JacksonLewis

THE YEAR AHEAD FOR EMPLOYERS

2020

Introduction

A combination of new laws and regulations, technology, innovation, social media and social movements, all played a significant role in how we work during 2019.

As we move headlong into a new decade, this report highlights the issues, trends, legislative and regulatory activity and litigation that employers need to be aware of in 2020.

Highlights

- OFCCP recovered a record setting $40 million in FY 2019 via settlements
- A proliferation of class action activity was seen in the privacy and wage and hour areas
- Diversity & Inclusion laws passed the full U.S. House of Representatives and are pending in the Senate
- The SEC whistleblower program sanctions surpassed the $2 billion mark in 2019 since its implementation in 2011
- Legalization of marijuana continues at the state and local level
- A new overtime rule is in effect January 1, 2020
- Immigration enforcement saw dramatic increases with no sign of slowing down
- Non-compete and restrictive covenant laws continue to pass at the state level
- California's most comprehensive privacy laws go into effect January 1, 2020
- Two OSHA related resolutions were introduced and are moving the U.S. Congress
- Connecticut, Illinois and Washington passed mandatory sexual harassment training

Table of Contents

AFFIRMATIVE ACTION AND FEDERAL CONTRACTORS

As was the case in 2018, fiscal year (FY) 2019—covering October 1, 2018, through September 30, 2019—was another busy year, during which Director Craig E. Leen and his staff continued to put their mark on the Office of Federal Compliance Programs (OFCCP). Much of that foundational work will continue to unfold into FY 2020, following the Agency's four guiding principles: Transparency, Certainty, Efficiency and Recognition for federal contractors.

Enforcement Efforts — A Focus on the Disabled and Veterans

OFCCP recovered a record-setting $40 million in FY 2019 via settlements but much of that figure came from older compliance reviews which Director Leen targeted for resolution. These settlements reinforce the fact that under Director Leen's watch, the Agency will continue to prioritize adverse impact in hiring and pay equity cases. Accordingly, federal contractors should ensure they accurately track all job seekers; uniformly and consistently use strategic dispositions to explain rejected applicants; and conduct proactive, privileged pay analyses.

Regarding pay analyses, a Department of Labor Administrative Law Judge recently ruled that pay analyses performed to comply with the regulatory requirement to conduct in-depth reviews of pay practices do not fall under the attorney-client privilege, but other pay analyses may. While not yet available on the website of the Office of Administrative Law Judges, this decision may be appealed. Nonetheless, contractors should consider steps to distinguish their regulatory pay analyses from other pay analyses.

OFCCP's March 2019 Courtesy Scheduling Announcement List (CSAL) included 3,500 reviews, 500 of which are corporate headquarter compliance reviews focused on compliance with Section 503 of the Rehabilitation Act (Section 503) to advance employment of people with disabilities. In November, the Agency issued a supplemental CSAL with 500 reviews focused on compliance with the Vietnam Era Veterans Readjustment Assistance Act (VEVRAA). Both varieties of focused reviews require an OFCCP on site. OFCCP has recently begun to schedule and conduct the Section 503 on sites but has not yet initiated the VEVRAA reviews. Preparation for these reviews should focus on the following:

- Outreach documentation;
- The documented assessment of outreach efforts;
- Accommodation policies and procedures;
- Potential barriers for people with disabilities, including physical and mental job requirements; promotional opportunities for the disabled and veterans;
- The application and hiring processes, including self-identification; and
- The five-year disability survey.

OFCCP scheduled 1,366 compliance reviews in FY 2019 and therefore has a significant task ahead of it to initiate and complete the balance of the 4,000 reviews in the March and November 2019 CSALs. It remains to be seen whether OFCCP will add to the backlog of audits by issuing another CSAL in 2020. Such a move would be consistent with the Agency's current objective to conduct more audits with great efficiency. However, to avoid a backlog, the Agency will need to conduct these reviews more efficiently, which should help compliant contractors close audits with minimal follow-up and more quickly.

Perhaps most importantly for FY 2020 audits, OFCCP has sought approval to expand the data and information contractors must submit at the outset of an audit pursuant to the Itemized Listing included in each Scheduling Letter for establishment reviews and focused reviews. Among other additions, the Itemized Listing for focused reviews would include personnel activity data for veterans and disabled persons by job title and compensation data. These proposed additions suggest OFCCP may analyze the data for indicators of discrimination.

In another favorable move, the Agency has clarified in a FAQ that it will consider a number of alternative practical significance measures in addition to statistical significance when viewing adverse impact indicators in hiring and other employment selection decisions. Federal contractors entering a compliance review in FY 2020 will want to take advantage of this guidance by pointing out non-practically significant indicators and encouraging OFCCP to, in its words, deploy its resources towards more meaningful indicators.

Compliance Resources

In addition to the many directives OFCCP issued during 2019, the Agency continues to pack its website with guidance documents in furtherance of its publicized belief that compliance is best achieved if contractors know and can readily understand the Agency's expectations. Chief among these resources are the Section 503 and VEVRAA focused review materials. Keep in mind, however, that much of this material focuses on best practices rather than regulatory requirements. During focused-review on sites, contractors will do well to know the difference.

OFCCP has issued Compliance and Technical Assistance Guides (TAGs) that should provide a roadmap to the Agency's 2020 efforts. Notable among the guides are the Construction TAG and Educational Institutions TAG. Both provide clear and useful guidance in areas long neglected by the Agency.

In addition to a new help desk and the resurrection of OFCCP Opinion Letters, the Agency has begun to institute an Ombud Service, including the hiring of an Ombudsman, Marcus Stergio. While the OFCCP website does not currently have any information about the service, the directive announcing the service provides that Mr. Stergio will act as a liaison to resolve certain issues after stakeholders have exhausted district and regional office channels. This service may also help the Agency with issues of audit consistency across regions.

Other Notables for FY 2020

- EEO-1 Reporting: Currently, federal contractors will not file EEO-1 pay data reports (Component 2) for 2019 but will, as in 2019, file EEO-1 Component 1 reports for 2019 by March 31, 2020. OFCCP recently reported it will not use the 2017 or 2018 pay data contractors filed in 2019 for enforcement purposes. The Equal Employment Opportunity Commission (EEOC) is presently studying the data to determine whether further pay data reporting would be valuable and under what circumstances.
- Predetermination Notices (PDN): In a move OFCCP may follow with respect to other directives, the Agency submitted a proposed regulation to codify Directive 2018-01 regarding PDNs. Regular issuance of PDNs, after approval from the Solicitor's Office and the National Office of OFCCP, provides transparency to contractors and facilitates resolution of alleged violations before OFCCP issues a Notice of Violation. OFCCP may seek to codify other guidance documents as a result of President Trump's Executive Order 13892, which disfavors agency guidance documents not subject to public review and comment, and because approved regulations cannot as easily be undone by subsequent administrations, as directives may.
- TRICARE Healthcare Providers: OFCCP has published a proposed rule that would exempt from affirmative action coverage healthcare providers that participate in TRICARE. The rule would codify the audit moratorium that has been in place since 2014.
- Gig Workers: In a topical FAQ regarding project-based or freelance workers, OFCCP has clarified that such workers are typically independent contractors that do not need to be included in affirmative action plans. However, it often remains a difficult factual determination as to whether a worker is an independent contractor or an employee, even using OFCCP's guidance.
- Early Resolution Procedures (ERP): In Directive 2019-02, OFCCP set up procedures to assist the Agency and federal contractors with resolving audits more quickly and efficiently. The Agency has liberally applied the ERP, and federal contractors should familiarize themselves with the directive's opportunities for FY 2020. The directive provides that if there are non-material violations that can be readily resolved, OFCCP should close the audit but note those

issues and remedies in the closure letter. Where a contractor has multiple open audits with alleged material, non-discrimination violations, those audits may be solved in a single Conciliation Agreement (ERCA) requiring limited reporting requirements and a five year audit moratorium for the locations under audit, concurrent with the reporting period. Finally, where a contractor has multiple open audits involving allegations of discrimination, those audits may be resolved according to a detailed process and timeline, with reporting requirements and a concurrent five year company-wide moratorium.

CLASS ACTION AND COMPLEX LITIGATION

Class and collective actions alleging violations of state and federal wage and hour laws continue to be filed by the thousands. Significant increases have occurred particularly in the retail, restaurant and insurance industries, as well as against healthcare providers and call centers. The trends in employment class action litigation are continuing to evolve in response to the ever-changing workplace. In the growing gig economy, the independent contractor model dominates, which has led to numerous misclassification cases, primarily in the wage and hour context and often pursued on a class wide basis.

There has been a large increase in privacy class actions filed, specifically those brought under the Telephone Consumer Protection Act (TCPA) and Illinois Biometric Information Privacy Act (BIPA). This trend will continue in 2020, especially with the enactment of the California Consumer Privacy Act (CCPA), considered one of the most expansive U.S. privacy laws to date.

Other employment class actions trends to watch include an increase in Fair Credit Reporting Act (FCRA) class actions, discrimination class actions and website accessibility class actions brought under Title III of the ADA and state and local laws.

Employment Class Arbitration

Class action arbitration is such a departure from ordinary, bilateral arbitration of individual disputes that courts may compel class action arbitration only where the parties expressly declare their intention to be bound by such actions in their arbitration agreement, the U.S. Supreme Court ruled in April in a 5-4 decision. *Lamps Plus, Inc. v. Varela*, No. 17-988 (Apr. 24, 2019). The Supreme Court held "Courts may not infer from an ambiguous agreement that parties have consented to arbitrate on a class wide basis." Following the Supreme Court's decision, arbitration agreements must clearly and unmistakably state that the parties agree to resolve class and collective actions through arbitration. Without such a clear agreement, a party cannot be compelled to class arbitration.

Notice of a Collective Action

In February, in a significant case of first impression *In re: JPMorgan Chase & Company*, No. 18-20825 (Feb.21, 2019), the U.S. Court of Appeals for the Fifth Circuit held it to be in error for a district court to order notice be sent to employees as part of a certification who, by a preponderance of the evidence, entered into a valid arbitration agreement.

Ninth Circuit Affirms Denial of Class Certification in Gender Bias Case

In November 2019, the U.S. Court of Appeals for the Ninth Circuit heard oral argument in a case where the plaintiff sought to certify a class of 8,600 women engineers at Microsoft alleging disparate impact and disparate treatment in pay and promotions. The lower court, relying on *Dukes*, denied certification and plaintiff appealed. Reinforcing the burden on any putative class to satisfy all of the requirements of Federal Rule of Civil Procedure 23, the Ninth Circuit affirmed the district court's order denying the plaintiffs' motion for class certification. *Moussouris v. Microsoft Corp.*, No. 18-35791 (9th Cir. Dec. 24, 2019).

CORPORATE DIVERSITY COUNSELING

2019 saw several shifts in corporate diversity and inclusion (D&I) foreshadowing a variety of new or continuing areas of focus in 2020.

Changing Demographics Cannot Be Ignored

The U.S. population continues to become more diverse. The U.S. Census Bureau projects that by 2020, no single race alone group will make up more than 50 percent of the population of children and that the country will become a majority minority nation by 2042, with no racial or ethnic group constituting a majority. In addition, due to the impending retirement of Baby Boomers and the fact that minority populations are growing at a faster rate than non-minorities, changes in workforce demographics will accelerate, rapidly increasing workforce diversity. Thus, securing the best available talent requires recruiting, hiring, developing, promoting and retaining racial and ethnic minorities.

CEO Action and Other Examples of Corporate Leadership

Many companies are embracing and publicizing their D&I commitments and efforts, and they increasingly endeavor to collaborate with peers — and even competitors — to encourage D&I. Rather than risk exposure of their lack of progress or hoard their best ideas, companies are joining peer-to-peer efforts to advance D&I in the workplace, often in industry-specific groups. Perhaps the wide-reaching and best known of these efforts is the CEO Action for Diversity and Inclusion (CEO Action). Spearheaded by PwC Chairman Tim Ryan, CEO Action launched in June 2017 and as of December 3, 2019, has nearly 850 signatories, including Jackson Lewis.

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

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

CEO Action hosts several annual events to foster D&I discussions and publishes ideas and D&I practices from member organizations on its website. For 2020, CEO Action has asked each member organization to host its own "Day of Understanding" in February, providing an opportunity for employee dialogue on diversity and inclusion.

More information on CEO Action, including an updated list of signatories, can be found here.

Diverse Candidate Slates

Diverse slates have been a hot topic in 2019. At least since the National Football League instituted the Rooney Rule in 2003, organizations have implemented internal rules to encourage consideration of minority candidates. The Rooney Rule requires teams to interview at least one minority candidate for head coaching positions and, since 2009, senior football operations positions, regardless of title. While the Rooney Rule has become shorthand for this type of requirement, most employers expand the approach to apply to women as well as minorities, and corporate policies typically cover a range of senior management positions. Defining the range of positions to which these types of rules applies accounts for much of the variation among corporate practices.

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

- **Characteristics to be considered**: As noted above, such rules typically apply to female and minority candidates. Some have advocated applying the rule to other characteristics, such as people with disabilities and members of the LGBT community, but those groups are harder to identify and define – and doing so creates its own risks. Since employers are required to identify employees by race and gender for purposes of EEO-1 reporting, this information is generally available for internal candidates.
- **Positions covered by the rule**: Organizations typically identify a range of mid- to senior-level executive positions, but some apply the rule to all positions.
- **Required minimums**: The NFL requires at least one minority candidate be considered for each of the two specified positions. Corporate diverse slate policies typically require that least one minority and at least one female candidate be interviewed for all positions that have an interview pool of at least five candidates. This effectively exempts positions at both the bottom and top of the hierarchy, where large interview slates are not typical. Most, but not all, employers specify that the one woman, one minority rule requires two separate individuals, *i.e.*, a minority woman may satisfy the requirement for a minority or a woman, but not both.
- **Progressive Rules**: Some employers that interview a large number of candidates for a position, *e.g.*, filling multiple low- to mid-level manager positions, adapt the rule to these larger candidate pools by increasing the minimum numbers of women and minority candidates based on the number of candidates to be interviewed. For example, if the interview pool is expected to be 5-9 candidates, some employers require at least two women and two minorities; for pools from 10-14 candidates, three each, *etc*.

House Financial Services Committee

After the 2018 elections, the U.S. Congress became the most diverse in its history. This 116th Congress opened with a record number of women and minorities: more than 23 percent of the Congress were women and more than 22 percent were racial or ethnic minorities, according to the Pew Research Center. For the first time, minorities and women make up more than 40 percent of Congress. The impact of this increased diversity is particularly apparent in the House Financial Services Committee. Chairwoman Maxine Waters (D-CA) and five of six subcommittee chairs are African American. The sixth subcommittee chair is Carolyn Maloney (D-NY), a white woman. The Committee created a new subcommittee on Diversity and Inclusion, chaired by Congresswoman Joyce Beatty (D-OH).

Already, the Committee has originated several D&I-related bills that have been passed by the full House and are pending action in the Senate:

- "Improving Corporate Governance Through Diversity Act of 2019" (H.R. 5084) combines H.R. 1018, introduced in the Consumer Protection and Financial Institutions Subcommittee, with H.R. 3279, introduced in the Subcommittee on Investor Protection, Entrepreneurship, and Capital Markets. H.R. 5084 was approved by the full House on November 19, 2019 and sent to the Senate for consideration, where a similar bill, sponsored by Senator Bob Menendez (D-NJ), is already pending.
- "Ensuring Diverse Leadership of 2019" (H.R. 281), and companion in the Senate, S. 65, would require that at least one gender-diverse candidate and a racially or ethnically diverse candidate to be interviewed when there is a vacancy among the Federal Reserve Bank presidents. H.R. 281 was passed unanimously by the full House and sent to the Senate for consideration by the Committee on Banking, Housing and Urban Affairs.

Preferred Gender Pronouns

Currently, many employers are considering whether to implement preferred gender pronoun policies, that allow employees to specify the pronouns to be used to refer to them. This is important to many in the LGBT+ community who do not identify as either male or female (he or she). The most typical variants selected for the objective, subjective and possessive cases are they/them/theirs, but there are other options.

Some questions employers need to consider include these:

- What are the benefits and potential concerns of implementing such a policy?
- At what stage will employees be offered the opportunity to identify their preferred pronouns: application, on-boarding, current employees?
- How will the policy be communicated to existing employees?
- How will the policy be communicated to applicants and candidates?
- Can the company's Human Resources Information System (HRIS), Applicant Tracking System, and other systems capture and store the information?
- What level of support will be shown by executives and other leaders?

Whatever approach a company chooses, it should ensure that employees, and especially supervisors at all levels, have been appropriately educated about the policy and how it is to be implemented. This often requires a phased approach to allow employees to adjust to the new policy.

Pay Equity

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

Board Diversity Is Trending Upward

California made headlines in 2018 for enacting legislation requiring publicly held corporations with principal executive offices in California to have at least one female board director by the end of 2019 and three female board directors by the end of 2021, depending on board size. In September 2019, California was again active on this front, enacting a law requiring certain insurers to report the demographic makeup of their governing board and company goals regarding board diversity. Colorado, Illinois, Maryland, Massachusetts, Michigan, New Jersey, New York, Ohio, Pennsylvania and Washington have similarly introduced or passed legislation or resolutions related to board diversity. Several recently filed lawsuits are challenging the California law requiring female board directors as unconstitutional, and it remains to be seen whether other states' laws will face hurdles.

Board diversity is gaining traction at the federal level as well. On November 19, 2019, the U.S. House of Representatives passed the "Improving Corporate Governance Through Diversity Act of 2019" (H.R. 5084) which would amend the Securities Exchange Act of 1934 to require certain securities issuers to disclose the gender, race, ethnicity and veteran status of their board of directors, nominees and executive officers. Moreover, the issuer would need to report whether it has "adopted any policy, plan, or strategy to promote racial, ethnic, and gender diversity" among the board of directors, nominees or executive officers. The bill also requires the U.S. Securities and Exchange Commission to create a Diversity Advisory Group, which would ultimately "make[] recommendations of strategies that issuers could use to increase gender, racial, and ethnic diversity among board members."

Whether prompted by legislation or not, the call to diversify boards of directors will likely continue into the future. Recent data confirms an increase in certain areas of board diversity. The 2019 U.S. Spencer Stuart Board Index reports that of 432 new independent directors, "[a] record breaking 59% … are diverse (defined as women and minority men)." The Index identified gender diversity as "a clear boardroom priority," noting that "women constitut[ed] 46% of the incoming class." Racial/ethnic diversity is also a priority, with 23 percent of new S&P 500 directors being minorities. Given the significant level of activity in this area, we anticipate board diversity will remain a hot topic in 2020.

SEC Whistleblower Program Remains Robust

In its 2019 Annual Report to Congress (Report), the U.S. Securities and Exchange Commission (SEC) whistleblower program announced a "momentous milestone": The SEC has ordered over **$2 billion** in sanctions since the implementation of the whistleblower program in 2011.

The Report noted that from FY 2012 to FY 2019, whistleblower tips to the Commission **increased by approximately 74 percent**. In FY 2019 alone, the Commission received over 5,200 tips. The Report also highlighted current trends in whistleblower activity. International activity was significant, as evidenced by the fact that in FY 2019 individuals from 70 foreign countries submitted whistleblower tips to the Commission. In FY 2019, three of the whistleblower award recipients "were located abroad, or reported conduct that was occurring abroad, demonstrating the international reach of the program." Moreover, several award recipients "reported misconduct that was impacting retail investors, furthering a Commission priority to protect the Main Street investor." The Report noted that seven of the eight individuals who received whistleblower awards "reported their concerns to the company." Another trending category was cryptocurrencies, which accounted for nearly 300 tips in FY 2019.

The Report underscored that the Office of the Whistleblower remains focused on anti-retaliation and disclosure, noting it "continues to work with investigative staff to identify and investigate practices in the use of confidentiality and other kinds of agreements, or engagement in other practices, to interfere with individuals' abilities to report potential wrongdoing to the Commission."

Internal Investigations: Refining Policies and Procedures, Increasing Investigator Training

This year marked the two-year anniversary of the #MeToo movement. When the movement first began, employers were scrambling to develop a response plan, contemplating questions such as, How do we identify a complaint? Do we need an investigation policy and protocol? What do we do after an investigation is concluded?

Two years later, many employers have addressed these initial questions and are now questioning what constitutes best practices in internal investigations. Companies are refining their policies and procedures to incorporate newly emerging best practices. Likewise, companies are ramping up their training programs for investigators to ensure the quality and consistency of their internal investigations. Preserving attorney-client privilege and work product protection when conducting internal investigations remains a hot topic in this area.

New Legislation Has Potential to Alter *Digital Realty* Outcome

In 2018, the United States Supreme Court decided *Digital Realty Trust, Inc. v. Somers*, 138 S. Ct. 767 (2018). The Court held that where the plaintiff allegedly reported suspected securities law violations internally to management (but not to the SEC) prior to termination, he was not a "whistleblower" for purposes of the Dodd-Frank Act's (Dodd-Frank) anti-retaliation provision.

Bipartisan legislation has been introduced that could address the outcome of *Digital Realty*. In July 2019, the U.S. House of Representatives passed the "Whistleblower Protection Reform Act of 2019" (H.R. 2515), and in September 2019, the "Whistleblower Programs Improvement Act" (S. 2529) was introduced in the U.S. Senate. Both bills are aimed at defining "whistleblower" under Dodd-Frank's anti-retaliation provision as an individual who reports internally to certain categories of people, *e.g.*, those with supervisory authority or authority to investigate misconduct. Further, S. 2529 includes a provision that would prohibit arbitration of Dodd-Frank whistleblower claims.

It is expected that legislation will be enacted in 2020 that will define Dodd-Frank whistleblowers to include those who report their concerns internally.

DISABILITY, LEAVE AND HEALTH MANAGEMENT

Mandated Employer Leave — Paid and Unpaid

The steady increase in new state and local leave laws over the last five years is expected to continue. In 2019, more than 20 new laws related to employee leave were adopted across the country.

As employers ring in the New Year, two new ***paid*** leave laws will go into effect on January 1, 2020: in Duluth, Minnesota, when the city's paid sick and safe leave law goes into effect; and in Nevada, where employers will face the first of what appears to be a trend toward "any time off" leave laws. Similar laws mandating that employers provide paid leave that can be used for any reason were also adopted in 2019 in Maine (effective January 1, 2021) and Bernalillo County, New Mexico (current effective date is January 1, 2020, but the County is considering extending to July 2020).

We expect this trend toward mandating paid time off and away from dictating the reasons employees can use the leave to continue.

Amendments to existing and newly adopted leave laws, as well as court challenges, require ongoing employer vigilance to remain in compliance. For example, Pennsylvania employers learned in July that the Pittsburgh paid sick leave law previously placed on hold by the courts was back on track. And out-of-city employers with employees in Minneapolis learned that they were required to provide paid time off to employees working in Minneapolis under its ordinance following a court of appeals decision. The fate of paid sick leave laws in Texas remains in flux. Dallas, San Antonio and Austin have all passed paid sick and safe leave laws, but business coalitions in each city have mounted legal challenges. On the eve of its December 1 effective date, San Antonio's paid sick and safe leave law was temporarily enjoined on November 22 as a result of pending litigation. A court decision enjoining the Austin paid leave law is on appeal before the Texas Supreme Court. The Dallas ordinance, despite being subject to legal challenge, is the only Texas paid sick leave ordinance in effect as of December 1, 2019. As a result of the uncertainty caused by these legal challenges, the fate of these laws in Texas remains an issue to watch in 2020.

Expansion of Paid Family and/or Medical Leave

On January 1, 2020, paid family and medical leave benefits will be available to employees in Washington under the state's paid family and medical leave program. July 2020 will be a big month for paid family and medical leave programs. In July, paid family and medical leave benefits will be available for employees for the first time in Washington, D.C; New Jersey expands family leave benefits from 6 to 12 weeks; and employees in California will be entitled to two additional weeks of benefits, increasing the potential period of benefits from 6 to 8 weeks. Colorado's family and medical leave task force is expected to publish details of a proposed program by July. Additional states are likely to adopt similar programs. While no significant action is expected at the federal level, the conversation around paid family and medical leave will remain in the spotlight with the approaching presidential election.

Parental Leave Policies

We expect employers will continue to grapple with the scope of permissible parental leave policies. Recent legal challenges have called into question the appropriateness of presuming fixed periods of disability following childbirth. Employers will continue to be challenged to defend parental "bonding" leave as gender-neutral, with primary and secondary caregiver distinctions likely raising the most significant gender discrimination concerns. As more paid family and/or medical leave laws are enacted, employers likely will spend more time coordinating "voluntary" and "statutory" benefits programs to avoid duplication of benefits.

Growing Number of Individuals Covered by Leave Laws

The number of individuals entitled to legally mandated paid and unpaid leave from work will likely increase in 2020, and not just because of new leave laws. In 2019, California adopted AB 5 limiting when businesses can classify employees as independent contractors. Additional jurisdictions may follow suit. Ultimately, employers should continually evaluate eligibility and be prepared to provide leave benefits to a broader category of workers.

Class Action Claims: Title III of the ADA

Over the last several years, public accommodation lawsuits brought under Title III of the Americans with Disabilities Act (ADA) and related state and local laws have increased dramatically. These lawsuits usually allege that an organization's website is not accessible in violation of these laws.

DRUGS AND ALCOHOL

Support for Marijuana Legalization Continues — A majority of the country continues to support the legalization of marijuana. According to a September 2019 Pew Research Center study, consistent with last year's study, 67 percent of Americans think marijuana should be legal. The study found that 59 percent of Americans are in favor of legalizing marijuana for both medicinal and recreational purposes, and only 32 percent believe marijuana should be limited to medicinal purposes.

Marijuana Status under Federal Law — Marijuana still is an illegal drug under the federal Controlled Substances Act. However, a committee of the U.S. House of Representatives approved H.R. 3884 on November 20, 2019, that would legalize marijuana and remove it from the federal Controlled Substances Act. The bill is expected to be approved by the full House, but it is unclear whether it will pass in the Senate.

Hemp and CBD Products — The Federal Agriculture Improvement Act of 2018 declassified industrial hemp as a controlled substance under federal law while allowing states to have more stringent laws regarding hemp production. For purposes of the law, industrial hemp is defined as cannabis with tetrahydrocannabinol (THC) levels of 0.3 percent or less. Cannabis with more than 0.3 percent THC is still considered to be marijuana, an illegal substance under the Controlled Substance Act. In October 2019, the U.S. Department of Agriculture (USDA) published a proposed interim final rule to establish rules and regulations related to the production of hemp, which is intended to be a heavily regulated agricultural crop. Hemp often is used to manufacture cannabidiol (CBD) products, among other things. CBD oil and other products are now being marketed and sold everywhere, and some are touted as having medicinal properties. However, the Food and Drug Administration (FDA) takes the position that CBD still is a Schedule I drug that may not be added to food or beverages or marketed to have therapeutic claims without the approval of the FDA.

The FDA has not approved any CBD products other than the prescription drug we reported about last year, Epidiolex, which is used to treat two rare forms of epilepsy. Congress has been pressuring the FDA to publish guidelines with respect to CBD production, but none have yet been forthcoming. This means that the majority of CBD products now on the market are unregulated, and consumers cannot be sure what these products actually contain. Some of these products claim to have no THC in them when they actually do. As a result, users of CBD products may test positive on workplace drug tests. To make this issue even more complicated, 17 states have laws allowing CBD use to treat certain medical conditions separate and apart from the 33 state medical marijuana laws, despite the fact that CBD remains illegal at the federal level. Each law differs as to the maximum amount of THC the CBD product may contain.

State and City Marijuana Laws to Take Effect in 2020 — The new year will bring changes to marijuana-related laws in Illinois, Nevada and New York City. Effective January 1, 2020, recreational marijuana will be legal in Illinois. The law initially appeared to put significant restrictions on employers' ability to conduct marijuana testing outside of reasonable suspicion and post-accident tests. However, the law was amended on December 4, 2019, to permit pre-employment and random marijuana testing and to permit employers to take disciplinary action for positive marijuana test results.

Also effective January 1, 2020, pre-employment marijuana testing will be prohibited in Nevada, except for safety-sensitive employees.

The law gives employers the discretion to determine which positions are deemed "safety-sensitive." In addition, employees who test positive for marijuana during the first 30 days of employment can rebut the results of the initial test, and the employer must "accept and give appropriate consideration to the results" of such test. New York City will ban pre-employment marijuana testing effective May 10, 2020. New York City's law has some limited exceptions for certain positions, but there is no expansive language permitting employers to conduct marijuana testing for any safety-sensitive position.

Rights of Medical Marijuana Users — New Jersey and New Mexico both amended existing medical marijuana laws during 2019 to prohibit discrimination against medical marijuana users. However, neither state restricts employers from taking action if an employee possesses or uses marijuana during working hours. New Mexico also allows employers to take adverse action against applicants and employees in safety-sensitive positions. In New Jersey, employers now must provide all applicants and employees who test positive for marijuana with a written notice giving them an opportunity to provide a legitimate medical explanation for the positive test result. In addition, Oklahoma enacted legislation in 2019 to clarify employers' rights with respect to medical marijuana users, including giving employers the ability to take adverse action against an applicant or employee who (1) tests positive for marijuana without holding a valid medical marijuana license; (2) possesses, consumes or is under the influence of medical marijuana on the employer's premises or during the fulfillment of employment obligations; or (3) tests positive for marijuana and the employee's/applicant's position involves safety-sensitive duties. Finally, courts in Arizona and Delaware ruled in favor of medical marijuana users in employment discrimination cases, continuing a trend in the courts that began in 2017.

FMCSA Clearinghouse — The U.S. Department of Transportation's Federal Motor Carrier Safety Administration's Clearinghouse will become operational on January 6, 2020. FMCSA-covered employers must use the Clearinghouse to report commercial motor vehicle drivers' drug and alcohol program violations identified in the final rule. They must also query the Clearinghouse for new hires upon hire and annually for current employees. Employers are required to revise their drug and alcohol testing policies to list the drug and alcohol violations that will be reported to the Clearinghouse.

Oral Fluid Testing Finally Approved by DHHS — After a long wait, the U.S. Department of Health and Human Services issued its Mandatory Guidelines for Federal Workplace Drug Testing Programs Using Oral Fluid on October 25, 2019.

The Guidelines establish standards for oral fluid drug testing for federal employees and will take effect on January 1, 2020.

Because the Department of Transportation (DOT) is required to follow the Mandatory Guidelines in developing drug testing programs, we expect all of the DOT operating agencies to implement their own regulations adopting the oral fluid testing guidelines sometime in 2020. Many employers will welcome oral fluid drug testing because it is quicker than urine testing, offers less opportunity for adulterating or substituting specimens and may provide more insight into recent drug use.

Drug Testing Update — Positive drug tests reached a 14-year high, according to a April 2019 Quest Diagnostics report (based on 2018 drug testing results). Quest reported an uptick in positive marijuana tests across nearly all employee testing categories, including an increase of almost 5 percent for the federally mandated, safety-sensitive workforce. There were decreases in the positivity rates for heroin and cocaine. A sharp increase of more than 51 percent in post-accident testing rates among federally mandated safety-sensitive employees appears to be linked to the addition of semi-synthetic opiates (hydrocodone, hydromorphone, oxycodone and oxymorphone) to the DOT drug testing panel.

HEALTH AND RETIREMENT

ACA Changes for 2020 — The Department of Labor (DOL), Internal Revenue Service (IRS) and Health and Human Services (HHS) jointly issued final regulations allowing employers to offer employees Health Reimbursement Arrangements (HRA) in lieu of offering traditional health coverage if certain conditions are met. The Individual Coverage HRA (ICHRA) allows employers to contribute pre-tax dollars to an HRA that employees can then use to pay individual health coverage premiums and other qualified medical expenses. ICHRAs provide new and exciting planning options for employers who wish to provide premium reimbursements rather than traditional health coverage to some or all of their employees.

Annual Premiums — The average annual premium for employer-sponsored health insurance in 2019 was $7,188 for single coverage and $20,576 for family coverage, with workers on average contributing 18 percent of the premiums for single coverage and 30 percent for family coverage. According to Kaiser, the average single premium increased 4 percent and the average family premium increased 5 percent, while workers average wages increased 3.4 percent and inflation increased 2 percent.

Prescription Drug Costs — The cost of prescription drug benefits continues to rise, and it still outpaces other medical services.

Health FSAs — In 2020, employees can contribute up to $2,750 to a health flexible spending arrangement (FSA), a $50 increase over 2019. FSAs provide employees a way to use tax-free dollars to pay medical expenses not covered by other health plans.

Health Savings Accounts — In 2020, the annual limit on contributions to a Health Savings Account (HSA) for enrollees covered under a high deductible health plan (HDHP) is $3,550 for self-only coverage (an increase of $50) and $7,100 for family coverage (an increase of $100), regardless of whether the contributions are made by the employee, the employer or a combination of sources. HDHP enrollees who are at least 55 years old can contribute an extra $1,000 "catch-up contribution" to their HSAs (no change from 2019).

The New Overtime Rule's Effect on Employee Benefits — The recent overtime rule was finalized on September 24, 2019, and will be effective January 1, 2020. The overtime rule change increased the minimum salary an employee doing certain duties can make without being eligible for overtime. Employers can either give those employees a raise or pay them overtime when applicable.

Employers with eligibility criteria for employee benefit plans based on an employee's payroll status, *e.g.*, non-exempt or exempt, could experience a shift in participants from the exempt plan to the non-exempt plan. Those employees, formerly exempt, are no longer eligible for the employee benefit plans designated for employees exempt from overtime.

The bottom line: Don't forget to consider employee benefit plans as you work through the new overtime rule. Plan Sponsors should not forget employee communications about any employee benefit changes, *e.g.*, what happens to employee's account if they change plans?

Determination Letter Changes — In May, the IRS cracked open the door of the determination letter program for individually designed retirement plans (IDP) that are merged plans or statutory hybrid plans. Plan Sponsors of merged plans may request a determination letter from September 1, 2019, going forward. Statutory hybrid plans, *e.g.*, cash balance plans or pension equity plans, have a 12-month window within which they may request a determination letter: September 1, 2019, through August 31, 2020.

Section 403(b) Retirement Plans — The Remedial Amendment Period, which began in 2010 for 403(b) plans finally ends March 31, 2020. This is a one-time opportunity to correct document errors all the way back to January 1, 2010, through a restatement of the plan on a compliant document. Because the IRS said it will not accept determination letter submissions for 403(b) plans, a Plan Sponsor may want to consider restating the plan to a pre-approved plan document, so it may rely on the IRS opinion/advisory letter associated with the pre-approved document as to the qualification status of the document. Once the March 31, 2020, deadline passes, any document errors must be corrected using the employee plans compliance resolution system (EPCRS).

Defined Benefit Plans — The deadline for the defined benefit six-year remedial amendment period for pre-approved defined benefit plans to restate the plan documents ends April 30, 2020. Sponsors of individually designed defined benefit plans that are not interested in converting to a pre-approved document should not restate their plan but continue to maintain the document in compliance with the requirements found in the IRS Required Amendments List issued each year.

Hardship Withdrawal Rules — The newly issued final rules offer a major change for retirement plans. The effective date for the final regulations for hardship distributions originally discussed in the Bipartisan Budget Act of 2018 is January 1, 2020.

The IRS announced that plans could implement any of the provisions for plan years beginning after December 31, 2018, but the two required provisions must be implemented for hardship distributions on or after January 1, 2020, for plans offering hardship distributions.

The required provisions are these:

- Plans may no longer require participants to suspend contributions following a hardship withdrawal; and
- The revised standard for demonstration of hardship, including a participant's written representation relating to the participant's need, on which the employer may rely unless the employer knows otherwise.

The IRS released Rev. Proc. 2020-9, in December 2019 clarifying the deadline for adopting the two required and any discretionary provisions by either a pre-approved plan or an individually designed plan (IDP), previously the two plan types had different adoption deadlines. The adoption deadline for all plans of both plan types is December 31, 2021. The clarified adoption deadline also applies to all plans who implemented the changes after December 31, 2018.

Employee Plans Compliance Resolution System — The IRS issued Revenue Procedure 2019-19, which updates the Employee Plans Compliance Resolution System (EPCRS) program that retirement plans use to correct operational and other errors. This revision opens to self-correction some common plan document, operational and even certain plan loan issues.

ACA Reporting Deadlines — Below is a chart of the filing deadlines for the ACA required information.

February 28, 2020: Deadline to file 1094-C/1095-C schedules for 2019 if paper filing.

March 2, 2020: (extended from January 31, 2020): Deadline to furnish 1095-C schedules for 2019 to employees.

March 31, 2020: Deadline to file 1094-C / 1095-C schedules for 2019 if electronic filing.

In keeping with past practice, the IRS will provide additional time to meet some of these requirements. Specifically, the deadline to provide IRS Forms 1095-B and 1095-C to individuals, as required under the Affordable Care Act, has been extended to March 2, 2020. As noted above, information returns must be filed with the IRS by February 28, 2020, for paper filers and March 31, 2020, for electronic filers. Employers that file at least 250 information returns with the IRS must file the returns electronically.

The IRS also states in the published relief that it will not enforce a penalty against reporting entities for failing to furnish Forms 1095-B to individuals if the reporting entities satisfy two conditions set out in IRS Notice 2019-63. However, there is no such relief available to self-insured applicable large employers that would allow them to avoid providing their full-time employees with Forms 1095-C.

Social Security Benefits — Retirees will receive a 1.6 percent cost-of-living increase in Social Security benefits in 2020. The average monthly Social Security benefit for retirees in 2020 is $1,503, an increase of $24 from 2019.

401(k) and 403(b) Plan Contribution Limits — In 2020, employees who participate in 401(k) and 403(b) plans can contribute up to $19,500 (a $500 increase over 2019), plus a catch-up contribution limit of $6,500 for employees at least 50 years old. A chart below contains these and other cost of living adjustments the IRS released November 4, 2019.

Defined Benefit Plans — The per-participant flat premium rate that single-employer pension plans must pay to the Pension Benefit Guarantee Corporation (PBGC) will increase to $83 for plan years beginning in 2020, up from $80 in 2019.

Frozen Defined Benefit Plans — The IRS again issued an extension, IRS Notice 2019-60, through the last plan year beginning before 2021, for the nondiscrimination testing flexibility relief for frozen defined benefit plans that satisfy specific requirements.

Multiemployer Plans — The deficit in the PBGC's insurance program for multiemployer plans remains dire for 2020. The situation is made worse primarily due to lower interest factors used to measure the value of future payments of failed plans. The PBGC paid $160 million, up $7 million from the prior year, to 89 insolvent multiemployer plans, up 8 from the prior year. The multiemployer program is still predicted to become insolvent by 2025. PBGC Director Gordon Hartogensis says alarms are ringing and legislation is needed now.

Electronic Disclosure Rule — The DOL published a proposed rule that would expand the use of online retirement plan disclosures. The proposed rule is in response to Executive Order 13847, issued in August 2018, encouraging the agencies make it easier to access retirement plans. The proposed rule does not replace or modify the existing electronic disclosure rule but instead adds a new safe harbor and only applies to retirement plans. Should the proposed rule become final without substantial modification, a plan administrator will be able to electronically publish any document the administrator is required to furnish under Title I of ERISA except any document that must be furnished upon request after notice to participants of the online availability. As with all participant communications, the notice of online availability must meet certain readability standards. Once the DOL publishes the final rule, we expect the DOL will also provide model notices for plan administrators to use as they implement the new disclosure rule.

Type of Limitation	2020
Elective Deferrals (401(k) and 403(b); not including adjustments and catch-ups)	**$19,500**
457(b)(2) and 457(c)(1) Limits (not including catch-ups)	**$19,500**
Section 414(v) Catch-Up Deferrals to 401(k), 403(b), 457(b), or SARSEP Plans	**$6,500**
Defined Benefit Plans	**$230,000**
Defined Contribution Plans (annual additions limit)	**$57,000**
Annual Compensation Limit	**$285,000**
Annual Compensation Limit for Grandfathered Participants in Governmental Plans which Followed 401(a)(17) Limits (With Indexing) on July 1, 1993	**$425,000**
Highly Compensated Employee (HCEs)	**$130,000**
Key Employee/Officer	**$185,000**
Individual Retirement Accounts (IRAs), for individuals 49 and below	**$6,000**
Individual Retirement Accounts (IRAs), for individuals 50 and above	**$7,000**
SIMPLE Retirement Accounts	**$13,500**
SEP Coverage	**$600**
SEP Compensation	**$285,000**
Tax Credit ESOP Maximum Balance	**$1,150,000**
Amount for Lengthening of 5-Year ESOP Period	**$230,000**
Maximum Amount for Qualified Longevity Annuity Contract Purchases	**$135,000**
Income Subject to Social Security Tax	**$137,700**
Contribution Limit - Flexible Spending Account (FSA)	**$2,750**
Contribution Limit - Health Savings Accounts - Single (HSA)	**$3,550**
Contribution Limit - Health Savings Accounts - Family (HSA)	**$7,100**
Qualified Small Employer HRA (QSEHRA) Single	**$5,150**
Qualified Small Employer HRA (QSEHRA) Family	**$10,450**
Dependent Care (DCAP)	**$5,000**

HEALTHCARE

Rapid Emergence of Consumerism

Healthcare consumers continue to pay more and more toward their out-of-pocket healthcare costs, driving a shift away from volume-based compensation models toward outcomes-based payment arrangements. By all accounts, meaningful consumerism in the healthcare market is rapidly emerging.

Historically, healthcare transactions were business-to-business encounters with traditional healthcare business processes that tended to neglect consumer wants and needs. With the rise of consumerism, however, healthcare providers and supporting industry actors are quickly adopting consumer-centric processes so they can more effectively work with consumers. Healthcare providers and supporting industry actors will risk losing relevance if they do not embrace the new role of the consumer in healthcare.

In the coming year, the healthcare industry will continue to adopt tools and techniques to better understand consumer behavior, provide consumers with the information necessary to inform and drive consumer decision-making and offer greater consumer convenience. Examples include minute clinics in grocery and other retail stores, settings with extended hours seven days a week, urgent and walk-in care clinics, telemedicine visits and around-the-clock access to nurses and other healthcare providers by telephone.

The data suggest that these trends will accelerate and lead to even more profound market transformation in the years to come.

Disruptive Innovation

Innovation in clinical care delivery and healthcare business processes have the potential to reshape the healthcare market. Healthcare providers and others who support the industry will rapidly lose market share if they do not evolve their business and clinical care models to leverage innovation.

Recognizing this dynamic, healthcare providers and others who support the industry are and will continue to collaborate with a vast variety of businesses and other organizations to leverage innovation. For example, many healthcare providers are using technology to enable patients to access clinical care through video visits, e-visits and other virtual visits. Still other healthcare providers are using improved techniques to enhance diagnostic medicine, precision medicine, remote monitoring, patient engagement and patient experience, to name just a few.

The need for the rapid adoption of transformation in the healthcare industry will continue to drive provider demand for access to capital, resources and administrative scale, causing ongoing consolidation (both vertical and horizontal) among healthcare providers. And these consolidated healthcare providers will need to develop organizational structures that capitalize on new core competencies, such as data analytics that inform and improve patient outcomes, experiences and cost. With these transformational changes, the healthcare industry will look to engage consultants and recruit an even more modern workforce that is adept at leveraging innovation.

Prescription Drug Pricing

The rising cost of prescription drugs will remain a top healthcare priority throughout the nation in 2020. Some prescription drugs that have been on the market for years have now quadrupled in cost, leaving patients to determine with their physicians the best cost-effective drug regimes. While the availability of generic and biosimilar medicines is a tested solution to lowering the cost of prescription drugs, many medications do not offer those alternative options. Patients affected by the increase in prescription drug pricing claim that they are skipping doses, splitting pills and abandoning treatments altogether.

To help reduce the growth of prescription drug prices and out-of-pocket costs, several 2020 presidential candidates are now proposing policies in their campaigns. Some lawmakers have already introduced legislation requiring that television commercials for prescription drugs disclose prices, while other lawmakers have approved programs that would cap the monthly co-pays for life-saving drugs. In 2020, pharmaceutical companies will likely be required to disclose even more financial information to help both government officials and the public understand how they establish drug prices. Also on the horizon in 2020 is government regulation on the rate at which drug prices can increase.

Opioid Use Disorder

Death by overdose has been at epidemic levels in the United States for the past 20 years, with opioid overdoses rising every year — killing 130 Americans every day. In 2018 alone, the United States allocated more than $600 billion to tackling the opioid crisis, and in the past four years, it has spent over $2 trillion. The costs associated with opioid use disorder include costs related with criminal justice, lost productivity, treatment of overdoses and treatment of babies born dependent on opioids.

At the state level, the opioid crisis has affected health care systems, public safety and corrections, child protective services and other agencies. Eleven states have partnered to examine proposed strategies for combatting the opioid crisis through Medicaid programs and public health departments, with the hope of better informing the public of the consequences of opioid misuse. Some states, such as Florida, have implemented prescription drug monitoring programs (PDMPs) to limit the amount of opioid prescriptions to no more than a three-day supply. While these strategies slightly lowered the number of opioid overdoses in 2019, it is expected that both state and federal governments will allocate further resources to continue to address the opioid use disorders crisis.

IMMIGRATION

U.S. Immigration

Pew Research reports that the United States has over 44 million immigrants, more than any country in the world. Immigrants are projected to drive future growth in the U.S. working-age population through at least 2035. As Baby Boomers retire, immigrants and their offspring will likely offset the decline in working-age population. More than one million new immigrants (slightly more women than men) arrive every year, but new arrivals have fallen off in recent years because of a decrease in unauthorized immigrants.

State Immigration Statistics

From 2000-2017, Texas, California, Florida, New York and New Jersey, respectively, had the largest growth in immigrant populations. The states with the largest percentage growth were North Dakota (156 percent), Delaware (119 percent), Tennessee (119 percent), South Dakota (118 percent) and Kentucky (111 percent).

Limit on Refugees

Since 1980, approximately 3 million refugees have been resettled in the U.S., more than in any other country. But the U.S. no longer leads the world in resettlement. For FY 2018, the Trump Administration capped the number of refugees allowed into the U.S. at 45,000, which, at the time, was the lowest limit in decades. For FY 2019, the administration lowered the cap to 30,000. For FY 2020, it was lowered again to 18,000 — a 40 percent drop.

I-9 Audits and Raids

There has been and continues to be a surge in I-9 notices of investigation — ICE sent 3,000 to employers in July 2019. And this increase was proceeded by a surge in No Match Letters sent to employers during the spring as well as other large-scale ICE raids around the country. ICE requested and received $65 million to hire new officers to staff various Homeland Security Investigation (HSI) offices. The administration continues to drive an increase in the number of I-9 audits targeting abusers to both create a culture of compliance and remove the immigration job magnet.

Legalized Marijuana and Immigration

Although not legal at the federal level, the marijuana industry is a fast-growing economic sector in the U.S. Thirty-three states have legalized medical marijuana and 14 have legalized recreational use. A Wall Street analyst forecasts the market in the U.S. could grow to $80 billion by 2030 if federal legalization occurs. U.S. immigration law is federal law. That means that any foreign nationals, even green card holders, who participate in the marijuana industry, make investments or use marijuana where it is legal (even for medicinal purposes) may be subject to harsh consequences, *e.g.*, being barred from returning to the U.S. or prevented from naturalizing (for at least 5 years). Bills have been introduced to alleviate the conflict between state and federal laws, but none have passed to date.

Cap H-1B Electronic Registration

Since 2007, during the first week of April, the U.S. Citizenship and Naturalization Service (Service) has conducted a lottery for the limited number of H-1B visas available. Employers seeking visas had to file full petitions in order to participate, and if their cases were not selected, those filings and fees were returned. This year, the USCIS is introducing a new plan. For $10 each, in March, employers or their attorneys will have to register online for the lottery by providing limited corporate and beneficiary information to the Service. Only if selected will the employers be able file full petitions. This new process should be more efficient for the USCIS and for employers.

Public Charge Rule

The Public Charge Rule limits the admission or immigration of individuals who were not basically self-sufficient, *e.g.*, those immigrants receiving a government subsidy. The Trump Administration recently enlarged the scope of the rule, making it harder for foreign nationals to obtain green cards or even secure or extend temporary non-immigrant visa status. Whereas the rule was originally interpreted to cover individuals who accepted cash welfare benefits, the proposed change would be extended to cover those individuals who use or might use food stamps, government-subsidized housing vouchers and subsidized medical insurance. However, the new rule, which was scheduled to become effective on October 15, 2019, was widely criticized and litigation ensued. In *State of New York et al. v. U.S. Department of Homeland Security*, U.S. District Court Judge George S. Daniels of the Southern District of New York enjoined the rule nationwide. The litigation will likely delay any implementation by the USCIS for some time. Consulates abroad are not subject to the injunction and may start enforcing the new public charge rule as early as December 2019.

Temporary Protected Status

Temporary Protective Status (TPS) allows individuals to remain in the U.S. because of disease, natural disaster or conflict in their home countries. More than 330,000 nationals from 10 countries have been granted TPS. Since 2018, the Department of Homeland Security (DHS) has been announcing the termination of TPS status for many of those countries, including El Salvador, Haiti, Honduras, Nepal, Nicaragua and Sudan. Various cases were filed opposing these terminations. Various injunctions were issued, and termination dates have come and gone. Because of the court orders, Employment Authorization Documents (EADs) for many of those affected have been automatically extended until January 2021. If the pending cases find for the government before January 2021, there will be wind-down periods of at least 120 days. For more information on TPS and work authorization, please see our TPS Tool.

Deferred Action for Childhood Arrivals (DACA)

In November 2019, the Supreme Court heard oral argument on whether DHS lawfully terminated the DACA policy, also known as the “Dreamers” policy, enacted by President Obama via Executive Order. The Court’s decision will affect more than 700,000 individuals and their families who came to the U.S. as children without proper documentation but who have been able to remain in the U.S. and work under DACA. The Court is being asked to decide a difficult issue: how to balance the life-changing implications for the Dreamers and their value to the economy against the administration’s decision to enforce the laws that Congress enacted about undocumented individuals. Although it is hard to predict, the general consensus is that the conservatives on the Court will likely prevail in terminating DACA.

A decision is not expected before June 2020, and until then, DACA recipients may continue to renew their DACA statuses. In the meantime, Congress could act to provide a safety net for the Dreamers.

Foreign Students

The administration has been putting limits on F-1 students — making it harder for companies to hire students in CPT, OPT and OPT STEM status. This year DHS started conducting inspections at companies employing F-1 students using STEM OPT. Under the STEM regulations, ICE may conduct onsite inspections to confirm that employers and student-employees are complying with all requirements and attestations in the Form I-983 Training Plans for STEM OPT Students. Employers should consider preparing by training a first responder, ensuring that all relevant employees are conversant in all aspects of the training plans and maintaining a process for reviewing the training plans to ensure compliance and appropriate updating.

The Fairness for High-Skilled Workers Act

The Fairness for High-Skilled Workers Act (Fairness Act) is one of several bills pending in Congress that attempt to eliminate the long waiting lines for Green Cards experienced particularly by Chinese and Indian nationals, some of whom can wait for a decade or longer before receiving legal permanent residence. The Fairness Act would eliminate the 7 percent per country cap and place Indian and Chinese nationals at the front of the line until the lines even out. As a result, individuals from other countries will have longer waits than they do now. Pitting foreign nationals and employers against one another may not be the optimal solution. The Backlog Elimination, Legal Immigration and Employment Visa Enhancement Act (BELIEVE Act), if passed, would simply quadruple the number of employment-based visas by doubling the number available annually and exempting dependents from being counted toward the annual quotas.

H-4 EAD Rescission Rule

It has been three years since the Trump Administration announced that it planned to rescind the policy permitting issuance of H-4 EADs to spouses of H-1B holders pursuing Green Cards. Since that time, spouses and their employers have been living in fear that their work authorization could be eliminated at any time. The DHS contends that the new rule will be finalized in 2020. To forestall the rescission and eliminate the uncertainty, H.R. 7150 was re-introduced in Congress to prohibit the action. For now, H-4 EAD holders can continue to renew their work authorizations, and others who are eligible may apply. However, current delays in processing those applications continue.

Israel Gains Treaty Investor Option

In mid-2019, the U.S. Embassy in Israel announced that necessary agreements were in place and that Israeli citizens will now be able to apply for E-2 Treaty Investor Visas. This announcement was an important development for the Israeli high-tech sector and the U.S. economy because it opens new possibilities for Israelis wishing to create start-ups or open subsidiaries in the U.S. Israelis who wish to apply should submit all application materials by mail to the Embassy's Branch Office in Tel Aviv.

Changes to EB-5 Investor Visa Program

A new final rule changing the EB-5 Immigrant Investor Program became effective on November 21, 2019. The rule addresses concerns about fraud, abuse and national security risks. These are the key changes:

- The standard investment amount will increase from $1 million to $1.8 million;
- The amount for investments in underserved areas will increase from $500,000 to $900,000;
- States will no longer be able to gerrymander regional center designations: and
- There will be more flexibility for derivative family members and about priority dates.

Senators Patrick Leahy (D-VT) and Charles Grassley (R-IA) have introduced the EB-5 Reform and Integrity Act of 2019 to further reform, legislatively, the EB-5 Regional Center Program, which has been plagued by fraud.

REAL ID
October 1, 2020, is the REAL ID deadline, and most people will not be able to board even a domestic air flight in the U.S. without either a REAL ID-compliant driver's license or a passport. While most states offer REAL-ID compliant driver's licenses, not everyone with a driver's license has a compliant one. To determine whether your license is compliant, look for a star in the upper right-hand corner. Other forms of identification may also be acceptable including passport cards, permanent resident cards, border crossing cards, DHS Trusted Traveler cards, federally recognized tribal-issued photo IDs, Canadian provincial driver's licenses and USCIS-issued EADs. Children until 18 are not subject to REAL ID when they are travelling with a companion who has acceptable identification. Travelers should be on the lookout for public service announcements.

INTERNATIONAL

Global #MeToo Movement
The global #MeToo Movement celebrated its second anniversary in October 2019, and several developments associated with the movement could have significant impact around the world.

In June 2019, the International Labour Organization (ILO) adopted the Violence and Harassment Convention (C190) and its accompanying Recommendation No. 206, setting out minimum legal standards for how national governments should address harassment and violence in the workplace. Minimum standards include passing/updating national harassment and violence workplace laws, instituting preventive measures and monitoring and enforcement. Employers are obligated to establish written workplace policies that address harassment and violence, implement employee training and risks assessments and provide remedies for victims, *e.g.*, whistleblower protections, compensation and complaint mechanisms.

Countries that ratify the ILO's Violence and Harassment Convention must ensure their national laws align with treaty standards and are subject to periodic review by the ILO. Ten countries have already announced their intention to ratify the convention and 2020 will certainly see additional countries' ratification and legislative initiatives within those countries.

There has also been some resistance against #MeToo-inspired workplace reforms and defamation suits against victims who have turned to social media to make claims of abuse. For example, an India High Court ordered Facebook and Instagram to reveal the identity of an individual anonymously sharing #MeToo stories from India's art world. Likewise, in September a French court fined the woman whose tweets sparked France's #MeToo movement for defamation.

2020 will likely continue this trend of increased awareness and reformation for violence and harassment prevention policies in the workplace — and conversely backlash in some locations against the #MeToo movement, mainly in the form of defamation suits.

Mexico Labor Law Reform

On May 1, 2019, Mexico enacted a major labor law reform affecting individual employment agreements, labor and collective relationships and individual litigation. Mexico's new labor law implements the modifications made to Article 123 of the Constitution that came into force on February 2017. These modifications were driven by the commitments assumed by Mexico as part of joining the Transpacific Partnership Agreement (TPP) and its execution and ratification of Convention 98 of the ILO regarding the right to organize and collective bargaining. These commitments are also an essential element supporting the potential ratification of the USMCA — the successor to the North America Free Trade Agreement.

Below are some highlights from the recent labor law reform:

- **Individual employment agreements** — Employers must update their agreements to include: appointment of an employee beneficiary for payment in the case of death or disappearance and expansion of benefits-eligibility criteria, permissibility of internet-based tax certificates to replace printed salary receipts and an explicit outline of their internal protocols for addressing violence and sexual harassment incidents and discrimination prevention.
- **Labor and collective relationships** — There are heightened transparency requirements in the union election process:
  - Employers may not intervene during elections;
  - Employers may only enter a collective bargaining agreement (CBA) with one union (with limited exceptions);
  - CBAs must be ratified by a majority of affected employees (rather than just a union official, as under prior practice);
  - More expansive notification requirements for employers apply when updating workers regarding the CBA; and
  - More comprehensive union strike procedures come into force.
- **Individual Litigation** — Labor Courts will replace the Conciliation and Arbitration Board (CAB) as the exclusive forum for filing most workplace related claims – this transition will take approximately 4 years to fully implement. More comprehensive procedures were established for court proceedings, *e.g.*, rules related to notification and communication obligations throughout the preliminary proceedings and judicial trial.

Although the Mexican labor reform took effect immediately following enactment, the reform incorporates a transition period for many provisions, and 2020 will see continued implementation of these new requirements.

Global Data Privacy Laws

In May of 2018 the EU's groundbreaking General Data Protection Regulation (GDPR) sparked a new era of privacy and security legislative initiatives across the globe and a heightened public awareness for such matters. Below is a rundown of several recent key data privacy and security laws across the globe:

- **Brazil** — The Brazilian General Data Protection Law (LGPD), Federal law no. 13,709/2018, was enacted and largely aligned with EU's GDPR in terms of scope, applicability and financial penalties for non-compliance. The LGPD will take effect in August 2020.

- **Australia** — The Privacy Amendment (Notifiable Data Breaches) to Australia's Privacy Act came into effect in February 2018. Organizations with an annual turnover of over 3 million AUD will have to disclose data breaches that pose a "real threat of serious harm" within 30 days of their discovery or face fines of up to 1.8 million AUD.

- **Japan** — In May 2017, Japan amended its Act on Protection of Personal Information, now applicable to both foreign and domestic companies that process the data of Japanese citizens. In 2019 an EU-Japan "reciprocal adequacy" agreement took force, allowing personal data to be transferred from the European Economic Area (EEA) to Japan and vice versa. Prior to the European Commission's adoption of this reciprocal adequacy agreement with Japan, it introduced additional safeguards to more closely align with the protections that exist in the EEA.

- **Thailand** — In February 2019, the National Legislative Assembly of Thailand approved and endorsed the Thailand Personal Data Protection Act (PDPA), effective in May 2020. The PDPA has many GDPR-like provisions, including the broad definition of personal data, the requirement to establish a legal basis for collection and use of personal data, extraterritorial applicability and potentially harsh penalties for non-compliance.

- **India** — In June 2018, the India legislature published a draft bill for a new comprehensive data protection law, the Personal Data Protection Bill 2018 (PDPB), in response to a mandate by the India Supreme Court that recognized privacy as fundamental right. Largely influenced by the EU's GDPR, the PDPB would grant India data subjects extensive data protection rights while imposing limitations on the collection and processing of personal and sensitive data. The PDPB has not yet been passed and will likely face several amendments before finalization.

In addition, international economic organizations such as the Organization for Economic Co-operation and Development (OECD) and the Asia-Pacific Economic Cooperation (APEC) Forum have issued their own data privacy guidelines regarding the transfer of personal data across borders. Moreover, many other countries across the globe are considering GDPR-like regulations or taking unique approaches that serve their country's data protection needs. This is an unprecedented expansion of data privacy and security regulations across the globe that will only continue in 2020.

LABOR AND PREVENTIVE

NLRB Composition

As 2019 ended, the National Labor Relations Board (NLRB) consisted of three members (two short of capacity) — Republicans John Ring, William Emanuel and Marvin Kaplan. Democrat Lauren McFerran's term ended December 16, 2019, and with her departure, the NLRB has the minimum number of members for a quorum. Kaplan's term ends on August 27, 2020, and if McFerran is not replaced by then, the NLRB will be unable to issue decisions. The NLRB's pro-business emphasis will continue even if President Trump nominates a Democrat to replace McFerran, given Ring, Emanuel and Kaplan's pro-business actions have been instrumental in the Board's rollback of pro-union and pro-employee Obama-Board precedents.

Representation Case Changes

On August 12, 2019, the NLRB issued a notice of proposed rulemaking with respect to three of its representation case procedures — the voluntary recognition bar, its blocking charge rule, and rules governing the formation of bargaining relationships in the construction industry. The public comment period closed on December 10, 2019. Action on those proposed changes is expected to take place during 2020.

Representation Case Changes to 2014 Quickie Election Rules

According to the NLRB's entry in the Fall, 2019 Unified Agenda of Federal Regulatory and Deregulatory Actions, revision of the NLRB's union-friendly representation case rules that were effective on April 14, 2015 was to be accomplished in two phases – in November 2019 and January 2020. (The 2015 changes allowed union organizing to move at an accelerated pace by significantly reducing the time between the filing of a representation petition and the election from an average of approximately six weeks to an average of 23 days. Other provisions created substantial burdens on employers by requiring, within 7 days after the filing of a representation petition, the submission of a Statement of Position addressing all potential bargaining unit issues and provision of copious amounts of information regarding potential voters. A further provision defers critical election issues, such as supervisory status issues, until after the election is held.)

However, in December 2019, the NLRB issued comprehensive revisions to the 2015 rules, calling into question whether there will be additional revisions in 2020. The revisions will go into effect on April 16, 2020 and likely will be challenged in federal court.

Among the changes in the proposed rule are:

- The pre-election hearing will take place 14 business days from service of papers (currently eight calendar days).
- The statement of the position due date will be eight business days from service of the notice of hearing (currently seven calendar days)
- An election normally cannot be held less than 20 business days following the direction of election. (This will tend to increase the amount of time between the date the union files its petition and the date of election.)
- An employer will have five business days after the service of the notice of hearing to post and distribute the "Notice of Petition" (currently two business days).

Possible Change in NLRB Off-Duty Employee Access Rules

In a footnote in *Southern Bakeries*, 368 NLRB No. 59 (Aug. 28, 2019), Board members Marvin Kaplan and William Emanuel, who formed the majority, signaled they support rethinking a key element of the Board's longstanding precedent on the legality of employers' off-duty employee access rules. The Board noted that it is prepared to "reconsider … in a future appropriate case" the "third prong" of the Board's test in *Tri-County Medical Center*, 222 NLRB 1089 (1976), for determining the validity of those rules. Under *Tri-County*, to demonstrate the legality of an off-duty employee access rule, an employer must show the rule applies to off-duty employees seeking access to the employer's property for "any purpose." That prong of *Tri-County* has been vexing for employers because it even bars them from maintaining a rule that would allow an employee to return to the workplace for innocuous reasons (*e.g.*, to pick up a paycheck). In connection with their desire to review the *Tri-County* test, Emanuel and Kaplan will likely find a willing ally in NLRB General Counsel Peter Robb. In a memorandum issued on December 1, 2017, Robb listed the types of cases he would like to present to the Board with the goal of convincing the NLRB to reverse or modify current law to present the Board an alternative option to the existing one. NLRB Memorandum GC 18-02 (Mandatory Submissions to Advice). Among them were cases arising under *Tri-County*.

Access to Private Property Rulemaking

In 2019, the Board issued decisions dealing with non-employee access to private property. Uniformly, those decisions have modified previous Board case law limiting access. According to its Fall 2019 Unified Agenda, in February 2020, the NLRB will issue a Notice of Proposed Rulemaking regarding the "standards under the National Labor Relations Act for access to an employer's private property." We expect that those standards will further restrict non-employee access to an employer's private property.

Standards for NLRA Protection for Profane or Offensive Statements

Decisions issued by the Obama Board have given employees wide latitude to use profanity and other offensive language in the workplace toward their supervisors and others if is used in the context of protected concerted activity. The NLRB has ordered the reinstatement of employees previously discharged under those circumstances. On September 5, 2019, the NLRB requested the public to file briefs in connection with the Board's reconsideration of the standards. Specifically the Board seeks to "address whether profane outbursts and offensive statements of a racial or sexual nature, made in the course of otherwise protected activity, lose the employee who utters them the protection of the Act." The Board asked the public to address three cases in which extremely profane or racially offensive language was judged not to lose the protection of the Act along with the following questions:

1. Under what circumstances should profane language or sexually or racially offensive speech lose the protection of the Act?
2. In determining whether an employee's outburst is unprotected, should the Board consider the norms of the workplace?
3. Should the Board adhere to, modify, or abandon the standard the Board applied in five decisions in which it has found that racially or sexually offensive language on a picket line did not lose the protection of the Act?
4. What relevance should the Board give antidiscrimination laws such as Title VII in determining whether an employee's statements lose the protection of the Act?

November 12, 2019, was the deadline for submission of briefs. A decision about whether the standard will change is expected in 2020.

Graduate Student Rulemaking

In 2016, in *Columbia University,* 364 NLRB No. 90 (2016), the Board determined that an employment relationship can exist under the Act between a private college or university and its employee — even when the employee is simultaneously a student. *Columbia University* is the current law on the status of student workers as "employees," entitling student workers to enjoy the collective bargaining rights and protections of the Act. In 2019, the Board issued a Notice of Proposed Rulemaking to establish that "students who perform any services for compensation, including, but not limited to, teaching or research, at a private college or university in connection with their studies are not 'employees' within the meaning of Section 2(3) of the [National Labor Relations] Act." If adopted, the proposed rule would overrule Columbia University. The comment period closed December 16, 2019. In 2020, the Board will be evaluating those comments and may issue its final rule.

Joint-Employer Rulemaking

On September 14, 2018, the NLRB issued a notice of proposed rulemaking "to establish the standard for determining joint-employer status under the National Labor Relations Act." If implemented as proposed (at the end of 2019 or beginning of 2020), the final rule essentially will reinstate the traditional joint-employer standard the Board overruled in its 2015 *Browning-Ferris* decision. There, the Board maintained the traditional, well-established direct and immediate control requirement, but added that indirect control or even the unexercised right to control may be sufficient to establish a joint-employer relationship. Under the proposed rule, joint-employer status would exist only where at least two entities actually share or codetermine the employees' essential terms and conditions of employment, such as hiring, firing, discipline, supervision and direction. An employer must possess and actually exercise substantial direct and immediate control over the essential terms and conditions of employment of another party's employees in a manner that is not limited and routine. The deadline for submitting comments was January 28, 2019; the Board received more than 7,000 comments, which an independent contractor is reviewing. This final rule likely will be challenged in federal court in 2020.

Employer Work Rules

Since the Board's 2017 decision in *The Boeing Company*, 365 NLRB No. 154 (Dec. 15, 2017), which overturned the Obama Board standard for reviewing employer work rules, the Board has reviewed numerous employer rules, including those regarding cellphones, confidentiality, civility, non-disclosure and others. In many instances, the Board has found rules lawful that would have been determined to be unlawful under the Obama Board review standard. In 2020, the Board is expected to continue this trend.

Application of *MV Transportation*

In 2019, the Board adopted a contract coverage standard in unilateral change cases in which the employer defends its actions by claiming it was privileged to make the change pursuant to a provision contained in the parties' collective bargaining agreement (CBA). *MV Transportation, Inc.*, 368 NLRB No. 66 (Sept. 10, 2019). Under this new standard, rather than requiring a specific and unequivocal expression of a mutual intention to permit unilateral employer action, the NLRB will evaluate whether the contract covers the employer's change by applying ordinary principles of contract interpretation. The Board will not require the contract language to specifically mention, refer to, or address the challenged employer decision. Instead, it will find that the agreement covers the challenged unilateral act if the act falls within the compass or scope of contract language that grants the employer the right to act unilaterally. The new standard is more employer-friendly than the previous test. As unilateral change cases reach the Board in 2020, the parameters of mutual intention to permit unilateral employer action will become clearer.

Review and Reversal of NLRB's Inherently Concerted Theory

In 2019, the NLRB narrowed the circumstances under which a complaint made by an individual employee is considered concerted activity pursuant to Section 7 of the NLRA. *Alstate Maintenance, LLC*, 367 NLRB No. 68 (Jan. 11, 2019). In *Alstate*, the Board also signaled that, presented with the appropriate fact pattern, it intends to further narrow the definition of concerted activity. In a footnote, it wrote that decisions that deem statements about certain subjects (such as job security and wages) inherently concerted without consideration of whether the individual making the statement was authorized to act on behalf of others or attempting to initiate or induce group action arguably may conflict with its seminal protected concerted activity (*Meyers*) decisions. In 2020, the Board may get its opportunity to make this employer-friendly change.

Purple Communications – Employee Email Use for Section 7 Activities

At the end of 2019, the NLRB overturned *Purple Communications*, Inc., 361 NLRB 1050, restoring an employer's right to control employee nonwork use of its information technology and email systems – with important exceptions — without violating the National Labor Relations Act. *Caesar's Entertainment d/b/a/Rio All-Suites Hotel and Casino*, 368 NLRB No. 143 (Dec. 17, 2019). Specifically, the NLRB held that "employees have no statutory right to use employer equipment, including IT resources, for Section 7 purposes" and "we shall recognize an exception… in those rare cases where an employer's email system furnishes the only reasonable means for employees to communicate with one another." Cases involving questions about the scope of "IT resources" and the "rare" exception may reach the NLRB in 2020.

Banner Estrella Medical Center – Confidentiality of Employer Investigations

Overruling *Banner Estrella Medical Center*, 362 NLRB 1108 (2015), in December 2019 the NLRB held that investigative confidentiality rules are lawful Category 1 rules under *The Boeing Company*, 365 NLRB No. 154 (2017), where by their terms the rules apply for the duration of any investi-gation. *Apogee Retail LLC d/b/a Unique Thrift Store*, 368 NLRB No. 144 (2019). Where a rule does not apply for the duration of an investigation, a determination will be made by the NLRB whether one or more legitimate justifications exist for requiring confidentiality even after an investigation is over. If legitimate justifications exist, a determination is then made whether those justifications outweigh the effect of requiring post-investigation confidentiality on employees' exercise of their Section 7 rights. Cases involving questions about what constitutes a "legitimate justification" may reach the NLRB in 2020.

LITIGATION

Sexual Orientation and Gender Identity

The U.S. Supreme Court heard oral arguments on Tuesday, October 8, 2019 in three cases that could determine whether Title VII of the Civil Rights Act of 1964 prohibits discrimination based on sexual orientation and gender identity. Two of the cases involve gay men who were allegedly fired for their sexual orientation, and one case that concerns a transgender woman allegedly fired for her gender identity.

The cases are significant because, while some states and localities prohibit workplace discrimination on the basis of sexual orientation and/or gender identity, the majority of states do not grant such protections. The Supreme Court's decision could extend Title VII's protections to workplaces across the nation. In the oral arguments on October 8, the justices' questions suggested they are divided along ideological lines, with the possible exception of Justice Neil Gorsuch, whose questions did not indicate any clear ideological leaning.

While the Court will most likely not reach a decision until June 2020, the Equal Employment Opportunity Commission (EEOC) position continues to be that discrimination based on sexual orientation and gender identity is prohibited under Title VII. Employers can expect to continue seeing EEOC charges brought alleging Title VII violations on those bases, in addition to state and local charges, in those jurisdictions that already contain those prohibitions. Employers should take LGBTQ complaints seriously and promptly and thoroughly investigate all claims, take remedial action where appropriate and conduct anti-harassment training that addresses LGBT complaints.

State Anti-Sexual Harassment Laws: Training, Use of Confidentiality, Non-Disclosure, Arbitration Agreements and More

Several states have passed new laws to address sexual harassment concerns raised by the #MeToo movement. Many of these laws bolster employees' right to sue for sexual harassment; introduce new, mandatory sexual harassment training requirements for employers; and forbid the use of confidentiality provisions and non-disclosure agreements in cases involving allegations of sexual harassment. Going further, some state laws — such as those in Illinois, Maryland, New Jersey, New York, Vermont and Washington — purport to invalidate arbitration agreements that prevent employees from filing sexual harassment claims in court.

The Federal Arbitration Act (FAA) generally preempts states' attempts to place restrictions on employment arbitration agreements, and it is likely that many of these new laws will face legal challenges in 2020. In the meantime, employers seeking to resolve sexual harassment claims may need to comply with new, more demanding state law requirements.

California Laws Targeting Employment Arbitration Agreements

Effective January 1, 2020, California Labor Code §432.6 prohibits employers from conditioning employment or some other employment-related benefit on an employee's consent to waive rights, forums or procedures for alleged violations of the California Fair Employment and Housing Act (FEHA) or California Labor Code. It also prohibits employers from threatening, terminating or otherwise retaliating or discriminating against employees or applicants because of their refusal to waive any rights, forums or procedures for alleged FEHA or California Labor Code violations. The law also clarifies that even voluntary opt-out clauses in mandatory arbitration agreements will not be enough to escape the new law's restrictions. The law took effect January 1, 2020, and applies only to agreements executed, modified or extended on or after that date. The law also explicitly carves out arbitration agreements that are otherwise enforceable under the FAA. Nonetheless, this law will face significant FAA preemption challenges and may be struck down by the courts.

Equal Pay and Wage Transparency Laws

Several states, counties and cities have passed wage transparency laws that prohibit employers from asking job applicants about their compensation history and make it illegal for employers to retaliate against employees who discuss their salaries with coworkers and others. Some jurisdictions also make it illegal for employers to disclose a current or former employee's compensation information without the employee's consent. These laws are part of a broader, continuing push to end pay discrepancies based on gender. States that have passed these laws include California, Connecticut, Delaware, Hawaii, Illinois, Maine, Massachusetts, New York, Oregon and Vermont. Numerous cities and counties in New York as well as cities like San Francisco, Chicago and Pittsburg have also passed similar ordinances. Employers in these jurisdictions may need to update their job applications to remove questions about pay history or change the way they set compensation. Rather than negotiate salaries based on applicants' pay history and current demands, employers may choose to set a salary range for a given position and negotiate a final number within that range. Such a change may prevent male applicants receiving significantly higher salaries than their female peers. Employers in these jurisdictions should also train their managers on the requirements and nuances of these laws.

Natural Hair Laws and Grooming Requirements

New York and California have passed laws making it illegal for employers to discriminate against such black hairstyles as natural, braids, twists and locks. These laws reflect a growing trend to do away with grooming requirements that may have a disparate impact on protected groups and result in claims of discrimination based on race or religion. Employers with strict grooming policies regarding hair length, facial hair, tattoos, *etc*., may wish to revisit their policies and assess how and why they are being implemented and enforced.

Various City and Local Ordinances

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

NON-COMPETES AND PROTECTION FROM UNFAIR COMPETITION

2019 saw a sharp increase in non-compete legislation, and those efforts are expected to continue during the coming year, both at the state and federal levels. While some legislators have proposed broad non-compete bans, the most successful trend to enactment has been to limit the use of non-competes with respect to low-wage workers. State attorneys general have also joined in the fight against allegedly unreasonable and abusive non-competes, including those involving low-wage employees.

Additionally, legislatures and governmental agencies at both the federal and state levels have stepped up their scrutiny of no-poach agreements *i.e.*, agreements between employers to not solicit, recruit, and/or hire each other's employees. Such agreements are increasingly viewed as antitrust violations, particularly where they are not connected to larger, legitimate collaborations between companies. Employers in 2020 should expect government enforcement to continue in this space.

Areas of Focus

Given that restrictive covenant regulation occurs primarily at the state level, employers should always ensure that their non-compete and other restrictive covenant agreements are compliant with the laws of all states in which they operate. However, with policymakers increasingly labeling such agreements as abusive and an attempt to suppress wages, employers should place even greater focus on ensuring that their agreements will withstand close scrutiny.

Laws/Regulations Going Into Effect in 2020

In 2019, restrictive covenant laws were enacted and/or amended in Connecticut, Maine, Maryland, New Hampshire, Oregon, Rhode Island, Utah and Washington. Of those, the new legislation in Oregon and Washington is set to take effect on January 1, 2020, while the legislation in Rhode Island will take effect on January 15, 2020.

Laws/Regulations Proposed

More than twenty other restrictive covenant laws were proposed by states in 2019. Non-compete legislation has also been proposed at the federal level Most recently, two U.S. Senators proposed a ban on all non-competes other than those entered into in connection with the sale of a business or dissolution of a partnership.

Non-compete reform initiatives also have been pursued at the administrative level, with the attorneys general of 19 states urging the Federal Trade Commission, by letter dated November 15, 2019, "to use its rulemaking authority to bring an end to the abusive use of non-compete clauses in employment contracts."

Outside of non-compete reform, efforts to curb no-poach agreements are likely to gain steam in 2020.

PRIVACY, DATA AND CYBERSECURITY

California Consumer Privacy Act

The most talked about privacy initiative of 2019, the California Consumer Privacy Act (CCPA) is considered the most expansive privacy legislation in the U.S. Even before its scheduled effective date of January 1, 2020, the CCPA saw lots of action in 2019. Several amendments were passed (SB 1121) at the end of 2018, and then several additional amendments signed by the California governor in October 2019. Further, after the California attorney general embarked on a 7-series tour of California seeking public comments on the impending law, in October 2019 the attorney general announced proposed regulations to the CCPA, which are still undergoing revisions and, with the public comment period closing on December 6, 2019, are anticipated to be finalized shortly after year-end.

A concerning aspect of the CCPA is that it authorizes a private cause of action against a covered business if a failure to implement reasonable security safeguards results in a data breach. Perhaps more troubling is that plaintiffs need not show actual harm from the breach in order to recover. If successful, a plaintiff can recover statutory damages in an amount not less than $100 and not greater than $750 per consumer per incident or actual damages, whichever is greater. Thus, in addition to notification obligations a covered business may have under the state's breach notification law, class action lawsuits brought pursuant to this provision of the CCPA could be very costly.

The CCPA also ushers in a range of new rights for consumers:

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

In general, the CCPA will apply to any for-profit entity that does business in California, collects personal information, determines the purposes or means of processing that information and satisfies one of the following:

- Annual gross revenue in excess of $25 million;
- Alone or in combination, annually buys, receives for the business' commercial purposes, sells or shares for commercial purposes;
- Alone or in combination, the personal information of 50,000 or more consumers, households or devices; or
- Derives 50 percent or more of its annual revenues from selling consumers' personal information.

It is worth noting that AB 25, a recently passed CCPA amendment, creates specific obligations for employment-related personal information for a one-year period, during which the legislature would consider more comprehensive employee privacy legislation. Those obligations include the following:

- Notifying employees, applicants and contractors of the categories of personal information collected by the business and the uses of those categories, and
- Implementing reasonable safeguards to protect that personal information.

2020 will be an interesting year for the CCPA as covered entities scramble to ensure compliance, and we will be able to gauge better what enforcement will look like.

Biometric Use in the Workplace and Beyond

In early 2019, the Illinois Supreme Court handed down a significant decision concerning the ability of individuals to bring suit under the Illinois Biometric Information Privacy Act (BIPA). In short, individuals need not allege actual injury or adverse effect beyond a violation of his/her rights under BIPA in order to qualify as an aggrieved person and be entitled to seek liquidated damages, attorneys' fees and costs and injunctive relief under the Act. Thus, simply failing to adopt a policy required under BIPA, collecting biometric information without a release or sharing biometric information with a third party could trigger liability under the statute. Potential damages are substantial: the BIPA provides for statutory damages of $1,000 per negligent violation or $5,000 per intentional or reckless violation of the Act. Shortly after, it seemed as though BIPA defendants may soon be getting relief, as the Illinois legislature introduced S.B. 2134, which would have amended the BIPA to delete the language that creates a private right of action. However, in April 2019 it was reported that S.B. 2134 did not survive the legislative process. There continues to be a flood of BIPA litigation, primarily against employers with biometric timekeeping/access systems that have failed to adequately notify and obtain written releases from their employees for such practices.

There has also been a substantial increase in biometric data use. Across all industries, biometric technology is being used for a variety of security and business purposes. A recent study suggests that 90 percent of business will use biometric technology in some form by 2020. For example, there has been a rapid increase in biometric data used in airports for verifying travelers through a facial scan or fingerprint during the boarding process, raising privacy concerns.

The law in this area is still lagging behind the technology, but it is starting to catch up. In addition to Illinois's BIPA, Washington and Texas have similar laws, and states including Arizona, Florida, Idaho, Massachusetts and New York have also proposed such legislation. In California, the CCPA also broadly defines biometric information as one of the categories of personal information protected by the law. Additionally, states are increasingly amending their breach notification laws to add biometric information to the categories of personal information that require notification if breached, including 2019 amendments in Arkansas, New York and Washington. 2020 will certainly see additional biometric related legislative proposals.

State Legislative Developments

As with other California legislation, the CCPA set off a flurry of copycat legislative initiatives from other states as well as enhancements to existing data breach notification laws. Below is a rundown of some of the most noteworthy legislation passed in 2019:

- **Maine** — Maine's Act to Protect the Privacy of Online Consumer Protection, L.D. 946, will take effect July 1 2020, imposing data privacy requirements on internet service providers (ISPs).
- **Nevada** — In late May, Nevada Governor Steve Sisolak signed into law an act relating to internet privacy, S.B. 220, which already took effect October 1, 2019. Nevada's new law 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.
- **New York** — New York's Stop Hacks and Improve Electronic Data Security Act (the SHIELD Act), effective March 21, 2020, amends the state's current data breach notification law, and imposes more expansive data security and data breach notification requirements on companies. In addition, the recently enacted Identity Theft Prevention and Mitigating Services Act, effective September 24, 2019, requires credit reporting agencies that face a breach involving Social Security numbers to provide five years of identity theft prevention and mitigation services to affected consumers.
- **Massachusetts** — Massachusetts updated its data breach notification law, effective April 10, 2019. Key changes include an obligation to provide 18 months of credit monitoring following a breach involving Social Security numbers (42 months, if the breached entity is a consumer reporting agency) and reporting to the Attorney General and the Office of Consumer Affairs and Business Regulation following a breach on whether they have a written information security program (WISP).

There is no doubt this state-level activity will continue in 2020 and may even prompt Congress to move more quickly with one of its proposed bills — the latest being the Mind Your Own Business Act that would expand the Federal Trade Commission's (FTC) authority to regulate data collection and use, allow consumers to opt out of data sharing and create civil and criminal penalties for certain violations of this Act.

GDPR

The GDPR celebrated its first birthday in May 2019 and is moving full steam ahead. During 2019 the GDPR paved the way for groundbreaking privacy legislative initiatives like the CCPA and similar laws across the globe. Moreover, 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. In the UK, the Information Commissioner's Office determined that one-third of reported incidents did not trigger a notification obligation, suggesting that over-reporting is a concern. DPAs have brought enforcement actions against organizations of all sizes and issued a number of fines for violations, including 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. Each of these actions has provided greater understanding of how the GDPR should be applied and what the DPAs are addressing.

In its first year, the GDPR also raised global awareness of data privacy. As it enters its second year, organizations should expect this awareness to generate increased requests from individuals to access or delete data and greater demand for appropriate data security. This may present unique challenges to employers as they navigate complying with the GDPR as well as applicable U.S. or EU member state employment laws. The European Data Protection Board (EDPB) continues to issue final and draft implementation guidance to clarify the application and scope of the GDPR. In November, the EDPB issued its long-awaited guidelines 3/2018 on the territorial scope of the GDPR, which provided further clarity on whether or how U.S. companies may be subject to the jurisdiction of the GDPR. The EDPB also issued final guidelines to support the drafting of codes of conduct, which will assist companies or industries properly apply the regulation. These and other pending guidelines along with increased DPA enforcement activity and decisions should provide further clarity in 2020.

Telephone Consumer Privacy Act

The Telephone Consumer Privacy Act (TCPA) saw lots of action in 2019. In June 2019, the U.S. Supreme Court issued its long awaited decision in *PDR Network LLC v. Carlton*, addressing the issue of whether the Hobbs Act requires the district court to accept the 2006 Federal Communication Commission (FCC) Order 2006 (the Order), which provides the legal interpretation for the TCPA. Unfortunately, the Court dodged the issue, instead ruling anonymously that the lower court failed to consider two preliminary issues. A final decision in this case had been long-awaited, and the wait continues.

There is also a growing circuit split over the definition of Automatic Telephone Dialing System (ATDS) under the TCPA. In 2018 the U.S. Court of Appeals for the District of Columbia set aside the FCC's expansive interpretation of what constitutes an ATDS and its approach to consent of reassigned wireless numbers. Since that decision, a circuit split has developed with the Third Circuit ruling that a dialer is not an ATDS unless it has the present ability to randomly or sequentially *generate* numbers and dial them. The Ninth Circuit has adopted a broader reading, holding that the definition of ATDS includes any equipment that has the capacity to *store* random numbers and dial them, even if it cannot generate numbers randomly or sequentially. In February of 2019, a petition of writ of certiorari was filed with the U.S. Supreme Court to review the Ninth Circuit panel's decision, but shortly after the parties reached a settlement agreement. Given the circuit split over the definition of ATDS under the TCPA, the issue is ripe for the Supreme Court to address, but due to the recent settlement, we will have to wait a bit longer to hear from the Court. Just after the Ninth Circuit ruling, the FCC sought comments from the public on the scope of the TCPA, including the ATDS definition. 2020 should continue to see important TCPA developments.

OCR HIPAA Enforcement Actions

In 2019 the Department of Health and Human Services Office of Civil Rights (OCR) issued hefty fines for HIPAA violations. Most recently a medical center was fined $3.1 million following a breach of unsecured electronic protected information (ePHI) stemming from the loss of an employee's hard drive. The OCR also issued HIPAA enforcement actions this year against business associates, including an electronic medical record (EMR) provider, which manages and stores patient protected health information. This serves as a reminder to healthcare providers to ensure their vendors are HIPAA compliant, where applicable. In 2018, the OCR had a record year for HIPAA enforcement, and though the final numbers are not yet in, it is anticipated that 2019 will be even higher. Additionally, in August 2019 the OCR issued its 2019 summer cybersecurity newsletter, entitled "Managing Malicious Insider Threats," acknowledging this threat and providing some best practices to neutralize it. 2019 serves as a reminder of the seriousness in which OCR treats HIPAA violations, and healthcare organizations and their business associates need to address basic best practices as they enter 2020.

WAGE AND HOUR

Overtime Exemption Regulations

In September 2019, the Department of Labor (DOL) issued a new Final Rule (Final Rule) updating the minimum salary requirements for the white collar (executive, administrative and professional) overtime exemptions effective January 1, 2020. Under the Final Rule, the annual salary level for these exemptions will increase to $35,568, or $684 per week, a 50 percent increase from the current level of $23,660 ($455 per week). In addition, the annual minimum compensation for highly compensated employees (HCE) will increase, from $100,000 to $107,432, well below both the minimum HCE compensation set forth in both the Obama-era rule and in the Notice of Proposed Rulemaking (NPRM) issued in March 2019.

Consistent with the Obama-era rule, employers will be permitted to use *nondiscretionary* compensation, including commissions, to satisfy up to 10 percent of the new standard salary level. Unlike the Obama-era rule, however, nondiscretionary compensation may be paid *annually* rather than quarterly, providing employers with more flexibility in paying exempt employees nondiscretionary bonuses and commissions to satisfy the salary level requirement. The new Final Rule also permits a catch-up payment at years-end, up to 10 percent of the standard salary level (*i.e.*, $3,556.80), if the employee has not earned sufficient nondiscretionary pay to satisfy the required salary. By contrast, for HCEs the standard salary level ($35,568) must be met without including any nondiscretionary pay, although such pay can be included in meeting the annual compensation requirement of $107,432. The DOL has not made any changes to the duties test and has not provided for any automatic increases, although it anticipates updating the salary level every four years through notice-and-comment rulemaking.

Regular Rate Regulations

In March 2019, the DOL issued a NPRM to revise the regulations governing the calculation of the regular rate under the Fair Labor Standards Act (FLSA). The FLSA generally requires employers to pay non-exempt employees overtime pay at 1.5 times their regular rate for all hours worked over 40 in a given workweek. Employers sometimes struggle with properly determining the regular rate when providing various benefits and other forms of compensation to their employees in the modern workplace. The proposed regulations are quite lengthy but, in summary, they intend to address the following:

- Clarify that payments for paid time off (PTO), when not worked, as well as payouts for unused PTO, need not be included in the regular rate because this is pay for non-working time;
- Address an apparent contradiction in the current regulations surrounding whether pay for bona fide meal periods is excludable from the regular rate, the DOL proposes to amend the regulations to remove the reference to lunch periods in 29 C.F.R. § 778.218(b) to "eliminate any uncertainty about its relation to [Section] 778.320 concerning the excludability of payments for bona fide meal periods from the regular rate.";
- Remove the word solely from the current regulations to clarify that an employee's reimbursable business expenses are excludable if they are incurred "in the furtherance of [the] employer's interests," even if they might also benefit the employee to some extent;
- Clarify what constitutes a reasonable expense within the meaning of 29 C.F.R. § 778.217(b) and excludable from the regular rate;
- Add a number of additional examples to the non-exhaustive list in the existing regulations of benefits excludable from the regular rate to include these:
  - Conveniences furnished to the employee, such as on-site chiropractic treatment, massage therapy, physical therapy and personal training services; gym, fitness and recreational classes and memberships;
  - Modern wellness programs such as health screenings, vaccinations, smoking cessation support and nutrition classes;
  - Discounts on employer-provided retail goods and services; and
  - Tuition benefits.

- Clarify that recent state and local laws, requiring reporting pay for employees who are unable to work their scheduled hours because the employer subtracted hours from a regular shift before or after the employee reports to duty, will be treated as show-up pay under existing regulations. The DOL refers to proposed laws in Arizona, Connecticut, Illinois, Massachusetts, Maryland, New York and Chicago;
- Eliminate the requirement that call-back payments be received only on an infrequent or sporadic basis for the exclusion to apply, although they cannot be so regular that they are essentially prearranged. Similarly, the proposed regulations provide that predictability/ scheduling pay (for failing to provide a certain minimum advance notice of the work schedule) and "clopening" pay (for failing to provide a certain minimum break between working a closing shift and the subsequent opening shift) — something recently enacted or proposed in several states — may be excluded from the regular rate of pay, so long as they too are not so regular that they are essentially prearranged;
- Elaborate on the types of bonuses that are and are not discretionary and therefore excludable from the regular rate calculation;
- Add more examples of the types of modern benefit plans that may be excludable from the regular rate of pay; and
- Remove language from the existing regulations to clarify when employers may exclude from the regular rate certain overtime premium payments made for hours of work on special days or in excess or outside of specified daily or weekly standard work periods.
- The public comment period for these proposed regulations has passed, and the DOL likely will issue a final rule in 2020. While unlikely to eliminate all problems stemming from the oft-confounding regular rate determination, the DOL's proposed amendments should provide some much-needed and updated guidance to employers in their efforts to comply with the FLSA.

Tip Pooling

In October 2019, the DOL issued an NPRM, seeking to eliminate the so-called 20% Rule or 80/20 Rule, which first appeared in a DOL Field Operations Handbook (FOH) in 1988. The 20% Rule requires employers to pay tipped employees the full minimum wage, rather than the lower cash wage applicable to tipped employees if the employees spend more than 20 percent of their time performing allegedly non-tipped duties. However, the DOL never defined what constituted tipped versus non-tipped duties. The DOL abrogated the rule in a November 2018 Opinion Letter and in a February 2019 FOH amendment, but courts have since split on whether the DOL's latest guidance deserves deference. The proposed regulation seeks to elevate that guidance to the regulatory level and rescind the former regulation that was the genesis of the rule.

The NPRM further seeks to implement changes made by the Consolidated Appropriations Act (CAA) of 2018 regarding tip pooling. The CAA prohibits employers, managers or supervisors from keeping employees' tips, including from a tip pool, regardless of whether the employer takes a tip credit under the FLSA, but it allows employers to mandate a tip pool that includes traditionally tipped (*e.g.*, servers and bartenders) and non-tipped (*e.g.*, cooks and dishwashers) positions if the employer does not pay the tipped employees using a tip credit (that is, the employee is paid the full minimum wage without any credit for tips). The proposed rule clarifies who is considered a supervisor or manager and thereby is excluded from receiving tips (regardless of whether a tip credit is taken). Employers implementing policies regarding tipped employees must also consider state laws, which may provide different rules for tip credits or even disallow them altogether. The public comment period regarding the proposed rules ended in late December 2019, and a final rule likely will be released in 2020.

Joint-Employer Standard Under the FLSA

In April 2019, the DOL issued a NPRM to update its interpretation of the standard for establishing joint-employer liability under the FLSA. Characterized as a deregulatory proposal by Secretary of Labor Alexander Acosta, the proposed test for joint-employer liability would limit such liability to circumstances where the purported joint-employer exercised direct or indirect control over an individual's terms and conditions of employment. The NPRM 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" and, citing a longstanding U.S. Supreme Court decision, frames the primary question as whether the purported joint-employer "exercises substantial control over the terms and conditions of the employee's work." The DOL proposes a four-factor balancing test assessing whether the purported joint-employer:

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

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 public comment period has expired, and the new rule likely will be issued in 2020. If adopted by the courts, the proposed test should be welcome news for franchisors, staffing agencies and other businesses that have faced uncertainty regarding their exposure to liability as joint-employers under the FLSA.

Fluctuating Work Week Pay Method

Under DOL regulations, if certain conditions are met, an employer may pay an employee who works fluctuating hours a fixed salary for all hours worked and then an additional half-time for all hours over 40, a number that decreases as the number of hours increases. Although DOL regulations expressly permit employers to use it, uncertainty regarding its requirements and the potential for litigation (particularly during the last 10 years) has limited employer use of the pay method. In a NPRM issued in November 2019, the DOL intends to clarify that employers may provide additional pay, such as bonuses or premiums, to employees subject to the fluctuating work week (FWW) method, even when the additional pay is tied to the number of hours worked, without jeopardizing the use of that pay method.

Since the current rule was issued in 2011, courts have reached inconsistent conclusions on whether such additional compensation is permitted under the FWW pay method. As a result, some courts have permitted so-called production bonuses but not hours-based bonuses under the FWW pay method, a distinction the DOL asserts in the NPRM that it has never before made. In the NPRM, the DOL seeks to clarify that such bonuses, premiums and other compensation are, in fact, permitted when using the FWW pay method, regardless of whether such compensation is hours- or performance-based. The relatively short public comment period ended in early December 2019, and a final rule is expected in 2020. If the proposed rule is finalized, employers clearly will be able to further reward productive non-exempt, salaried employees eligible to receive such additional compensation. Thus, the rule not only should bring some clarity to the FWW method but revive its use, which has waned in the years following the 2011 Rule.

State Minimum Wages

Several states enacted legislation in 2019 that will provide for a minimum wage rate higher than the federal rate, which has not changed in more than ten years. Joining the list this year are New Jersey, Illinois, Connecticut and Nevada. These laws vary in the timing of the increases but generally provide for tiered increases over the next several years and a final minimum wage of as much as $15 per hour.

WHITE COLLAR AND GOVERNMENT ENFORCEMENT

Despite the Trump Administration's continuing efforts to deregulate commercial regulations and reduce government oversight of business and the workplace, including affording American business significant corporate tax relief, strong federal regulatory mechanisms remain on the books and will continue to have broad and significant impact on your business and workforce in 2020. With a projected budget of almost $30 billion for fiscal 2020, the Department of Justice (DOJ) under Attorney General William P. Barr's leadership continues to aggressively enforce federal laws that confront fraud and abuse in the workplace, specifically in areas of government contracting; illegal kickbacks in the healthcare industry, including Medicare fraud; and foreign bribery.

Below are updates of two expansive federal regulatory statutes that will have important workplace enforcement implications in 2020.

False Claims Act

The False Claims Act (FCA) is the cornerstone of federal investigations of fraud and abuse in the workplace. Organizations that do business with the government or obtain reimbursement from entitlement programs like Medicare and Medicaid must be vigilant invoicing the government for work performed or risk significant FCA penalties, including $5,000 to $10,000 fines for each false claim. In 2018, DOJ secured more than $2.8 billion from 600 settlements and judgments in civil and criminal enforcement actions involving false claims, including qui tam cases initiated by whistleblowers largely from the healthcare and life sciences sectors.

Robust FCA enforcement continues. During the first half of 2019, alone, the government announced more than $750 million in settlements. At the same time, the administration has signaled greater flexibility in resolving FCA cases by issuing guidance expanding cooperation credit in FCA cases by scaling back the all or nothing approach and allowing DOJ attorneys more discretion to accept settlements.

In addition, DOJ has reversed a past practice and now will seek dismissal of some whistleblower cases where DOJ had previously declined to prosecute. In a January 2018 memorandum, DOJ provided detailed guidance on when it might seek to dismiss non-intervened cases and signaled that it would exercise that authority with greater frequency.

FCA litigation remains hard fought given the high stakes. In the only FCA case to reach the Supreme Court this year, *Conchise Consultancy, Inc. v. United States ex rel. Hunt*, 139 S. Ct. 1507 (2019), the Court resolved a multicircuit split defining the FCA two-part statute of limitations under section 3731(b): six years after the violation occurs or three years after the government knew or should have known of the violation, but not more than 10 years after the violation.

The question before the Court was whether a whistleblower pursuing a qui tam action without government participation could take advantage of the ten-year statute of limitations. In a unanimous opinion by Justice Clarence Thomas, the Court held that, a whistleblower action will not be time-barred if it is filed either within six years of the alleged violation or within three years of the date on which the government was notified of the conduct, up to ten years from the date of the violation.

Foreign Corrupt Practice Act

Although DOJ and the Securities Exchange Commission (SEC) brought relatively few Foreign Corrupt Practice Act (FCPA) enforcement actions in Q1 and Q2 2019, the majority of those actions resulted in penalties exceeding $100 million thereby signaling the government's appetite to continue to pursue aggressively illegal foreign bribery committed by domestic and foreign companies with ties to the United States.

As of mid-2019, DOJ/SEC enforcement actions involving four U.S. and two foreign corporations had been resolved with total sanctions of almost $1.69 billion. The six enforcement actions also included criminal charges against 20 individuals and civil claims against two other individuals making 2019 more active than usual for individual prosecutions.

In legal developments, the 2018 Second Circuit Court of Appeals decision in *United States v. Hoskins*, No. 16-1010 (2nd Cir.) that significantly curtailed the jurisdictional reach of the FCPA was rejected in a Northern District of Illinois case, *United States v. Firtash*, 1:13-cr-00515 (N.D. Ill 2019). In denying defendant's (a foreign national) motion to dismiss on jurisdictional grounds, the court wrote that Congress did not clearly intend to limit the prosecution of foreign nationals to solely "agents, employees, officers, directors, or shareholders of an American issuer or domestic concern." On the contrary, the court explained that Congress did not intend the FCPA to require "an additional element to be alleged" in a conspiracy count, *i.e.*, defendant is either the agent of a domestic concern or a qualified foreign national — where the substantive offense charges an FCPA violation.

Finally, the Stockholm-based telecom giant, Ericsson, agreed in December 2019 to pay criminal and civil penalties totaling more than $1 billion to U.S. authorities. Ericsson's criminal conduct was carried out by multiple high-level executives within the company. Ericsson's wrongdoing dated back to 2002 and spanned at least five countries in a flagrant and, apparently, unsuccessful effort to increase profits. The company's subsidiary, Ericsson Egypt Ltd., has agreed to plead guilty to conspiracy to violate the FCPA while its parent company entered into a deferred prosecution agreement (DPA) with DOJ. In addition to $520 million in criminal fines and penalties, Ericsson will undergo a corporate monitorship for three years and pay the SEC $540 million in disgorged profits and related interest.

WORKPLACE SAFETY AND HEALTH

OSHA Leadership

In May 2019, after a long confirmation process that seemed stalled, former Vice President for Safety, Sustainability and Vehicle Maintenance at FedEx Ground Scott Mugno withdrew his nomination from consideration as OSHA's Assistant Secretary of Labor. The administration is currently led by Acting Assistant Secretary of Labor, Occupational Safety and Health Admistration's (OSHA's), Loren Sweatt, who has been leading the agency in an acting role since she joined OSHA in July of 2017. Employers can expect Sweatt to stay in her acting role for the foreseeable future, as the Trump Administration has not made a nomination since Mugno's withdrawal.

OSHA Safety Incentive Program Guidance

One of the most controversial parts of OSHA's 2016 Improve Tracking of Workplace Injuries and Illness Rule was its anti-retaliation provisions. Specifically, employers were concerned that the rule prohibited workplace safety incentive programs and post-incident drug testing. In October 2018, OSHA issued a standard interpretation letter clarifying that safety incentive programs are not prohibited so long as they are not implemented in a manner that discourages reporting. It also explained that most instances of post-incident drug testing are permissible under the anti-retaliation rule. OSHA has now included revising the anti-retaliation provisions of the final to the regulatory agenda in an effort to memorialize its position.

OSHA's Top Ten Violations

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

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

Generally, this list does not change much from year to year, with the top three violations tending to be fall protection, hazard communication and scaffolding.

Recordkeeping and Reporting

All requirements of OSHA's 2016 Improve Tracking of Workplace Injuries and Illnesses Rule are now in effect. Employers must post their prior year's annual summary, OSHA Form 300A, for each establishment from February 1 through April 30. Additionally, certain covered employers must electronically submit their OSHA Form 300A Summary of Work-Related Injuries and Illnesses to the OSHA Injury Tracking Application by March 2. With this submission starting in 2020, employers will also need to provide their Employer Identification Number (EIN).

Increase in Penalties

As it has done since 2016, OSHA will increase its penalties in early 2020 to adjust for inflation. Since Congress enacted legislation requiring federal agencies to adjust civil penalties to account for inflation, maximum penalties for serious, other-than-serious and posting requirement penalties have increased from $7,000 per violation to $13,260, and maximum penalties for repeated and willful violations have increased from $70,000 to $132,598 per violation.

OSHA Regulatory Agenda

OSHA's regulatory agenda includes nineteen items it intends to address in the coming months. It expects to begin analyzing comments it received from requests for information regarding revisions to its lockout/tagout and powered industrial truck standards. OSHA is seeking to revise both regulations as evolving technologies have affected each. In 2020, OSHA also expects to promulgate proposed rules for its standards on Walking-Working Surfaces, Cranes and Derricks in Construction, Communication Tower Safety, Welding in Construction Confined Spaces and Occupational Exposure to Beryllium and Beryllium Compounds in Construction and Shipyard Sectors standards.

OSHA-Related Legislation

The House of Representatives considered two major OSHA-related bills during the 2019 legislative session, one regarding the development of a heat stress standard (H.R. 3668) and the other addressing workplace violence in the healthcare and social services industries (H.R. 1309). The workplace violence bill passed a House vote and is currently with the Senate's Committee on Health, Education, Labor and Pensions. The heat stress bill has yet to receive a vote in the House and sits with the House Committee on Education and Labor.

Silica
On March 25, 2016, OSHA published a final rule on Occupational Exposure to Respirable Crystalline Silica. The final rule contained two separate standards regulating respirable crystalline silica, one for construction, and one for general industry and maritime. The construction standard includes *Table 1: Specified Exposure Control Methods When Working with Materials Containing Crystalline Silica*, which identifies common construction tasks and establishes dust control methods for those tasks. However, in August 2019, OSHA issued a request for information on the effectiveness of control methods not included in the table. OSHA expects to issue a Notice of Purposed Rulemaking regarding revisions to the table in June 2020. While there are expected changes coming to the standard, OSHA will likely continue to focus enforcement resources on this standard in 2020.

WORKPLACE TRAINING

Mandatory Sexual Harassment Training
In the wake of the #MeToo movement and following the employee-protectionist trend observed in other contexts, states and municipalities continue to enact sexual harassment prevention legislation, including employer training requirements. In 2018, California expanded its requirement that covered employers must train all employees, not just supervisory employees as previously had been the case. Additionally, Delaware, the District of Columbia (although unfunded and not in effect), New York State and New York City passed laws with specific training requirements. In 2019, more states followed suit. Connecticut expanded its training requirement that covered employers must provide two hours of training to all employees. Illinois and Washington passed new laws with specific training requirements.

The new laws are summarized below, and additional information is available as to their respective — and different— requirements. The fact remains that numerous states have pending bills, at various stages of their legislative processes, which include more employer training mandates. A patchwork of legal training obligations likely applies to many multistate employers.

Connecticut: Connecticut previously required employers with 50 or more employees to provide two hours of sexual harassment training to supervisory employees. Effective October 1, 2019, Connecticut employers with three or more employees must provide two hours of training to all employees; and employers with less than three employees must provide two hours of training to supervisors only. The Connecticut Commission on Human Rights and Opportunities released a resource page which include FAQs, which can be found here.

Illinois: Effective January 1, 2020, all Illinois employers must provide harassment prevention training to all employees annually. The new law does not mandate the length of the training but does mandate the timing and frequency and the topics covered.

Washington: Signed by Washington's governor on May 13, 2019, Washington's new law requires every hotel, motel, retail or security guard entity or property services contractor to provide sexual harassment prevention training to all employees. Hotels and motels with 60 or more rooms must meet the requirements of this new law by January 1, 2020. All other employers must meet the requirements of this section by January 1, 2021.

Employers would be wise to develop training programs designed to meet all existing requirements. Stay tuned for updates from Jackson Lewis as additional states and municipalities pass similar laws in the year ahead.

Thank you for your interest in the

2020: The Year Ahead for Employers.

Focused on labor and employment law since 1958, Jackson Lewis P.C.'s 950+ attorneys located in major cities nationwide consistently identify and respond to new ways workplace law intersects business. We help employers develop proactive strategies, strong policies and business-oriented solutions to cultivate high-functioning workforces that are engaged, stable and diverse, and we share our clients' goals to emphasize inclusivity and respect for the contribution of every employee.

Should you want to discuss how items contained in this report could impact your organization, please contact the Jackson Lewis attorney with whom you regularly work, or visit us at jacksonlewis.com to find out how we can partner with you.