JacksonLewis

WINTER 2021

CLASS ACTION TRENDS REPORT

Looking back, looking ahead

It was especially gratifying to bid farewell to 2020 and to welcome the proverbial "fresh start" of a new year. In this issue of the Class Action Trends Report, *we look back at the most significant developments affecting employment class and collective action litigation in the previous, tumultuous year. And we look ahead at what a new year, a new presidential administration, and the end of a pandemic will mean for employers.*

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Year in review: Top 10 class action stories and trends

A look at the most significant cases and stories in class and collective litigation last year, and the anticipated impact of these developments in 2021:

1. Pandemic-related class actions lie in wait

The COVID-19 pandemic was the most significant challenge employers had to reckon with in 2020, and COVID-19-related litigation continues to evolve alongside the ever-changing workplace. Although companies faced an onslaught of employment claims related to the pandemic and its operational and financial impact, relatively few of these were class filings.

According to the Jackson Lewis COVID-19 Employment LitWatch, there were more than 1,300 COVID-19 related employment complaints filed in federal and state courts in 2020; only 67 of those complaints were class or collective actions. However, multi-plaintiff lawsuits are expected to pick up steam in 2021, as the nation continues to contend with the most recent surge and the pandemic's ongoing economic fallout.

In particular, expect an uptick in wage and hour class and collective actions arising in part from the dramatic spike in telework in 2020. By year's end, the number of employees working remotely was nearly double that of onsite workers, and that trend will likely continue unabated, at least for the foreseeable future. As such, we expect an increase in "off-the-clock" claims by nonexempt employees, as well as class action suits seeking expense reimbursements for employees' home office costs.

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A WORD FROM MIA, DAVID AND ERIC

MIA FARBER

DAVID GOLDER

ERIC MAGNUS

Happy New Year! The greeting is particularly rich with meaning this year, as we collectively bid farewell to 2020, a year of challenge and change. In this issue of the *Class Action Trends Report*, we look back at the most significant developments in class and collective actions — most of which were *not*, in fact, pandemic-related.

The COVID-19 pandemic altered our lives and our workplaces profoundly in 2020. It forced us to reconsider how and where we work and, speaking as attorneys, how and where we litigate. We adopted on-site safety measures, staggered shifts, remote work, and a newfound regard for the "essential workers" who made it possible. And we gained a deeper appreciation for our employees and our employers.

Unfortunately, many businesses had to make painful choices in the aftermath of the pandemic-fueled economic turmoil, laying off and furloughing workers in response to unforeseen and unprecedented developments. In addition, many employers faced lawsuits — some class action suits, but mostly individual claims arising under a myriad of COVID-19-related causes of action.

However, a new year and the rollout of new vaccinations spur optimism that we will turn the corner on the pandemic, reinvigorate our economy, gradually return to the office — or not — and perhaps recall some of our valued workers. Still, the new normal will carry new risks and bring new lawsuits, and we anticipate the next wave of litigation will be class-based.

Of course, 2020 was also an election year, and 2021 brings a new administration. Whenever there's turnover at the top, the compliance ground shifts for employers. We anticipate the current transition will bring especially seismic change, particularly with Democrats gaining control of the Senate. As we ponder in this issue what lies ahead for employers in the new year, we do so through the lens of a Biden presidency.

Wishing you a productive and promising New Year,

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About the *Class Action Trends Report*

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

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✓ Mitigate the risk of such claims by shoring up your timekeeping practices and policies for the virtual workplace. Provide detailed rules for recording time worked, set strict prohibitions against working off the clock without prior approval, and ensure compliance with state-law reimbursement mandates, particularly for employees in California and Illinois.

In addition, healthcare, hospitality/restaurants, and retail employers — industries already hard-hit by the pandemic, both financially and operationally — may be particularly vulnerable to wage and hour class actions by onsite employees. Employers face the prospect of class-wide overtime or off-the-clock lawsuits by nonexempt essential workers for the time they are required to wait in line for temperature scans; exempt managers who perform a disproportionate amount of nonexempt work (in an effort to control payroll costs) and now contend they are nonexempt employees; and healthcare staff working extended shifts.

Beyond the wage and hour realm, employers can anticipate other pandemic-related class action suits going forward. Claims may arise over employer-mandated COVID-19 vaccinations, as well as discrimination cases challenging employers' decisions as to which employees they will bring back after extended furloughs.

See the Summer 2020 issue of the *Class Action Trends Report* for a detailed look at pandemic-related class action vulnerabilities.

2. Biometric lawsuit settles for $550 million, more on the horizon

In a non-employment case, a social media company agreed to settle a class action brought under the Illinois Biometric Information Privacy Act (BIPA) for a record $550 million, the largest-ever recovery in a privacy case. The plaintiffs in this massive class action alleged that the company's use of facial-recognition software to help users "tag" people in photographs violated the Illinois law. The company collected, used, and stored biometric identifiers without a written release, and failed to maintain a retention schedule or guidelines for destroying biometric identifiers, according to the plaintiffs.

Currently, Illinois is the only state with a biometric privacy statute that allows individuals to bring claims for damages. The plaintiffs in this case, brought on behalf of millions of Illinois users, initially sought tens of billions of dollars in statutory damages. The case was litigated in California against a California-based defendant. The suit settled after the U.S. Supreme Court rejected a petition for *certiorari* seeking review of an opinion by the U.S. Court of Appeals for the Ninth Circuit upholding the district court's decision to allow the class action to proceed. The appeals court had rejected the defendant's contention that the plaintiffs suffered no concrete injury from the alleged BIPA violations and thus lacked standing to sue. In August 2020, the district court granted a motion for preliminary approval of the settlement; final approval was granted on January 14, 2021.

This case offers important lessons, as BIPA claims against employers continue to rise: (1) the reach of the statute extends well beyond Illinois; (2) class-wide damages can be considerable; and (3) in the employment context, we usually think of fingerprint-scan timekeeping devices, but

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Jackson Lewis' biometric privacy team

Jackson Lewis is uniquely qualified to represent employers facing BIPA lawsuits. The firm is currently handling a number of such cases and has advised many clients on the statute's technology and compliance requirements. The firm pairs BIPA-seasoned litigators in our Class Action and Complex Litigation Practice Group with data privacy experts in our Privacy, Data and Cybersecurity Group. Successfully defending these cases requires a carefully conceived litigation strategy informed by a deep understanding of the law and its practical applications.

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BIPA claims also arise from the use of facial recognition software and other technologies (for example, facial recognition in the context of COVID-19 employee screenings). And novel claims continue to emerge.

✓ Consult with counsel regarding the use of thermal scanners and other "biometric" measures to control the spread of COVID-19 at the worksite.

With privacy concerns a growing touchstone in an increasingly technological culture, biometric privacy laws may be enacted in other jurisdictions at both the state and local levels. Moreover, the National Biometric Information Privacy Act, federal legislation that closely mirrors the Illinois statute, was introduced in the last Congress, and can be expected to resurface. Finally, several significant BIPA cases currently on appeal could dramatically shape the legal landscape.

3. The ground shifts on who is "similarly situated" for FLSA collective actions

In 2020, the U.S. Supreme Court was asked to weigh in on a critical issue related to collective actions under the Fair Labor Standards Act (FLSA): What does it mean for a putative class of workers to be "similarly situated" for purposes of proceeding as a collective under the FLSA? According to the petition for *certiorari* seeking review of an April 1, 2020, decision by the U.S. Court of Appeals for the Second Circuit in *Chipotle Mexican Grill v. Scott*, there is an "intractable conflict" among the federal courts on the issue. However, on December 31, the parties asked the Court to stay the petition, signaling their intent to settle their dispute. Consequently, the Justices will not take up a case that could have fundamentally reshaped how FLSA cases are litigated. Nonetheless, 2020 saw the continuation of a steady shift in the courts on the issue.

The *Chipotle* case involved the *decertification* of a collective action that already had been conditionally certified; as such, it did not raise the more compelling issue of whether a collective action should be conditionally certified in the first instance. What should plaintiffs be required to show in order to pursue a costly FLSA collective action, and how long should employers have to litigate the certification issue before having the opportunity to defend the claims on the merits?

Some courts apply a fairly low bar when granting conditional certification under FLSA, Section 216(b), compared to the more rigorous showing required to proceed as a class under Rule 23 of the Federal Rules of Civil Procedure. The problem, in part, can be traced to the two-step "*Lusardi*" approach used by courts across the country in collective actions. Under this framework, courts grant "conditional certification" without inquiring into the merits of the allegations — rather, they focus solely (and leniently) on whether the plaintiffs are "similarly situated" to the employees they seek to represent in a collective action; after discovery, the employer can then move for "decertification." The problem, of course, is that the employer is already drawn into costly class-wide litigation and extensive discovery, and thus is pressured into settling the matter — meritorious or not — just to end the dispute.

On January 12, 2021, the U.S. Court of Appeals for the Fifth Circuit issued a decision in *Swales v. KLLM Transport Services, LLC*, a case that addresses head-on the extent to which a district court may examine the factual circumstances of whether potential opt-in plaintiffs are similarly situated before conditionally certifying a class. The appeals court expressly disavowed the two-step framework (emphasizing that the circuit had never formally adopted *Lusardi* anyhow). Instead, the Fifth Circuit endorsed a "gatekeeping" approach to deciding whether to certify collective actions.

And while a Supreme Court decision in *Chipotle* would have offered important clarity, it is the widely used *Lusardi* framework for FLSA certification that is in more dire need of high court scrutiny. In the meantime, at least within the Fifth Circuit, courts will apply a fairer, more workable framework for evaluating whether potential opt-in plaintiffs are similarly situated — *before* conditional certification is granted.

✓ An organization defending a putative collective action may find it worthwhile, in certain jurisdictions, to urge the court to consider merits evidence at the conditional certification stage to defeat such claims at the outset.

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(For a detailed discussion of the issue, see "Certifying a FLSA collective — or stirring up litigation?" in the Fall 2020 issue of the *Class Action Trends Report*.)

4. FAA's transportation worker exemption splits the circuits

Another hotly contested procedural matter in wage and hour law in 2020 was whether "gig" drivers can be forced to arbitrate independent contractor misclassification claims. Although the Federal Arbitration Act (FAA) has sent many would-be class litigations into individual arbitration in recent years, the statute's "transportation worker exemption" — which applies to workers engaged in interstate commerce — has become a potential obstacle for some companies seeking to enforce their arbitration agreements. The critical question is whether the exemption (which covers both statutory employees and independent contractors, the U.S. Supreme Court has held) applies to "last mile" delivery drivers who do not cross state lines in the course of making deliveries of out-of-state goods.

In July 2020, the U.S. Court of Appeals for the First Circuit held that the exemption applied to an online retailer's drivers who performed the last leg in the intrastate transport of goods purchased online by customers; therefore, the drivers were not covered by the FAA, and they could *not* be compelled to arbitrate their independent contractor misclassification claims. One month later, the Ninth Circuit adopted the same view. However, in a divided panel opinion authored by now-Supreme Court Justice Amy Coney Barrett, the U.S. Court of Appeals for the Seventh Circuit rejected the notion that local drivers for a restaurant delivery app fell under the FAA exemption. The Seventh Circuit hewed to a narrower interpretation of the exemption, saying it applied solely to individuals who are themselves directly "engaged in the channels of foreign or interstate commerce."

✓ Businesses that utilize the services of delivery workers and other drivers, either as employees or independent contractors, should confer with counsel to determine whether the transportation worker exemption presents an obstacle to enforcing their arbitration agreements under the FAA. Even if an arbitration agreement is not covered by the protective umbrella of the FAA, which favors arbitration as a matter of federal policy, the agreement may nonetheless be enforceable under state law.

In November 2020, the Supreme Court was asked to weigh in to resolve the circuit split on this increasingly contentious issue in 2021. The Court has not decided whether to review the case yet. For now, the uncertainty persists.

5. Jurisdictional challenges used to prevent nationwide class certification

Since the U.S. Supreme Court's 2017 decision in *Bristol-Myers Squibb Co. v. Superior Court of California,* a consumer mass tort action, the federal judiciary has grappled with whether to exercise personal jurisdiction when a resident of the forum state seeks to represent a nationwide class that includes nonresidents. The same question arises with respect to collective actions. As to both, the federal courts have been sharply split. The issue of whether it applies in Rule 23 class actions may be coming to a head, as the Supreme Court in 2020 was asked to decide the question.

In *Bristol-Myers*, the high court held that California courts could not exercise personal jurisdiction over the claims of out-of-state class members who did not suffer their alleged injuries in the state. Some federal courts have extended *Bristol-Meyers* to the class or collective action context, while others have limited its reach. Several of these cases reached the appellate level in 2020, also with mixed results.

In one wage and hour dispute, a divided panel of the U.S. Court of Appeals for the D.C. Circuit declined to resolve the issue outright, instead ruling that a federal court could not dismiss nonresident putative class members *before* a class action was certified (reasoning that absent class certification, those individuals are not parties before the court). The Fifth Circuit reached a similar conclusion. On the other hand, the Seventh Circuit held that *Bristol-Myers* does not apply to putative nationwide class actions. The defendant in that case, *Mussat v. IQVIA Inc.*, has filed a petition for *certiorari*, which is currently pending.

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✓ Consider raising a challenge to certification on jurisdictional grounds when faced with a putative nationwide class or collective action. There are numerous factors to consider in determining whether this is the optimal defense strategy. Counsel can assist in identifying the benefits and drawbacks of this approach.

6. Only in California: Faulty pay stubs cost more than $100 million

In November 2020, the Ninth Circuit heard oral arguments in an employer's appeal of a $102 million damages award in a class action suit for violations of the California Labor Code — more than $48 million of which was for violations of the Labor Code's itemized wage statement requirement, and an additional $48 million in penalties under the Private Attorneys General Act (PAGA). The employer was assessed another $5.8 million in PAGA penalties for violating the Labor Code's final wage statement provisions, and an additional $70,000 in PAGA penalties for meal period violations.

While Proposition 22 is limited to app-based rideshare and delivery companies, its passage may spur other industries to take their arguments for independent contractor classification to the voters.

The argument focused primarily on whether the plaintiff had suffered an actual injury sufficient to confer standing to sue for PAGA purposes. He had no monetary loss from the technical pay stub violation; the alleged harm was his inability to ensure that he was paid what he was owed. According to the plaintiff, though, his injury was not the issue: under the PAGA, he was entitled to enforce the state law and pursue relief on behalf of a class of aggrieved workers (50,000 of them in this case) even if he was not himself injured, he claimed.

An additional issue at oral argument was whether the pay stub violation was "knowing or intentional," as the statute requires before damages can be imposed. Notably, this was a case of "no good deed goes unpunished": the wage statement violation resulted from the company's failure to clearly identify on workers' pay stubs how the bonuses that it gave employees were calculated into their hourly rate for overtime purposes.

The Ninth Circuit's ruling in the case may narrow a trial court's ability to impose PAGA penalties on California employers when the plaintiff has not suffered financial harm.

✓ Seemingly harmless, inadvertent breaches can lead to exorbitant penalties. To avoid such damages, California employers *must* ensure their wage statements are fully compliant with applicable Labor Code provisions.

7. California vote favors rideshare companies; other states in flux

In the November 3, 2020, election, California voters passed Proposition 22, an initiative that creates a carve-out from California's independent contractor law (A.B. 5) for app-based drivers. Under the new law, app-based rideshare and delivery companies may hire drivers as independent contractors if certain conditions are met, including minimum compensation levels; health insurance subsidies to qualifying drivers; medical costs for on-the-job injuries; and restrictions on working more than 12 hours in a 24-hour period for a single company. The companies also must develop sexual harassment policies, conduct criminal background checks, and require safety training for drivers.

While Proposition 22 is limited to app-based rideshare and delivery companies, its passage may spur other industries to take their arguments for independent contractor classification to the voters. The measure's passage also may impact similar battles going on with rideshare and delivery companies in other states as well as states that had planned to follow California's lead and adopt similar legislation regulating the classification of app-based drivers.

Meanwhile, there is no clear guidance for businesses outside of California. In one closely watched case, the U.S. Court of Appeals for the Third Circuit revived a class

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action lawsuit brought by drivers claiming they were misclassified as independent contractors within the meaning of the FLSA and similar Pennsylvania laws. The case was remanded to district court and, in November 2020, the appeals court denied the employer's petition for *en banc* review. Though the Department of Labor's recently finalized independent contractor rule was expected to provide much-needed guidance, its future is uncertain under the Biden administration. (See "The Biden administration: What employers can expect" on pg. 14).

✓ Independent contractor classification remains a moving target, with continual legislative and regulatory developments on the federal, state, and local levels creating a confusing compliance minefield for businesses wishing to utilize the services of independent workers.

8. Sexual harassment securities fraud class action settles for $240 million

A national jewelry retailer settled a sexual harassment-related securities fraud class action for $240 million — among the top 75 securities class action settlements of all time, according to the lead plaintiff. A federal district court signed off on the parties' agreed settlement in 2020.

Previously, the court had certified a class of investors who claimed the retailer had artificially inflated its stock price by making materially misleading statements and omissions about its culture of sexual harassment and the strength of its in-house customer financing credit portfolio.

The court rejected the retailer's claim that the dual nature of the case — the two distinct theories of securities fraud and sexual harassment — precluded certification. The court also denied the retailers' motion to dismiss and, after extensive litigation, the parties entered mediation and ultimately reached a settlement agreement.

✓ It is not clear how much of the $240 million settlement related specifically to the underlying sexual harassment allegations. However, the case is an important reminder of an employer's potential liability — not just to a class of employees, but to investors — if a culture of harassment is allowed to permeate a workplace.

9. Eleventh Circuit bars incentive awards for class plaintiffs

In a suit brought under the Telephone Consumer Protection Act (TCPA), a divided U.S. Court of Appeals for the Eleventh Circuit ruled that "incentive" or "service" awards to lead plaintiffs in Rule 23 class actions are unlawful. As of now, the decision is an anomaly, but it is a noteworthy development.

The panel majority reasoned that the U.S. Supreme Court prohibited the award of incentive payments to plaintiffs more than a century ago, although it acknowledged the high court's directive has since gone unheeded, as incentive awards are routine features of class settlements today. As a result of the opinion, future class settlements in the Eleventh Circuit may no longer provide named plaintiffs with incentive awards.

Significantly, this is the first time a federal court of appeals has expressly invalidated incentive awards as a matter of law, and it remains to be seen whether other circuit courts will follow its lead. Additionally, whether the majority's rationale will be applied in the context of collective actions brought under Section 216(b) of the FLSA, or to the settlement of hybrid claims under both Rule 23 and Section 216(b) is an open question.

✓ The prospect of incentive awards often is dangled by plaintiffs' attorneys in their efforts to recruit named plaintiffs for a class litigation. The circuit court's ruling may reduce the number of class cases initiated by plaintiffs' lawyers in search of a claimant. On the other hand, incentive awards can be an important settlement term when attempting to resolve a putative class claim without extensive litigation.

10. COVID-19 slams higher education

Colleges and universities have been inundated with class action suits directly related to the COVID-19 crisis. Last spring, as the pandemic surged, many institutions of

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higher education were forced to abruptly shutter their residence halls and transition to online instruction for the safety of students, faculty and staff. In the aftermath, students filed suit alleging they were entitled to partial reimbursement of tuition and fees and room and board.

New class action cases are being filed almost daily, with novel theories of liability continuing to emerge, and some of the initial suits have avoided early dismissal. As the state of the pandemic and on-campus instruction are likely to remain in flux, at least through the remainder of this academic year, new pandemic-related tuition claims may be filed well into 2021. ■

Class actions challenging 401(k) plan fees increase sharply

By Howard Shapiro, Rene E. Thorne, and Lindsey H. Chopin

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

Generally, these complaints include claims alleging:

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

In addition, recent actions challenging the inclusion of affiliated funds include claims that:

- The funds charge excessive fees;
- The funds are imprudent investment options because, net of fees, they offer inferior performance to available alternatives; and
- The payment of fees to an affiliate constitutes a prohibited transaction.

In 2020, the outcome in fee cases was mixed. Some district courts rejected these claims, while others denied motions to dismiss or for summary judgment in full or in part. Some of these cases settled in 2020 in amounts ranging from several million dollars to almost $40 million.

The law is expected to "smooth down" in defendants' favor, tracking what occurred in the past when plaintiffs challenged employer stock funds held in 401(k) plans.

Other 2020 developments

Class actions and arbitration

Arbitrator to decide if franchisor covered by agreement. The U.S. Court of Appeals for the Sixth Circuit held that by incorporating the American Arbitration Association (AAA) National Rules for the Resolution of Employment Disputes, the parties to an arbitration agreement (in this case, a pizza franchise and an employee) dictated that the threshold question of whether the agreement also covered the national franchisor had to go to an arbitrator. The employee was fired by one franchise when he started working for a second one because the first employer believed that his termination was required under the franchise agreement. Affirming the district court's order compelling arbitration of his class action suit under antitrust and state laws, the appeals court held that by incorporating the AAA rules, the arbitration agreement provided "clear and unmistakable" evidence that the parties agreed to arbitrate the gateway issue of arbitrability, including the question of whether the agreement covered the franchisor and not just the franchisee.

Seventh Circuit adopts notice rule. In a case of first impression on an issue of growing significance, the Seventh Circuit held that a district court may not authorize notice of a collective action to individuals who have signed arbitration agreements waiving the right to join collective actions, and the court must allow the employer to make that showing.

Announcing a new standard, the appeals court held that when an employer opposes notice by asserting that proposed notice recipients have entered into mutual arbitration agreements with collective action waivers, the trial court must:

1. Determine whether a plaintiff contests the defendant's assertions about the existence of valid arbitration agreements entered by the proposed notice recipients.
2. If no plaintiff contests those assertions, then the court may not authorize notice to the employees with whom the defendant allegedly entered into valid arbitration agreements. However, if a plaintiff contests the defendant's assertions that a valid arbitration agreement exists, then, before authorizing notice, the court must permit the parties to submit additional evidence on the agreements' existence and validity.
3. If the employer shows that an employee has entered into a valid arbitration agreement, the court may not authorize notice to that employee, unless the record reveals that nothing in the agreement would prohibit that employee from participating in the action.

Court won't enjoin 10,000 individual arbitrations. An app-based delivery service was unlikely to succeed on the merits of its argument that a misclassification suit brought by a single law firm on behalf of 10,356 couriers constitutes a *de facto* class arbitration in violation of the arbitration provisions of the company's agreement with its couriers, and therefore, the court should enjoin the arbitration demands.

The question of whether the arbitration demands violate the arbitration provisions is one that should be decided by the arbitrator, a federal district court held; thus, the court denied the company's emergency TRO motion. Further, the court was not persuaded the company's $4.6 million in arbitration fees or the possibility of arbitrating a dispute that was not covered by their agreement would result in irreparable harm. Litigation expenses alone, even if not recoverable, are not irreparable harm, the court said.

Company ordered into over 5,000 individual arbitrations. A federal judge in California held that an online delivery company must arbitrate 5,000 individual minimum wage and overtime claims brought by delivery drivers. The court rebuffed the defendant's attempt to evade individual arbitration after it had imposed a mandatory arbitration agreement on the drivers. The company also moved to stay the arbitration proceedings until final approval of a settlement in a separate state-law case, but the court denied the motion, noting that, ironically, the employer had moved to dismiss the state-law claims arguing that the workers had a duty to arbitrate.

Decade-long litigation battle goes to arbitration. A federal court has ruled that 1,000 putative class members in a lengthy gender discrimination suit against a multinational

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investment bank will have to arbitrate their claims individually, pursuant to the arbitration agreements they signed as part of their separation, promotion, or compensation agreements. However, employees who may have been misled into agreeing to arbitrate as part of their equity award agreements — more than six years after the suit commenced — will be given the chance to opt out. A magistrate judge rejected the employees' contention that the employer waived its right to compel arbitration, finding all four categories of operative arbitration agreements were enforceable. The employees also failed to convince the court that the arbitration provisions in all 1,220 agreements entered into by class members after this action was filed should be voided pursuant to the court's duty to manage communications with putative class members under Rule 23(d).

Wage and hour

Retailer's FWW method was sound. The Second Circuit affirmed summary judgment in favor of a major retailer in a class action brought by department managers challenging the company's use of the fluctuating workweek (FWW) method to calculate their overtime pay. Addressing the U.S. Department of Labor (DOL) final rule on the FWW method (published in May 2020), the appeals court held that the managers fell short of establishing a fact dispute as to whether their weekly wages were truly fixed and guaranteed. Further, the FWW method did not require employees' hours to fluctuate above and below 40 hours per week, and the employer's practice of allowing employees to take days of paid time off on later dates after working on holidays or previously scheduled days off was consistent with the FWW method.

[T]he employer's practice of allowing employees to take days of paid time off on later dates after working on holidays or previously scheduled days off was consistent with the FWW method.

Drivers get second chance at class certification. A divided panel of the U.S. Court of Appeals for the Third Circuit reversed the district court's denial of class certification, holding that the court not only misapplied the circuit's ascertainability standard, but also inappropriately demanded the plaintiffs identify the class members at the certification stage. The panel found the documents provided by the plaintiff, though incomplete, were sufficient, reliable, and a feasible mechanism to ascertain class members at the certification stage. Here, the records included large samples of driver rosters, gate logs, and pay statements, so much so that the gaps did not challenge the conclusion that the plaintiffs, a putative class of full-time drivers, could be reasonably ascertained. The panel held the district court improperly focused on the gaps in the evidence, despite that those gaps were created by the defendant-employer's own recordkeeping (records the employer was *not* legally required to keep). Relying on, and citing, Supreme Court precedent such as *Anderson v. Mt. Clemens* and *Tyson Foods, Inc. v. Bouaphakeo*, the Third Circuit also ruled that a failure to keep records should not act as a roadblock to certification. This holding appears to create a new route to class ascertainability in the Third Circuit.

Wage calculation claim can't advance as class action. A call center employee for a national bank was properly denied her motion to certify a class with regard to her California Labor Code claim that her employer miscalculated overtime wages, held the Ninth Circuit. While the employee satisfied the Rule 23 requirements of commonality and typicality, she failed to establish predominance because the bank's challenged policies either did not apply or did not cause an injury to many employees. While the employer's method of calculating overtime (using total hours worked in the divisor of its overtime formula) was improper, its calculations were not evidence of harm in every instance to all employees since not all class members worked overtime or received a bonus in the same period and therefore were not exposed to the improper overtime formula.

Bank to pay $35M overtime settlement. A federal court in New Jersey granted final approval of a $35 million settlement to resolve the class and collective overtime claims of nonexempt bank tellers. The tellers alleged that in order to make quarterly quotas for new accounts, they had to work off the clock to seek out potential new customers and to work during lunch hours and after regular hours without overtime compensation. The claimants will receive a

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pro rata amount of the residual net settlement amount from the sum of the total number of qualifying workweeks for all claimants. The claimants' individual shares will be based on the number of qualifying workweeks they worked according to the bank's payroll and personnel records.

Retail managers secure $31.5M settlement. A retailer agreed to pay $31.5 million to 1,911 former and current assistant store managers to resolve claims that they were misclassified as exempt and denied overtime pay. The proposed settlement would end a consolidated wage and hour class and collective action that had gone on for more than six years. The average recovery amount would be about $10,207 per plaintiff after awards for administration, attorneys' fees and costs, and service payments. Attorneys' fees and costs and disbursements would be up to $10.49 million and service payments to class representatives and the FLSA opt-in plaintiffs who appeared for deposition would total $108,000.

Bonus plan settlement gets preliminary approval. A uniform company will pay up to $21 million to resolve common-law and statutory claims that it refused to pay bonuses owed to managerial employees under their standard bonus plan. The class action suit, a consolidation of two separate actions, involved some 4,500 managers, and three subclasses under Illinois, North Carolina, and South Carolina law, certified for settlement purposes. A federal court granted preliminary approval to the settlement, which will award class members an average individual payout of $3,243 (and as much as $71,945).

Truck drivers' wage suit ends for $16.5M. A federal court granted final approval of a settlement agreement resolving a class and collective action brought by a group of truck drivers who contended they were shorted on compensation for "sleeper berth" time, among other claims. The $16.5 million settlement resolved four years of litigation on behalf of 16,000 truck drivers alleging the transportation company violated the FLSA and state minimum wage laws. The settlement will be split between 16,000 drivers. Class counsel will receive $5.5 million in fees and $600,000 in costs.

Discrimination

SCOTUS: Title VII protects gay and transgender employees. In a highly anticipated opinion — and one of the most significant employment discrimination decisions in decades — the U.S. Supreme Court ruled in a 6-3 decision that Title VII's "because of sex" discrimination protections extend to gay and transgender employees, and an employer may not discriminate against or discharge an individual based solely on sexual orientation or gender identity. Many U.S. employers voluntarily provide protections to their LGBTQ employees as a matter of policy; however, the Court's ruling clears the way for employees to bring a potential class-wide cause of action when they contend the company's voluntary protections fall short. Employers in states or localities where such protections already are codified into law now may now face potential federal claims and class action vulnerability under Title VII.

National statistics didn't support hiring policy challenge. A divided Second Circuit panel affirmed the dismissal of a putative class action brought by two African-American job applicants against a global IT company that withdrew their job offers upon learning of their felony convictions. In arguing that the company's policy not to hire persons with certain criminal convictions had a disparate impact on black applicants, the plaintiffs relied on national statistics showing that African Americans are more likely to be arrested and incarcerated than whites. However, "the fact that such a disparity exists among the general population does not automatically mean that it exists among the pool of applicants qualified for the jobs in question — what is true of the whole is not necessarily true of its parts," the court majority said.

Pay data drama unfolds. The states of California, Maryland, and Minnesota, along with their respective fair employment practices agencies (FEPAs), filed suit against the Equal Employment Opportunity Commission (EEOC) in late October 2020 seeking the pay data provided to the EEOC by private employers (with 100 or more employees) in their annual Employer Information Report (EEO-1) filings. (In November 2020, the states of Illinois, Nevada, and New Jersey joined the suit, brought under the Administrative Procedures Act.)

The EEOC had a long-standing practice of sharing with state FEPAs the EEO data from the employers in their respective states. However, in early 2020, the EEOC adopted a policy whereby it would only turn over EEO-1 data on specific employers, and only when an investigation or charge against that employer was pending at the state agency.

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The skirmish over the sharing of EEO-1 data follows a policy shift at the EEOC over the scope of data it would seek from employers. In 2016, the EEOC expanded employer reporting requirements to include summary W-2 earnings and "hours worked" data for employees by job category, broken down by sex, race, and ethnicity. The EEOC only collected the data for two years, 2017 and 2018. The Trump administration changed course, though, and the Office of Management and Budget stayed the new data collection requirements. However, a federal district court vacated the stay and reinstated the new data collection. The EEOC relented but said it would collect the pay data for the three-year collection period and would not issue a new pay data information request thereafter. It was at this point the EEOC balked at providing the EEO-1 data to the state agencies and altered its data-sharing practices, citing confidentiality concerns.

The EEOC has not yet responded to the states' complaint. Meanwhile, another state, California, has implemented new legislation that aims to continue the pay data collection from employers. Specifically, beginning in March 2021, California employers will need to annually report similar EEO, earnings, and hours worked data on (at least) California employees to the state of California. California has indicated it will give its state agencies access to the data for enforcement purposes.

Of course, under the Biden administration, the EEOC is expected to reverse course once again. Pay equity was a key priority of the Obama administration, and Joe Biden made "pay transparency" as a means of closing the pay gap a component of his campaign platform. Expect a reinstatement of the pay data collection, and less resistance to sharing that data with state agencies.

Class certification of ADA claim improper. A federal district court abused its discretion in ordering class certification of an Americans with Disabilities Act (ADA) action brought by former railroad employees challenging the employer's fitness-for-duty program as an unlawful pattern or practice of discrimination used to systematically

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Jackson Lewis: A pay equity "one-stop shop"

K. JOY CHIN

STEPHANIE E. LEWIS

With a team of experienced attorneys and statisticians, the Jackson Lewis Pay Equity Group provides support and defense in the broad range of pay equity issues employers face.

Our "one-stop shop" approach allows clients to address all aspects of pay equity with just one firm. In addition to defending class action claims of systemic pay discrimination in federal and state courts, we provide employers with a variety of services, including:

- Counsel on the design, implementation and administration of pay systems to ensure compliance with federal and state fair pay laws, regulations and pay data reporting requirements;
- Privileged statistical analyses — by our in-house, master's and Ph.D. statisticians — to proactively identify areas of risk, and in response to internal complaints, agency enforcement actions and litigation;
- Defense against allegations of systemic pay discrimination in EEOC investigations and OFCCP audits; and
- For publicly traded companies, counsel in the challenging area of activist shareholders demanding "pay equality" and announcements to the public.

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remove individuals with disabilities. Reversing, the U.S. Court of Appeals for the Eighth Circuit held that individualized inquiries could not be addressed in a manner consistent with Rule 23. The determination of whether the policy was unlawfully discriminatory under the ADA could not be made without consideration of whether it was job-related and consistent with business necessity as to each of the more than 650 jobs at issue, as well as consideration of each employee's individual circumstances, including their supervisor's reactions to any functional job restrictions placed upon them, the appellate court said.

Pregnancy discrimination suit ends for $14M. A federal court granted final approval of a settlement resolving a lengthy pregnancy discrimination class action brought by employees of a large retailer. The employer agreed to pay $14 million to resolve employees' claims that the company denied accommodations, such as light-duty, to workers with pregnancy-related medical restrictions between 2013-2014. The claimants will receive $2,221.65, on average, and the deal grants attorneys' fees to class counsel in the amount of $4.6 million, which represents one-third of the common fund.

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

Other class action developments

Fully vested retirees lacked standing to sue fiduciaries. In a divided opinion, the U.S. Supreme Court ruled that retirees in a defined benefit plan who had received all of their vested monthly payments lacked standing to sue plan fiduciaries for fiduciary breach as they lacked a "concrete stake" in the lawsuit. Affirming a ruling from the Eighth Circuit, the Court majority, in an opinion written by Justice Brett Kavanaugh, stressed that the retirees would continue to receive the same amount of monthly benefits, regardless of the outcome of the litigation. A lengthy dissent by Justice Sonia Sotomayor (joined by Justices Ruth Bader Ginsburg, Stephen Breyer, and Elena Kagan) charged that the Court's conclusion that pensioners may not bring a federal lawsuit to stop or cure retirement plan mismanagement until their pensions are on the verge of default conflicts with common sense and long-standing precedent.

Individual settlement didn't affect PAGA standing. In an appeal of a decision dismissing an aggrieved employee's PAGA claim after the parties settled the employee's individual claims, the California Supreme Court clarified that settlement of those claims did not affect the employee's PAGA standing. The employer's argument that the employee no longer had representative standing because his injury had been redressed failed because it was "at odds with the language of the statute, the statutory purpose supporting PAGA claims, and the overall statutory scheme," according to the state high court.

Antitrust challenge to "no poach" pact survives. A former fast-food restaurant employee may proceed with her consolidated putative class action asserting that her employer violated the Sherman Act by agreeing with franchisees not to hire each other's current or former employees for a period of six months. Denying the company's motion to dismiss, a federal district court ruled the employee plausibly alleged Article III standing by asserting the no-hire agreement depressed her wages; and established antitrust standing by asserting "the injury of depressed prices (wages) to sellers (employees) due to anticompetitive behavior of buyers (employers)." Nor was dismissal warranted on statute-of-limitations grounds; her claim accrued the last time she received a depressed wage, not when she initially became aware of the no-hire agreements.

Rideshare company faces class action for paid sick leave. An app-based driver filed a class action suit against a rideshare company alleging that it systematically failed to provide Washington, D.C. drivers with paid sick leave under the District's Accrued Sick and Safe Leave Act (ASSLA), invoking the COVID-19 pandemic to characterize paid sick leave as critical to public health and the current pandemic. Without paid sick leave, the lawsuit asserts, the company "forces its drivers into a Hobbesian choice: risk their lives (and the lives of their passengers) or risk their livelihoods" and that ASSLA was enacted so workers "would not have to make such a choice." ■

The Biden administration: What employers can expect

Forecasting what's next for class and collective action litigation in the labor and employment context requires a look at the post-election political landscape. The election of Joe Biden as president and the switch from a Republican to a Democratic administration is a large piece of the puzzle.

Still stymied by the Senate?

President Biden has an ambitious legislative agenda. The new administration will seek to revive many Obama-era priorities that were weakened — if not reversed outright — by the Trump administration. However, restoring and building on those achievements may prove difficult. A 50-50 Senate split, with Vice President Kamala Harris poised to break tie votes, may not be enough to pass the kind of sweeping legislation Biden and his more liberal Democratic colleagues have in mind. The prospects for a $15 federal minimum wage, legislative protections for gig workers, a federal pay equity bill, or restrictions on mandatory arbitration agreements — all policy goals on which Biden campaigned — are uncertain, especially with the filibuster at the Republicans' disposal.

Federal agencies

There is much that President Biden can accomplish in the near-term through federal agency appointments, enforcement, rulemaking and agency guidance. While the new administration has numerous paths to achieving its policy ends, the president will be hampered initially in his ability to shape the federal agencies through his own appointees.

Department of Labor. One immediate change at the Biden DOL will be a shift from voluntary compliance to increased enforcement. The agency likely will hire more investigators. (During the Obama era, OSHA had approximately 1,000 investigators; currently there are about 760.) The DOL also may place greater emphasis on pursuing liquidated damages for FLSA violations, which had not been an agency priority during the Trump administration.

On his first day in office, President Biden issued an executive order freezing any Trump-era regulations that had not yet gone into effect — including the DOL's independent contractor rule, formally published in the waning days of the previous administration, and scheduled to take effect March 8, 2021. The regulation, first introduced as a proposed rule last fall, makes it easier for businesses to classify an individual as an "independent contractor" under the FLSA. In fact, the Biden administration may lean in the opposite direction, similar to what California did with the enactment of A.B. 5, making it difficult to retain independent contractors. As such, businesses that had expected they might be able to retain the services of independent contractors without fear of misclassification claims can anticipate heightened scrutiny when doing so, and the prospect of a continued wave of class action wage suits by independent contractors contending they are, in fact, statutory employees.

Likewise, the Biden action freezes a recently published regulation allowing restaurants to expand the use of tip pools and eliminating the "80/20" rule, "sub-regulatory" guidance that restricted the amount of time tipped workers could engage in nontipped duties.

In addition, the Biden DOL may seek to revise the white-collar overtime exemptions, going further than the Trump DOL in expanding overtime protections to a larger number of workers. With wage and hour statutes and regulations the primary driver of class action lawsuits in the employment realm, it's likely these regulatory actions will spur an uptick in such litigation.

But serious rulemaking does not happen overnight. The DOL will need to issue a proposed rule and go through the administrative process, which can take many months or in some instances, years. In the meantime, the Biden administration probably will choose not to defend the Trump-era regulations in the face of inevitable legal challenges. Alternatively, with both the House and Senate under Democratic control, Congress may opt to quash these regulations more quickly, invalidating them legislatively through the Congressional Review Act.

Equal Employment Opportunity Commission. The EEOC currently has a 3-2 Republican majority. One slot currently held by a Democrat becomes vacant in July 2021. Therefore, absent an early Republican departure, Republicans will hold a majority on the EEOC until mid-2022. Additionally, the term of the current general counsel, a Trump appointee, runs through 2023. Immediately upon taking office, President Biden named Democrat Charlotte Burrows as the EEOC chair and Democrat Jocelyn Samuels

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as the vice chair. But even with these appointments, it will not be easy for Democrats to advance the president's agenda while in the minority. Moreover, the EEOC's current Strategic Enforcement Plan, drafted under the Trump administration, does not expire until 2022. Consequently, any major changes at the EEOC will not be immediate.

We can expect a more aggressive posture once the political stars align at the EEOC. A Biden EEOC is expected to turn its attention to pay equity and seek to reinstate EEO-1 pay reporting (and with more reporting may come more lawsuits). It's possible the EEOC will use pay reporting data to support systemic discrimination suits. A change to Democratic control also may prompt a renewed focus on systemic litigation, which the EEOC had de-prioritized in recent years.

Executive action: Biden's best bet?

Lacking legislative leverage or the opportunity to force immediate change through the regulatory agencies, President Biden could continue to use executive action to advance some of his workplace policy goals, affecting the considerable share of U.S. workers who are employed by the federal government or federal government contractors. Through executive orders, he may reinstate the Obama administration's Fair Pay and Safe Workplaces executive order (or "blacklisting" rule) for federal contractors, rescind President Trump's executive actions limiting civil service protections and collective bargaining rights for federal employees, and recalibrate the balance between LGBTQ protections and religious rights. The likely consequence will be a corresponding rise in class litigation among these segments of the U.S. workforce. ■

Judicial counterbalance

Even with legislative wins and aggressive agency activity, a 6-3 conservative majority at the U.S. Supreme Court would be an important counterbalance to the new administration. With the confirmation last fall of Amy Coney Barrett to serve as Associate Justice to replace Justice Ruth Bader Ginsburg, the Court's conservative wing will have an immediate and enduring impact. Time will tell how significant an impact the conservative majority will have in the class and collective action context.

In its current term, the Court has been asked to take up issues of considerable importance in this regard, such as whether a federal district court has jurisdiction over non-resident absent class members in a Rule 23 class action, and the scope of the FAA's transportation worker exemption (a high court decision would affect a recent wave of class action suits by independent drivers, determining whether they could be compelled into more manageable, individual arbitration). As of press time, the Court has not decided whether to grant petitions for *certiorari* in these cases.

However, an immediate impact will be felt at the district and circuit court levels. Not only has President Trump appointed one-third of the Supreme Court, a significant number of his lower court appointees have been approved by the Senate. Over the course of his term, Trump appointed more than 230 judges — over a quarter of all federal jurists — a prodigious amount for a one-term president. Most of these newly appointed judges are relatively young and, with lifetime appointments, could be on the bench for years to come. Thus, these appointments cement a conservative judiciary in the federal courts for the foreseeable future.

What **it means for employers.** Employers can anticipate a more favorable judicial climate for the foreseeable future. Generally, conservative judges are more inclined to award summary judgment than liberal judges, and to scrutinize motions for class certification more carefully. Therefore, we expect early dismissal of complaints and denial of class certification may happen with greater frequency. Moreover, the new class of conservative judges may interpret ambiguous legal standards in a more business-friendly fashion, such as the meaning of "severe or pervasive" under Title VII, and "similarly situated" under the FLSA's collective action provision. As a result, plaintiffs' attorneys increasingly will seek to litigate their cases — both single-plaintiff and class action suits — in friendlier state courts.

On the JL docket

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

February 3, 2021	What You Need to Know About the Virtual Workplace and Transitioning Back to the Non-Virtual Office
February 10, 2021	Unconscious Bias and Social Movements: How Do Employers Respond?
February 17, 2021	COVID-19 and Leave Management under the ADA, FMLA, FFCRA and North and South Carolina Law
February 24, 2021	Immigration Outlook 2021 and Beyond: What to Expect under the Biden Administration
March 3, 2021	Labor Law in the Carolinas Under a Biden Administration

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