# The Mid-Year Outlook for Employers

2019

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# Introduction

**The first six months of 2019 have proven to be busy, challenging professionals in the labor and employment communities to keep up with a number of newly enacted laws and regulations. In the 2019: Mid-Year Outlook for Employers, Jackson Lewis attorneys provide a snapshot of activity from the first half of the year as well as a preview of what may lie ahead for employers in the U.S. and abroad.**

### Highlights:

OFCCP will publish CSALs on its website and provide notice of the CSAL only to those on its email list.

Federal legislation affecting retirement plans is moving through the U.S. House of Representatives and Senate.

Worksite investigations, including I-9 audits, are on the rise. The SSA is also stepping up enforcement efforts sending out No-Match Letters — notifications to employers that an employee's W-2 form does not match SSA records.

States across the nation are strengthening their legislation to keep in line with California's CCPA and the EU's GDPR including Illinois, Maine, New York, Nevada, Oregon, Texas and Washington.

Connecticut, Illinois, Maryland and New Jersey have joined the growing number of state and local jurisdictions enacting $15-an-hour minimum wage laws.

The DOL issued a new proposed rule regarding the minimum salary requirements for FLSA white collar overtime exemptions and proposed updates to the agency's joint-employer and regular rate regulations.

The NLRB ruled that unions no longer can require objectors to contribute toward union lobbying costs.

"Protecting the Right to Organize Act of 2019" has been filed in the Senate and House of Representatives, proposing to make pro-union changes to the NLRA.

The NLRB has narrowed the circumstances under which a complaint made by an individual employee is considered concerted activity.

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## Courtesy Announcement Scheduling List (No Letters)

In March 2019, the Office of Federal Contract Compliance Programs (OFCCP) for the first time published a Courtesy Announcement Scheduling List (CSAL) notifying federal contractors of upcoming compliance reviews without sending letters directly to those federal contractors selected. From now on, at least under the current administration, OFCCP will publish CSALs on its website and provide notice of the CSAL only to those on its email list. Federal contractors should subscribe to OFCCP's emails to receive timely notice of new CSALs.

**OFCCP may issue CSALs twice a year: in the late summer/early fall and late winter. OFCCP issued a CSAL in September 2018, followed by the current CSAL in March 2019. Be on the lookout for another CSAL in the late summer or early fall of 2019.**

The March 2019 CSAL includes 3,500 audits — a significant uptick in the number of audits conducted during the latter years of the prior administration. OFCCP has commenced mailing scheduling letters for audits on the current CSAL, even as it works through the list of audits in the September 2018 CSAL. OFCCP District Offices will continue to mail scheduling letters based on district office workloads. At the current rate, OFCCP scheduling letters from the current CSAL may be mailed late into 2019 and possibly into 2020. However, when OFCCP asks federal contractors for information about the top official for the location selected for audit or provides information regarding compliance training, this may be an indication the scheduling letter will soon be on its way to you.

## Focused Reviews, Compliance Checks — What's Old Is New Again

As explained in OFCCP's selection methodology document, included in the CSAL are 500 Section 503 Focused Reviews, 500 Compliance Checks, and 83 Corporate Management Compliance Evaluations (CMCEs), also known as "glass-ceiling" audits. OFCCP also will be conducting Focused Reviews under the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA). While OFCCP has long had the authority to conduct them, it has not initiated Focused Reviews or Compliance Checks for many years.

***Focused Reviews.*** Focused Reviews target federal contractors' affirmative action efforts for individuals with disabilities and protected veterans. Focused Reviews include an onsite visit from OFCCP to interview managers and employees, review documents and tour the facility. OFCCP has stated that it will not schedule any onsite visits until September 2019.

OFCCP has published a copy of the current Focused Review scheduling letter, which includes a list of documents to be produced with the Section 503 Affirmative Action Plan (AAP). In particular, OFCCP will pay closer attention to federal contractors' accommodation policies and procedures than it has in previous audits. It will also be interested in contractor documentation of the outreach effectiveness assessment and accommodation log.

# Affirmative Action

To advance its renewed interest in Focused Reviews, OFCCP sought public comment on proposed scheduling letters that would require contractors to submit a significant number of additional documents and data to OFCCP at the outset of the review.

***Compliance Checks.*** A Compliance Check "is a determination of whether the contractor has maintained records consistent with Executive Order 11246, Section 503 of the Rehabilitation Act (Section 503) and the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA)." It is (or should be) a recordkeeping review.

The current Compliance Check scheduling letter requires contractors to produce:

1. AAP results for the preceding year;
2. Examples of job advertisements, including listings with state employment services; and
3. Examples of accommodations made for persons with disabilities.

It remains to be seen whether OFCCP will limit itself to checking that federal contractors maintain the records or whether it will delve deeper into compliance issues.

## EEO-1 Component 2 Pay Data Reports — Alive Again

A federal district court has finally revived the obligation for most employers with at least 100 employees to report pay and hours worked data to the Equal Employment Opportunity Commission (EEOC) by September 30, 2019. The EEOC has dubbed this aspect of EEO-1 reporting "Component 2." Covered employers must provide data on pay and hours worked in separate reports for 2017 and 2018 for the same workforce covered in their 2017 and 2018 Component 1 (race and gender) EEO-1 reports.

Notably, the EEOC did not until recently provide updated guidance for Component 2. Updated instructions, sample forms and FAQ answers are now available here under the "More Info" tab. EEOC anticipates opening the portal for filing Component 2 data in mid-July.

Based on information the EEOC provided in 2016 (before the current administration stayed the pay data reporting requirement), employers will complete two forms. The first form will report the number of employees by race and gender within each EEO category and divided into 12 pay ranges for each category. Employee headcounts will be slotted into the pay ranges using 2017 and 2018 W-2 Box 1 pay data. This form will look much like the current Component 1 form with pay ranges added.

The second form will report aggregate hours worked for all employees in each of the race/gender and pay data cells. For example, if filers report five Hispanic females in the second pay range in EEO Code 2 Professionals, they will aggregate the hours worked for all five of the Hispanic females.

For non-exempt employees, filers will aggregate only hours of work (or hours on call), excluding paid time off and other non-work hours for which an employee was paid. For exempt employees, filers will default to 40 (full-time) and 20 (part-time) hours worked per week multiplied by the number of weeks in the year the employee was "employed." Thus, filers will not need to divide work and non-work hours for exempt employees.

## Disability Discrimination Claims Related to Medical Marijuana Use

A New Jersey appellate court has held that a disabled employee may sue his former employer under the New Jersey Law Against Discrimination (LAD) for alleged discrimination based on the employee's use of medical marijuana. *Wild v. Carriage Funeral Holdings Inc., et al.,* No. A-3072-17T3 (N.J. App. Div. Mar. 27, 2019). In *Wild*, plaintiff alleged that he was unlawfully discriminated against because he had a disability (cancer) and was legally treating that disability with medical marijuana as permitted under New Jersey state law. Despite the employer's argument that marijuana is illegal under federal law, the appeals court determined that the plaintiff sufficiently stated a claim for disability discrimination. The takeaway for employers is that even in states where the medical marijuana law offers no employment protections, disabled employees and applicants may fashion their legal claims as ordinary disability discrimination claims.

## Pre-Employment Marijuana Testing Banned in 2020

Laws passed in New York City and Nevada will make it illegal for employers to conduct pre-employment drug testing for marijuana in 2020. Nevada's ban will take effect on January 1, 2020, and New York City's ban will take effect on May 10, 2020.

## Recreational Marijuana and Potential Drug Testing Issues for Illinois Employers

Recreational marijuana will be legalized in Illinois. Beginning on January 1, 2020, marijuana will be considered a "lawful product" for purposes of the Illinois Right to Privacy Act, and employers will be prohibited from discriminating against applicants and employees who use marijuana while off-duty and off-premises. This fact will significantly affect employers who conduct drug testing. Drug testing for marijuana may no long be permitted in Illinois unless an employer can demonstrate that the employee was impaired at work or during working time.

## Oklahoma's Unity Bill

Oklahoma's Medical Marijuana and Patient Protection Act (Unity Bill) will take effect on August 28, 2019. This law clarifies certain regulatory aspects of the state's existing medical marijuana law. The new law also includes provisions that will help Oklahoma employers by allowing them to take adverse employment action when:

1. The applicant or employee does not possess a valid medical marijuana license;
2. The licensee possesses, consumes or is under the influence of medical marijuana or medical marijuana product while at the place of employment or during the fulfillment of employment obligations [the law does not define "under the influence"]; or
3. The position involves safety-sensitive job duties. "Safety sensitive" is defined to mean any job that includes tasks or duties the employer reasonably believes could affect the safety and health of the employee performing the task.

# Drugs and Alcohol

## FMCSA Clearinghouse Rules

The U.S. Department of Transportation's (DOT) Federal Motor Carrier Safety Administration's (FMCSA) Clearinghouse will become operational on January 6, 2020. The FMCSA Clearinghouse is an electronic database that will contain information about commercial motor vehicle drivers' drug and alcohol program violations. By fall 2019, to ensure compliance, FMCSA-regulated employers should register with the Clearinghouse and become familiar with its new website. Additionally, FMCSA-regulated employers must add language to their DOT drug and alcohol testing policies to notify drivers and driver-applicants about the types of information that will be reported to the Clearinghouse. Employers should be mindful that the law imposes additional query, reporting and enforcement responsibilities on them.

# Employment Litigation

## Early Resolution Procedures

The U.S. Supreme Court may soon decide whether Title VII of the Civil Rights Act of 1964 prohibits discrimination based on sexual orientation and gender identity. In April, the Court granted *certiorari* in *Bostock v. Clayton County, Georgia,* No. 17-1618, *Altitude Express, Inc. v. Zarda,* No. 17-1623, and *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission,* No. 18-107. The cases came before the Court after circuit courts reached different conclusions on whether Title VII prohibits sexual orientation-based discrimination. The Second Circuit in *Zarda* ruled that it does; the Eleventh Circuit in *Bostock* reached the opposite conclusion. The Sixth Circuit ruled in *R.G. & G.R. Harris* that Title VII outlaws discrimination based on "gender identity," including "transgender status."

Meanwhile, on June 17, 2019 the Court declined to grant *certiorari* in *Klein v. Oregon Bureau of Labor and Industries,* 18-547. In this case, the Oregon Court of Appeals found the owners of a bakery violated Oregon's anti-discrimination law by refusing, based on religious objections, to bake a wedding cake for a gay couple. The bakers petitioned the Supreme Court, arguing the state decision violated their First Amendment rights. Denying the bakers' petition and remanding the case to the state court, the Supreme Court instructed the state court to apply *Masterpiece Cakeshop, Ltd., et al. v. Colorado Civil Rights Commission et al.,* No. 16-111, in which the Supreme Court reversed a Colorado state court decision against a baker who refused to bake a cake for a gay couple because of religious objections.

## New Jersey Prohibits Enforcement of Non-Disclosure Provisions in Settlement Agreements, Other Employment Contracts

On March 18, 2019, New Jersey Governor Phil Murphy signed into law a sweeping amendment to the New Jersey Law Against Discrimination (LAD) to bar enforcement of non-disclosure provisions in settlement agreements and other employment contracts and to prohibit the waiver of substantive and procedural rights under the LAD. The amendment applies to all contracts and agreements entered into, renewed, modified or amended on or after March 18, 2019.

The amendment was introduced at the height of the #MeToo movement in response to non-disclosure provisions in settlement agreements between certain well-known media personalities and their alleged victims.

The amendment to the LAD prohibits enforcement of agreements containing provisions that:

1. "waive [] any substantive or procedural right or remedy relating to a claim of discrimination, retaliation, or harassment." N.J.S.A. § 10:5-12.7(a);
2. serve to "prospectively waive a right or remedy under the LAD or any other statute or case law." N.J.S.A. § 10:5-12.7(b); and
3. "have the purpose or effect of concealing the details relating to a claim of discrimination, retaliation, or harassment." N.J.S.A. § 10:5-12.8(a).

The amendment also requires a notice in every settlement agreement resolving a LAD discrimination, retaliation or harassment claim by an employee against an employer in the form of the following disclaimer: “although the parties may have agreed to keep the settlement and underlying facts confidential, such a provision in an agreement is unenforceable against the employer if the employee publicly reveals sufficient details of the claim so that the employer is reasonably identifiable.” N.J.S.A. § 10:5-12.8(b).

Agreements containing the prohibited provisions or that fail to include the required notice are deemed against public policy and unenforceable. If an employer seeks to enforce a provision prohibited by the new law, aggrieved employees may file suit in New Jersey state court to recover common law tort remedies in addition to reasonable attorneys’ fees and costs associated with the filing.

The practical effect of the amendment on employers is that it is expected to make it harder to resolve employment disputes. In the past, non-disclosure provisions in settlement agreements have served as a partial incentive for settlement. Moreover, legal challenges are expected from employers because the amendment’s prohibition on jury trial waiver and arbitration provisions in employment agreements appears to conflict with the Federal Arbitration Act, which preempts state law prohibiting the use of arbitration agreements. See *AT&T Mobility LLC v. Concepcion,* 563 U.S. 333, 341 (2011) (“When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA”).

Given the amendment’s broad language and its effect on all types of employment agreements, it will be important for employers to seek guidance in drafting settlement agreements when resolving LAD claims with current or former employees and severance agreements when LAD claims have been asserted. Finally, guidance should be sought when reviewing employment contracts and other agreements containing jury trial waiver and arbitration provisions that may conflict with the new law.

## Supreme Court Strikes Down Medicare Reimbursement Cuts

The U.S. Supreme Court in *Azar v. Allina Health Servs.,* 139 S. Ct. 1804 (2019), struck down a U.S. Department of Health and Human Services (HHS) reimbursement methodology that would have cut several billion dollars of Medicare payments to hospitals that serve low-income patients. The Court determined that HHS failed to publish its reimbursement methodology for public notice and comment, as required by the authorizing statute. Instead, HHS simply implemented its reimbursement methodology after posting it on the HHS website. HHS has not indicated whether it will seek to adopt the same reimbursement methodology through the formal rulemaking process.

## FCA Statute of Limitations Extended for Relators

The U.S. Supreme Court, in *Cochise Consultancy, Inc. v. United States ex rel. Hunt,* 139 S. Ct. 1507 (2019), held that, in some circumstances, a private party known as a "relator" under the False Claims Act (FCA) can have up to 10 years from the date of an alleged violation to file an FCA claim.

***Cochise Consultancy, Inc. v. United States ex rel. Hunt,* 139 S. Ct. 1507 (2019)**

**This ruling effectively extends in some circuits the FCA limitations period – and, by extension, the potential exposure period — for relator claims.**

The circuit courts were previously split on this issue, with some circuits holding that a relator has 10 years within which to file an FCA claim and others holding that a relator has just six years.

An FCA claim must be brought the later of:

1. Six years of the date of the alleged violation; or
2. Three years of the date when facts material to the action are "known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances," whichever date is later.

31 U.S.C. § 3731(b).

In all cases, an FCA claim cannot be brought more than 10 years after the date of the alleged violation.

The defendants in *Hunt* argued that the relator filed the FCA case more than six years after the alleged conduct, making it time-barred under the first prong of the limitations statute. They further argued that the relator could not avail himself of the longer, second prong of the limitations statute because it applies only when the government intervenes in a case, something that the government declined to do in *Hunt*. The Supreme Court rejected these arguments, ruling that the second prong is not limited to cases in which the government intervenes and thus the relator's case could proceed (having been filed both within three years of when the government learned about the alleged FCA violations and within 10 years of those alleged violations).

## Value-Based Payment Models Drive Possible Stark Reforms

The Centers for Medicare and Medicaid Services (CMS) is working to update regulations under the federal physician self-referral law. The regulations are expected to be issued later this year and will represent "the most significant changes to the Stark law since its inception," according to CMS Administrator Seema Verma. Verma noted that the need to update the regulations is a result of the changing healthcare payment system from a fee-for-service system to a value-based payment system. Some changes to the regulations will clarify the regulatory definitions of volume or value, commercial reasonableness and fair market value. CMS also said the update will create more flexibility around technical noncompliance, such as missing signatures, incorrect dates and similar issues.

## CMS Announces Two Alternative Payment Program Models

In April, CMS announced that it is proposing the Primary Care First payment model, consisting of two alternative five-year payment programs in Medicare that focus on providing advanced primary care and the primary care physician relationship. One payment program will serve a general population, while the other will serve a high-need population.

These payment programs are designed to reward value and quality and to empower primary care providers to spend more time with patients and reduce administrative burdens on primary care providers.

Participation in Primary Care First is voluntary and will be offered in 26 geographic regions starting in 2020. (The regions include, among others, the following states: California, Colorado, Florida, Massachusetts, Michigan, New Jersey, Rhode Island, and Virginia, as well as regions in New York — around Buffalo and the North Hudson-Capital region — and the Greater Kansas City region.)

CMS anticipates releasing a Request for Application soon and to start Primary Care First in January 2020. CMS also expects another round of Primary Care First applications in 2020 for a January 2021 start.

## CMS Issues Draft Guidance on the "Co-Location" of Services

CMS has issued draft interpretive guidance for hospitals that clarifies the "co-location" of services provided by separate healthcare entities. The draft interpretive guidance is a change from CMS's previous, more restrictive view of regional office guidance. The draft guidance provides for and would allow flexibility to permit co-location of hospitals that share space or co-locate with other hospitals or healthcare entities, with limitations, without jeopardizing a hospital's provider-based status.

According to the draft interpretive guidance, hospitals and other "healthcare entities" are allowed to share "public" spaces such as main entrances, waiting areas, bathrooms, staff lounges, elevators and main corridors through non-clinical areas, lobbies and reception areas (with separate "check-in" areas and clear signage). Sharing of staff also would be permitted as long as they are working for each entity at separate and distinct times.

The draft guidance allows hospitals to obtain services under contract or arrangement with the co-located hospital or healthcare entity, including laboratory, food services, pharmacy, maintenance, housekeeping and security, in compliance with the Medicare Conditions of Participation.

Despite the changes under the draft guidance, hospitals and other healthcare entities still are prohibited from sharing clinical space, ensuring that patient care of the two entities remain separate.

# Health and Retirement / Employee Benefits

## The SECURE Act

The House of Representatives has overwhelmingly passed the SECURE Act, the most sweeping legislation affecting retirement plans in 10 years. Similar legislation has been introduced in the Senate, and observers say there will be some agreement and final legislation passed this year that likely will address: offering annuities in defined contribution plans; extending the starting date for minimum required distributions (currently 70½); and requiring plans to allow part-time employees to participate in a 401(k) plan's employee deferral feature.

## Plan Fiduciary Litigation on the Rise

Litigation against 401(k) and 403(b) plan fiduciaries over plan investment options and fees continue to grow and, in most cases, survive early dismissal and resolution.

**Plan sponsors should consider focusing on fiduciary processes and best practices to reduce potential risk.**

Best practices include regular committee meetings and extensive documentation of committee decisions and how the committee arrives at the decisions (reasoning and substantiation).

Best practices for managing ERISA litigation risk include:

- Select committee members carefully. At least one member should have a financial background and one member should have an HR background. The objective third-party investment adviser should be part of the team and attend all committee meetings;
- The committee charter should clearly describe members' authority and delegated roles;
- The plan should have and follow a written investment policy statement;
- The committee should have no fewer than quarterly meetings;
- Committee members should review the plan documents at least annually;
- Committee members should undergo annual fiduciary training;
- The committee should go through the exercise of a formal RFP/RFI process every 3-5 years, unless issues arise in the interim warranting a shorter period of time;
- Plan sponsors must be transparent with participant fees and monitor fees for competitiveness; and
- Consider caps on company stock investments and an independent fiduciary for stock plans.

## ESG Investment Funds

There has been much discussion over including in 401(k) investment lineups those investment funds that focus on environment, social and governance (ESG). One question is how the inclusion of these funds fits within fiduciary responsibilities to maximize returns and lower fees. There is hope that the Department of Labor (DOL) will address this by providing guidance for when it is appropriate to consider the ESG feature of an investment. Sustainable Investing in Defined Contribution Plans is a wonderful guide for plan sponsors regarding ESG investing.

## Pharmacy Benefits Fees

Proposed HHS regulations, an Executive Order and other informal guidance have put a focus on the fees and rebates associated with pharmacy benefits and the plan sponsor's fiduciary duty to understand how and when fees and expenses affect participants under these benefit arrangements.

## State Action on Benefits-Related Issues

Individual states have become increasingly involved in passing or exploring benefits-related matters — such as requiring individuals to have health insurance (essentially replacing the individual mandate under the ACA that was effectively eliminated this year), addressing "Surprise Billing" of healthcare costs and considering transportation benefits. Multistate employers will have to monitor and administer a growing patchwork of requirements. The National Conference of State Legislatures has a comprehensive database of state laws and the status of each, enacted or not.

New Jersey and Vermont have adopted a state version of an individual mandate. Many states have enacted requirements related to what plans must cover that offset or negate some of the reductions in requirements provided by the Administration on a federal level, *e.g.,* contraceptive coverage and mental health parity coverage.

# Immigration

## Immigration Enforcement

The rise in immigration enforcement continues unabated — even in business immigration. Immigration and Customs Enforcement (ICE) reported that worksite investigations, including I-9 audits, surged in FY 2018 by "300 to 750 percent" over 2017.

## No-Match Letters

The Social Security Administration (SSA) is also stepping up enforcement efforts. This spring, SSA started sending out No-Match Letters — notifications to employers that an employee's W-2 form does not match SSA records. These letters also inform employers that corrections are necessary and direct employers to use the SSA's Business Services Online (BSO) database, which requires registration, to find out exactly which employees came up as "mismatched" and to respond. Receiving such a notice, without more, does not indicate that the employee intentionally provided incorrect information; it could just be a mistake. Nor should receipt of such a letter adversely affect employment. However, employers should consider appropriate follow-up in accordance with government instructions as well as statutory requirements and limitations. How to respond also will depend upon each employer's specific circumstances. Because employers must walk a narrow path in terms of follow-up, seeking advice from immigration counsel is recommended. For some general guidance, please click here.

## Should Your Company Register for E-Verify?

Given the current enforcement environment, many employers are considering whether to register for E-Verify, the federal web-based system that allows enrolled employers to confirm the eligibility of their employees to work in the United States based on the presented documentation. Whether this is the right move for your company depends on various factors, and the pros and cons should be taken into consideration.

## L Visas for Canadians Under NAFTA

Because Canadians are visa exempt, *i.e.,* they do not need visa "stamps" in their passports to enter the U.S., they have been able to apply for L visa classification at ports of entry (POEs). There was no need to either go to a consulate or file a petition with U.S. Citizenship and Immigration Services (USCIS). But, after 20 years of following that procedure, Customs and Border Protection (CBP) is refusing to adjudicate anything other than initial L petitions or applications for intermittent/commuter status Ls at the border. This means that employers who want to renew or extend L status for Canadians must apply to USCIS. This change extends the adjudication process and makes it costlier. Moreover, denials (not to mention RFEs) in the L context generally are considered much more likely to come from the USCIS than from officers at the POEs.

# Immigration

## Deferred Action for Childhood Arrivals (DACA) and Temporary Protected Status (TPS)

Unable to implement the termination of DACA because of pending litigation, the Trump Administration has three times asked the Supreme Court to take up the issue on an expedited basis. Twice the Court has refused, most recently on June 3, 2019. But on June 28, the Court finally agreed to hear and decide a case on the issue when it reconvenes next term.

The Administration's attempts to terminate Temporary Protected Status (TPS) also is being held up by litigation. At this point, the Department of Homeland Security (DHS) has agreed to extend TPS status in accordance with the various court injunctions. Meanwhile, Congress continues to attempt to take the "dreamers" and TPS beneficiaries out of limbo with legislation. On June 4, 2019, the U.S. House of Representatives passed the Dream and Promise Act, which would grant permanent residence status and a path to citizenship for dreamers as well as to beneficiaries of Temporary Protected Status (TPS) and Deferred Enforced Department (DED). Reportedly because of White House opposition, the bill is unlikely to be taken up by the Senate in its current form.

# Privacy, Data and Cybersecurity

## GDPR Celebrates One-Year Anniversary

The EU General Data Protection Regulation (GDPR) wrapped up its first year in May and is moving full steam ahead. The impact of the GDPR was felt beyond the borders of the EU as many countries adopted data protection regulations.

EU Data Protection Authorities (DPAs) saw a significant increase in the public's awareness of data privacy as they fielded over 144,000 questions and complaints regarding individual rights. This awareness further resulted in organizations reporting approximately 89,000 data breaches. DPAs have brought enforcement actions against organizations of all sizes and issued fines for violations that include failing to secure users' data, lack of consent for advertisements, failing to inform citizens that their data was being processed, unlawful video surveillance and failing to implement necessary security for data processing.

In its first year, the GDPR raised global awareness of data privacy. The second year likely will generate increased requests from individuals to access or delete data and greater demand for appropriate data security. This may challenge employers as they navigate compliance with the GDPR, as well as applicable U.S. or EU member state employment laws.

## CCPA Continues to See Updates

The California Consumer Privacy Act (CCPA) has been in constant revision since it was enacted in June 2018. Beginning in January 2019, the California Attorney General's Office conducted a CCPA rulemaking process with a six-part series of public forums, allowing all interested persons the opportunity to comment on the new law. The California Assembly subsequently approved bills intended to clarify some ambiguities in the CCPA. Following is a rundown of Assembly-approved CCPA amendment bills:

- **AB 25** – Excludes "employees" from the definition of consumer.
- **AB 846** – Expands incentives and differential treatment related to value of data.
- **AB 873** – Narrows definition of "personal information" and expands definition of "de-identified" data.
- **AB 874** – Redefines "personal information" to exclude information from government records.
- **AB 981** – Exempts from deletion personal information needed to complete insurance transactions.
- **AB 1146** – Exempts sharing between motor vehicle dealers and manufacturers.
- **AB 1355** – Narrows disclosure requirement to categories of third parties data is sold to.
- **AB 1416** – Permits use of data to prevent fraud or illegal activity.
- **AB 1564** – Decreases the minimum number of methods organizations must provide consumers to submit requests for information.

The CCPA is certain to see more changes in the upcoming months.

# Privacy, Data and Cybersecurity

## States Update their Privacy, Security and Data Breach Notification Laws

Whether considered privacy, security or data breach notification bills, states across the nation are strengthening their legislation to keep in line with California's CCPA (CCPA) and the EU's GDPR, shifting the legal landscape in this field. The following new laws will go into effect in the coming year:

- **Maine** – The Act to Protect the Privacy of Online Consumer Information, LD 946, imposes data privacy requirements on internet service providers (ISPs).
- **Nevada** – "An act relating to Internet privacy," SB 220 prohibits an operator of an internet website or online service that collects "covered information" from consumers from selling that information to a third party without prior consent.
- **Illinois** – The General Assembly voted to approve an amendment to its data breach notification law, the Personal Information Protection Act (PIPA). The amendment updates the notification requirements to the Attorney General and grants the Attorney General authority to public information regarding the breach, among other changes. Governor J.B. Pritzker is expected to sign the amendment into law.
- **Washington** – Washington state amended its data breach notification law on May 7 (HB 1071) to expand the definition of "personal information" and shorten the notification deadline, among other changes.
- **Oregon** – SB 684 updated the data breach notification law to include an expanded of definitions of "breach of security" and "personal information" and creating new obligations for vendors.
- **Texas** – HB 4390, dubbed the Texas Privacy Protection Act, started as a comprehensive consumer privacy bill; however, through multiple amendments and dilutions, it was left with essentially two things: updates to the breach notification requirements in the Texas Identity Theft Enforcement and Protection Act and the creation of the Texas Privacy Protection Advisory Council.

The New York Privacy Act (NYPA), S5642, introduced in May, is considered a more aggressive version of its California counterpart. The NYPA is still in the early stages of the legislative process.

## TCPA and its Relationship with the FCC

The U.S. Supreme Court issued its long-awaited decision in *PDR Network LLC v. Carlton,* No. 17-1705 (June 20, 2019), addressing whether the Hobbs Act requires the district court to accept the 2006 Federal Communication Commission Order, which provides the legal interpretation for the Telephone Consumer Protection Act (TCPA). "Ruling narrowly," and instead of deciding the question presented, the Supreme Court vacated the Fourth Circuit's decision and remanded for consideration two "preliminary issues."

**The Senate recently approved the Telephone Robocall Abuse Criminal Enforcement and Deterrence Act (TRACED Act), S. 151, which provides enhanced TCPA enforcement powers to the FCC. The TRACED Act moves to the House of Representatives for approval.**

This continues to be an important year for the TCPA and its relationship with the FCC.

# Unions and the National Labor Relations Board

## Protected Concerted Activity

The National Labor Relations Board (NLRB) has narrowed the circumstances under which a complaint made by an individual employee is considered concerted activity under Section 7 of the National Labor Relations Act (NLRA). *Alstate Maintenance, LLC,* 367 NLRB No. 68 (Jan. 11, 2019).

Reversing precedent, the Board said that "individual griping does not qualify as concerted activity solely because it is carried out in the presence of other employees and a supervisor and includes the use of the first-person plural pronoun."

It also set out a five-factor test for determining whether a reasonable inference exists that in making a statement at a meeting, in a group setting or with other employees present, an employee was seeking to initiate, induce or prepare for group action, which would qualify the individual activity as concerted activity.

The NLRB is expected, in future cases, to further define what is and is not protected concerted activity in an employer-friendly manner. Areas the Board may look at include where an employee acts with other employees or on their behalf as their authorized representative; where an employee who, although not expressly authorized to do so, "brings a truly group complaint to the attention of management"; and where "an employee who addresses one or more coworkers with the object of initiating, inducing, or preparing for group action."

## Independent Contractor Status

The NLRA does not cover independent contractors; therefore, independent contractors cannot unionize or file unfair labor practice charges. In *SuperShuttle DFW, Inc.,* 367 NLRB No. 75 (Jan. 25, 2019), the NLRB overruled a 2014 Board decision that had made it more difficult to prove an individual was an independent contractor. In *SuperShuttle*, the Board held that in deciding whether an individual is an independent contractor or an employee, it will return to focusing on the extent to which the arrangement between the ostensible employer and the alleged employee provided an "entrepreneurial opportunity" to the individual, a factor that was downplayed in the 2014 decision.

## Labor Board General Counsel Finds Uber Drivers to Be Independent Contractors

Applying *SuperShuttle DFW, Inc.*, discussed above, the NLRB's General Counsel (GC) — and its chief prosecutor of unfair labor practice charges — directed the Regional Director of Region 20 in an Advice Memorandum that unfair labor practice charges filed by a number of Uber X and UberBLACK drivers should be dismissed because the drivers were independent contractors. *Uber Technologies,* 13-CA-163062 (May 14, 2019). The GC found the UberX drivers had "significant entrepreneurial opportunity by virtue of their near complete control of their cars and work schedules, together with freedom to choose log-in locations and to work for competitors of Uber. On any given day, at any free moment, drivers could decide how best to serve their economic objectives: by fulfilling ride requests through the App, working for a competing ride-share service, or pursuing a different venture altogether." Regarding the UberBLACK drivers, the GC decided that they operated almost exactly like the UberX drivers.

### Union Nonmembers Cannot Be Compelled to Pay Union Lobbying Expenses

The NLRB ruled that unions no longer can require objectors to contribute toward union lobbying costs. *United Nurses & Allied Professional (Kent Hospital),* 367 NLRB No. 94 (Mar. 1, 2019). An employee challenged the lobbying expenditure as outside the scope of the union's statutorily required functions and as unrelated to collective bargaining, contract administration or grievance adjustment. The NLRB agreed. It found that lobbying expenses, at best, can serve only indirectly a union's representative functions. Political functions, such as lobbying, are "too attenuated to justify compelled support."

***United Nurses & Allied Professional (Kent Hospital)***

**This decision represents the latest setback to efforts by public and private sector unions to collect and make use of nonmembers' contributions.**

### Congressional Democrats Introduce "Protecting the Right to Organize Act of 2019"

A bill to make more-than-sweeping pro-union changes to the National Labor Relations Act — the "Protecting the Right to Organize Act of 2019" — has been filed in the Senate and House of Representatives.

Among other things, the bill would:

- Codify the definition of joint-employer contained in the NLRB's *Browning-Ferris* decision;
- Broadly define the term "employee" contained in the NLRA to drastically reduce independent contractor findings;
- Narrow the circumstances under which an employee can be considered a supervisor under the NLRA and therefore not protected by its provisions;
- Eliminate permanent replacements for strikers;
- Prohibit employer-held mandatory employee meetings about union issues;
- Require collective-bargaining to begin no later than 10 days after a request to bargain from a newly certified or recognized union;
- Require arbitration of contract disputes when 120 days has passed after the commencement of bargaining; and
- Require employers to post notices, physically and electronically, setting forth the "rights and protections afforded employees under" the NLRA.

# Unions and the National Labor Relations Board

The legislation also would give the NLRB the right to assess substantial civil penalties (on employers, directors and officers) for wrongfully terminating an employee. It will allow employees who have been discriminated against to bring civil actions seeking back pay, front pay and consequential, liquidated and punitive damages.

The 34-page bill also would reverse Supreme Court decisions making class action waivers lawful and prohibit unions from requiring public sector employees who do not want to join the union covering them to pay a "fair share" fee to the union. The legislation is expected to pass in the House of Representatives but not in the Senate. However, more significantly, support for the bill likely will be an important factor for unions trying to decide which candidate to put their weight behind in the 2020 presidential election.

## NLRB Announces Its Rulemaking Agenda for the Coming Months

The NLRB's priorities are included in the Unified Agenda of Federal Regulatory and Deregulatory Actions (Long Term Actions / Short Term Actions), a semiannual compilation of information about regulations under development by federal agencies, published in the spring and fall, detailing the most significant regulatory actions that federal agencies expect to take in the coming year.

The Board plans to engage in rulemaking in the following areas:

1. Representation case procedures that govern union elections;
2. Standards for "blocking charges" that apply when unfair labor practice charges block the processing of union election petitions;
3. Voluntary recognition rules that govern when and how employers may recognize unions without the need for an election;
4. Formation of bargaining relationships in the construction industry;
5. Standard for determining whether students employed at private colleges or universities may organize; and
6. Rules governing access to employer property.

The Board also plans to proceed with its rulemaking regarding the joint-employer standard.

The Board did not set expected rulemaking dates, although NLRB Chairman John F. Ring has previously suggested that the blocking charge, voluntary recognition and construction industry issues should be acted upon soon.

# Wage and Hour

## DOL Proposes New FLSA Overtime Rule, Regular Rate and Joint-Employer Regulations

The Department of Labor (DOL) remained very active in the first half of 2019, issuing a new proposed rule regarding the minimum salary requirements for the Fair Labor Standards Act (FLSA) "white collar" (executive, administrative and professional) overtime exemptions and proposed updates to the agency's "joint-employer" and "regular rate" regulations.

Under the proposed overtime rule, the salary level for the white collar exemptions will increase to $35,308, or $679.00 per week, nearly a 50-percent increase from the current level of $23,660 ($455 per week), but well below the salary level set under the Obama-era rule, which would have set the salary level at $47,476 ($913 per week). Under the proposed new rule, the annual compensation level for highly compensated employees also will increase from $100,000 to $147,414, which is *higher* than the level set by the Obama-era rule.

Regardless of what the final DOL rule may include, employers also must consider how the new rule interacts with corresponding exemptions under myriad state laws. Some states do not have overtime laws; others incorporate the FLSA as it stands; others incorporate the FLSA's overtime provisions, but with higher salary requirements; and still others have their own exemptions and salary levels without reference to the FLSA.

The DOL also has issued a Notice of Proposed Rulemaking (NPRM) to revise the regulations governing the calculation of the regular rate under the FLSA. The lengthy and detailed proposed regulations, released on March 28, 2019, seek to clarify the inclusion or omission from the regular rate calculation of items such as vacation, sick time and paid time off (PTO); "bona fide" meal periods; reimbursement of reasonable expenses; and "other similar payments" in FLSA Section 7(e)(2). With respect to the last item, the proposed amendments would add a number of examples to the non-exhaustive list of excludable benefits currently in the regulations to include "conveniences furnished to the employee," such as on-site treatment from specialists, including chiropractors, massage therapists, physical therapists, personal trainers, counselors or EAP programs; gym access, gym memberships, fitness classes and recreational facilities; "wellness programs" such as health screenings, vaccinations, smoking cessation support and nutrition classes; discounts on employer-provided retail goods and services; and tuition benefits.

The Regular Rate NPRM also addresses exclusion of certain types of supplemental pay that either are provided by the employer voluntarily or are required by state or local law, such as "show-up" pay, "call-back" pay, schedule change or predictability pay, and "clopening" pay (a premium provided to an employee who must work both a closing shift and the subsequent opening shift within a minimum number of rest hours between those shifts). In addition, the NPRM addresses contributions pursuant to a bona fide benefit plan, as set forth in FLSA Section 7(e)(4). The public comment period on the proposed regulation changes has closed, but no date has been announced for issuance of a final rule.

Just a few days after issuing the Regular Rate NPRM, on April 1, 2019, the DOL issued an NPRM regarding the "joint-employer" analysis under the FLSA, a regulation that has not been meaningfully updated in more than 60 years. In the NPRM, the DOL proposes to replace the "not completely disassociated" test with one that focuses on "the potential joint-employer's exercise of control over the terms and conditions of the employee's work." Citing the U.S. Supreme Court's decision in *Falk v. Brennan,* 414 U.S. 190 (1973), the NPRM frames the primary question as whether the purported joint-employer "exercises substantial control over the terms and conditions of the employee's work." Derived from *Bonnette v. California Health & Welfare Agency,* 704 F.2d 1465 (9th Cir. 1983), the DOL proposes a four-factor balancing test assessing whether the purported joint-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.

Moreover, the DOL limits the test to "actions taken with respect to the employee's terms and conditions of employment, rather than the theoretical ability" to take such actions. The DOL notes in the NPRM that four circuit courts of appeal have adopted tests that are similar to the *Bonnette* test, while the remaining circuit courts apply different tests, yet "each of them applies at least one factor that resembles one of the Department's proposed factors derived from the *Bonnette* test."

The public comment period on this NPRM has closed and employers await a final rule.

## California's "ABC" Test for Independent Contractor Analysis to Be Applied Retroactively, Ninth Circuit Holds

Noting California's "basic [] legal tradition" that "judicial decisions are given retroactive effect," the U.S. Court of Appeals for the Ninth Circuit held that the state's recently adopted "ABC" test, used in the employee-versus-independent contractor analysis in cases involving California's wage orders, must be applied retroactively. *Vazquez v. Jan-Pro Franchising Int'l, Inc.,* 2019 U.S. App. LEXIS 13237 (9th Cir. May 2, 2019). In so holding, the Court reversed the grant of summary judgment to an international janitorial franchising company in a class action lawsuit brought by several franchisees claiming they are, in fact, employees of the franchising company.

Almost exactly a year earlier, the California Supreme Court, in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles County,* 416 P.3d 1 (Cal. 2018), broadened the definition of "employee" in the context of the state's Industrial Work Commission (IWC) wage orders when undertaking the employee-versus-independent contractor analysis. The California court adopted what commonly is known as the ABC test. Under that standard, to establish that an individual is in fact an independent contractor, an employer must prove that:

- It does not control how the individual performs the work;
- The individual provides a service that is not part of the employer's usual business; and
- The individual customarily engages in an established business, trade or profession that is independent of the employer's business.

The standard in *Dynamex* presumes that workers are employees subject to the requirements of the IWC wage orders and clearly places the burden on the employer to prove all three elements of the ABC test to establish independent contractor status.

### List of States Enacting $15 Minimum Wage Continues to Grow

During the first six months of 2019, Connecticut, Illinois, Maryland and New Jersey have joined the growing number of state and local jurisdictions enacting $15-an-hour minimum wage laws. In each of these states, the applicable minimum wage will increase in stages over the next few years.

In 2018, Michigan became the third state, after New York and California, to enact a $15-an-hour minimum wage law. A significant number of local jurisdictions, most of which are in California, likewise have enacted $15-an-hour minimum wage laws over the past couple of years. More than half of the states now have a minimum wage rate higher than the current federal minimum ($7.25 and holding since 2009).

# Workplace Training

## Mandatory Sexual Harassment Training

In the wake of the #MeToo movement and following the employee-protectionist trend observed in other contexts at the state and municipal level, states continue to pass legislation requiring private employers to provide sexual harassment training.

In June 2019, Connecticut's legislature passed the Time's Up Act, which expands sexual harassment training obligations for Connecticut employers. Prior to the Act, Connecticut employers with at least 50 employees were required to provide sexual harassment training to supervisors only. Under the new law, all Connecticut employers will be required to provide two hours of training to supervisors, and Connecticut employers with at least three employees also will be required to provide two hours of training to all employees — supervisors and non-supervisors. Employers must provide training by October 1, 2020. Employers need not repeat training that was provided after October 1, 2018. New employees or new supervisors must be provided training within six months of hire or promotion to a supervisory position. Supplemental training must be provided every 10 years. The Act was sent to Connecticut's governor for signature on June 6, 2019.

One day after Connecticut passed its bill, the Illinois legislature passed similar legislation that, for the first time, requires Illinois employers to provide sexual harassment training. Senate Bill 75 contains many provisions aimed at curbing discrimination and harassment in the workplace, including a requirement that private employers provide annual sexual harassment training to all employees. The state will develop a model sexual harassment training program, including a program specifically tailored to the restaurant and bar industry. The program will be made available to employers and to the public online at no cost. Every employer with employees working in Illinois must provide annual training using the model training program or establish its own harassment prevention training program that equals or exceeds the model training. The bill was sent to the governor for signature on June 10, 2019, and has an effective date of January 1, 2020.

Many other states have bills pending at various stages of their respective legislative processes that include more employer training mandates. At the federal level, Senate Bill 1082, introduced on April 9, 2019, would require the EEOC to promulgate regulations to require certain employers, as determined by the EEOC, to provide in-person or other interactive training for each employee regarding discrimination and harassment in the workplace and to provide training specifically designed for supervisors regarding the prevention of and response to discrimination and harassment in the workplace. The bill also proposes to require the EEOC to make available resource materials for policies and trainings for employers with fewer than 15 employees.

# Thank you for your interest in 2019: The Mid-Year Outlook for Employers.

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