

The Year Ahead for Employers

2019

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Introduction

Labor and employment law saw a flurry of activity in 2018 as the Trump Administration's deregulation and pro-business policies took effect across the country.

State and local governments responded in a variety of ways to national policy, and the midterm elections painted a picture of what's in store for employers in 2019 and beyond.

Jackson Lewis outlines upcoming issues, trends, legislation and regulations employers need to be aware of in 2019.

Highlights:

Paid leave statutes gain momentum in the states, trending away from local laws.

The Office of Federal Contract Compliance Programs is issuing a number of new directives.

Sexual harassment and gender identity laws will continue to create a complicated patchwork of employer obligations as federal, state and local governments take action.

Medical and recreational marijuana bills and initiatives continue to advance across the country, in stark contrast to the federal policy.

Legislation was introduced to overturn the U.S. Supreme Court's stance on arbitration agreements in class action litigation.

Federal agencies involved in the immigration process are increasing workplace audits, workplace raids and deportations.

Personal protective equipment joined the top 10 list of most frequently cited OSHA safety and health violations.

Many localities raised their minimum wages above the federal rate.

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Absence / Paid Leave

Paid Leave

The steady increase in new paid leave statutes over the last four years is expected to continue. At the same time, there is a trend away from [local paid leave laws](#). The New Jersey Earned Sick Leave Law went into effect on October 29, 2018, invalidating 12 local paid sick leave laws. The Texas Court of Appeals ruled that a local Austin paid sick leave ordinance was invalid under the state's Minimum Wage Act.

For 2019, paid sick laws enacted in the state of Michigan, Texas' San Antonio, New York's Westchester County and Minnesota's Duluth will go into effect January 1, 2020.

In addition, while enacted, employers still must watch out for last-minute changes to the laws. For example, in Michigan, outgoing GOP Governor Rich Snyder amended the enacted paid leave law to significantly limit its scope.

The District of Columbia, Massachusetts and Washington will officially join the paid family leave law landscape in 2019, as employers there will be required to begin collecting salary deductions. Benefits will begin in 2020 for D.C. and Washington, and in 2021 for Massachusetts.

Parental Leave Policies

Parental leave policies will continue to be a hot-button issue for employers in 2019. For companies with multistate or global operations, the complexity of designing policies that comply with Title VII of the Civil Rights Act and the Pregnancy Discrimination Act and integrating them with the expanding state or local statutory paid leave offerings will be especially challenging. Several recent Equal Employment Opportunity Commission (EEOC) cases challenging companies' parental leave policies have focused on equal leave benefits for both male and female employees, including equal return-to-work transition programs. Policies that differentiate based on primary or secondary caregiver responsibilities do not appear immune from challenge, even though they do not expressly base leave benefits on gender.



Affirmative Action and Federal Contractors

Fiscal year (FY) 2018, covering October 1, 2017, through September 30, 2018, proved to be an extremely busy year for both the Office of Federal Contract Compliance Programs (OFCCP) and the federal contractors and subcontractors it regulates. OFCCP not only experienced significant changes in leadership, but also issued a slew of new directives – nine in FY 2018 and an additional three in FY 2019. OFCCP also publicly disclosed details regarding its audit-selection process and created a standardized approach to request extensions in connection with its scheduling letters. These efforts reflect the OFCCP's stated goal of providing greater transparency and consistency in its enforcement activities.

Changes in Leadership

Craig E. Leen became director of the OFCCP in 2018. Leen previously had served as Senior Advisor to Alexander Acosta, the Secretary of Labor.

Disclosure of Audit Scheduling Methodology

In April 2018, OFCCP voluntarily released a detailed description of its process for selecting contractors for audit in its most recent scheduling list. The document detailed how OFCCP prioritized establishments with higher employee counts. It also applied criteria to regulate the number of establishments and types of audits assigned to the district offices.

Requests for Extensions

In September 2018, OFCCP published a FAQ on contractor requests for extensions of time to respond to a scheduling letter. The OFCCP will provide a 30-day extension for the submission of supporting data in connection with a contractor's affirmative action program (AAP) if two criteria are met:

1. The contractor requests the extension prior to the initial 30-day due date for the AAP; and
2. The contractor timely submits its basic AAPs within the initial 30-day period after receiving the scheduling letter and itemized listing.

The FAQ does not explain what constitutes a "basic" AAP, but it has been widely interpreted as the current AAP and items 1-14 from the Itemized Listing that accompanies a scheduling letter. Failure to timely submit the basic AAPs or the supporting data will result in an immediate Notice to Show Cause, which does not require approval from the OFCCP's national office.

New Directives

OFCCP issued a [flurry of new directives](#) aligned with Director Leen's vision of four pillars: transparency, certainty, efficiency and recognition.

Rescission of Active Case Enforcement

OFCCP [Directive 2019-01](#) rescinds the Obama Administration's Active Case Enforcement (ACE) directive, which had replaced the Bush Administration's Active Case Management

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(ACM) directive. The ACM directive emphasized abbreviated, more frequent OFCCP audits, focused on identifying indicators of systemic discrimination. If OFCCP did not find potential indicators during the desk audit, it tended to address technical violations informally and close the audit. In contrast, ACE signaled a fundamental shift in OFCCP's approach: fewer, but more involved, audits that tended to take considerably longer, even if OFCCP ultimately identified no issues. Directive 2019-01 aims to combine the best aspects of both ACE and ACM. It seeks to increase the number of compliance evaluations, shorten desk audits and conciliate issues more efficiently, thereby maximizing the OFCCP's resources.

Early Resolution Procedures

Directive 2019-02 offers contractors the opportunity to voluntarily remedy compliance deficiencies found in establishment-based compliance evaluations, in exchange for avoiding additional non-voluntary OFCCP audits for five years. OFCCP's goal is to promote early resolution of issues, increase agency efficiency and limit the taxpayer and contractor resources being spent on lengthy OFCCP investigations. For more serious, non-monetary violations that cannot be corrected during the desk audit stage, the OFCCP will offer the contractor the opportunity to enter an Early Resolution Conciliation Agreement (ERCA) with company-wide corrective action. Under an ERCA, the contractor must investigate whether the compliance deficiency affected other parts of the organization and, if so, apply corrections company-wide. In exchange, OFCCP would not audit the establishment under review for five years, though it may audit other establishments.

Contractually Speaking Webinar Series

Join Jackson Lewis on the fourth Tuesday of every month throughout the year for our webinar series – a 20 minute “quick-fire” review of all things OFCCP. We will discuss new regulations, enforcement trends and provide meaningful and practical advice to help you achieve your compliance goals.

2019 Topics Include:

- 2018 Year in Review (January 22)
- OFCCP's New Compensation Directive – What Does This Mean for Contractors (February 26)
- Surviving an OFCCP Audit (March 26)
- Responding to OFCCP Requests for Information Post AAP Submission (April 23)
- Let's Not Forget About Technical Compliance (May 28)
- OFCCP Mid-Year Update (June 25)

OFCCP also will seek voluntary, company-wide relief for material, discrimination violations. If the contractor agrees, OFCCP has established a 60-day process for data exchange, analysis refinement, and conciliation of an ERCA to cover the entire company or an appropriate subset. Under the ERCA, OFCCP would monitor compliance and require progress-reporting for a five-year period, during which all establishments covered by the ERCA are free from new OFCCP audits.

Opinion Letters and Help Desk

Directive 2019-03 continues OFCCP's trend toward increased transparency and certainty by announcing it would begin issuing opinion letters and will modify and improve the convenience of

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its Help Desk. The Directive allows employers and employees to request opinion letters. Requestor(s) will remain anonymous, and the resulting guidance may address an “individual contractor, an industry, a category of contractors, all contractors as well as a particular category of employees such as Protected Veterans.”

Prior to issuance, the Office of the Solicitor will review the guidance to ensure consistency with applicable laws and regulations. Once issued, these letters are intended to reduce uncertainty for compliance in unusual situations. However, as might be expected, opinion letters are not a “get out of jail free card.” The Directive states that OFCCP will not issue opinion letters that address matters currently under litigation or for a contractor currently undergoing a compliance review. In addition, OFCCP announced it will expand its Help Desk functionality by making certain Help Desk inquiries and responses dynamically available and searchable as a self-service option on OFCCP’s website. As the Directive notes, during an enforcement action, “OFCCP will consider whether a contractor has acted consistently and in good faith with an Opinion Letter, Directive, FAQ, Help Desk answer or other OFCCP guidance” While guidance issued by opinion letter or the Help Desk is sub-regulatory and without the force of law, the message is clear: OFCCP may give more of the benefit of the doubt to contractors who rely on the agency’s guidance.

False Claims Act (FCA)

Government contractors must be scrupulous in their accounting and billing practices or face strict FCA prohibitions and penalties. Contractors

who submitted either false or fraudulent billings paid more than [\\$3.7 billion in settlements](#) (restitution and penalties) in 2017 arising out of 799 new cases. More than eighty percent of settlements originated from qui tam actions in which the government intervened. Of the \$3.7 billion, [\\$2.4 billion involved the healthcare industry, \\$900 million of which was attributed to the pharmaceutical and medical device industries](#). As of the publishing of this report, FCA settlements were on course to exceed \$2.8 billion for fiscal 2018. Note that the penalty threshold (per occurrence) under the FCA increased from \$5,500 to \$10,781 per violation.

In FCA cases, federal courts continue to grapple with “express” versus “implied” certification as true and accurate by contractors. In *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016), the U.S. Supreme Court unanimously held that even an implied certification of a FCA claim is actionable as long as:

1. The claim made *specific* representations about the goods and services provided; and
2. The claimant failed to disclose non-compliance with a *material* statutory, regulatory or contractual requirement such that the representations that were made were misleading.

Escobar reinforces the rigorous and demanding standard regarding the *materiality* requirement of an FCA claim the government must establish to recover.

Cybersecurity and Privacy

General Data Protection Regulation (GDPR)

The European Union's (EU) GDPR took effect in May 2018, marking the most significant change to European data privacy and security law in more than 20 years. The GDPR can reach [U.S.-based companies](#) processing EU citizen personal data, including [employee data](#). A main concern for companies is the significant fines the GDPR may impose for failure to comply: up to €20 million or up to 4% of annual global revenues, whichever is greater. The extent to which EU data protection authorities (DPAs) will enforce fines will be tested in 2019. Max Schrems, founder of the European Centre for Digital Rights, [anticipates](#) that, although uniformity of enforcement is supposed to be ensured, the level of GDPR enforcement may vary across the EU, as approach and culture will play a role in how aggressively GDPR violations are pursued by nation-state DPAs.

California Consumer Privacy Act (CCPA)

In [June 2018](#), the California legislature enacted the [CCPA](#), with [several amendments passed](#) in September 2018. The CCPA's definition of "consumer" was drafted broadly enough to include employees; [lobbying efforts](#) to exclude employees from the definition, to date, have been unsuccessful. Key consumer rights include the right to request deletion of personal information, to request that a business disclose the categories of information and the identity of any third parties to which the information was sold or disclosed and to opt-out of the sale of personal information.

“ On the heels of the EU's GDPR, states across the U.S. have begun reassessing their data privacy protection regulations. ”

State Developments

On the heels of the EU's GDPR, states across the U.S. have begun reassessing their data privacy protection regulations. In May, Vermont passed [H.764](#), a first-of-its-kind law requiring data brokers to implement a written information security program, disclose to individuals what data is being collected and permit individuals to opt-out of the collection. In September, [Colorado strengthened its consumer data protection law](#) with [HB 1128](#), a groundbreaking bill requiring reasonable security procedures and practices for protecting personal identifying information, limiting the timeframe to notify affected Colorado residents and the Attorney General of a data breach and imposing data disposal rules. In November, the Ohio Data Protection Act ([2018 SB 220](#)) took effect, as part of a broader [CyberOhio Initiative](#) providing a safe harbor for businesses implementing and maintaining "reasonable" cybersecurity controls. In 2019, similar state data privacy protection initiatives will be introduced.

Cybersecurity and Privacy

Biometric Privacy Laws

Since 2015, there has been a marked increase of [employee putative class actions](#) based on Illinois' Biometric Information Privacy Act (BIPA). This shows no sign of slowing. The Illinois law prohibits private entities from obtaining a person's biometric identifier or biometric information unless the person is informed in writing and signs a release. This is of particular importance to workplaces where employers have implemented biometric tools to validate time entries. Although some consider Illinois the leader in biometric data protection, [other states](#), including Washington and Texas, have enacted similar laws. Others are considering legislation.

Affirmative Duty to Protect Employee Data

While several states mandate data security measures by statute, the Pennsylvania Supreme Court [issued a landmark decision](#) recognizing, for the first time, an employer's affirmative common law duty to "exercise reasonable care to safeguard their employees' sensitive personal information by the employer on an internet accessible system." The Pennsylvania Supreme Court also clarified that the "economic loss doctrine" does not preclude recovery of monetary damages, under a negligence theory, "provided that the plaintiff can establish the [employer's] breach of a legal duty arising under common law that is independent of any duty assumed pursuant to contract." In the coming year(s),

other courts across the U.S. may address the issue of whether employers have an affirmative common law duty to protect employee data.

Telephone Consumer Protection Act (TCPA)

A significant amount of activity around the TCPA is expected in 2019. On November 13, 2018, the U.S. Supreme Court agreed to decide whether the [Hobbs Act](#) requires the district court to accept the Federal Communications Commission (FCC) interpretation of the TCPA, in [PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.](#), No. 17-1705. The case could affect judicial deference to agency rules more generally. Additionally, the FCC's expansive interpretation of what constitutes an automatic telephone dialing system (ATDS), and its approach to consent of reassigned wireless numbers, likely will be reviewed as several cases proceed through the court system. Further, Congress recently proposed the Telephone Robocall Abuse Criminal Enforcement and Deterrence Act ([TRACED Act](#)) to combat the increasing number of "robocall" scams and other intentional violations of telemarketing laws. If passed, the TRACED Act would broaden FCC authority to levy civil penalties and extend the time period for the FCC to catch and take civil enforcement action against intentional violations.

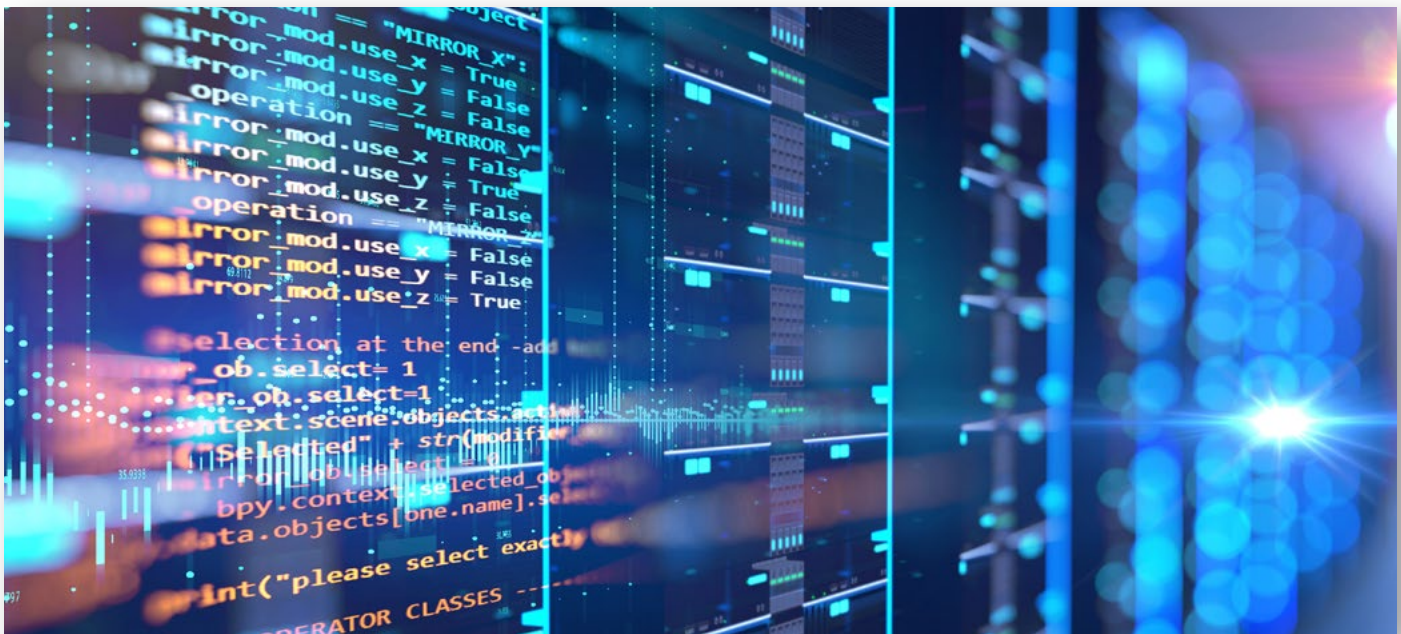
Cybersecurity and Privacy

Business Email Compromise (BEC) / Email Account Compromise (EAC)

BEC and EAC attacks are widespread and show no sign of slowing in the coming year, continuing to evolve and grow, targeting small, medium and large business and personal transactions.

A July 2018 [FBI report](#) stated that BEC attacks have resulted in a 136% increase in identified global losses between December 2016 and May 2018, totaling \$12.5 billion.

BEC, also known as a cyber-enabled financial fraud, often targets employees with access to company finances, enticing them through a variety of methods (including social engineering and computer intrusions) to conduct unauthorized transfers of funds. Often, the attacks also may result in the access and/or acquisition of some or all of the emails in the compromised email account(s), putting personal and other information at risk. Other variations of these attacks involve compromising legitimate business email accounts and requesting personal information or [wage and tax statement \(W-2\) forms](#) for employees.



Drugs and Alcohol

Marijuana Legalization Continues

A majority of Americans support the legalization of marijuana. According to a 2018 study conducted by the [Pew Research Survey Center](#), 62% of Americans support legalizing marijuana — and Americans are not alone. In 2018, Canada legalized recreational marijuana. In November 2018, Mexico's National Regeneration Movement (MORENA) party introduced legislation that would legalize recreational marijuana in Mexico. The MORENA party holds a majority in both houses of Mexico's Congress. The bill is expected to pass.



Federal Law Marijuana Updates

Marijuana continues to be illegal under federal law and attempts to reclassify marijuana under the federal Controlled Substances Act have failed in the past. However, steps taken in 2018 by the Food and Drug Administration (FDA) and Drug Enforcement Administration (DEA) may lead to eventual approval by the agencies of other cannabis-based drugs. In June 2018, the [FDA approved](#), for the

first time, a prescription drug made from cannabidiol (CBD), a component of marijuana, to treat two rare and serious types of epilepsy. In September, the [DEA classified](#) the drug as a Schedule V controlled substance, the lowest level of the Controlled Substances Act (meaning the drug has a low potential for abuse).

State Law Marijuana Updates

As of December 31, 2018, only four states (Idaho, Kansas, Nebraska and South Dakota) have not yet legalized CBD products or some other form of marijuana. Thirty-two states and the District of Columbia have legalized medical marijuana (Oklahoma, Missouri and Utah passed medical marijuana laws in 2018). Recreational marijuana now is legal in 10 states and the District of Columbia, with Michigan and Maine passing recreational marijuana laws in 2018. Although marijuana still is illegal under federal law, state laws continue to pose many challenges for employers. In June 2018, Oklahoma passed a broad medical marijuana statute that prohibits employers from taking action against applicants or employees solely based on their status as a medical marijuana license holder or due to a positive drug test result. This language will create challenges for Oklahoma employers who administer workplace drug testing programs.

Drugs and Alcohol

Rights of Medical Marijuana Users

The first court decision holding that a failure to hire a medical marijuana user constituted employment discrimination was handed down in 2018. [Challenges in states](#) with anti-discrimination provisions for medical marijuana users, particularly in the context of pre-employment and random drug testing, are expected in 2019, as well as a decision regarding the breadth of the anti-discrimination provisions of the Arizona medical marijuana law.

Prescription Drug Use

Employers will need to keep in mind the potential liability that exists if they require employees to disclose all medication prescriptions. In 2018, several EEOC cases involved challenges to employer actions related to prescription drug use by employees. For example, in June 2018, the [EEOC filed a disability discrimination lawsuit](#) against Steel Painters for terminating an employee after his pre-employment drug test came back positive. The employee was on prescription medication to treat his opioid pain medication addiction and had provided the laboratory a copy of his prescription and documentation about his treatment. Steel Painters terminated the employee without additional consultation with the employee's doctor about the employee's ability to work safely while on prescription medication. The EEOC settled a similar case in 2018, where an employer withdrew a job offer after an applicant tested positive for prescription medicine. The consent decree

in that case requires the company to adopt a policy that will require employees to disclose prescription drug use only after the company has "reasonable suspicion" that the medication use may affect performance.

Substance Use-Disorder Prevention that Promotes Opioid Recovery and Treatment for Patients and Communities Act (SUPPORT Act)

In November 2018, Congress overwhelmingly passed, and President Trump signed into law, sweeping legislation to address the country's troubling opioid epidemic. Touching on almost every aspect of the epidemic, the [SUPPORT Act](#) expands access, prevention and treatment for persons with opioid dependence or substance use disorders (SUDs).

Recovery Kickback Prohibition

A critical component of the SUPPORT Act is the Recovery Kickback Prohibition, applied broadly to any healthcare benefit program, public or private. The Prohibition is more narrow than the Federal Anti-Kickback Statute, which applies only to referrals and services of certain types of entities (namely, recovery homes, clinical treatment facilities, and laboratories as defined in the statute). Both laws make it a crime to offer, pay, solicit or receive remuneration in connection with referrals of patients to certain healthcare providers/facilities. A violation of the Recovery Kickback Prohibition can result in a fine of not more than \$200,000, imprisonment for not more than 10 years or both for each occurrence.

Drugs and Alcohol

Department of Transportation (DOT) Update

The SUPPORT Act, which primarily focuses on opioid treatment, requires the U.S. Department of Health and Human Services (HHS) to determine whether a revision of the Mandatory Guidelines for Federal Workplace Drug Testing Programs to include fentanyl or any other drug is justified. Additionally, the Secretary of HHS was required to report to Congress on the status of scientific and technical guidelines for hair testing by December 25, 2018, and will report every year thereafter, until HHS publishes a final notice of guidelines for hair testing. The law also requires the Secretary of HHS to publish a final notice of the Mandatory Guidelines for Federal Workplace Drug Testing Programs using Oral Fluid by December 31, 2018. DOT-regulated employers should look for updates on hair and oral fluid testing in the coming months.

“Positive cocaine tests were up 7% nationally, with double-digit year-over-year increases in Nebraska, Idaho, Washington, Nevada, Maryland and Wisconsin.”

Drug Testing Update

Positive drug tests for cocaine, amphetamine and marijuana use have significantly increased, but prescription opioid positivity rates have decreased, according to a May 2018 [Quest Diagnostics report](#) (based on 2017 drug

testing results). Positive cocaine tests were up 7% nationally, with double-digit year-over-year increases in Nebraska, Idaho, Washington, Nevada, Maryland and Wisconsin. There was an approximately 90% increase in positive urine cocaine tests in Nebraska and Idaho. The Centers for Disease Control and Prevention reported that the national opioid prescribing rate is at a 10-year low, but it also reported a 45% increase in deaths involving fentanyl in 2017.

Private employers are trending away from the traditional five-panel drug test in favor of expanded test panels that include semi-synthetic opioids (where permitted by law). This uptick likely is a result of the [2018 expansion](#) of the DOT's drug testing panel to include four semi-synthetic opioids (specifically hydrocodone, hydromorphone, oxycodone and oxymorphone) and ongoing concerns about opioid abuse.

The Occupational Safety and Health Administration (OSHA) [clarified its position](#) on post-incident drug and alcohol testing in 2018 to state that its final rule does not prohibit employers from using drug testing to investigate an incident that harmed or could have harmed employees. It also stated that employers should test all employees whose conduct could have caused or contributed to the incident, not just those who reported injuries.

Employment Litigation

Class Action Trends

The trends in workplace class action litigation are continuing to evolve in response to the realities of the workplace. In particular, the plaintiff's bar has continued to redefine classes in order to increase certifications in discrimination claims. Based on these evolving trends, significant developments in Title VII discrimination claims and Equal Pay Act class actions are anticipated.



Certification Standards

The standards for certifying a class action under [FRCP Rule 23](#) continue to be addressed by the lower courts. Varying interpretations of the standards now exist as the plaintiff's bar attempts to redefine classes to increase the likelihood of certification. The U.S. Supreme Court may take up the issue to resolve any discrepancies in interpreting the standards.

Class Waivers

In 2018, the U.S. Supreme Court held in [Epic Systems v. Lewis, No. 16-285](#) that class action waivers in employment arbitration agreements are enforceable under the Federal Arbitration Act (FAA). In response, Congressional Democrats proposed legislation intended to overturn the U.S. Supreme Court's ruling that employers do not violate the National Labor Relations Act by requiring workers to sign arbitration agreements with class action waiver provisions as a condition of their employment. Democrats regained control of the House of Representatives in the 2018 midterm elections, thereby increasing the odds that this legislation will pass in 2019. Should the legislation become law, the ability of employers and employees to use arbitration agreements to waive the right to class litigation would be severely curtailed and likely result in an increase in class actions.

Sexual Orientation and Gender Identity

The U.S. Supreme Court may soon decide whether Title VII of the Civil Rights Act of 1964 prohibits discrimination based on sexual orientation and gender identity. Three petitions for review are pending before the Court.

Employment Litigation

New York Anti-Sexual Harassment Rules

Employers doing business in [New York City](#) and [New York State](#) face stricter anti-sexual harassment rules under legislation passed in 2018 that require all employers to comply with anti-sexual harassment legislation prohibiting harassment based on sex, sexual orientation, gender identity and transgender status and mandating that anti-harassment policies and employee training specifically address those types of harassment.

Transgender Military Service

Responding to challenges raised by civil rights organizations, lower court judges temporarily blocked implementation of the Trump Administration's ban of U.S. military service by transgender men and women, exempting the approximately 900 transgender individuals who are already serving. The Trump Administration's appeal is pending before the U.S. Court of Appeals for the District of Columbia Circuit.

Physical Ability Testing

The EEOC is expected to increase its enforcement actions against employers' physical ability testing programs. In September 2018, the EEOC [filed a lawsuit](#) against trucking company JBS Carriers, accusing the company of using pre-employment screening procedures to improperly screen out job applicants on the basis of disability. The [32-page complaint](#) illustrates the complexity of these programs, which are often found to involve "under-developed" aspects of the Americans with Disabilities Act (ADA) and Title VII.



Over 6,000 legislative seats and 36 governorships, as well as over 160 statewide ballot measures were decided on Election Day, November 6, 2018. While the change of control in the U.S. House of Representatives will affect employment law throughout the country, the impact of state elections may be even greater on companies doing businesses in certain states. With the most stark example of this being in New York.

Democrats won enough seats in the November election to take control of the New York State Senate, and they will hold the majority in both legislative chambers beginning the next session. Many expect that the progressive, pro-employee measures that have consistently passed in the Assembly, but failed in the Senate, likely will be passed by a new, liberal Senate majority. One can look to the [progressive employment laws that New York City](#) has enacted over the past five years under a Democratic mayor and an overwhelmingly Democratic City Council (48 out of 51 members) to see what might be in store for the state.

Disclosure of Personal History of Job Applicants

The New York State Assembly passed a [bill](#) in 2018 making it an unlawful discriminatory practice for an employer to inquire about a criminal conviction of an employee, unless the employer first makes a conditional offer of employment. It is likely to be taken up again in 2019.

A piece of [legislation](#) that would prohibit the disclosure or use of consumer credit history in hiring, employment and licensing determinations will be reintroduced in 2019. Governor Andrew Cuomo likely will support these efforts, having announced his own version of a [bill](#) that would prohibit an employer from inquiring about or considering salary history as a factor in offering employment or a salary to an applicant for a job.

Paid Sick Leave

New York City now provides paid sick leave to its residents, and efforts to expand it statewide are expected to gain traction in 2019. One [proposal](#) would require all employers in New York to provide paid sick leave to employees, accrued at a rate of one hour for every 20 hours worked. There is also a proposal pending in [Albany County](#) to require all employers to provide paid sick leave to all employees.

Predictive Scheduling

The New York State Legislature likely will press the advancement of [proposed regulations](#) by the New York Department of Labor governing call-in pay for employees subject to the Miscellaneous Wage Order.

Pay Equity Package

Democrats in both chambers carry legislation aimed to address pay equity in New York. One [bill](#) in this package would make it an unlawful discriminatory practice to pay employees different wages based on sex, race or national origin.



Sexual Harassment

Governor Cuomo recently released [final](#) materials and guidance to assist in the implementation of new sexual harassment laws enacted in April 2018 as part of New York's Fiscal Year 2019 State Budget.

Gender Non-Discrimination

There will be a renewed effort to pass the Gender Expression Non-Discrimination Act (GENDA) in the New York State Legislature. The [bill](#) would prohibit discrimination based on gender identity or expression and would include offenses regarding gender identity or expression in New York's hate crime statute.

Cybersecurity

A [bill](#) in the New York Legislature, the New York Stop Hacks and Improve Electronic Data Security (SHIELD) Act, seeks to update New York's current data breach notification law to keep pace with individuals' use and dissemination of private information.

Drugs and Alcohol

Governor Cuomo has increasingly [signaled](#) a willingness to move toward the legalization of recreational marijuana in New York.

The New York State Department of Health released a report stating a desire to expand its medical marijuana program. Two major proposed changes to the program would be to expand the list of medical practitioners who could recommend eligible patients and to remove the list of eligible conditions. The report indicated support for a [bill](#) that would remove the list

of conditions to qualify for medical marijuana use and allow the practitioner to rely on his or her judgment regarding medicinal benefits of marijuana for the patient.

Immigration

The proposed New York State DREAM [Act](#) would create a fund to advance the educational opportunities for the children of undocumented immigrants by providing scholarships to college-bound students. Governor Cuomo [included](#) the legislation in his list of priorities for 2019.

Health and Retirement / Employee Benefits

Annual Premiums

The average annual premium for employer-sponsored health insurance in 2018 was \$6,896 for single coverage and \$19,616 for family coverage, with workers on average contributing 18% of the premiums for single coverage and 29% for family coverage, according to [Kaiser](#).

Healthcare Costs

U.S. employers expect healthcare costs to increase 5.3% to 6.5% on average in 2019, according to separate surveys by [PriceWaterhouseCoopers](#) and [Mercer](#). Increases are primarily due to the use of predictive analytics to improve plan utilization and reduce claims costs.

Prescription Drug Costs

Prescription drug benefit costs continue to rise and can account for up to 30% of the cost of a medical plan, according to the [Aon Rx Coalition](#). Participating in purchasing coalitions, adding a fourth-tier copay for specialty drugs and carving out specialty drugs from medical benefits are still among the best approaches employers can use to rein in prescription drug costs.

Health Flexible Spending Accounts (FSA)

Employees can contribute up to \$2,700 to a FSA in 2019, a \$50 increase over 2018. FSAs provide employees a way to use tax-free dollars to pay medical expenses not covered by other health plans.

Health Savings Accounts (HSA)

The annual limit on contributions to an HSA for enrollees covered under a high deductible health plan (HDHP) is \$3,500 for self-only coverage (an increase of \$50) and \$7,000 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.

Wellness Programs

In March of 2018, the EEOC said that it had no immediate plans to issue new wellness regulations after a federal judge ordered them vacated effective January 1, 2019. Existing wellness regulations remain in effect.

Health and Retirement / Employee Benefits

Forfeiture Use

The Internal Revenue Service (IRS) issued regulations allowing plans to use forfeitures to make qualified non-elective contributions (QNEC) and qualified matching contributions (QMAC). The feature is effective for plan years ending on or after July 20, 2018. This is a voluntary change, but plans anticipating using forfeitures for QNEC or QMAC contributions must adopt an amendment before doing so.

Hardship Withdrawal Rules

The [Bipartisan Budget Act of 2018](#) made changes to the hardship distribution rules for 401(k) plans for plan years beginning after December 31, 2018. The most notable changes include expanding the types of contributions available for withdrawal. Participants are no longer required to suspend contributions for six months following a hardship withdrawal and participants are no longer required to exhaust plan loan options (if available) prior to requesting a hardship withdrawal. The plan amendment deadline for the hardship provisions is not certain until the IRS publishes the amendment requirement in its annual Required Amendments List.

Anticipated Guidance

The IRS issued [proposed regulations](#) providing guidance for the change to hardship distribution. The regulations differentiate between the required changes for a plan and those the IRS considers discretionary, *e.g.*, the plan loan exhaustion provision is discretionary

in the proposed regulations. The proposed regulations also formalize other provisions needing guidance from the Pension Protection Act of 2006, through the Bipartisan Budget Act of 2018.

Student Loan Repayment “Match”

The IRS issued a private letter ruling (PLR) to a company wanting to contribute to its retirement plan based on employees' student loan repayments. The PLR is applicable only to the particular company and plan to which it is addressed, but the consensus is the IRS is amenable to allowing plans to consider student loan repayments for purposes of calculating contributions to the 401(k) plan, instead of using only elective deferrals to determine matching amounts.

New Special Tax Notice

Plans must provide any payee receiving an eligible rollover distribution with certain information about tax consequences of the distribution and rollover opportunities. Tax law changes made by the Tax Cuts and Jobs Act to rollover opportunities, *e.g.*, loan rollover extensions. The IRS issued revised model notices in [IRS Notice 2018-74](#).

Health and Retirement / Employee Benefits

Employee Plans Compliance Resolution System (“EPCRS”)

The IRS issued [Revenue Procedure 2018-52](#), updating the EPCRS program allowing the Voluntary Correction Program (VCP) that plans use to correct operational errors with the consent of the IRS. The most significant change requires plans to file all VCP submissions electronically beginning April 1, 2019. The IRS expects to release updated submission instructions in January 2019.

Association Retirement Plans

The Department of Labor (DOL) and the IRS are preparing regulations for multi-employer retirement plans for unrelated employers.

Disasters Continue As Does the Relief

[IRS Press Release 2018-236](#) reminds plan sponsors of the relaxed hardship distribution and plan loan rules. In addition, the proposed regulations associated with the hardship changes brought about due to the Bipartisan Budget Act of 2018 also includes more permanent language for relief from disasters when Federal Emergency Management Agency (FEMA) is involved.

ACA Reporting Deadlines

Self-insuring employers, insurers, other coverage providers and applicable large employers have an **extra 30 days** (until March 4, 2019) to provide IRS Forms **1095-B** or **1095-C** to individuals, as required under the Affordable Care Act. In addition, information returns must be filed with the IRS by February 28, 2019, for paper filers and April 2, 2019, for electronic filers. Employers that file at least 250 information returns with the IRS must file the returns electronically.

Social Security Benefits

Retirees will receive a 2.8% cost-of-living increase in Social Security benefits in 2019, the largest hike since 2012. The average monthly Social Security benefit for retirees in 2019 is \$1,461, an increase of \$57 from 2018.

401(k) Plan Contribution Limits

Employees who participate in 401(k) plans can contribute up to \$19,000 (a \$500 increase over 2018), plus a catch-up contribution limit of \$6,000 for employees at least 50 years old in 2019.

Health and Retirement / Employee Benefits

Defined Benefit Plans

The per-participant flat premium rate that single-employer pension plans must pay to the Pension Benefit Guarantee Corporation (PBGC) **increases** to \$80 for plan years beginning in 2019 (up from \$74 in 2018). After 2019, all rates are subject to indexing. There are no scheduled increases (other than indexing) for years after 2019.

Frozen Defined Benefit Plans

The IRS extended the nondiscrimination testing flexibility relief for frozen defined benefit plans that satisfy specific requirements through the last plan year beginning before 2020.



Multiemployer Plans

The deficit in the PBGC's insurance program for multiemployer plans remains dire in 2019. The situation is made worse by the financial decline of several large multiemployer plans that are expected to run out of money in the next decade. Absent changes in the law, the PBGC's multiemployer program likely will run out of money by the end of 2025, if not sooner.

Disability Claim Rule

The disability claims procedures went into effect for claims filed on or after April 2, 2018. Employee Retirement Income Security Act (ERISA) plans with disability benefits should confirm amendments containing the new claims procedures are adopted timely if required according to the new rule.

Healthcare

Consolidation of Healthcare Providers

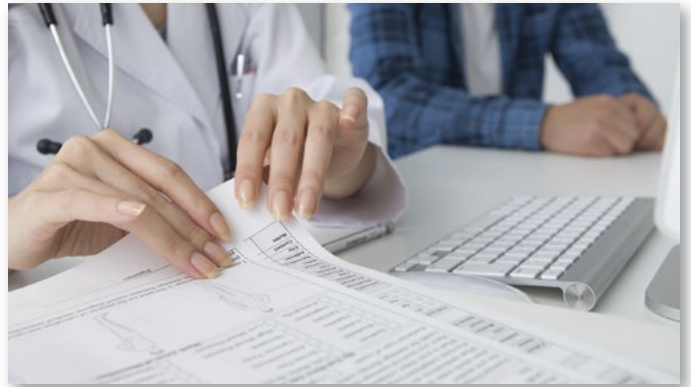
The trend toward consolidation of healthcare providers has continued to accelerate. Acquisitions, consolidations and different types of affiliations among hospitals and other providers have become common as providers seek to achieve economies of scale to lower costs and permit them to thrive in a managed care and value-based payment (VBP) environment. Federal and state agencies have been increasingly active in investigating and challenging anticompetitive consolidations.

Value-Based Payments

VBP systems, in which providers are paid for the value (and not the volume) of healthcare services that they furnish, are on the rise. Commercial and government third-party payers are expected to continue implementing VBP systems, requiring providers to modify or otherwise restructure their operations to reflect arrangements that reward healthcare service value rather than volume.

Mandated Nurse-Patient Staffing Ratios in Hospitals

Nurse-patient staffing ratios in healthcare facilities will remain a hot-button issue in many states across the nation in 2019. Fourteen states have introduced some form of legislation mandating nurse-patient staffing ratios and patient maximums in facilities, while others have established ratios in individual departments or facilities.



Telemedicine

Telemedicine continues to expand as healthcare consumers look for convenient, affordable and quality healthcare. While the expansion of telemedicine programs seems likely, the rapid development of these programs and services is expected to create a number of unique legal challenges – particularly in the areas of credentialing, privileging, licensing, contracting and privacy.

Immigration

U.S. Immigrants

Pew Research reports that the United States has over 40 million immigrants, more than any country in the world. “Most immigrants (76%) are in the country legally, the rest are unauthorized.” The population is very diverse, with just about every country in the world represented among U.S. immigrants.

States and Cities

About half of the nation’s immigrants live in just three states (California: 25%, Texas: 11% and New York: 10%), and two-thirds live in just 20 metropolitan areas (including New York City, Los Angeles, Miami, Chicago, Houston, Dallas and Washington, D.C.)

Limit on Refugees

Since 1980, about 3 million refugees have been resettled in the U.S., more than in any other country. Despite this, the U.S. no longer leads the world in resettlement. For FY 2018, the Trump Administration has capped the number of refugees allowed into the U.S. at 45,000, which, at that time, was the lowest limit in decades. For FY 2019, the cap has been lowered to 30,000.

Immigrant Entrepreneurs

“More than 40% of companies on the U.S. Fortune 500 list were launched by immigrants or children of immigrants.” “Fifty-one percent of all U.S. start-up companies valued at \$1 billion – the so-called unicorns – have at least

one immigrant founder.” The Administration is making it more difficult for entrepreneurs to come to the U.S. by planning to eliminate the International Entrepreneur Rule, which created a special immigration status for founders of start-ups. Other countries, including Canada, are taking advantage of the opening and welcoming immigrants into their countries.

I-9 Audits and Raids

ICE reported in a press release that worksite investigations surged in FY 2018 by 300 to 750 percent over FY 2017. In 2018, Homeland Security Investigations (HSI), one of three operational directorates in ICE, “opened 6,848 worksite investigations compared to 1,691 in FY 17; initiated 5,981 I-9 audits compared to 1,360; and made 779 criminal and 1,525 administrative worksite-related arrests compared to 139 and 172, respectively . . .”

The Administration continues to be committed to increasing the number of I-9 audits in an effort to create a culture of compliance among employers.

Notices to Appear (NTAs)

Under new guidance, the United States Citizenship and Immigration Services (USCIS) is issuing NTAs, the initial charging document in a removal or deportation proceeding, when certain petitions or applications are denied. The new policy is being implemented in a staged manner and has not yet affected business immigration cases, but that is likely just a temporary reprieve.

Immigration

According to the new guidance, USCIS will issue NTAs when an application or petition is denied, among other circumstances, leaving the applicant unlawfully present in the U.S. The expectation is that despite the plain language of the guidance, there will be some sort of notice period before an NTA is issued. Without that, issuing more NTAs will lead to even greater backlogs in the dockets of U.S. immigration courts and severe consequences such as loss of work authorization, eventually deportation and possible bars to returning to the U.S. for those affected.

Legalized Marijuana and Immigration

Thirty-two states and the District of Columbia have laws legalizing marijuana in some form and Canada has legalized restricted recreational use of marijuana. U.S. federal immigration law has failed to keep up. The use and sale of cannabis is not legal under federal law and cross-border movement of cannabis is illegal. Canadians have reportedly been denied entry or subjected to lifetime bans for investing in legal marijuana enterprises in the U.S. Absent Congressional action, this likely will continue.

Increase in H-1B and L-1 Requests For Evidence (RFE)s and Denials

Reacting to President Trump's "Buy American, Hire American" Executive Order, 68.9% of H-1B petitions in Q4 FY 2017 resulted in RFEs, compared to the 22.5% rate in Q3. L-1A and L-1B RFEs crested at 39.6% and

47.2% respectively in Q4. Denial rates also increased. This uptick is expected to continue as the USCIS moves forward with a new rule, "Strengthening the H-1B Nonimmigrant Visa Classification Program." The rule is designed to enshrine new definitions of the terms that the USCIS has already been using to issue RFEs.

Elimination of H-4 Employment Authorization Documents (EADs)

The USCIS expects to release a notice of proposed rulemaking to eliminate H-4 EADs in 2019. This has been and may well continue to be a destabilizing issue for many spouses of H-1B visa holders, primarily Indian nationals, who have been eligible for H-4 EADs since 2015. Approximately 90,000 spouses currently hold H-4 EADs, and many have started businesses and created jobs.

The Travel Ban

In June 2018, the U.S. Supreme Court held that President Trump's Proclamation No. 9645, known as "Travel Ban 3.0," could stand. Consequently, certain individuals from Iran, Libya, North Korea, Somalia, Syria, Venezuela and Yemen will continue to be subject to the ban. At the time of the U.S. Supreme Court ruling, the waiver rate was approximately 2%. Out of 33,176 applicants, 579 waivers were granted. It appears that the number of waivers granted has increased somewhat in recent months, but there remain no clear guidelines on processing waivers.



Immigration

Temporary Protected Status (TPS)

TPS allows individuals to remain in the U.S. because of disease, natural disaster or conflict in their home country. More than 330,000 nationals from 10 countries have been granted TPS. In 2018, the Department of Homeland Security (DHS) announced the termination of TPS status for individuals from most of those countries, including El Salvador, Haiti, Nicaragua and Sudan. Due to a court order, individuals from those countries may get a reprieve. DHS has automatically extended EADs for certain of those individuals. For more information on TPS and work authorization, please [see our TPS Tool](#).

Deferred Action for Childhood Arrivals (DACA)

DACA remains in effect due to various court orders, but Congress has yet to pass any legislation that would permanently protect “the Dreamers” from deportation. In November, the Ninth Circuit Court of Appeals ruled against the Trump Administration and upheld the nationwide injunction in *Regents of University of California v. DHS*, ending the Administration’s efforts to terminate the program, for now. The Administration had previously asked the U.S. Supreme Court to take up this case on direct review, and now that the Ninth Circuit has ruled, it may.



**Determine TPS
Work Authorization**

Jackson Lewis’ digital solution to workplace
law and regulation challenges.

Foreign Students and F-1 Visas

Despite indications to the contrary, Optional Practical Training (OPT) did not show up on the most recent DHS regulatory agenda. Nevertheless, the Administration has been putting limits on F-1 students in other ways, making it more challenging for companies to hire students in STEM OPT. This makes it more likely that they will unknowingly fall out of status and have subsequent petitions denied. Additionally, USCIS has been denying H-1B skilled guest worker visas to former international students who worked in their field more than 12 months while earning their degrees and in the year after they graduate.

Non-Compete and Unfair Practice Protection

Non-Compete Legislation, Federal

On April 26, 2018, Democratic legislators in the United States Senate and House of Representatives proposed companion bills ([SB 2782](#) and [H.R. 5631](#)) that would seek to broadly ban the use of non-compete agreements in workplaces across the country. Given Republican majorities in both legislative chambers, the bills languished without further consideration. However, with Republicans losing control of the House in 2019, House Democrats may seek to revive the ban. While such legislation may stand little chance of gaining the Senate's endorsement, much less the President's, the attention at the federal level could drive the topic of non-compete reform into the public consciousness and intensify legislative efforts at the state and local levels.

Non-Compete Legislation, State and Local

In 2018, Massachusetts [finally realized](#) its decade-long goal of enacting a non-compete law, and [Utah](#) and [Idaho](#) passed amendments to existing legislation. While each of the laws are unique, they share a common purpose of limiting the prevalence and/or enforceability of non-compete agreements.

Importantly, for 2019, legislatures continue to pursue non-compete reform initiatives in [New Jersey](#), [New Hampshire](#), [Pennsylvania](#) and [Vermont](#), as well as [New York City](#). It would not be surprising if additional states join that list before the year is through.

Antitrust Enforcement of Federal No-Poach Agreements

On April 3, 2018, [the Department of Justice \(DOJ\)](#) [settled](#) a civil antitrust action against the world's two largest rail equipment suppliers for maintaining naked no-poach agreements. Eight days later, the DOJ [reiterated](#) its intention "to zealously enforce the antitrust laws in labor markets and aggressively identify and end anticompetitive no-poach agreements that harm employees and the economy." More activity is expected in this area in 2019.

Antitrust Enforcement of State No-Poach Agreements

Since July 2018, attorneys general from 11 states and the District of Columbia [have initiated](#) investigations and/or enforcement actions against a number of national fast-food restaurant chains, accusing them of using franchise agreements that would prevent the ability of employees to move from one franchise to another in search of higher wages or job status. This trend is expected to continue in 2019.

OSHA Leadership

Fourteen months after his nomination by President Trump, [Scott Mugno](#), a retired corporate safety director, has not been confirmed by the Senate to lead OSHA. If confirmed, Mugno is expected to continue the more business-friendly approach OSHA has taken so far, with greater emphasis on compliance assistance and employer-friendly guidance.

OSHA Resources

With approximately \$5 million in new funding, OSHA is positioned to fulfill plans to refill 42 enforcement positions and 32 compliance assistance positions lost in recent years through attrition, while providing increased assistance to State Plans. This may reverse last year's 5% decrease in inspections. Mine Safety and Health Administration (MSHA) funding remains level.

Crane Operators

Eight years after introduction, OSHA finalized its rule requiring employers to train and certify crane operators in the construction industry. The final rule was effective December 10, 2018, and evaluation and documentation requirements will become effective on February 7, 2019.



Top Ten OSHA Violations

The [ten](#) most frequently cited OSHA safety and health inspections in FY 2018 were:

- Fall Protection
- Hazard Communication
- Scaffolding
- Respiratory Protection
- Lockout/Tagout
- Ladders
- Powered Industrial Trucks
- Fall Protection Training
- Machine Guarding and Personal Protective Equipment (PPE)

The changes over 2017 were slight, with PPE climbing into the top ten.

Site-Specific Targeting

In 2018, OSHA launched its Site-Specific Targeting program aimed at high-injury worksites in manufacturing and non-manufacturing sectors. OSHA is selecting employers in specific industries with historically high rates of injuries and illnesses and employers that were required to submit but failed to electronically file Form 300A (Summary of Work-Related Injuries and Illnesses).

Workplace Injuries and Illnesses

Based on employer surveys, the Bureau of Labor Statistics (BLS) estimates that private industry employers had 2.8 million nonfatal injuries and illnesses in 2017, a decrease by more than 45,000, as compared to the year before. Median days away from work dropped from nine to eight in the manufacturing sector. Fatality numbers were not available.

Recordkeeping

After promulgating a rule requiring more than 450,000 employers to submit to OSHA their 2017 Forms 300A (Summary of Work-Related Injuries and Illnesses), 300 (Log of Work-Related Injuries and Illnesses), and 301 (Injury and Illness Incident Report) electronically by July 1, 2018, OSHA partially reversed the rule. OSHA announced it will not accept Forms 300

and 301 electronically and proposed a rule to eliminate the requirement to submit them electronically, citing concerns about potential worker privacy issues. OSHA will continue to require electronic submission of Form 300A.

OSHA's 2019 Penalties, Regulatory Agenda

At the beginning of the year, OSHA and MSHA will release the new inflation-adjusted maximum penalties. OSHA recently [proposed a rule](#) to clarify its [beryllium standard](#), and employers can expect to see that rule finalized in the coming year. OSHA has nine regulatory actions in the pre-rule stage relating to Communication Tower Safety, Emergency Response and Preparedness, Tree Care and Prevention of Workplace Violence in Health Care and Social Assistance. We may see a Mechanical Power Press Update and additional action on a rulemaking underway in Infectious Diseases in healthcare and other high-risk work sectors.

Pay / Wage and Hour

Overtime Exemption Regulations

The DOL will issue new regulations in 2019 regarding the salary requirements for the Executive, Administrative and Professional (i.e., the “white collar”) overtime exemptions under the Fair Labor Standards Act (FLSA). The Obama Administration’s rule, which would have doubled the minimum qualifying salary to more than \$47,000, was declared invalid by a federal court in late 2017. The new minimum salary is still expected to be somewhere closer to \$30,000.

Tip Pooling

In March 2018, an [FLSA amendment](#) was enacted prohibiting employers from keeping tips received by its employees for any purposes. However, the amendment also expressly rescinded regulations disallowing the sharing of tips between traditionally tipped and typically non-tipped employees. The first full opportunity to ascertain whether the amendment will result in significant changes by employers, particularly those in the restaurant and hospitality industries, will likely be in 2019.



Minimum Wage Rate Increases

With the federal minimum wage unchanged at \$7.25 since 2009, cities and other municipalities have enacted statutes providing for minimum wage rates in excess of the federal rate, in many cases to as high as \$15.00 per hour. Many minimum wage statutes passed in 2016 or earlier incorporate pre-determined annual “stepped” increases and/or potential annual increases based on a particular consumer price index (CPI). Many such statutes continue with their pre-established increases this year.

The majority of the upcoming minimum wage increases went into effect on January 1, 2019 (the day before, in New York). Most others, including many municipal increases, will take effect on July 1, 2019.

State Minimum Wages

Through both state legislative action and voter initiatives, more states than ever now have minimum wage rates higher than the federal rate. [Joining the list this year are Arkansas, Delaware, Massachusetts and Missouri.](#)

Local Minimum Wages

St. Paul, MN joins the list of almost 40 cities enacting minimum wage ordinances, although its tiered rate increases won’t begin until 2020. Seattle increased its minimum wage for large employers (more than 500 employees) to \$16.00 per hour beginning in January 2019. Conversely, half of the states have passed laws prohibiting cities and other municipalities from enacting their own wage rates.

Unions and the National Labor Relations Board (NLRB)

Agency Leadership

General Counsel Robb’s “Wish List”– When he first took office, NLRB General Counsel Peter Robb identified a number of Obama-era Board precedents he would like to ask the NLRB to overturn.

Expected activity on that front during 2019 includes cases involving discretionary discipline before an initial collective-bargaining agreement is in place, the dues check off obligation, witness statements disclosures, company-wide wage increases to newly represented employees during initial contract bargaining, drug testing and circumstances under which an employer may be found to be a “perfectly clear successor.”

Pearce Returning to the Board

Mark Gaston Pearce’s re-nomination to a third term on the NLRB is expected to be approved by the United States Senate. The former NLRB Chairman was nominated and re-nominated by President Barack Obama. If confirmed, he will join Lauren McFerran as the second Democrat on the Board.

NLRB Strategic Plan

The [NLRB’s 2019-2022 strategic plan](#) includes two case processing goals: shortening the amount of time in which unfair labor practice cases are processed and resolving more representation cases within 100 days of the filing of the petition. The goal is a yearly 5%

reduction in unfair labor practice charge processing time, including case handling in the regional offices, by administrative law judges and the Board.

Structural Changes in the NLRB

Peter Robb outlined his plans for change in the NLRB in 2018, including reorganizing the agency’s 26 regional offices into a smaller number of districts or regions, run by officials who report directly to the General Counsel. Robb’s reported plan could significantly change how the NLRB operates.

Bargaining Units

In 2019, the NLRB will continue to analyze bargaining units under its pro-business “community-of-interest” standard set forth in *PCC Structural, Inc.*, 365 NLRB No. 160 (Dec. 15, 2017). A General Counsel Memorandum issued after that decision gives parties to representation cases an extensive opportunity to re-litigate directed bargaining unit determinations, and even to withdraw from election agreements, made by the regional director under the *Specialty Healthcare* standard.

Unions and the National Labor Relations Board (NLRB)

Public Sector Fair Share Fees

In *Janus v. AFSCME Council 31*, No. 16-1466 (June 27, 2018), the U.S. Supreme Court held that public sector employees who are non-members of a union cannot be legally required to pay agency or “fair share” fees as a condition of employment. Several individual and class action lawsuits have been filed since, in various federal district courts seeking reimbursement of previously paid mandatory union fees. A [Minnesota college professor](#) has petitioned the U.S. Supreme Court to review her case and rule, based on *Janus*, that the state violated her constitutional rights by forcing her to associate with a union. In addition, a lawsuit based on *Janus* has been filed involving the [North Dakota Bar Association](#), raising the question whether mandatory state bar dues are constitutional.



Joint-Employer Rulemaking

The comment period concerning the joint-employer standard will close in January 2019. The [proposed rule adopts the pre-Browning-](#)

[Ferris](#) standard for determining if two or more employers are joint employers of employees. That standard provides that an employer may be found to be a joint-employer of another employer’s employees only if it possesses and exercises substantial, direct and immediate control over the essential terms and conditions of employment and has done so in a manner that is not limited and routine.

The Trump Administration noted the proposed rule as an “other significant” priority in its Unified Agenda of Regulatory and Deregulatory Actions in the fall of 2018. The Agenda covers approximately 60 departments, agencies and commissions, including regulatory agendas from all federal entities that currently have regulations under development or review. It also includes agency statements of regulatory priorities and additional information about the most significant regulatory activities planned for 2019.

Legality of Arbitration Agreements

The Supreme Court’s 2018 decision in *Epic Systems v. Lewis*, No. 16-285, determining that class or collective action waivers in employment arbitration agreements (requiring employees to pursue work-related claims in arbitration) are lawful under the National Labor Relations Act (NLRA), did not end all controversies involving these waivers. In several cases before it, the NLRB will determine whether the arbitration agreements independently violate Section 8(a)(1) of the NLRA because they interfere with employees’ ability to access the Board.

Unions and the National Labor Relations Board (NLRB)

Purple Communications

The NLRB's General Counsel is urging the Board to overrule its decision in *Purple Communications, Inc.*, 361 NLRB 1050 (2014), which allowed employees to use employer email systems for NLRA Section 7 purposes during non-working time. On August 1, 2018, the Board invited briefs on whether the Board should adhere to, modify or overrule *Purple Communications*. It also asked whether the standard should apply to computer resources beyond email systems, including instant messages, text messages, posts on social media and the like.

“ On August 1, 2018, the Board invited briefs on whether the Board should adhere to, modify or overrule *Purple Communications*. ”

In its brief, the NLRB argued that the Board should abandon *Purple Communications* and return to the *Register Guard* standard, which allowed employers to prohibit, in a nondiscriminatory manner, the use of their email systems. *Register Guard*, 351 NLRB 1110 (2007). In restoring the *Register Guard* standard, the General Counsel's office recommended a limited exception in circumstances where an employer email system is the only means of communication. The General Counsel's office noted such an

exception could exist in “rare” workplaces with no access to face-to-face communication and no cellphone coverage. Personal email, text messaging and social media, however, would constitute viable alternatives for employees to communicate for Section 7 purposes.

“Quickie Election” Rule Changes

The NLRB will engage in rulemaking to change the “quickie election” rule, issue by issue, rather than taking on the entire rule at once. The Board will release the first in a series of proposed rules covering the NLRB's blocking charge policy and voluntary recognition bar. A Request for Information (RFI) regarding the “Quickie Election” representation regulations was published on December 13, 2017, by the NLRB. The end date for submissions was March 19, 2018. It is unclear whether action will be taken on the amendments in 2019.

Union Duty of Fair Representation

An [NLRB directive](#) encourages field office staff to get tougher on unions that engage in negligent behavior toward their members. This initiative may well have a ripple effect upon employers with unionized or partially unionized workforces. Where unions' handling of grievances are scrutinized, they may ask employers to accept untimely grievances or to seek arbitration of stale cases. Where charges are filed, employers are likely to see more requests from investigating NLRB personnel for information on the circumstances underlying

Unions and the National Labor Relations Board (NLRB)

grievances. If the General Counsel finds merit to the unfair labor practice charge against a union and issues a complaint against it, there is a high probability that the company will receive subpoenas for testimony or to produce documents at trial.

Work Rules Analysis

The NLRB has remanded at least 40 workplace rules cases to its Administrative Law Judges (ALJs) for analysis under *Boeing Co.*, 365 NLRB 154 (2017). In *Boeing*, the Board held that determining whether an employer rule is unlawful involves a balancing test that measures the rule's impact on employee rights against an employer's legitimate business interests in maintaining the rule. The Board created a three-tiered rule classification system: "Category 1" rules are those the Board has specifically designated as lawful; "Category 2" rules are those that require individualized scrutiny to determine their legality; and "Category 3" rules are those specifically designated by the Board as unlawful. Any new decisions will provide employers with clear examples of what employee conduct they can and cannot prohibit or limit through workplace rules under the new standard.

Misclassification of Employees

The NLRB is expected to resolve the question of "under what circumstances, if any, the Board should deem an employer's act of misclassifying statutory employees as independent contractors a violation of Section

8(a)(1) of the National Labor Relations Act."

In 2018, the Board invited interested parties to file amicus briefs to address this issue in light of the decision in *Velox Express, Inc.*, 2017 NLRB LEXIS 486 (Sept. 25, 2017), that misclassification of employees as independent contractors violates the NLRA. If upheld by the Board, the decision has serious policy implications for employers. Businesses that employ individuals who they classify as independent contractors could face unfair labor practice liability if the classification is mistaken.



Right To Work Laws / Local Ordinances

Wisconsin Governor Scott Walker, a "right to work" law advocate, was defeated for re-election and the Missouri "right to work" law has been repealed, signaling that the momentum that existed for state and local adoption of right to work laws and ordinances may have dissipated. The constitutionality of "right to work" ordinances, adopted by several municipalities, may move closer to a decision by the U.S. Supreme Court.

White Collar / Government Enforcement

Despite the Trump Administration's move toward deregulation by removing, lessening and relaxing government regulation and oversight of business, existing federal regulatory mechanisms continue to have broad and significant impact on the workforce. For example, over the first nine months of 2018, the DOJ secured indictments charging mail fraud, wire fraud or conspiracy to commit mail or wire fraud against 348 individual defendants across the country. That number is likely to rise.



Through three quarters of 2018, DOJ had brought 15 enforcement actions with penalties and disgorgement amounting to almost \$3 billion dollars in sanctions. The number of staff attorneys at DOJ and the [Securities Exchange Commission \(SEC\)](#) also have continued to grow in an effort to beef up enforcement efforts, especially of U.S. companies doing business in Asia and South America.

Finally, the U.S. Court of Appeals for the Second Circuit in *United States v. Hoskins*, No. 16-1010 (2d Cir. 2018), drastically limited the FCPA's use of aiding and abetting and conspiracy theories to prosecute individuals for foreign bribery violations holding that prosecuting a non-U.S. citizen working for a U.K. subsidiary of a French company on a project in Indonesia fell outside the extraterritorial reach of FCPA jurisdiction allowing an individual's prosecution under either conspiracy or complicity theories of liability.

Foreign Corrupt Practice Act (FCPA)

The DOJ's willingness and enthusiasm to enforce the FCPA has not waned. Government oversight of companies publicly traded on U.S. exchanges and other firms headquartered in the United States that conduct business in foreign countries has only increased, as has enforcement of the FCPA's foreign bribery prohibitions.

Workplace Training

Mandatory Sexual Harassment Training

In the wake of the #MeToo movement, and following the employee-protectionist trend observed in other contexts at the state and municipal level, a number of states, the District of Columbia and New York City enacted sexual harassment prevention legislation that included employer training requirements.

California expanded its training requirement to require that covered employers train all employees, not just supervisory employees, as previously had been the case.

Delaware, the District of Columbia, New York State and New York City passed laws with specific training requirements. This, combined with a number of bills pending at the state level, will likely create a patchwork of legal training obligations that applies to many multistate employers.

California

California previously required employers with at least 50 employees to provide two hours of sexual harassment training to supervisory employees. California expanded its mandatory sexual harassment training requirement to include more employers and more employees. The California Department of Fair Employment and Housing released [FAQs for employers](#).

Delaware

Effective January 1, 2019, Delaware employers with at least 50 employees within the state must provide interactive training and education to employees regarding the prevention of sexual harassment. The new law does not mandate the length of the training, but it does mandate the timing and frequency of such training and the topics covered during the training.

District of Columbia

Signed by the District of Columbia's mayor on October 23, 2018, the Tipped Wage Workers Fairness Amendment Act of 2018 requires businesses that employ tipped employees (as defined by D.C. law) to provide sexual harassment prevention training. The law includes details regarding the timing and frequency of such training. Employers are required to submit certification of compliance to the D.C. Office of Human Rights. The law became effective December 13, 2018.

Workplace Training

New York

As part of New York's sweeping sexual-harassment prevention legislation, effective October 9, 2018, Governor Andrew Cuomo signed measures that, among other things, require that all New York employers annually train all employees on sexual harassment prevention. While the New York legislation does not mandate the duration of the training sessions, the law requires that the training be interactive and that its substantive content meets or exceeds the state model ([available on its website](#)).

Employers must have all employees trained on or before October 9, 2019. New York State [created a website](#) dedicated to combating sexual harassment in the workplace, which contains guidance, a sample training and FAQs for employers on the training requirement. On May 9, 2018, New York City Mayor Bill de Blasio signed the Stop Sexual Harassment in NYC Act. The NYC law requires employers with at least 15 employees to conduct annual sexual harassment "interactive training" for all employees, with specific content requirements, starting April 1, 2019.





A number of sexual harassment prevention and anti-discrimination laws became effective on January 1, 2019.

Prohibition on Confidential Sexual Harassment Settlement Agreements

(Cal. Civ. Pro. § 1001; Senate Bill 820)

Effective January 1, 2019 - Settlement agreements may not prevent an individual from disclosing factual information related to claims of sexual assault, harassment or discrimination, including retaliation for reporting sexual harassment or discrimination. Any such provision is void.

Limits on Obtaining Release Agreements and Non-Disparagement Agreements from Employees

(Cal. Gov. Code §§ 12923; 12940; 12950.2, 12964.5, 12965; Senate Bill 1300)

Effective January 1, 2019 – With certain exceptions, these provisions prohibit an employer from conditioning continued employment on the release of claims under the California Fair Employment & Housing Act. These provisions also prohibit an employer from requesting an employee to sign a non-disparagement agreement or other document that purports to deny the employee the right to disclose information about unlawful acts in the workplace. An employer is similarly prohibited from offering a raise or bonus to individuals in exchange for the same.

Sexual Harassment Prevention Training (Cal. Gov. Code §§ 12950 & 12950.1; Senate Bill 1343)

Mandatory compliance by January 1, 2020 – Employers with at least five employees, including seasonal and temporary employees, must provide interactive sexual harassment prevention training to all employees in California. Non-supervisory employees must receive one hour of training while supervisory staff must receive at least two hours of training.

Prohibition on Agreements That Waive Right to Testify in Any Proceeding Concerning Alleged Criminal Conduct

(Cal. Civ. Code § 1670.11; Assembly Bill 3109)

Effective January 1, 2019 – Any provision in a contract or settlement agreement that attempts to waive a party's right to testify in an administrative, legislative or judicial proceeding concerning alleged criminal conduct or sexual harassment is void.



Amending Sexual Harassment Elements to Include Professional Relationships

(Cal. Civ. Code § 51.9 & Gov. Code §§ 12930 & 12948; Senate Bill 224)

Effective January 1, 2019 – The statute was amended to provide that the elements in a cause of action for sexual harassment include when the plaintiff proves, among other things, that the defendant holds himself or herself out as being able to help the plaintiff establish a business, service or professional relationship with the defendant or a third party. The statute eliminates the element that the plaintiff prove there is an inability by the plaintiff to easily terminate the relationship; and provides that an investor, elected official, lobbyist, director and producer may be liable to a plaintiff for sexual harassment.

Employers' Obligation to Provide Salary Information

(Cal. Lab. Code §§ 432.3 & 1197.5; Assembly Bill 2282)

Effective January 1, 2019 – The bill clarifies that employers need not provide pay scales except to applicants, upon their request, who have completed at least one interview; provides guidance on permissible employer questions; and fortifies the distinction between job applicants and current employees. Significantly, the law expressly clarifies that an employer may ask an applicant what his or her salary expectation is for the position sought.

Public Companies Must Have Female Board Members

(Cal. Corp. Code §§ 310.3 & 2115.5; Senate Bill 826)

Mandatory compliance by December 31, 2019 – All publicly held corporations whose principal executive offices are located in California shall have a minimum of one female director on their boards of director.

Thank you for your interest in 2019: The Year Ahead for Employers.

Jackson Lewis P.C. is a law firm with more than 900 attorneys nationwide serving clients across a wide range of practices and industries. Our client service philosophy is rooted in strong relationships built on a thorough understanding of each client's particular industry, business and culture.

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.