 704 (1947), and *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947). The factors are:

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

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

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

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

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

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

For the last 70-plus years, federal courts and the DOL have applied these factors inconsistently, sometimes reaching opposite conclusions when applying what appear to be essentially the same facts. The Final Rule sought to lend clarity and uniformity to the analyses, while maintaining the same "economic reality" underpinnings of the analysis, that is, "whether, as a matter of economic reality, the workers depend upon someone else's business for the opportunity to render service or are in business for themselves." Rather than treat the analytical factors as unweighted or affording them equal weight, the Final Rule elevated the comparative value of two "core" factors: "the nature and degree of the individual's control over the work" and "the individual's opportunity for profit or loss." However, if these two factors are inconclusive, then three other factors should be considered: the skill or expertise required by the individual; the permanency of the relationship between the parties; and whether the work is "part of an integrated unit of production."

Now, however, the DOL under the current administration has made an about-turn. In withdrawing the Final Rule, the DOL noted that no court or the WHD had ever applied the "core factor"/secondary factor analysis set forth in the Final Rule and, "after careful consideration of the comments received, the Department believes that elevating two factors of the multifactor economic realities analysis above all others is in conflict with the [FLSA], congressional intent, and longstanding judicial precedent."

In short, the DOL now "believes that the Rule is inconsistent with the FLSA's text and purpose, and would have a confusing and disruptive effect on workers and businesses alike due to its departure from longstanding judicial precedent." The DOL has not stated whether it intends to create new regulations addressing the issues that spurred the previous administration to issue the Final Rule, stating only that it "did not propose and is not now issuing regulatory guidance to replace the guidance that the Independent Contractor Rule would have introduced." Rather, it is merely "withdrawing the Rule for the reasons described throughout this final rule, and is not creating a new test, but is instead leaving in place the current economic realities test which allows for determinations that some workers are independent contractors."

OSHA's COVID-19 Vaccine-or-Test Mandate Raises Wage and Hour Questions

At the direction of President Biden and in an effort to end the COVID-19 pandemic, in November 2021 the Occupational Safety and Health Administration (OSHA) issued a vaccine-or-testing emergency temporary standard (ETS). If and when effective, the ETS would mandate that private employers with at least 100 employees, other than those employers already subject to the Healthcare ETS previously issued by OSHA, must require their employees to be vaccinated or to be subjected to at least weekly testing. The vaccine-or-testing ETS has been met with legal opposition by a number of private employers and by several states asserting, among other arguments, that the mandate was beyond OSHA's authority. As of the publication of this Report, the Sixth Circuit Court of Appeals, before whom the legal challenges to the ETS have been consolidated, temporarily has allowed the vaccine-or-testing mandate to be enforced while the merits of the legal challenges are being resolved. However, the ETS raises a number of wage and hour issues.

While the ETS states that it does not require an employer to pay for the costs of weekly testing or face coverings, it provides no guidance on whether other laws, including the FLSA or state law, might require the employer to pay for the cost, other than to state that it "may be required by other laws, regulations, or collective bargaining agreements or other collectively negotiated agreements." The ETS further notes that employers are not prohibited from paying for costs associated with testing.

A separate, but related, question is whether the time it takes the employee to complete the test is compensable under the FLSA and state law. Again, the DOL has not taken a firm position on the issue. It states only that the time clearly is compensable if it occurs during normal working hours. If the employer requires the testing to be completed prior to arriving at the workplace, the DOL says the answer depends on whether COVID-19 testing is necessary for the employees to perform their jobs safely and effectively during the pandemic (for example, the employees' jobs require significant face-to-face interaction with the general public). However, just as with other wage and hour issues, some states have more stringent expense reimbursement requirements and working time definitions that will control and should be considered.

DOL Issues Final Rule Raising Minimum Wage to $15 for Many (but Not All) Federal Contracts and Contractors

The DOL published its Final Rule implementing President Biden's April 27, 2021, Executive Order 14026, raising the minimum wage from $10.95 an hour to $15.00 an hour, with increases to be published annually. The new wage rate will take effect January 30, 2022, but will not be applied to contracts automatically on that date.

Covered Contracts

The $15.00 wage rate will apply to workers on four specific types of federal contracts that are performed in the United States (including the District of Columbia, Puerto Rico, and certain U.S. territories):

1. Procurement contracts for construction covered by the Davis-Bacon Act (DBA), but not the Davis-Bacon Related Acts;

2. Service Contract Act (SCA) covered contracts;
3. Concessions contracts, *i.e.*, a contract under which the federal government grants a right to use federal property, including land or facilities, for furnishing services. The term "concessions contract" includes, but is not limited to, a contract the principal purpose of which is to furnish food, lodging, automobile fuel, souvenirs, newspaper stands, or recreational equipment, regardless of whether the services are of direct benefit to the government, its personnel, or the general public; and
4. Contracts related to federal property and the offering of services to the general public, federal employees, and their dependents.

The Executive Order does not apply to contracts or other funding instruments, including:

- Contracts for the manufacturing or furnishing of materials, supplies, articles, or equipment to the federal government;
- Grants;
- Contracts or agreements with Indian Tribes under the Indian Self-Determination and Education Assistance Act;
- Contracts excluded from coverage under the SCA or DBA and specifically excluded in the implementing regulations; or
- Other contracts specifically excluded, as set forth in the Final Rule.

Effective Date; Definition of "New" Contracts Expanded

The Final Rule specifies that the wage requirement will apply to new contracts and contract solicitations as of January 30, 2022. Despite the "new contract" limitation, the regulations, consistent with the language of the Biden Executive Order, strongly encourage federal agencies to require the $15.00 wage for all existing contracts and solicitations issued between the date of the Executive Order and January 30, 2022.

Similarly, agencies are "strongly encouraged" to require the new wage where they have issued a solicitation before the effective date and entered into a new contract resulting from the solicitation within 60 days of such effective date.

Pursuant to the Final Rule, the new minimum wage will apply to new contracts; new contract-like instruments; new solicitations; *extensions or renewals of existing contracts or contract-like instruments*; and *exercises of options on existing contracts* or contract-like instruments on or after January 30, 2022.

Geographic Limitations Expanded

The Final Rule applies coverage to workers outside the 50 states and expands the definition of "United States" to include the 50 states, the District of Columbia, Puerto Rico, the Virgin Islands, Outer Continental Shelf lands as defined in the Outer Continental Shelf Lands Act, American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, Wake Island, and Johnston Island.

Workers Performing Work "On or In Connection With" a Covered Contract

Only workers who are non-exempt under the FLSA and performing work on or in connection with a covered contract must be paid $15 per hour. The wage requirement applies only to hours worked on or in connection with a covered contract.

A worker performs "on" a contract if the worker directly performs the specific services called for by the contract. A worker performs "in connection with" a contract if the worker's work activities are necessary to the performance of a contract but are not the specific services called for by the contract.

The Final Rule includes a "less-than-20% exception" for those workers who only perform work "in connection with" a covered contract, but do not perform any direct work on the contract. For workers who spend less than 20 percent of their hours in a workweek working indirectly in connection with a covered contract, the contractor need not pay the $15.00 wage for any hours for that workweek.

Tipped Employees

Under the Final Rule, the DOL is phasing out lower wages and tip credits for tipped employees on covered contracts. Employers must pay tipped employees $10.50 per hour in 2022 and increase those wages incrementally, under a proposed formula in the NPRM. Beginning in 2024, tipped employees must receive the full federal contractor wage rate.

$15.00 Wage Contract Clause Requirements, Enforcement Obligations

The Final Rule provides that a Minimum Wage contract clause will appear in covered prime contracts, except that procurement contracts subject to the Federal Acquisition Regulation (FAR) will include an applicable FAR Clause (to be issued by the FAR Council) providing notice of the wage requirement. In addition, covered prime contractors and subcontractors must include the Contract Clause in covered subcontracts and, as will be in the applicable FAR Clause, procurement prime contractors and subcontractors will be required to include the FAR clause in covered subcontracts. Furthermore, the Final Rule provides that contractors and subcontractors "shall require, as a condition of payment, that the subcontractor include the minimum wage contract clause in any lower-tier subcontracts ... [and] shall be responsible for the compliance by any subcontractor or lower-tier subcontractor with the Executive Order minimum wage requirements, whether or not the contract clause was included in the subcontract."

The DOL will investigate complaints and enforce the requirements but under the Final Rule, contracting agencies may also enforce the minimum wage requirements and take actions including contract termination, suspension, and debarment for violations.

STATE UPDATES

ARIZONA

Tucson Voters Pass Sweeping Wage and Hour Initiative

By a 65-35 margin, on November 2, 2021, Tucson voters passed Proposition 206, officially known as the Tucson Minimum Wage Act, increasing the City's minimum wage to $15.00 an hour by 2025. In addition, the Act included several other significant changes that will impact employers operating in the City.

Minimum Wage Increases

Under the Act, the City's minimum hourly wage will increase as follows:

- To $13.00 on April 1, 2022;
- To $13.50 on January 1, 2023;
- To $14.25 on January 1, 2024; and
- To $15.00 on January 1, 2025.

Thereafter, the minimum wage may increase each January, to the nearest $0.05, depending on the rate of inflation. The increase will be announced no later than November 1 of the previous year. A higher state or federal minimum wage will supersede these rates.

The Act will apply to all employees, whether full-time, part-time, or temporary, who perform at least five hours of work within Tucson's geographic boundaries. Employers may take a tip credit of no more than $3.00 for "tipped employees," whose definition essentially matches that found under the federal FLSA. Casual employees who perform babysitting services at an employer's home are excluded. All employers, except the State of Arizona, the United States, and tribal entities, are covered by the Act.

Expanded Definition of Work Hours

Importantly, the Act goes well beyond the mere enactment of a $15.00 minimum wage. For example, and contrary to federal law, the Act defines work hours to expressly include "time that an employer requires the employee to undergo a security screening immediately prior to or following a work shift; to be on the employer's premises; to be at a prescribed work site; or to be logged in and actively attentive to an employer-provided computer program, phone application, or similar device." A relatively recent U.S. Supreme Court case held that security screenings or other preliminary and postliminary time that is not "integral and indispensable" to the duties performed by an employee is not compensable work time under the FLSA.

Employee or Independent Contractor?

While independent contractors are not considered employees, under the Act, an individual is assumed to be an employee unless the employer can establish that:

(1) the individual is free from the control and direction of the hiring entity in connection with the performance of the work; (2) the individual performs work that is outside the usual course of the hiring entity's business; and (3) the individual is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed for the hiring entity. In other words, the Act implements the employee-friendly "ABC" test, recently adopted by the California Supreme Court for employers in that state and existing in few other states.

“Annexed” Employers and Remote Employees

If Tucson annexes property that brings it within the City limits and an employer’s workplace(s) fall within the annexed property, the employees of that employer become covered by the Act 90 days after annexation. Similarly, if an employer and employee mutually agree that the employee will work from home and the employee’s residence subsequently is annexed into the City, the employee will be covered by the Act 90 days after annexation. An employee’s involuntary discharge during the 90-day period creates a rebuttable presumption that the discharge was retaliatory in violation of the Act.

Method of Payment

The Act prohibits employers from requiring employees “to receive minimum wage payments using a pay card, reloadable debit card, or similar method that requires the employee to possess a valid social security number.” Whether this means that an employer may require such methods of payment for compensation *in excess* of minimum wage is unclear.

Scheduling Pay

Under the Act, “large” employers, defined as those that averaged at least 26 employees (full-time, part-time, or temporary) during the last quarter of the previous year, must pay at least three hours of minimum wage compensation when (1) an employee is scheduled to work at least three hours; the employee timely reports for duty; the employee is able to work the entire shift; and the employer engages the employee for fewer than three hours; or (2) an employee is scheduled to work at least three hours and the employer cancels the employee’s shift with less than 24 hours’ notice.

Prohibited Pay Deductions

Except as required by law or court order, the Act prohibits employers from making deductions from employee pay “if doing so will result in the employee receiving less than the minimum wage, including but not limited to amounts deducted for employer-provided meals and damaged, lost, or spoiled goods.” The FLSA similarly prohibits deductions that drop an employee’s pay below minimum wage for the hours worked in a workweek.

Creation of a Department of Labor Standards, Private Causes of Action

The Act provides that no later than April 1, 2022, the City will establish a Department of Labor Standards. The new department’s purpose will be to receive complaints from aggrieved individuals and interested parties, initiate investigations of employers and hiring entities, initiate enforcement actions, periodically conduct studies of the City’s low-wage workers for the purpose of guiding the department’s targeted enforcement efforts, educate employers of their obligations, and educate employees of their rights.

The Act prohibits retaliation for filing a complaint, asserting any claim or right or assisting another employee in doing so, communicating a complaint to an interested party, or informing another employee about their rights. If an employer takes an adverse action against an individual within 90 days of the individual engaging in the rights covered by state minimum wage and benefits law, or of notifying the employer or employer’s representative of a violation of the Act, a rebuttal presumption will arise that the adverse action was retaliatory.

The Act provides a three-year statute of limitations. An aggrieved party may bring suit in the City’s municipal court, where it may recover legal and equitable relief, including payment of back wages, liquidated damages in an equal amount, and reasonable attorneys’ fees and costs. In addition, the City may initiate an investigation and bring its own complaint in municipal court, where it may recover a civil penalty of up to $100 per affected employee, to be paid to the City. For multiple or repeated violations, the City also may revoke, suspend, or decline to renew an employer’s business license(s).

CALIFORNIA

State Independent Contractor Test Continues Its Pendulum Swing

At the end of 2020, it seemed the legislature, the courts, and even California voters wanted to move away from the independent contractor test codified in Assembly Bill 5 (AB 5). However, during 2021, the pendulum seems to have swung back in favor of AB 5 and its guidelines on classifying workers as employees versus independent contractors.

In 2019, the Legislature passed AB 5 to add Section 2750.3 to the Labor Code, adopting and expanding the common law “ABC Test” to define “employee” not just for purposes of the Wage Orders, but also for purposes of the Labor Code and the Unemployment Insurance Code.

Under the AB 5-enhanced version of the ABC Test, a worker is presumed to be an employee, unless the hiring entity can establish that:

(A) The person is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact;

(B) The person performs work that is outside the usual course of the hiring entity's business; and

(C) The person is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

A worker cannot be classified as an independent contractor under the ABC Test unless all three factors are met, or unless one of the exemptions established by AB 5 is satisfied.

At the start of 2020, a U.S. district court granted a preliminary injunction against the enforcement of AB 5 for truckers. Later that year, Governor Gavin Newsom signed Assembly Bill 2257 (AB 2257), which recast, clarified, and expanded the exemptions to AB 5. Even California voters were in favor of an exemption for app-based rideshare and delivery companies and passed Proposition 22 in November 2020. It seemed that AB 5 was going out of vogue.

However, 2021 took a different turn. As the year started, the California Supreme Court issued its opinion in *Vazquez v. Jan-Pro Franchising International*, which held that *Dynamex Operations West, Inc. v. Superior Court* applied retroactively. *Dynamex* was the case that originally set forth the ABC Test. While this mainly affected litigation that had been filed before *Dynamex*, it set the tone for independent contractor issues for the rest of the year.

In April, the U.S. Court of Appeals for the Ninth Circuit reversed the district court's preliminary injunction against AB 5 as to motor carriers. Currently, the California Trucking Association has a petition for writ of *certiorari* pending before the U.S. Supreme Court.

Similarly, Proposition 22 has been under attack in the courts, with one state court prohibiting Prop 22 from being applied. This decision also is on appeal to the California Court of Appeal.

In 2021, the California legislature also extended exemptions to the ABC Test to some industries. These exemptions include licensed manicurists, construction trucking subcontractors, and newspaper distributors and carriers.

New Law Prohibits Food Delivery Platforms From Retaining Amounts Designated as Tips or Gratuity

In October 2021, Governor Newsom passed Assembly Bill 286 (AB 286), making it unlawful for a food delivery platform (*e.g.*, GrubHub, DoorDash) to charge a customer any purchase price for food or beverage that exceeds the price posted by the food facility on the food delivery platform's internet website at the time of the order. AB 286 also prohibits food delivery platforms from retaining any portion of amounts designated as a tip or gratuity. Instead, the food delivery platform must pay the entire tip or gratuity to the person delivering the food or beverage and any tip or gratuity for a pickup order directly to the food facility. Finally, AB 286 requires the platform to disclose to the customer and the food facility certain specified information related to fees, commissions, and costs charged to both parties.

California is not the first to pass legislation to address transparency in delivery services, joining New York City and Chicago, among other jurisdictions, enacting similar legislation. The law takes effect on January 1, 2022.

Governor Signs New Wage Theft Law

In September 2021, Governor Newsom signed Assembly Bill 1003 (AB 1003), creating a category of "grand theft" for the intentional theft of wages in an amount greater than $950 from any one employee, or $2,350 in the aggregate from two or more employees by an employer in any consecutive 12-month period. Following the trend of other recently passed laws broadening the scope of legal protections for workers, this legislation includes independent contractors within the meaning of employee. Therefore, hiring entities of independent contractors would face the same penalties or jail time for engaging in wage theft.

The new legislation allows wages, tips, or other compensation that are the subject of a prosecution to be recovered as restitution. Under existing law, grand theft is punishable either as a misdemeanor by imprisonment in a county jail for up to one year or as a felony by imprisonment in county jail for 16 months or two or three years, by a specified fine, or by both a fine and imprisonment.

California Eliminates Subminimum Wage Certificate Program

Current California law authorizes employers to pay less than minimum wage for employees with physical or mental disabilities under a subminimum wage certificate program. However, in September 2021, Governor Newsom signed Senate Bill 639 (SB 639), requiring the development of a plan to phase out the use of this program. Under SB 639, the program will be phased out by January 1, 2025, and no new special licenses will be issued under the program after January 1, 2022. Existing license holders will be required to meet benchmarks in order to be re-licensed during the phaseout period.

Meal and Rest Period Premium Pay are Based on an Employee's Regular Rate of Pay, Not the Base Hourly Rate Alone, Supreme Court Rules

The California Supreme Court has concluded that an employee's "regular rate of compensation" for meal and rest period premium pay is synonymous with the employee's "regular rate of pay" for overtime. Accordingly, employers paying meal and rest period premiums must pay those, not at an employee's base hourly rate alone, but at that rate plus all non-discretionary payments, meaning, those that are paid "pursuant to [a] prior contract, agreement, or promise[.]" *Ferra v. Loews Hollywood Hotel, LLC*, 489 P.3d 1166 (Cal. 2021).

Plaintiff Ferra had alleged that Loews improperly calculated her meal and rest period premium payments when it excluded her non-discretionary quarterly incentive bonuses from premium pay calculations. Loews successfully argued before the trial court and court of appeal that Ferra's "regular rate of compensation" for meal and rest period premium pay is her base hourly rate of pay and is distinguishable from her overtime "regular rate of pay."

After a lengthy analysis of legislative history, the California Supreme Court disagreed and reversed the court of appeal. The Supreme Court concluded that the "regular rate of compensation" for meal and rest period premium pay under California Labor Code section 226.7(c) is synonymous with the "regular rate of pay" for overtime as defined under California Labor Code section 501(a). As a result, when employers pay meal and rest period premiums, they must use the employee's overtime regular rate of pay, which includes all non-discretionary payments for the work performed.

Moreover, the California Supreme Court rejected Loews' argument that its decision should only apply prospectively. Following its decision in *Vazquez v. Jan-Pro Franchising International*, the Court held that, because it was interpreting a statute, not overruling or disapproving previous case law, its holding applies retroactively.

California Supreme Court Issues Important Prevailing Wage Opinions

In August 2021, the Supreme Court of California issued two opinions assessing the breadth of California's prevailing wage law. In *Mendoza v. Fonseca McElroy Grinding Co.*, Inc., 492 P.3d 993 (Cal. 2021), the court addressed whether California Labor Code Section 1772 helped establish the scope of coverage by providing that workers employed "in the execution" of a public work contract should be deemed to be employed on a public work. In a welcome development for contractors, the court rejected a broad interpretation advanced by the California Department of Industrial Relations, instead holding that Section 1772 was enacted to simply clarify that employees of non-public entities can be subject to prevailing wage obligations. When assessing what activity is actually subject to prevailing wages, the court clarified that the focus should be on specifically identified activity, such as activity listed in Labor Code 1720. The court declined to definitively establish whether off-site activity, including travel time, can be subject to California prevailing wage obligations.

In *Busker v. Wabtec Corporation*, 492 P.3d 963 (Cal. 2021), the court addressed another narrow issue regarding the breadth of California prevailing wage law, i.e., whether such coverage can extend to "rolling stock" such as train cars and locomotives. Focusing on legislative history and specific statutory language, the court noted the Labor Code had never been amended to broadly extend prevailing wage coverage to non-fixed contexts such as rolling stock. Although the court noted the concepts of "construction" and "installation" triggering prevailing wage coverage under Labor Code

Section 1720 conceivably could include activity outside of real property, the historic context of California's prevailing wage law did not support such a conclusion. Echoing its ruling in *Mendoza*, the court rejected an argument premised on Labor Code Section 1772 that installation work on rolling stock was covered because such activity was necessary to execute the public works contract. According to the court, while the California legislature has enlarged the concept of "construction" to include certain pre- and post-construction phases, the Labor Code has not been amended to extend coverage to work in non-fixed contexts outside of freestanding modular furniture.

COLORADO

2021 COMPS Order #38

In March 2020, the Colorado Department of Labor and Employment (CDLE) adopted the Colorado Overtime and Minimum Pay Standards (COMPS) Order #36, which significantly increased the coverage of the rules, placed greater limitations on exemptions from the overtime requirements, expanded the definition of time worked, and imposed other requirements and potential liability on employers. Under that Order, virtually all private employees in all industries became covered by the State's minimum wage, overtime, and working condition rules. COMPS Order #37, issued in late 2020, made only incremental revisions to the substantial changes enacted earlier that year. In late 2021, the CDLE adopted COMPS Order #38, which, like COMPS Order #37, made only incremental revisions to the substantial changes that were implemented in 2020. COMPS Order #38 became effective on January 1, 2022.

Agricultural Employees

The most expansive changes in COMPS Order #38 are the result of Colorado's passage of the Agricultural Labor Rights and Responsibilities Act. Under that new law, and as reflected in COMPS Order #38, most agricultural employees, who previously were exempt from the minimum wage and overtime requirements of Colorado state law, are now entitled to minimum wage. Similarly, "range workers" must be paid a minimum weekly salary. In addition, under some circumstances, agricultural employees may be entitled to overtime. Employers may avoid these overtime obligations by meeting certain minimum pay and break requirements.

Highly Compensated Employee (HCE) Exemption

Another change in COMPS Order #38 that will impact a wider range of employers is the CDLE's adoption of the highly compensated employee (HCE) exemption. An employee will qualify under this exemption if they are paid 2.25 times the rounded annual salary for the executive, administrative, or professional (EAP) salary limit in Colorado's PAY CALC Order ($101,250, as of January 1, 2022); if they customarily and regularly perform any one of the exempt duties and responsibilities of an EAP employee; and if their primary duty is office or nonmanual work. This last requirement may be seen as a departure from the FLSA's HCE exemption, which requires only that an employee's primary duty *include* office or nonmanual work, not that it be office or nonmanual work. COMPS Order #38's inclusion of a long list of the types of jobs not qualifying for the HCE exemption certainly suggests that jobs primarily involving manual work will not qualify for this exemption.

Calculating the Regular Rate of Pay for Employees With Multiple Jobs

COMPS Order #38 provides two methods for determining the regular rate of pay for employees who work two or more jobs at different hourly rates for the same employer. First, the employer may add all wages earned by the worker in each job and then "divid[e] that amount by the total number of hours worked in all jobs, consistent with the [FLSA], and resulting in a weighted average rate of pay." Alternatively, the employer may use "the regular rate of hourly pay for the job being performed during the actual overtime hours." If employers use the second option (which could result in a lower regular rate), they must enter into a written agreement with the employee to use this option. Otherwise, the first calculation method will apply by default.

Elimination of Lower Minimum Wage for Disabled Workers

Finally, COMPS Order #38 eliminates an employer's option to pay disabled employees who have been certified by the CDLE to be less efficient in performance of their job duties a discounted minimum wage.

"Use It or Lose It" Vacation and PTO Policies No Longer Allowed

In June 2021, the Colorado Supreme Court held that Wage Protection Rule 2.17 forbids forfeiture of any accrued vacation pay in an employment policy or

agreement. *Nieto v. Clark's Market, Inc.*, 488 P.3d 1140 (Col. 2021). Finding the Colorado Wage Claim Act (CWCA) ambiguous on the issue, the court looked to the legislative intent of the Act and determined that its "remedial purpose, [it's] legislative history, and the relevant agency interpretation" led to the conclusion that the Act prohibits forfeiture of earned vacation pay. "Consequently, when an employer chooses to provide vacation pay to its employees, an employee is entitled to receive all that is earned but still unpaid upon separation from employment, and any agreement purporting to forfeit earned vacation pay is void."

Nieto left unsettled the question of whether such forfeiture agreements might still apply to broader paid-time-off (PTO) policies. In response to *Nieto*, the CDLE revised it Wage Protection Rules, defining vacation pay to include "pay for leave, regardless of its label, that is usable at the employee's discretion," as opposed to leave, such as for illness or bereavement, that may be used only under more limited circumstances. Thus, in Colorado, any policy or agreement providing for the forfeiture of accrued PTO or vacation is unlawful. While employers are prohibited from implementing forfeiture provisions on accrued-but-unused PTO or vacation, they nevertheless may still impose caps on the amount of such leave benefits that may accrue and, therefore, require payout at termination.

CONNECTICUT

Connecticut Publishes Guidance Regarding Disclosure of Salary Range for Vacant Positions

The Connecticut Department of Labor published guidance regarding the state's "An Act Concerning the Disclosure of Salary Range for a Vacant Position," which went into effect on October 1, 2021.

The guidance reiterates that the law applies to any employer *within* the state using the services of one or more employees for pay, even if those employees are located outside the physical confines of the state. With respect to covered employees, the Department of Labor considers remote employees working outside Connecticut as covered by the law if they are working for or reporting to an employer within the state. With respect to national employers, however, the Department of Labor does not interpret the law to cover employees who report to a physical out-of-state location, even if the employer also has a location within Connecticut.

The guidance acknowledges that there is no definition of "applicant" in the law and advises employers to interpret the term broadly. The Department of Labor has defined "applicant" as "any individual who applies for a job" and cautions employers that they may not adopt their own definition of "applicant."

The guidance also discusses what must be included in the wage range. Consistent with how "wages" are defined under Connecticut law, the Department of Labor states that, "[g]enerally, discretionary pay does not constitute wages," and therefore, "such compensation is not required to be disclosed to an employee or applicant." Non-discretionary bonuses and commission plans must be disclosed as part of the wage range, however.

The guidance further addresses employers' concerns about the breadth of the required disclosures. Under the law, an applicant can only request the wage range for the position to which that applicant is applying. According to the guidance, "The employer is not required to provide the applicant with information concerning the amount of wages paid to any other employees." While employees may ask other employees about their wages, and are protected from retaliation for doing so, an employer is not required to disclose the wages paid to other employees.

Finally, the guidance reiterates that an applicant or employee may file a civil action within two years of the date of any alleged violation of the law. Available remedies include compensatory damages, attorney's fees and costs, punitive damages, and any other relief that a court deems "just and proper." Additionally, any person who alleges a violation of the law may file a complaint with the Labor Commissioner. The Labor Commissioner may assess civil penalties against an employer, but cannot seek damages for the applicant or employee if a violation is found.

FLORIDA

New Independent Contractor Reporting Requirements

As of October 1, 2021, a new law requires Florida employers to report newly retained independent contractors in the same manner as new *employees* to the Florida Department of Revenue's State Directory of New Hires. This requirement was a component of

Senate Bill 1532, which updated state family law. The goal of the new reporting requirement is to increase child support collections.

The law requires a service recipient to report to the Florida Department of Revenue's State Directory of New Hires any newly engaged non-employee to whom the service recipient pays more than $600 in a calendar year for services performed by the individual in the course of the service recipient's trade or business. Previously, the law required only that employers report newly hired *employees* to the State Directory of New Hires, while reporting independent contractors was optional.

To comply with the law, employers must report the independent contractor's name; address; Social Security number (or other identifying number assigned under Section 6109 of the Internal Revenue Code); the date services for payment were first performed by the individual; and the name, address, and employer identification number of the service recipient. The information may be submitted on the same Florida New Hire Reporting Center website as is used for employees. This information must be submitted within 20 days after the first payment to the independent contractor or on the date the business and independent contractor entered into the contract, whichever is earlier.

ILLINOIS

Paid Sick Leave Ordinance Amended to Include Wage Theft Claims

Originally enacted in 2017, Chicago's Paid Sick Leave Ordinance (PSLO) requires employers in the City to provide eligible employees up to 40 hours of paid sick leave in each 12-month period of their employment for certain reasons. Effective August 1, 2021, the amended PSLO allows covered employees to bring claims of wage theft against their employers. Wage theft is prohibited by the Illinois Wage Payment and Collection Act, and Chicago employees now have an additional avenue to obtain relief from any employer who fails to timely pay a covered employee.

To avoid liability for wage theft, employers must pay covered employees for (i) wages due for work performed; (ii) paid time off required by the Ordinance, applicable legislation, or the employee's contract with the employer; and (iii) employee benefits required by contract. Covered employees may file a wage theft claim with the Office of Labor Standards or in state court, but not both. If an employer is found to have violated the PSLO, it becomes liable for the amount of any underpayment and the greater of either: (i) two percent of the amount of any underpayments for each month following the date of payment during which the underpayments remain unpaid; or (ii) the amount specified by the IWPCA. Because the amount specified in the IWPCA is five percent per month for underpayments, the IWPCA rate will apply. Finally, employers must post and disseminate a revised PSLO notice that advises employees of their ability to seek redress for wage theft. Chicago's Commissioner of Business Affairs and Consumer Protection will prepare and make available a new poster that satisfies the new requirements.

Compensability of Time Spent Getting Vaccinated

In March 2021, the Illinois Department of Labor (IDOL) issued guidance letter explaining that if an employer requires an employee to get a COVID-19 vaccine, the time spent getting the vaccine likely is compensable under state law. If an employer makes receiving a vaccine optional, the employee should be allowed to use sick leave, vacation time, or other paid time off to get the vaccine. Moreover, the IDOL takes the position that the Illinois Employee Sick Leave Act requires employees to use their sick leave benefits for the purposes of taking a qualifying family member to get the COVID-19 vaccine.

MAINE

Maine Amends Tip Credit Law

Effective June 20, 2021, Maine's tip law was amended to implement a significant increase in the minimum monthly tips required for an employee to be classified as a "service" employee, for whom an employer may take a tip credit. Currently, Maine's tip credit law mirrors federal law, which requires only that an employee "customarily and regularly" receive at least $30 in tips per month to be considered a service (tipped) employee.

Under the amended law, beginning January 1, 2022, the minimum tip-receipts requirement increased to $100 per month, and increases to $175 per month on January 1, 2023. Beginning in January 2024, every January thereafter, the monetary amount over which an employee is considered a service employee must be increased by the same percentage of the increase, if any, in the cost of living over the previous year, based on the Consumer Price Index for Urban Wage Earners and Clerical Workers,

CPI-W, for the Northeast Region, or its successor index, as published by the U.S. Department of Labor, Bureau of Labor Statistics or its successor agency, with the amount of the increase rounded to the nearest multiple of $1.

MASSACHUSETTS

Service Charge or Administrative Fee? A Distinction With a Difference, Supreme Court Holds

Although it may have intended for a customer charge to be treated as an administrative overhead fee separate from gratuities paid to its employees, a country club's reference to the amount as a "service charge" in some documents necessarily required the amount retained be paid to the employees, the Supreme Judicial Court of Massachusetts held. *Hovagimian v. Concert Blue Hill, LLC*, 2021 Mass. LEXIS 507 (Mass. Aug. 23, 2021). The Supreme Judicial Court is the highest appellate court in Massachusetts.

Background

In Massachusetts, an employer that collects a tip or other gratuity is required to remit the total proceeds of that charge to the wait staff and service employees in proportion to the services provided. Mass. Gen. Laws Ann. ch. 149, § 152A. Under this law, commonly referred to as the Tips Act, the term "service charge" is defined as "a fee charged by an employer to a patron in lieu of a tip . . ., including any fee designated as a service charge, tip, gratuity, or a fee that a patron or other consumer would reasonably expect to be given to a [tipped employee] in lieu of, or in addition to, a tip." Any fee determined to be a "service charge" must be given to the wait staff employee(s) providing the services, as such a charge is one that a patron reasonably would assume to be proceeds paid to such employee(s) for the services they provided.

The Lawsuit

In this case, the defendant, operating as Blue Hill Country Club, hosts banquets and other events that involve food and beverages. When a patron desires to hold such an event, they first execute an "Event Contract" with the club, setting forth the general provisions of the event, such as deposit and payment schedule, menu options, and pricing. The Event Contract also provides that the patron will be charged a 10 percent gratuity, to be paid to the wait staff, and an additional 10 percent "administrative" or "overhead" charge that is kept by the club. Once the details are ironed out, the patron signs a "Banquet Event Order Invoice," setting forth items such as the number of anticipated guests, the food and beverage selections, and other instructions for the event's managers. After the event, the patron receives a final bill listing all the actual charges. However, whereas the initial Event Contract referred to the club's additional 10 percent surcharge as an administrative or overhead fee, the Banquet Event Order Invoice and the final bill documents failed to distinctly identify this fee, placing it instead under the category of "service charges and gratuities" or "service."

In May 2018, banquet servers filed suit against the club, asserting that the designation of this 10 percent fee as a service charge required it be paid to the employees and that the club unlawfully had retained it. Upon cross-motions by the employer and the plaintiffs, the trial court dismissed the case in favor of the club. It ruled the "safe harbor" provision of the Tips Act allowed the employer to retain the proceeds from the disputed charge. The Tips Act's safe harbor provision permits an employer to "impos[e] on a patron any house or administrative fee in addition to or instead of a service charge or tip," but only if the employer gives the patron a sufficient "designation or written description" of the fee. The plaintiffs appealed and the Appeals Court affirmed the dismissal on the same grounds.

On further appeal, the Supreme Judicial Court concluded the plain meaning of the Tips Act required the club to remit the disputed charge to the employees. As an initial matter, the high court considered the classification of the disputed charges. Citing longstanding contract law principles, the court noted that any ambiguities in a contract must be construed against the drafter – here, the club. If the employer wanted to retain the additional surcharge as an administrative fee, then it carried the burden of ensuring that all the contractual documents accurately described the surcharge accordingly. In this case, the club failed to do so in all of its documentation, categorizing the fee instead as a service charge in some documents provided to patrons that, under Massachusetts law, must be remitted to the wait staff.

Moreover, the club could not avail itself of the Tip Act's safe harbor provision because its own description of the fee at issue was as a "service charge," at least in

some documents provided to patrons. The court also found particularly relevant that the fee was mislabeled on the final invoice received on the heels of the event's conclusion, the time when a patron would be most likely to make a decision related to tipping. Conversely, the event contract, which contained the proper language sufficient to invoke the Tips Act safe harbor, had been signed months before the event and the patron could not be expected to base their tipping decision on a contract signed months earlier. Accordingly, the Supreme Judicial Court reversed and remanded the case, with direction to enter judgment in favor of the plaintiffs.

Independent Contractor Analysis Differs From Joint Employer Analysis, Supreme Court Holds

In December 2021, the Supreme Judicial Court of Massachusetts held that the state law standard for determining whether an individual is an independent contractor rather than an employee is not the same standard that applies to determining whether an entity is a joint employer of the employee. Rather, the state standard that applies to determining a joint employment relationship is borrowed from the federal FLSA. *Jinks v. Credico (USA) LLC*, 2021 Mass. LEXIS 684 (Mass. Dec. 13, 2021).

Under that test, "the totality of the circumstances" of the relationship between the individual is analyzed using four primary factors: (1) whether the entity had the power to hire and fire the individual; (2) whether it supervised and controlled the individual's work schedules or conditions of employment; (3) whether it determined the rate and method of the employee's payment; and (4) whether it maintained employment records on the employee. The determination "is not [] mechanical" and the four factors "are not etched in stone and will not be blindly applied."

In so holding, the court rejected the plaintiffs' contention that the independent contractor "ABC" test should apply, noting that:

> [t]he ABC test [] asks a question that differs from the question relevant to determining whether an entity is a joint employer. The [ABC] test classifies a worker as either an employee or an independent contractor for purposes of the wage laws based on the answer to the question "who, if anyone, controls the work other than the worker herself." By contrast, the question of joint employment focuses on whether an individual, whose work is controlled by one entity, is also subject to the control of another entity.

MINNESOTA

New Paid Lactation Break Law

Effective January 1, 2022, Minnesota employers are required to provide nursing and lactating employees paid break time to express milk at work during the 12 months following the birth of the child. The amendment does not require employers convert current unpaid break times, such as meal breaks to paid break time.

Rent Credits May Constitute Wages Under State Labor Law

In *Hagen v. Steven Scott Management*, 963 N.W.2d 164 (Minn. 2021), the Minnesota Supreme Court held that rent credits may be considered wages under the Minnesota Fair Labor Standards Act (MNFLSA). In *Hagen*, the plaintiff worked for the defendant as a part-time, on-site property caretaker and was compensated primarily through rent credits, an express condition of the terms of his employment. He brought suit, alleging failure to properly pay minimum wage and overtime. In concluding that rent credits constitute wages, the Supreme Court first noted that the statutory definition of wages is "subject to the allowances permitted by the [labor] commissioner." Previously, the commissioner had adopted a "lodging allowance rule" that, where an employee accepts it as a condition of employment, allows an employer to satisfy its minimum wage obligations by applying the rent credits. Therefore, the Supreme Court concluded, such credits should be considered a form of wages. However, it noted that rent credits may qualify as wages only to the extent provided for in the lodging allowance rule.

NEW YORK

No Wage Theft Loophole Act

In August 2021, the New York Legislature passed the "No Wage Theft Loophole Act," which amends New York Labor Law Sections 193 and 198 to eliminate a "judicially created loophole." That loophole was used by some state courts to conclude the Labor Law provisions prohibiting improper deductions and permitting private lawsuits did not apply when, as opposed to making a deduction from an employee's paid wages, the employer withheld the employee's pay in its entirety.

Construction Contractors Liable for Unpaid Wage Claims for Subcontractors

In September 2021, the New York Legislature passed Senate Bill S2766C (A3350), making certain contractors liable for unpaid wages owed by their subcontractors. The law, entitled "An act to amend the labor law and the general business law, in relation to actions for non-payment of wages," amends New York Labor Law Section 198-e and General Business Law Section 756-f. The law applies to "construction contracts," a term defined broadly, but excluding public works contracts, home improvement contracts made by the owners of an owner-occupied dwelling, and some (but not all) contracts for the construction of one- or two-family homes. The law considers a contractor jointly and severally liable for any unpaid wages, benefits, damages, and attorney fees related to a civil or administrative action by a wage claimant or the Department of Labor against a subcontractor of such contractor. However, it permits contractors to establish by contract or to enforce any other lawful remedies against a subcontractor for liability created by violation of the Act, provided the contract or arrangement does not diminish the right of employees to bring a claim pursuant to Section 198.

NORTH CAROLINA

New Final Pay and Wage Notice Requirements

In July 2021, Governor Roy Cooper signed into law changes to the North Carolina Wage and Hour Act, setting forth certain pay and notice requirements for employers. The amendments require an employer to pay final wages to separated employees on or before the next regular payday through its regular pay channels, unless the employee requests in writing that final payment be made by trackable mail. The amendments further require that an employer provide written notice at the time of hiring of: (i) promised wages; and (ii) the day and place for payment. In addition, the employer must provide written notice of at least one pay period prior to any reduction in an employee's promised wages.

OREGON

Oregon Temporarily Amends Equal Pay Act to Remove Vaccine Incentive from Regular Rate Calculation

In June 2021, the Oregon legislature passed House Bill (HB) 2818, temporarily amending the state's Equal Pay Act to exclude vaccine incentives from the definition of compensation. The amendment applies to lawsuits filed on or after April 29, 2021, as well as any pending Bureau of Labor and Industries (BOLI) complaints that had not yet been decided as of that date. Moreover, from May 25, 2021, to March 1, 2022, hiring and retention bonuses are excluded from the definition of compensation. The exclusion applies to any lawsuits or BOLI complaints filed after May 25, 2021. These amendments were designed to incentivize employers to return employees to work by allowing them to offer vaccine incentives and bonuses without potentially running afoul of the Oregon Equal Pay Act. Both amendments will expire on March 1, 2022.

PENNSYLVANIA

Pennsylvania Supreme Court Rules Security Screening Time Compensable, No "de minimis" Exception

In July 2021, responding to certified questions from the U.S. Court of Appeals for the Sixth Circuit, the Pennsylvania Supreme Court held that, under the Pennsylvania Minimum Wage Act, workers must be paid for all time spent during security screenings, with no exception for small amounts of (*i.e., de minimis*) time. *Heimbach v. Amazon.com, Inc.*, 255 A.3d (Pa. July 21, 2021). The Pennsylvania Supreme Court's ruling establishes a more employee-friendly standard than that established under the FLSA by the U.S. Supreme Court in *Integrity Staffing Solutions, Inc. v. Busk*. In that case, the U.S. Supreme Court interpreted the Portal-to-Portal Act to render time spent waiting in line and undergoing Amazon's mandatory security/loss-prevention screening to be non-compensable as not "integral and indispensable" to the "principal activities" of the employees.

Noting that the Pennsylvania legislature had never formally adopted the federal Portal-to-Portal Act, the Pennsylvania Supreme Court concluded that doing so would be "incongruous with [the Pennsylvania] legislature's expressly stated purpose for enacting the PMWA," that is, to "address '[t]he evils of unreasonable and unfair wages,' and to ameliorate employer practices which serve to artificially depress those wages." On the contrary, under Pennsylvania law, compensable time includes "any time the employee is required by the employer to be on the premises of the employer." Because the workers were required to undergo their on-site screening while on employer premises, such time is compensable under Pennsylvania law.

The Pennsylvania Supreme Court also rejected the application of the "de minimis" doctrine, which, under the FLSA, provides that small, insignificant periods of time spent working before or after shifts may be non-

compensable. Rejecting this doctrine, the Pennsylvania Supreme Court noted the PMWA "unambiguously requires payment for 'all hours worked,' signifying the legislature's intent that any portion of the hours worked by an employee does not constitute a mere trifle."

PUERTO RICO

Puerto Rico Adopts Minimum Wage Act

Citing factors such as inflation, population deceleration, migration, and the long-term economic effects of Hurricane Maria and the COVID-19 pandemic, Governor Pedro Pierluisi signed into law the "Puerto Rico Minimum Wage Act." The new law supersedes the lower federal minimum wage beginning in 2022 and creates a "Minimum Wage Review Board" to periodically review and potentially increase minimum wage every two years.

The new law also establishes Puerto Rico's public policy that no full-time worker should live below the poverty level and that all workers should earn enough to cover their basic living expenses. This is the first time in more than a decade Puerto Rico has increased its minimum wage, which currently matches the federal minimum wage of $7.25 an hour.

The minimum wage increased to $8.50 per hour on January 1, 2022, and will increase to $9.50 per hour on July 1, 2023, for all employees covered by the FLSA. The minimum wage will increase further to $10.50 per hour on July 1, 2024, unless the new Minimum Wage Review Board provides otherwise. Exceptions to coverage include agricultural workers, all government and municipal employees, judicial and legislative branch employees, as well as "administrators," "professionals," and "executives," as defined by Regulation 13 of the Puerto Rico Minimum Wage Board. Employees covered by a collective bargaining agreement that provides for higher wages than those set by the law or by Decree will also be excepted from coverage. Those receiving tips will be entitled to the federal minimum wage that, added to their tips, must reach the Puerto Rico minimum wage, established by either law or Decree.

The law provides penalties of up to $5,000 per infraction for first-time offenders and up to $10,000 for repeat offenders, as well as automatic doubling of damages for unpaid wages. It also increased the statute of limitations to bring a claim from one year to five years from the termination date or filing of a judicial or extrajudicial claim and increased the claim period from three years to five years.

RHODE ISLAND

Rhode Island Joins List of States Enacting $15 Minimum Wage Law

On May 20, 2021, Governor Dan McKee signed an amendment to Rhode Island law that will see the Ocean State's minimum wage increase to $15.00 per hour by 2025. As of January 1, 2022, Rhode Island's minimum wage increased to $12.25 per hour. On January 1, 2023, it will increase to $13.00 and then increase another $1.00 per hour each January 1, until reaching $15.00 in 2025. Less than one-third of the states now have a minimum wage equal to or lower than the federal minimum wage of $7.25 per hour.

SOUTH CAROLINA

Wage Notice Provision Does Not Provide for Private Cause of Action

While the minimum wage in New York City will remain The South Carolina Payment of Wages Act does not provide for a private cause of action for violation of the notice provision of the wage payment act, a South Carolina federal district court has held. *Sawyer v. Tidelands Health ASC, LLC*, 2021 U.S. Dist. LEXIS 180975 (D.S.C. July 26, 2021), *report and recommendation adopted*, 2021 U.S. Dist. LEXIS 179831 (D.S.C. Sept. 21, 2021). The Act requires employers to provide notice at the time of hiring of the time and place of payment of wages, as well as any deductions to be taken from wages and seven days advance notice of any changes to wages. S.C. Code Ann. 41-10-30. South Carolina employers have long argued that no such private cause of action exists under the law, but this appears to be the first published opinion reaching that conclusion.

VIRGINIA

Virginia Enacts Overtime Wage Law

As of July 1, 2021, Virginia employers are subject to new state overtime pay requirements. Previously, Virginia had been content to rely on the overtime pay requirements of the FLSA. While they differ in certain respects, both the FLSA and the Virginia Overtime Wage Act obligate employers to pay one and one-half times an employee's regular rate of pay for hours worked in excess of 40 in a workweek. Departures from the federal law include how the regular rate of pay is calculated, a longer statute of limitations to bring potential claims, and the possible damages available.

Rate Calculations
Under the FLSA, an employee's regular rate of pay is the sum of all remuneration for employment (barring certain statutory exclusions) divided by total hours worked in a workweek. The state law employs a different calculation that depends on whether the employee is paid on an hourly or a salary basis. For hourly employees, the regular rate of pay is the hourly rate plus any other non-overtime wages paid or allocated for the workweek — not counting the same items that would be excluded from the FLSA calculation — and then divided by the total number of hours worked in the workweek. For employees who are salaried or paid on some other regular basis, the regular rate of pay is 1/40 (0.025) of all wages paid for the workweek.

Significantly, the new standard for salaried and other regularly paid employees appears to preclude employers from paying traditionally non-exempt employees a fixed salary to cover wages for hours in excess of 40 in a workweek (including on a fluctuating workweek basis), requiring instead an hourly rate calculation for overtime pay for even these employees in most circumstances.

Employers also may face greater liability for misclassifying employees as exempt under the new law. Under federal law, employers commonly argue that a misclassified employee's salary already covers the employee's straight-time wages for all hours worked and, therefore, only the additional "half-time" amount is owed for hours in excess of 40. The Virginia Overtime Wage Act eliminates this argument, providing instead that all salaried employees are entitled to one and one-half times their regular rate for any hours worked over 40. In addition to the overtime premium under the FLSA, Virginia employers will need to account for time-and-a-half pay under the new law.

Statute of Limitations
The new law provides that an employee's overtime claim may include workweeks in a total span of up to three years. It imposes a three-year statute of limitations on overtime claims, rather than the FLSA's default two-year limitations period (three years for willful violations).

Liquidated Damages
While the FLSA provides for liquidated damages equal to the amount of unpaid overtime wages, an employer may defend against such a damages claim on the basis that it acted in good faith, with reasonable grounds for believing it acted in compliance with the FLSA's requirements. This defense is unavailable under the new Virginia law. In Virginia, all overtime wage violations are subject to double damages, plus pre-judgment interest at eight percent a year. In addition, the law provides for treble damages for "knowing" violations.

Collective Actions
Virginia law typically does not authorize class or collective actions. There are exceptions, and the Virginia Overtime Wage Act is now one of them. Amendments to existing sections of the Virginia Code accompanying the new law authorize collective actions "consistent with the collective action procedures of the Fair Labor Standards Act" for violations under the Virginia Overtime Wage Act. Thus, Virginia employers face the possibility of defending overtime claims of multiple employees in a collective lawsuit covering workweeks up to a three-year period.

Virginia Adopts Prevailing Wage Statute, Amends Wage Theft Law

Virginia has adopted a prevailing wage statute and amended its Wage Theft Law.

Prevailing Wage Statute
Like its federal counterpart, Virginia's new prevailing wage statute, Virginia Code §2.2-4321.3, requires contractors and subcontractors working on state public projects to pay prevailing wage rates to any "mechanic, laborer, or worker" providing labor or services "in connection with" the public project. However, prevailing wages on public contracts with a locality (*e.g.*, any county, city, town, school division, or other political subdivision) are not required, unless the locality has adopted an ordinance requiring bidders or contractors to do so. The prevailing wage statute does not apply to public contracts for public works valued at $250,000 or less. For contracts in excess of $250,000, contractors must comply with several mandates in the law.

The statute defines a "prevailing wage rate" as the product of (1) the geographic area where work on an applicable public project is to be performed and (2) the class of mechanics, laborers, or workers to which the rate applies. It tasks the Virginia Commissioner of Labor and Industry with determining prevailing wage rates based upon rates set by the U.S. Secretary of Labor pursuant to the Davis-Bacon Act.

The prevailing wage statute also comes with certification requirements. When awarded a contract subject to the statute, a contractor must certify, under oath to the Commissioner of Labor and Industry, the pay scale the contractor will use for each craft or trade employed under the public contract. The sworn certification must include:

1. The hourly amounts to be paid, including wages and benefits;
2. An itemization of amounts paid in wages in each particular benefit; and
3. A list of the names and addresses of any third-party fund, plan, or program to which benefit payments will be made on behalf of employees

In addition, the statute requires contractors to preserve records relating to the wages paid to and hours worked by each mechanic, laborer, and worker, as well as a daily and weekly work schedule for each worker including each worker's job classification. Contractors must preserve these records for a minimum of six years and must make them available to the Department of Labor and Industry (DOLI) within 10 days of a DOLI request for the records. Moreover, contractors must certify the records reflect the actual hours worked by each employee and the actual amount paid to each employee.

Additionally, a contractor must post the general prevailing wage rate for each craft and classification on the public project in prominent and easily accessible places at the worksite or at places where the contractor pays the employees their wages. The contractor also must certify compliance to DOLI within 10 days of issuing the posting.

Contractors risk significant liabilities for noncompliance. Any contractor who compensates a covered employee at a rate less than the prevailing wage rate will be liable to the employee for the payment of outstanding wages due, plus interest at an annual rate of eight percent accruing from the date the wages were due. Further, the contractor will be disqualified from bidding on public contracts until the contractor pays any owed restitution.

Where the contractor's violation is determined to be willful, criminal liability attaches; the contractor will be guilty of a Class 1 misdemeanor. Moreover, violation of the statute will provide an interested party (including a bidder, offeror, contractor, subcontractor, or operator) standing to challenge or protest a bid specification, project agreement, or other public contract that violates the statute.

Wage Theft Law

The Virginia Wage Theft Law provides that, in the event a general contractor knew or should have known that its subcontractor or supplier was not paying its employees all wages owed, the employees of the subcontractor or supplier may bring lawsuits against the general contractor to hold the general contractor jointly and severally liable for the wage payment violations of its subcontractors or suppliers. The General Assembly has enacted amendments the Wage Theft Law to afford some relief from this provision.

First, a general contractor will not be held jointly and severally liable for wage payment violations by suppliers that exclusively furnish materials. Second, under the amended law, a written certification by a subcontractor stating that (1) the subcontractor has paid its employees all wages due for the work performed on the project and (2) to the subcontractor's knowledge, all sub-subcontractors have also paid their employees all wages due will be evidence of the general contractor's compliance with the Wage Theft Law. Additionally, where the subcontractor falsifies its certification, the general contractor may hold the subcontractor civilly liable. As a general matter, contractors should pursue these certifications from their subcontractors to limit potential risks.

WASHINGTON

Court of Appeals Expands Compensability of Out-of-Town Travel Time

Washington employers must reevaluate their travel policies, as the Washington Court of Appeals has ruled that travel time for out-of-town travel is considered compensable "hours worked" as a matter of Washington law. *Port of Tacoma v. Sacks*, 2021 Wash. App. LEXIS 2304 (Wash. Ct. App. Sept. 21, 2021).

The case involved four Washington-based hourly employees who made two trips to China to observe the manufacturing of marine cranes and one trip to Houston to attend relevant training. The court of appeals held the employees had to be paid for all the time they spent traveling to, from, and within China, not just the eight hours per day the Port had negotiated with the employees' union.

The court of appeals concluded that travel time for out-of-town travel is considered compensable "hours worked" as a matter of Washington law, regardless of whether any work is performed during the journey, whether the employer owns or controls the employee's means of transport, or whether the employee's travel takes place during normal work hours. In so ruling, the court embraced the policy advocated by the Washington Department of Labor & Industries, which both distinguished overnight and out-of-town travel from other types of travel and contrasted Washington law with the more employer-friendly federal law on the issue.

Seattle Enact Independent Contractor Protections Ordinance

In a growing trend of increasing workplace protections for independent contractors, the Seattle City Council passed the "Independent Contractor Protections Ordinance," SMC 14.34, aimed at increasing pay transparency for the ever-growing gig workforce. The Ordinance goes into effect September 1, 2022.

The Ordinance broadly applies to "hiring entities," which generally includes any person or entity that hires an independent contractor. The city's frequently-asked-questions webpage describes the law as applying to any hiring entities "regularly engaged in business or commercial activity," including non-profits. Under the Ordinance, "independent contractor" is defined as "a person or entity composed of no more than one person, regardless of corporate form or method of organizing the person's business that is hired by a hiring entity as a self-employed person or entity to provide services in exchange for compensation." However, the Ordinance excludes attorneys; workers whose relationship with the hiring entity is limited to a property rental agreement (such as a hair stylist who rents a booth at a salon); and "any other class of independent contractors that the Director of the Office of Labor Standards excludes through forthcoming rules."

The Ordinance requires covered "hiring entities" to provide independent contractors with certain pre-contract disclosures or "the proposed terms and conditions of work." These include:

- Date;
- Names of parties and contact information of the business;
- Description and location of the work;
- Compensation structure (*e.g.*, pay rate, pay basis, tips/service charge distribution policy, reimbursements, deductions, fees, and charges); and
- Pay schedule.

At the time of payment, required disclosures include many of the above items, as well as gross payment, specific deductions, and net payment after deductions.

Additionally, hiring entities must provide timely payment as required by the terms of a contract, the terms of the pre-contract disclosure, or within 30 days of contract performance.

MINIMUM WAGE INCREASES

The following state minimum wage increases went into effect as of January 1st, unless otherwise noted. States marked with an asterisk (*) also have city or other local minimum wage increases for 2022; contact a Jackson Lewis attorney if you need details for these local rates.

State	Minimum Wage
Arizona*	$12.80
California*	$15.00 (26+ employees) $14.00 (1-25 employees)
Colorado*	$12.56
Connecticut	$14.00 (July 1)
Delaware	$10.50
Dist. of Columbia	TBD (July 1)
Florida	$11.00 (Sept. 30)
Illinois*	$12.00 (std.)/$9.50 (youth)
Maine*	$12.75
Maryland*	$12.50 (15+ employees) $12.20 (1-14 employees)
Massachusetts	$14.25
Michigan	$9.87
Minnesota*	$10.33 ("Large" employers) $8.42 ("Small" employers/ 90-Day Training Wage/ Youth Wage
Missouri	$11.15
Montana	$9.20
Nevada	$10.50 (w/o health benefits) $9.50 (with benefits) (July 1)
New Jersey	$13.00
New Mexico*	$11.50

New York	Outside NYC and Nassau, Suffolk & Westchester Counties: $13.20 (generally); all others $15.00 (generally) (Dec. 31, 2021)
Ohio	$9.30
Oregon	$12.50 (“Non-urban” counties) $13.50 (“Standard” counties) $14.75 (Portland Metro) (July 1)
Puerto Rico	$8.50
Rhode Island	$12.25
South Dakota	$9.95
Vermont	$12.55
Virginia	$11.00
Washington*	$14.49 (most employees) $12.32 (employees ages 14-15)

MINIMUM SALARIES FOR THE “WHITE COLLAR” EXEMPTIONS

The following state minimum annual salaries for the FLSA Executive, Administrative, and Professional (a.k.a. the “white collar”) exemptions are effective in 2022. These minimum salaries became effective on January 1st, unless otherwise noted. Contact a Jackson Lewis attorney if you need additional details.

California	$62,400 (26+ employees) $58,240 (1-25 employees)
Colorado	$45,000
Maine	$38,250
Washington	$52,712.80 (employers of any size)
New York (eff. 12/31/2021)	Note: Applicable to Executive and Administrative exemptions only; Professional exemption follows federal law $58,500 (New York City + Nassau, Suffolk & Westchester Counties); $51,480 (remainder of the State)

Thank you for your interest in the

2021 Wage & Hour Developments: A Year in Review.

Contact

Jeffrey W. Brecher

Principal
New York Metro
Long Island
(631) 247-4652
Jeffrey.Brecher@jacksonlewis.com

Justin R. Barnes

Principal
Atlanta Office
Atlanta, GA
(404) 586-1809
Justin.Barnes@jacksonlewis.com

David T. Wiley

Knowledge Management Attorney
Birmingham Office
Birmingham, AL
(205) 332-3104
David.Wiley@jacksonlewis.com

©2020 Jackson Lewis P.C. This material is provided for informational purposes only. It is not intended to constitute legal advice nor does it create a client-lawyer relationship between Jackson Lewis and any recipient. Recipients should consult with counsel before taking any actions based on the information contained within this material. This material may be considered attorney advertising in some jurisdictions. Prior results do not guarantee a similar outcome. Reproduction of this material in whole or in part is prohibited without the express prior written consent of Jackson Lewis P.C., a law firm focused on labor and employment law since 1958. Our 950+ attorneys located in major cities nationwide help employers develop proactive strategies, strong policies and business-oriented solutions to cultivate high-functioning workforces that are engaged, stable and diverse.

jacksonlewis.com