JacksonLewis

WINTER 2022

CLASS ACTION TRENDS REPORT

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A look back

For employers, 2021 was a challenging year. The post-election landscape, evolving federal and state law, and the effects of a seemingly endless global pandemic created a difficult business climate. Efforts to contain the spread of COVID-19 were met with stiff resistance — legal and otherwise; still, employers persist in earnest to maintain their operations safely and efficiently. However, 2021 brought other important, non-COVID-19 developments. This issue of the *Class Action Trends Report* offers a snapshot of the most significant employment-related class action activity from the tumultuous year.

Vaccine mandates spark litigation surge

The COVID-19 pandemic continued to pose enormous challenges in 2021. The Delta and Omicron variants, the volatile politics of vaccines and masks and testing, serious worker shortages, and the patchwork of ever-changing laws and regulations have created an environment fraught with risk of classwide liability. The Fall 2021 issue of the *Class Action Trends Report* discussed many of the challenges wrought for employers by the late phase of the COVID-19 pandemic.

At present, the bulk of new COVID-19-related employment lawsuits are centered around mandatory vaccination policies. A wave of complaint filings began mid-2021 without any sign it will ebb any time soon. Employees have sued individually, have brought large multi-plaintiff complaints, and have filed class actions seeking to invalidate vaccine mandates and redress for adverse employment actions resulting from the failure to comply. Republican-led state governments, trade groups, corporations, labor unions, public policy groups, and private citizens also have filed complaints (often jointly) raising similar challenges. College students and parents of K-12 children have sued to enjoin mandates implemented by universities and by local school districts.

Plaintiffs have sued to invalidate President Joe Biden's executive orders for federal contractors and employees, Department of Defense (DOD) vaccine mandates for military and civilian employees, the Occupational Safety and Health Administration's Emergency Temporary Standard (OSHA ETS) "vaccine or test" rule for employers with 100 employees or more, the Centers for Medicare and Medicaid Services (CMS) mandate for covered providers who participate in the Medicare and Medicaid programs and others covered by the CMS mandate,

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A WORD FROM MIA, DAVID AND ERIC

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This issue of the *Class Action Trends Report* looks back at the most significant developments in class and collective action litigation in 2021. The COVID-19 pandemic continued to exact a considerable toll on employers, of course, and COVID-19-related complaint filings likewise showed no signs of slowing down. The availability of COVID-19 vaccinations prompted the rollout of vaccine mandates in various forms, which led to a surge in lawsuits challenging those mandates. At press time, nearly 450 lawsuits had been filed; 60 of those were brought as class actions and more than double that number are multi-plaintiff suits.

Vaccine mandate litigation was not the only story, though. The circuit courts in 2021 issued a number of significant procedural decisions related to class litigation, including rulings related to pressing jurisdictional issues. The U.S. Supreme Court added clarity to the enduring question of what constitutes "harm" for purposes of federal court standing. And, in a groundbreaking decision under the Fair Labor Standards Act, the Fifth Circuit chipped away at the prevailing presumption that plaintiffs are entitled to conditional certification of collective actions under a lenient standard of proof.

Also in 2021, the turnover in presidential administrations resulted in the reversal of federal agency rules and enforcement priorities, developments that have a measurable impact on classwide liability. At the state level, California lawmakers and plaintiffs' lawyers continued to vex employers, and Illinois courts, in particular, proved to be an ongoing hotbed of class litigation brought under the state's Biometric Information Privacy Act.

The first weeks of 2022 already have brought notable developments on the class action front, and the Supreme Court has teed up important cases for arbitration jurisprudence. Vaccine mandate litigation will begin to make its way through courts, which will begin to issue significant rulings on class certification, addressing questions of commonality in the context of novel factual scenarios. There will be much to discuss in forthcoming issues. For now, we turn our attention to an eventful 2021.

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About the *Class Action Trends Report*

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

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and a mandate for federally funded Head Start programs. Vaccine mandates enacted by Democrat-led states and localities also face legal challenges.

Many private employers have adopted their own COVID-19 vaccination requirements for employees, sometimes in adherence to government directives, but more often on their own initiative. These mandates also are under fire in courts. The court pleadings frequently challenge the mandate itself. In many cases, however, plaintiffs challenge the mandates as *applied* — alleging that the defendant has wrongly refused to grant a religious accommodation exempting the plaintiffs from the mandatory vaccination policy, among other claims.

Class action challenges. So far, more than 450 complaints have been filed challenging various COVID-19 vaccine mandates, and about 60 of those complaints have been brought as putative class actions. A majority of those class action complaints seek to invalidate private employer mandates. Like many vaccine mandate challenges, plaintiffs have filed motions for injunctive relief (both TRO and preliminary injunctions) pending a decision on the merits of their class action claims. Courts have been reluctant to enjoin employers from enforcing their mandates before resolving the dispute. Injunctive relief has been denied in 30 class action vaccine mandate cases and granted in only two cases, both involving public entities.

Federal mandates. Courts have shown willingness to enjoin some government-issued vaccine mandates. For example, the U.S. Court of Appeals for the Fifth Circuit suspended enforcement of the OSHA ETS. The U.S. Court of Appeals for the Sixth Circuit dissolved the stay, but the U.S. Supreme Court reversed the Sixth Circuit's decision and granted a temporary stay. The Biden Administration has since withdrawn its enforcement of the OSHA ETS but left its provisions in place to serve as a notice of proposed rulemaking for a permanent rule.

Meanwhile, a Georgia federal district court has issued a preliminary nationwide injunction halting enforcement of the vaccine requirements of Executive Order (EO) 14042 (although the EO's other requirements, such as masking and social distancing, remain in force for now). The U.S. Court of Appeals for the Eleventh Circuit has denied the Biden Administration's motion to stay the preliminary injunction pending its appeal of the lower court's ruling.

Other federal courts also have enjoined EO 14042, but only within certain states. Most recently, an Arizona federal district court issued a *permanent* injunction of the federal contractor mandate but limited the scope of the injunction to Arizona. In addition, federal courts have blocked vaccine mandates for federal employees nationwide and Head Start providers in certain jurisdictions.

In contrast, the Supreme Court ruled in favor of the government, allowing the CMS vaccine mandate to continue. The CMS rule is now in effect across the country, although litigation challenging the CMS mandate is ongoing in several courts, including the Fifth and Eighth Circuits. ■

Jackson Lewis Vaccine Litigation Task Force

As COVID-19 vaccines became available, many states, municipalities, and companies made decisions on the best way to protect people from COVID-19, including the implementation of vaccine mandates. For companies, this has brought on a wave of accommodation requests to manage, a slew of new state laws to navigate, and, despite the approval and endorsement of vaccine mandates by the federal government, plenty of legal challenges.

Since the outset of the pandemic, Jackson Lewis has been immersed in responding to COVID-19 workplace challenges, working side-by-side with clients across the country to help them navigate challenges and protect their businesses. We have created a Vaccine Litigation Task Force comprised of attorneys with subject matter knowledge and vaccine litigation experience to help our clients respond to these claims and navigate sensitive topics with employees.

Procedural issues take center stage

Federal courts of appeal issued significant opinions in 2021 involving key procedural matters related to class and collective actions. A groundbreaking decision by the U.S. Court of Appeals for the Fifth Circuit changed the way district courts must handle plaintiffs' motions for conditional certification in that circuit. Three federal circuits addressed the applicability of the U.S. Supreme Court's landmark *Bristol-Myers Squibb* decision to Rule 23 class actions and collective actions brought under Section 216(b) of the Fair Labor Standard Act (FLSA). In an appellate decision on another important procedural matter, the U.S. Court of Appeals for the Third Circuit rejected a district court's trial-before-certification strategy in a hybrid wage and hour case.

Within the Fifth Circuit, at least, courts will apply a fairer, more workable framework for evaluating whether potential opt-in plaintiffs are similarly situated before *granting conditional certification.*

Fifth Circuit nixes rubber-stamped FLSA collective

The Fifth Circuit (which covers Louisiana, Mississippi, and Texas) shunned the familiar two-step, conditional certification-followed-by-decertification process commonly followed by federal courts in FLSA collective actions. The appeals court announced that district courts must review the factual record developed by the parties to determine whether plaintiffs meet the "similarly situated" standard *before* notice goes out to potential opt-in plaintiffs. The Fifth Circuit rejected the commonplace doctrine that courts should avoid considering any merits discovery at the conditional certification stage.

The immediate effect of the decision has been that, for collective actions brought in the Fifth Circuit, plaintiffs no longer are able to issue notice to potential opt-in plaintiffs based merely on the allegations raised in the complaint. Instead, a district court must decide what discovery is warranted to make the threshold determination on whether plaintiffs are actually "similarly situated" to the proposed collective they seek to represent. As a result, a defendant can obtain more information about the extent of a potential class early in the case, allowing the employer to make critical strategic decisions at an earlier stage of litigation rather than wait until it can move to decertify a conditionally certified class.

Within the Fifth Circuit, at least, courts will apply a fairer, more workable framework for evaluating whether potential opt-in plaintiffs are similarly situated *before* granting conditional certification. For example, a federal district court in Texas applying the new framework denied conditional certification to a proposed collective of approximately 1,700 restaurant servers alleging minimum wage violations under the FLSA. Pre-certification discovery showed the individualized nature of the employees' claims and the absence of a uniform employer policy that would render classwide resolution feasible.

District courts outside the Fifth Circuit may be persuaded to adopt the new framework, or something like it. At the very least, district courts will be asked to address the question of whether to adopt the new approach, and appellate review of those decisions will eventually create a conflict between the circuits ripe for Supreme Court review.

Courts ponder jurisdiction over out-of-state class members

In 2017, the Supreme Court held in *Bristol-Myers Squibb Co. v. Superior Court of California* that a state court could not exercise specific personal jurisdiction over nonresident plaintiffs' claims against a nonresident company. Federal courts have grappled ever since with whether this holding, issued in the context of a mass tort action, also applies to class action suits brought under Rule 23 and Section 216(b) collective actions. Three federal circuit courts of appeal addressed the issue in 2021, adding to the growing body of case law.

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Circuit split on collective actions

In a January 13, 2022, decision on an interlocutory appeal, a divided First Circuit panel created a direct conflict with the Sixth and Eighth Circuits on whether *Bristol-Myers* applies in the collective action context. The majority held that employees who live outside the state where a collective action is being litigated can opt in to an FLSA collective action, creating a circuit split. Read more on the latest case here.

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Collective actions. An August decision is perhaps the most significant ruling to date — and the most important for multistate employers potentially at risk of nationwide representative lawsuits, class or collective. In a closely watched case, a divided three-member panel of the Sixth Circuit ruled that the *Bristol-Myers* holding *does* apply to collective actions. Therefore, the district court could not exercise personal jurisdiction over the claims of nonresident members of a putative collective. This marked the first federal appeals court decision to consider the Supreme Court's *Bristol-Myers* holding in an FLSA collective action. That the ruling came from the Sixth Circuit, a hotbed of sorts for cases addressing *Bristol-Myers* jurisdiction, is especially important.

The U.S. Court of Appeals for the Eighth Circuit, citing *Bristol-Myers*, held that personal jurisdiction is to be decided on a "claim-by-claim basis." In that case, two consultants for a Florida-based company (one a Florida resident, the other, a New York resident) filed a putative FLSA collective action in federal court in Minnesota, seeking pay for time spent traveling to various live events in the United States, including several in Minnesota. The plaintiffs contended that because the court had jurisdiction over the claims that arose based on travel to Minnesota, the court could exercise jurisdiction over all of the travel time claims against the employer, including those arising outside of the forum state. In its August decision, the Eighth Circuit panel pointed out that the FLSA does not contain a nationwide service-of-process provision and held the Minnesota district court properly refrained from exercising personal jurisdiction over claims arising from events elsewhere that had no connection to Minnesota.

Class actions. Following up on its decision related to collective actions, the Sixth Circuit reached a different conclusion with respect to *class* actions, holding in a Telephone Consumer Protection Act (TCPA) case that *Bristol-Myers* does *not* apply to Rule 23 class action suits and, therefore, only the named plaintiff in a class action must satisfy personal jurisdiction requirements. The appeals court found a district court had personal jurisdiction over a defendant as to all of the claims brought by class members.

Class and collective actions have fundamental differences, the Sixth Circuit observed, describing the differences in detail. Class and collective actions call for "different approaches to personal jurisdiction," it stated. In so ruling, the Sixth Circuit joined the U.S. Court of Appeals for the Seventh Circuit, which had ruled in another TCPA suit that "the principles announced in *Bristol-Myers* do not apply to the case of a nationwide class action filed in federal court under a federal statute."

Three other circuit courts have punted on the issue thus far. Most recently, the U.S. Court of Appeals for the Ninth Circuit declined an invitation to directly address the issue on the merits and remanded the case to the district court to address the *Bristol-Myers* defense to certification in the first instance. (This was the approach taken by the Fifth and the D.C. Circuits as well.)

The remanded litigations likely will end up in the circuit courts again, perhaps creating a circuit split on the applicability of *Bristol-Myers* to Rule 23 class actions. That outcome could prompt the Supreme Court to take up the question and issue a definitive ruling.

Third Circuit rejects trial-before-certification in hybrid action

In October, the Third Circuit addressed thorny procedural issues raised by "hybrid" wage and hour actions. In these actions, plaintiffs seek certification of both an FLSA

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collective and a Rule 23 class pursuant to claims brought under state wage and hour law. The appeals court ruled that a writ of mandamus was appropriate where the district court scheduled a trial on plaintiffs' FLSA collective claims *before* deciding on Rule 23 class certification.

The Third Circuit reasoned that the district court's plan to try the main factual issue in the FLSA claim would encroach on the merits of a Rule 23 class action that was still without a certified class. Rule 23's history confirms that a post-trial certification decision is strongly disfavored, the appellate panel observed, and seven circuits have held that "Rule 23 *requires* class certification prior to a trial on the merits." The panel noted the Third Circuit and three other circuits have "occasionally blessed a trial-before-certification approach," but added that these circuits had not gone quite so far, explaining it has "cabined it to cases in which the defendant consents" and "consistently spurned a *forced* trial-before-certification procedure." Here, the appeals court instructed the district court to "conduct a rigorous examination of the factual and legal allegations underpinning the claims before deciding class certification."

Data breaches are a continually rising concern for employers and with good reason, given the ever-expanding uses of data, the growing virtual workforce, the sharp rise in breach incidents, and the prospect of significant classwide liability that can result.

Circuits address standing requirement for data breach actions

Employers continue to face data breach class actions arising from the exposure of employees' or consumers' sensitive personal and health information. In 2021, several circuit courts weighed in on the critical question of what constitutes "injury" sufficient to confer standing to sue.

In February 2021, the Eleventh Circuit weighed in on the hotly disputed question of whether plaintiffs in a data breach class action can establish standing if they only allege a heightened "risk of future harm." In the past few years, the Third, Sixth, Seventh, Ninth, and D.C. Circuits generally have found standing, while the First, Second, Fourth, Fifth, and Eighth Circuits have found no standing where a plaintiff only alleges a heightened "risk of future harm." Addressing the issue for the first time, the Eleventh Circuit relied heavily on the Eighth Circuit's analysis and concluded the plaintiff failed to allege either that the data breach placed him in a "substantial risk" of future identify theft or that identify theft was "certainly impending."

In another case, U.S. Court of Appeals for the Second Circuit affirmed the dismissal of state-law claims filed against a mental healthcare provider following the company's inadvertent disclosure of sensitive personally identifiable information (PII) of 130 current and former employees. Three employees whose information had been shared in the email filed a class action complaint against the employer alleging state-law claims for negligence, negligence *per se*, and statutory consumer protection violations on behalf of classes in several states. Although the Second Circuit found that, in the context of unauthorized data disclosures, plaintiffs may establish an Article III injury in fact based solely on a substantial risk of identity theft or fraud, the employees here failed to show a substantial risk because there was no evidence the PII was targeted or obtained by a third party or any evidence of data misuse. The employees' claims of future risk of identity theft were not substantial enough to confer standing.

Data breaches are a continually rising concern for employers and with good reason, given the ever-expanding uses of data, the growing virtual workforce, the sharp rise in breach incidents, and the prospect of significant classwide liability that can result. The lack of clarity on standing issues has made it difficult for businesses to assess the risk of litigation and its associated costs in the wake of a data breach incident. ■

Wage and hour developments

Novel wage and hour claims emerged in 2021, arising from employers' efforts to respond to the COVID-19 pandemic. The coming year also could bring a pandemic-related uptick in the more routine types of wage and hour allegations that comprise the lion's share of employment class and collective actions. Another factor likely to drive an increase in class litigation is the Biden Administration's reversal of Trump-era rulemaking.

Off-the-clock claims

Lawsuits seeking compensation for activities undertaken by employees pre- and post-shift are premised on a variety of factual underpinnings. The COVID-19 pandemic has ushered in new ways of working and new potential "off-the-clock" scenarios, which may spur a rise in claims involving both new and familiar fact patterns.

Boot-up time. In October, the U.S. Court of Appeals for the Tenth Circuit ruled that call center employees were entitled to compensation for time they spent booting up their work computers and launching software programs prior to clocking in before each shift, finding these activities were integral and indispensable to their primary duties. In addition, applying the *de minimis* doctrine, the appeals court concluded the employer failed to establish that, as a practical matter, it would be administratively unfeasible to record or estimate the time at issue.

The employer urged the appeals court to consider the policy implications of finding computer boot-up time compensable "in our modern and digital age, including during the COVID-19 pandemic, when telework is increasingly common." However, the appeals court wrote, "we need not speculate about the FLSA's application to teleworkers or the pandemic's broad implications for our digital age. We need only decide the case before us, which doesn't concern teleworking." With the dramatic expansion of the virtual work model accelerated by the pandemic, however, telework-related claims may soon make up a considerable share of off-the-clock wage and hour class and collective actions.

Security checks. The U.S. Supreme Court, in its 2014 decision in *Integrity Staffing Solutions, Inc. v. Busk*, ruled that post-shift security screenings were not integral to employees' primary duties, and thus were *not* compensable under the FLSA. The question remains, however, whether such off-the-clock time is compensable under *state* wage and hour laws — particularly in those states that have not adopted the federal Portal-to-Portal Act, which established the FLSA's "integral and indispensable" framework for determining the compensability of pre- and post-shift work.

In July, the Pennsylvania Supreme Court held the time spent by warehouse workers going through security screening after clocking out is compensable under the Pennsylvania Minimum Wage Act. Answering certified questions from the Sixth Circuit and accepting as true the Sixth Circuit's finding of fact that the employer required employees to remain on the premises during that time, the state's high court concluded the screenings constitute "hours worked" under Pennsylvania law and there is no statutory *de minimis* exception. The defendant, an online retail giant, later agreed to pay $13.5 million to Nevada workers to settle another case, part of a long-running multidistrict litigation.

In December, the Ninth Circuit asked the Oregon Supreme Court to decide whether time spent onsite waiting for and undergoing security screenings is compensable under Oregon law. The federal district court concluded Oregon had incorporated the Portal-to-Portal Act (if not expressly) and granted judgment on the pleadings to the employer in an off-the-clock class action suit. However, the Ninth Circuit found it unclear whether Oregon adopted the federal standard, and so certified the question to the state's high court.

California continues to be an active forum for security screening class actions. As 2021 drew to a close, a federal court granted preliminary approval to a $29.9 million settlement in a long-running suit involving a 14,000-member class of retail workers. A federal court initially concluded the time spent waiting to undergo baggage checks was not compensable; however, the Ninth Circuit certified the question to the California Supreme Court, which advised in a unanimous decision that the mandatory security checks (and time waiting time to

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undergo such screening) was indeed compensable under California Wage Order No. 7.

COVID-19 screening. Employers in several states are defending class action suits filed by employees seeking pay for pre-shift time spent waiting to have their temperature checked before entering the worksite or responding to COVID-19-related symptom questionnaires. Like post-shift security check cases, these claims — several dozen of which have been filed so far — rely on state wage laws that do not incorporate the Portal-to-Portal Act. And, like all class and collective actions, the suits pose a risk of significant exposure if they survive early dismissal.

A new administration, a new regulatory environment

Under the Biden Administration, new leadership at the U.S. Department of Labor (DOL) moved to revoke three Trump-era regulations in 2021.

- **Independent contractor rule.** In May, the DOL withdrew its final rule addressing independent contractor status under the FLSA. The rule, which never took effect, would have established the "economic reality" test as the uniform standard for determining whether an individual is in business for themselves (an independent contractor) or is economically dependent on a putative employer for work (an employee). Consequently, the judicial precedents and DOL regulations and guidance that were in place prior to the final rule's publication continue to apply.
- **Joint employer rule.** In July, the DOL announced it was rescinding the joint employer rule issued during the Trump Administration, effective September 28. The 2020 rule provided clearer guidance for the business community in determining joint employer status under the FLSA, in the form of a four-factor balancing test to determine when an entity is acting directly or indirectly in the interest of an employer in relation to the employee.
- **Tip rule.** On the tail end of the Trump Administration, the DOL issued a final rule eliminating the "80/20" rule, which the DOL and some courts had adopted to assess whether tipped workers were sufficiently engaged in tip-generating duties so that their employer could take the tip credit against the minimum wage rate. The tip rule was scheduled to become effective in March 2021, but the Biden DOL delayed its enactment. In October, the DOL reinstated the 80/20 rule and added a new "30-minute" rule. Under the final rule, an employer may not take a tip credit when work directly supporting tips exceeds 20 percent of the hours worked during the employee's workweek or is performed for a continuous period exceeding 30 minutes. The new rule, which took effect December 28, also addresses tip-sharing and other provisions related to tipping.

The net result will be greater uncertainty for employers with respect to complex legal questions about employee-employer status and the extent to which tipped employees can perform tasks that do not directly generate tips. Confusion breeds litigation and — particularly in the wage and hour context — class action litigation.

Other wage and hour decisions of note

Per diem allowance for traveling expenses. In an FLSA collective action, the Ninth Circuit ruled that per diem payments a healthcare staffing agency paid to "traveling clinicians" amounted to compensation for work rather than reimbursement for expenses. Therefore, reductions in the payments for failing to work full shifts were improperly excluded from the employees' regular rate of pay for purposes of calculating overtime pay. In its February decision, the appeals court cited a combination of factors indicating the payments functioned as compensation for hours worked, including the connection between per diem deductions and shifts not worked regardless of the reason for the missed time, the "banking hours" system, the payment of per diem on a weekly basis regardless of whether expenses were actually incurred on a given day, and the payment of the same amount of per diem to both local clinicians and traveling clinicians.

The employer filed a petition for certiorari asking the Supreme Court to take up the question of "[w]hether, under the FLSA, per-diem allowances for traveling

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See our Jackson Lewis report Wage & Hour Developments: A Year in Review for a deeper dive into key wage and hour developments in 2021.

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expenses, which are reduced when the employee fails to work a contractually required shift, are excluded from the employee's 'regular rate' as 'reasonable payments for traveling expenses … incurred by an employee in the furtherance of his employer's interests.'" The U.S. Chamber of Commerce (and several other industry groups) filed supporting briefs urging the Supreme Court to reverse the Ninth Circuit's decision. However, in December, the Supreme Court denied certiorari.

Bonuses and fluctuating workweek. The Eleventh Circuit ruled that an employer's practice of paying salaried nonexempt employees two types of bonuses (a night shift premium and holiday pay) on top of a fixed salary did not preclude it from using the fluctuating workweek method of calculating overtime. The appeals court thus revived an employee's individual claim alleging he was denied overtime pay in violation of the FLSA. (The court below had denied conditional certification of a collective action, finding the plaintiff failed to establish there were other employees who wanted to opt-in to the suit or that any employees who might opt in were similarly situated.)

Reviewing the statutory text, the Supreme Court's 1942 decision in *Overnight Motor Transportation Co. v. Missel*, and regulatory guidance, the Eleventh Circuit squarely rejected the employee's contention that all payments to an employee other than overtime pay must be deemed part of his fixed salary, explaining that "compensation an employee receives is not the same as the fixed salary; the salary is a subset of the employee's compensation." ■

Biometric privacy

Legal landmines continue to lurk for companies that collect, store, and use individuals' biometric information. Class action cases continue to be filed against companies under the Illinois Biometric Information Privacy Act (BIPA). BIPA carries with it the potential for actual damages or statutory liquidated damages of $1,000 for each negligent violation and $5,000 for each reckless or intentional violation, plus attorneys' fees and costs, and injunctive relief.

A wave of BIPA class action complaints have been brought against companies in recent years, and 2021 was no exception. Further, in 2021, plaintiffs' attorneys expanded the types of BIPA cases they are bringing beyond just claims involving the use of alleged biometric time clocks. Cases involving all sorts of alleged biometric technology, including multiple cases involving consumers instead of (or in addition to) employees, have been filed. What constitutes a "violation" of the BIPA has not yet been settled by the courts, and it is expected to be a hotly contested issue.

State and federal courts issued several important BIPA decisions in 2021:

- **Standing.** In a January decision, the Seventh Circuit ruled a federal court lacked standing to consider a class action BIPA case where the plaintiffs (in a deliberate strategy to keep their case in state court) did not allege they suffered concrete harm as a result of the alleged violation of the statute. The initial

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BIPA claims are being brought by employees and consumers

While BIPA class action claims by employees over employers' use of alleged biometric time clocks continue to be brought, plaintiffs' counsel are looking beyond just claims relating to timekeeping technology. BIPA cases relating to "virtual try-on" technology on websites, COVID-19 screenings, safety equipment in motor vehicles, security access systems, and virtual proctoring software, among others, are some of the new iterations. These lawsuits demonstrate the potential scope of the BIPA, as well as how new technologies present compliance and litigation risks to companies.

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complaint alleged violations of three provisions of the BIPA against a company that developed a facial recognition program that "scrapes" photographs from social media sites, harvests the data, and stores the information in a database that users (typically law enforcement agencies) pay to access. After the defendant removed the case to federal court, the plaintiff voluntarily dismissed the suit and filed a new, narrower complaint in state court, asserting only a "bare procedural violation" of BIPA Section 15(c), which prohibits a private entity in possession of customer biometric information from profiting from that information. Once again, the defendant removed the case to the federal court, but this time the plaintiff filed a motion to remand, noting the complaint alleged a violation "divorced from any concrete harm." The federal court concluded it lacked standing and remanded the suit to state court. The appeals court affirmed.

An essential element of Article III standing is that the plaintiff suffered an injury in fact that is concrete, particularized, and actual or imminent, but the plaintiffs conceded they suffered no such injury. "It is no secret to anyone that [plaintiffs] took care in their allegations, and especially in the scope of the proposed class they would like to represent, to steer clear of federal court," the appeals court observed. "But in general, plaintiffs may do this .... And here, they may take advantage of the fact that Illinois permits BIPA cases that allege bare statutory violations, without any further need to allege or show injury."

- **Labor preemption.** In September, the Seventh Circuit affirmed dismissal of BIPA claims brought by a unionized employee. It extended an earlier holding in which it found BIPA claims are preempted by the Railway Labor Act and concluded BIPA claims of unionized employees are similarly preempted by the Labor Management Relations Act. The Seventh Circuit reaffirmed that, where resolution of a plaintiff's BIPA claim depends on interpretation of a collective bargaining agreement, the claim is preempted by federal labor law.
- **Claim accrual.** In December, the Illinois Appellate Court for the First Judicial District held that BIPA claims accrue at "each and every capture" of an individual's biometric data, rejecting an argument from the defendant that a BIPA claim accrues the first time it collected the plaintiff's alleged biometric data. However, as detailed below, the issue of when BIPA claims accrue will be decided by the Illinois Supreme Court in a pending matter.

Workers comp law does not preempt BIPA

The Illinois Supreme Court has ruled that the Illinois Workers' Compensation Act does not preempt BIPA claims brought by employees against their employers, deciding this open question with finality and dashing hopes that the state high court's long-awaited decision might help to rein in the onslaught of BIPA actions by Illinois-based employees. A detailed analysis of the recent decision can be found here.

BIPA settlements. In 2021, BIPA cases settled in the six-, seven-, eight-, and even nine-figure ranges, even in cases where there have been no allegations that the plaintiffs' biometric data was hacked or improperly accessed by a nefarious third party.

In the past year, a federal court in California approved a $615 million settlement in a BIPA class action against a social media company that allegedly collected users' facial geometry without following the requirements of the BIPA. A federal judge in Illinois also granted preliminary approval of a $92 million settlement involving alleged violations of the BIPA against another social media company. In that case, the plaintiffs alleged the defendant had been "surreptitiously harvesting and profiting from [their] private information, including their biometric data, geolocation information, personally identifiable information, and unpublished digital recordings."

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These settlements, among many others, reflect both the magnitude of possible liability under the BIPA and the reach of the statute.

Employers not yet subject to biometric privacy laws in the jurisdictions where they operate should nevertheless consider adopting notice and consent practices as a best practice given the proliferation of biometric privacy laws across the country.

Pending decisions. Several closely watched BIPA appeals await decisions from various appellate courts in 2022. These decisions may dramatically shape the course of biometric privacy litigation in Illinois.

- **Claim accrual.** On December 20, the Seventh Circuit issued a decision certifying to the Illinois Supreme Court the question of whether claims under 15(b) and 15(d) of the BIPA "accrue each time a private entity scans a person's biometric identifier and each time a private entity transmits such a scan to a third party, respectively, or only upon the first scan and first transmission." The federal appeals court further invited the Illinois Supreme Court to consider the related question of "whether every unauthorized fingerprint scan amounts to a separate violation of the statute." The Illinois Supreme Court accepted the certified question on December 23.
- **Workers' compensation preemption.** The Illinois Supreme Court also is set to decide whether BIPA claims brought by employees against their employers are preempted by the Illinois Workers' Compensation Act. Previously, the Illinois Appellate Court for the First Judicial District rejected an employer's contention that the plaintiff's BIPA claim was barred by the exclusivity provisions of the Workers' Compensation Act. However, the Illinois Supreme Court decided to take the appeal and is poised to decide this issue with finality. The state high court heard oral arguments in September, and a decision is expected to be imminent.

Other laws enacted. Other states have biometric privacy laws, including Texas and Washington. Legislation similar to the Illinois BIPA, which creates a private right of action, is pending in several state legislatures, including New York. Also, a number of states have added biometric information to the categories of personal data that require notification under their respective breach notification laws. Local governments have begun to regulate the use of biometric technologies as well. In 2021, Baltimore and New York City joined Portland in prohibiting the use of facial recognition technology or requiring notice prior to collection of biometric data. Additional states and municipalities can be expected to adopt biometric privacy measures as the expanding use of biometric technology coincides with a sharp rise in public wariness about privacy risks.

The best defense…

Employers not yet subject to biometric privacy laws in the jurisdictions where they operate should nevertheless consider adopting notice and consent practices as a best practice given the proliferation of biometric privacy laws across the country. Further, for companies that operate in Illinois, even if the organization has created a strategy for BIPA compliance, it is important to periodically review time management, point of purchase, physical security, or other systems that may obtain, use, or disclose biometric identifiers or biometric information against the requirements under the BIPA, particularly as the case law continues to develop.

In the event an organization finds technical or procedural gaps in compliance, it needs to quickly remedy those gaps. Creating a robust privacy and data protection program or regularly reviewing an existing one can mitigate risk and ensure legal compliance. The Jackson Lewis Biometrics Team guides businesses in utilizing biometric data in a legally compliant manner and defends employers facing BIPA class action litigation. ■

Discrimination developments

It was a relatively quiet year on the class action front with respect to employment discrimination claims. However, the following developments in 2021 warrant mention.

Employers seek *Bostock* exemption

In a rare class action involving a class of employers, a federal court in Texas granted in part the plaintiffs' motion to certify classes in a suit against the Equal Employment Opportunity Commission (EEOC) seeking a religious exemption from Title VII antidiscrimination protections to the extent they prohibit discrimination based on LGBTQ status. The plaintiffs, citing the First Amendment and Religious Freedom Restoration Act (RFRA), seek a declaratory judgment that they have the right to hire and fire in accordance with their asserted sincerely held religious beliefs, including the right to set employment policies and to make adverse employment decisions based on sexual orientation and gender identity — notwithstanding the U.S. Supreme Court's landmark 2020 decision in *Bostock v. Clayton County, Georgia*, which held Title VII protects employees from discrimination based on LGBTQ status.

The employers contend there are questions of law common to the class members, including whether the RFRA compels the grant of exemptions to *Bostock*'s interpretation of Title VII, among others. The district court certified two classes of employers as to several of the asserted claims: (1) a "Religious Business-Type Employers" class including a private company that claims to operate its health and wellness center, vitamin shop, and pharmacy as Christian businesses (and does not employ individuals who engage in homosexual behavior or gender-nonconforming conduct, does not recognize same-sex marriage or extend benefits to an employee's same-sex partner, and enforces a sex-specific dress-and-grooming code); and (2) an "All Opposing Employers" class comprised of employers that oppose homosexual or transgender behavior for religious *or* nonreligious reasons.

The court declined to certify a "Church-Type Employers" class and awarded summary judgment in defendant's favor as to these plaintiffs, reasoning the employers qualify as "religious organizations" under the text of the statutory exemption in Title VII and, therefore, are not burdened by the statute's protections for LGBTQ individuals. In addition, the court awarded partial summary judgment to the EEOC as to other alleged claims and awarded partial summary judgment in favor of two of the employer classes as to certain employment policies the court found do not violate Title VII as a matter of law.

"Ambient" harassment won't get class treatment

In a March decision, a Seventh Circuit panel ruled that a district court erred in certifying a class of female jail employees in a suit alleging their county employer failed to prevent sexual harassment by male inmates. The appellate panel found the court below abused its discretion in adopting an overbroad "ambient" or indirect harassment theory, and that the hostile work environment class could not stand because it was comprised of class members with materially different work settings whose claims required separate, individualized analyses.

In its initial order certifying a class comprised of about 2,000 nonsupervisory female employees who worked with male inmates at the jail or adjoining courthouse, the district court found a common question: "whether the ambient harassment experienced by female employees at the jail and the courthouse is sufficiently severe and pervasive to support a Title VII hostile work environment claim." The court defined ambient harassment as "the experience of working in an environment highly permeated with sexually offensive and degrading behavior, that is, a highly sexualized atmosphere in which crude and offensive sexual behavior is common and employees see that it is normative, whether specifically directed at them or not." The Seventh Circuit reversed, finding the ambient harassment theory was a problematic basis for commonality because it overlooks meaningful distinctions among the class members' individual experiences, which can vary dramatically depending on where they work.

The district court had treated ambient harassment at the jail complex as if it were a homogenous phenomenon affecting every class member in the same way. However, the jail complex in question was massive (spanning 36 buildings across eight city blocks) and, while sexual harassment

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allegedly occurred throughout the jail, the evidence showed it was heavily concentrated within a few residential divisions where a fraction of class members worked. Thus, whether the employees endured objectively severe or pervasive harassment depends on individualized questions of fact and law and must be resolved individually.

However, the appeals court observed that a smaller class comprised of a subset of class members with comparable work experiences might conceivably form a coherent class. Remanding, the Seventh Circuit left that issue to the district court's discretion. In August, the named plaintiffs notified the district court that they would pursue their claims in their individual capacities instead, and the court instructed the parties to propose potential bellwether plaintiffs for trial.

Investor suit over harassment, discrimination fallout

A gaming company is defending a class action investor lawsuit related to the company's alleged "frat boy" workplace culture and ongoing pattern of discrimination against women and minority employees. The investor suit, filed last August, was brought on the heels of a July complaint by the California Department of Fair Employment and Housing (DFEH) that revealed allegations of egregious and pervasive sexual harassment, as well as disparate treatment and discriminatory promotion practices. After the DFEH lawsuit was filed, some 2,000 employees staged a walkout condemning the company's response. The protest led to further comments from the company's CEO and a drop in share prices of more than 6 percent.

According to the investors' complaint, the company made multiple materially false and misleading statements that concealed from investors a pervasive culture of harassment and discrimination, which drew regulatory and legal scrutiny and enforcement. The suit alleges that, while the company's annual and quarterly filings disclose it is party to "routine claims and lawsuits," they failed to disclose the two-year DFEH investigation. Also, the company's 10-Ks incorporated by reference its code of conduct, which directed the

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Website accessibility litigation

Class action suits continued to proliferate in 2021 contending that businesses' websites are not accessible to vision-impaired users, in violation of Title III of the Americans with Disabilities Act (ADA), the provision related to discrimination in public accommodations, and state-law counterparts.

Under Title III, individuals with disabilities, advocacy groups, and the U.S. Department of Justice can sue for violations. Spurred by the availability of attorney's fees under Title III, plaintiffs' firms have aggressively pursued these claims. (New York continues to be the epicenter of such litigation, but 2021 brought a notable increase in suits brought in California.) Defendants have ranged from small "mom and pop" restaurants to Fortune 50 corporations.

In a significant decision in 2021, the Eleventh Circuit (which includes Alabama, Florida and Georgia) held a grocery chain's website is not a "place of public accommodation" under the ADA, joining several circuits in so holding. However, the Eleventh Circuit went even further: the divided panel expressly held that, under the facts of the case, a website that lacks an auxiliary aid that would enable the website to be read aloud by screen-reader technology is not necessarily equal to the denial of goods or services.

This groundbreaking holding is welcome news to businesses operating in the Eleventh Circuit. The decision is especially favorable for entities that operate fully online businesses, as "it holds that a website itself is not a place of public accommodation to which the ADA applies," write Jackson Lewis attorneys Mendy Halberstam, Joseph Lynett, and Rebecca McCloskey in their analysis of the decision. In addition, they note, brick-and-mortar businesses that provide alternative means for disabled patrons to obtain goods and services, such as in-person or by phone or email instead of just through a website, will find good points in the court's decision as well. As the authors note, "it remains to be seen whether other circuits will follow or that the court's decision will be favored with respect to state disability laws."

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company and employees to comply with applicable laws and regulations and stated no-tolerance policies for harassment and discrimination — statements that were materially false and resulted in shareholder losses when the falsehoods came to light, the class action complaint alleges. A motion to dismiss the investors' suit is pending.

Separately, the employer entered into a proposed three-year consent decree with the EEOC to settle Title VII claims arising from the alleged misconduct, creating an $18 million fund to compensate and make amends to eligible claimants and agreeing to significant injunctive and equitable relief.

Fast-food chain faces class bias claims

Individual and classwide sexual harassment claims against a national fast-food franchisor and its franchisee survived a motion to dismiss. The class action under Title VII and the Florida Civil Rights Act was brought on behalf of all female employees who worked in a position below that of general manager at restaurants in Florida. The district court held the employees sufficiently alleged at the pleading stage that the complained-of harassment and hostile work environment were the result of company-wide policies, including inadequate training and a corporate-level policy of incentivizing managers to ignore sexual harassment, and there was enough evidence of a pattern or practice sufficient to satisfy Rule 23's commonality and typicality requirements. The court, in its July decision, did foresee problems meeting the adequacy requirement because the proposed class may include individuals (such as lower-level supervisors) who contributed to the hostile work environment. However, the court explained, that issue would be considered when the employees move to certify the class.

In a separate action, a federal court in Michigan certified a class action in another sexual harassment suit against the fast-food chain, finding a 99-member class was sufficiently large to proceed and the allegations of harassment by the same manager could be resolved on a classwide basis (even if some of the class members had been involved in sexual or romantic relationships with the manager). In its December ruling, the court held the question of whether the manager's conduct was unwelcome could be litigated on an individual basis. The court dismissed claims against the national corporate defendants, however, as the court rejected the plaintiffs' contention that the franchisor entities were their joint employers. ■

The California landscape

California continues to be the nation's most challenging legal environment for employers. The challenge has been all the more vexing in recent years due to new legislation and rapidly unfolding case law, particularly with respect to the Private Attorneys General Act (PAGA). California's Labor Code is frequently more stringent than FLSA, presenting distinct and complex compliance issues and a harsh environment for defending wage and hour class actions. PAGA continues to be a particular thorn for California employers, as does the Golden State's controversial AB 5.

The PAGA threat persists

Enacted in 2004, PAGA dramatically increased the risk of significant exposure for employment violations and launched an ever-rising wave of litigation against California employers. The *qui tam*-like statute empowers private citizens to enforce the Labor Code, ostensibly to shore up compliance in the face of limited state government enforcement resources, by seeking monetary relief on behalf of similarly situated employees.

A series of court rulings over the years has lowered barriers for employees to bring claims and has added to the allure of such lawsuits for the plaintiffs' bar. These rulings determined that class certification requirements do not apply to PAGA actions; that employees cannot, by entering into mandatory arbitration agreements, waive the right to bring a PAGA claim in court; and that plaintiffs have broad rights to information through the discovery process bringing a claim. Plaintiffs also are entitled to 25 percent of the civil penalties imposed on employers for violations. PAGA has proven a windfall for the state: it has been reported that in 2020 alone, California's Labor and Workforce Development Agency netted $100 million from PAGA penalties.

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PAGA filings continued unabated in 2021. For California employers, however, the year also brought reasons for optimism:

$102 million judgment reversed. In a significant victory for employers, the Ninth Circuit vacated a $102 million award against a major retailer in a suit alleging the employer violated the California Labor Code's wage-statement and meal-break provisions. The court's opinion provided an important clarification of the cognizable harm required to establish Article III standing under PAGA and the Labor Code's wage statement requirements. It explained that an employee does not have standing to bring PAGA claims in federal court for alleged Labor Code violations the employee himself did not suffer. In addition, on the merits, the federal appeals court determined that, under the Labor Code, an employer may make lump-sum payments as a retroactive adjustment to employees' overtime rate to factor in bonus payments without identifying a corresponding "hourly rate" for the payment on employees' wage statements.

For now, PAGA has no parallel elsewhere. However, several states are considering legislation that mirrors the California law, giving an employee or in some cases a representative organization the authority to file an enforcement action on behalf of the state to enforce labor violations.

SCOTUS to consider PAGA arbitrability. In 2014, the California Supreme Court ruled that employees cannot be compelled to arbitrate PAGA actions, even when the parties have an enforceable arbitration agreement in place. However, the U.S. Supreme Court recently granted certiorari to consider whether this holding is in conflict with the well-established federal policy favoring arbitration as embodied in the Federal Arbitration Act (FAA). The petitioners argue that such a PAGA carveout is impermissible under federal law and that the state high court's decision should be overturned.

Coming to a state near you? For now, PAGA has no parallel elsewhere. However, several states are considering legislation that mirrors the California law, giving an employee or in some cases a representative organization the authority to file an enforcement action on behalf of the state to enforce labor violations. During the summer of 2021, Maine became the first state to pass a PAGA-type statute mirroring the California law. However, the state governor swiftly vetoed the measure. Other states that have bills pending include Connecticut, Colorado, Illinois, Massachusetts, New Jersey, New York, Oregon, and Washington.

AB 5 remains controversial

In 2019, the California legislature passed Assembly Bill (AB) 5, adopting and expanding use of the common-law "ABC test" to define an "independent contractor" (as opposed to a statutory "employee") not just for purposes of California Wage Orders, but also for the Labor Code and the Unemployment Insurance Code. The ABC test is a more rigorous standard. There were built-in exceptions to AB 5 and more were added after enactment by courts, the legislature, and the political process. At the start of 2020, a federal district court enjoined enforcement of AB 5 as to truck drivers, finding AB 5 was preempted by the Federal Aviation Administration Authorization Act of 1994. Later that year, Governor Gavin Newsom signed AB 2257, which recast, clarified, and expanded the exemptions to AB 5. In November 2020, California voters passed Proposition 22, approving an exemption for app-based rideshare and delivery companies.

At the start of 2021, the fate of AB 5 began to change course. The California Supreme Court held that *Dynamex Operations West, Inc. v. Superior Court* (the case that originally set forth the ABC test) applied retroactively. Further, a California court granted a writ of mandate barring the state from enforcing Prop 22's AB 5 exemption for rideshare drivers. The Ninth Circuit upheld AB 5 against constitutional challenges brought by a journalist association.

A divided Ninth Circuit panel also overruled the injunction against enforcement of AB 5 for truckers. A trucking industry group has asked the U.S. Supreme Court to review the decision, arguing that, if allowed to stand, the ruling will effectively preclude the use of independent owner-operators from providing trucking services. The Supreme Court has

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asked the U.S. solicitor general to weigh in on whether to grant certiorari. Meanwhile, the injunction originally imposed by the district court remains in effect pending a decision on the trucking industry's petition for certiorari.

Additionally, the California legislature has extended several industry-specific exemptions that were set to sunset in 2023, including for licensed manicurists, construction trucking subcontractors, and newspaper distributors and carriers. Therefore, these occupations need not follow the ABC test to determine whether they are statutory employees under California law.

Ninth Circuit: FAA does not preempt AB 51

California AB 51 provides that an employment arbitration agreement, to be enforceable, must be voluntarily agreed to by the employee, and not unilaterally imposed by an employer as a mandatory condition of employment. Before AB 51 was scheduled to take effect, a federal district court held the measure was preempted by the FAA and enjoined enforcement. However, in a September decision, a divided Ninth Circuit panel reversed in part, vacating the lower court's preliminary injunction. In a vigorous dissent, Judge Sandra Segal Ikuta said AB 51 runs afoul of the FAA because AB 51's threatened criminal and civil penalties create an obstacle to the FAA's pro-arbitration objectives and that AB 51 discriminates against arbitration agreements by imposing a heightened consent requirement on such agreements.

A petition for *en banc* review of the panel decision is pending. The petition argues that the Ninth Circuit's decision creates a circuit split over the reach of FAA preemption. In contrast to the Ninth Circuit, the First and Fourth Circuits have held state laws that created obstacles in forming and discouraging arbitration agreements were preempted by the FAA. ■

The Jackson Lewis California Class and PAGA Actions Resource Group offers a powerful combination of substantive insights into labor and employment law, extensive litigation experience in class and PAGA-only actions, and deep roots in the state of California. The team of attorneys works with organizations to identify potential issues before they present and expeditiously address them should they arise.

ERISA class action developments

Since January 2020, the number of Employee Retirement Income Security Act (ERISA) class actions targeting the alleged mismanagement of 401(k) and 403(b) defined contribution employer-sponsored retirement plans has exploded. During that time, more than 150 of these class actions have been filed nationwide. These suits generally contend that plan sponsors and other plan fiduciaries have breached their fiduciary duties under ERISA by authorizing the plan to pay excessive recordkeeping fees and/or by selecting plan investments that charged excessive investment management fees or that underperformed. The complaints in these "fee litigation" cases seek tens of millions of dollars in damages.

In 2021, motions to dismiss were granted in about a dozen cases, but courts have denied such motions in many others.

Supreme Court remands fee case

In December, the U.S. Supreme Court heard oral argument in a Seventh Circuit case involving the proper standards for motions to dismiss such claims. Specifically, the Justices considered whether allegations that a defined contribution retirement plan paid or charged its participants fees that "substantially exceeded" fees for alternative available investment products or services (including recordkeeping) are sufficient to

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state a claim against plan fiduciaries for breach of the duty of prudence under ERISA. The Seventh Circuit affirmed a district court decision dismissing the claims, which arguably were premised on the same substantive allegations that the Third and Eighth Circuits had deemed sufficient to survive.

The Supreme Court, in a unanimous opinion, vacated the Seventh Circuit decision in this closely watched case. The Court concluded that the Seventh Circuit erred by failing to apply the Court's guidance in *Tibble v. Edison International*, a 2015 decision, that plan fiduciaries have a duty to monitor all plan investments and to remove imprudent ones.

The appeal queues up a hotly litigated issue in recent fee litigation: can defined contribution plan participants challenge the prudence and loyalty of retaining a plan investment option they never invested in?

The Supreme Court did not decide whether plaintiffs had plausibly alleged a violation of the duty of prudence. Instead, the Court remanded to the Seventh Circuit to reevaluate plaintiffs' allegations consistent with *Tibble* and existing pleading standards. The Court further explained that "the appropriate inquiry" into whether investment options and fees are prudent "will necessarily be context specific." As such, the Court recognized that "the circumstances facing an ERISA fiduciary will implicate difficult tradeoffs, and courts must give due regard to the range of reasonable judgments a fiduciary may make based on her experience and expertise."

Read the detailed analysis of this recent Supreme Court decision on the Jackson Lewis ERISA Complex Litigation blog.

Class certification issues in fee litigation

In May, the Third Circuit agreed to review a district court's decision to certify a 60,000+ person class in a fee class action. The appeal queues up a hotly litigated issue in recent fee litigation: can defined contribution plan participants challenge the prudence and loyalty of retaining a plan investment option they never invested in?

The defendants argued that plaintiffs could not have been harmed by excessive fees or underperformance of the funds in which they did not invest; therefore, they lack Article III standing to pursue claims relating to those funds. The defendants relied on a 2020 Supreme Court holding that participants in a defined benefit retirement plan lacked standing to pursue a fiduciary breach claim relating to the management of the plan because they had no "concrete stake" in the lawsuit, as winning or losing the suit would not alter their monthly retirement benefit.

The defendants had raised a similar challenge to oppose class certification, arguing that plaintiffs' claim failed to meet typicality standards under Rule 23 because the named plaintiffs suffered no injury with respect to the performance or fees of the investment options in which they did not invest. The district court disagreed, finding that plaintiffs' claims "primarily involve allegedly imprudent decision-making processes as to the Plan as a whole" and challenge "uniform conduct across the Plan."

The defendants sought immediate review of the class certification decision, which the Third Circuit granted. On appeal, defendants argued that plaintiffs' claims challenging the 7 funds they selected are not typical of absent class members' claims challenging the 30 funds plaintiffs did *not* select. Defendants also argued that plaintiffs lack constitutional standing to challenge the 30 unselected options. The case has been calendared for oral argument in February 2022. ■

Supreme Court news

The U.S. Supreme Court in 2021 issued a significant decision on Article III standing in the context of a class action brought under the Fair Credit Reporting Act (FCRA). The Court also granted certiorari in cases that will have important implications for employers' right to pursue arbitration (in lieu of costly litigation).

"No concrete harm, no standing"

In recent years, many employment class actions have been premised on technical statutory violations. Examples include actions alleging defective FCRA notices issued when conducting preemployment background checks, defective COBRA election notices, and violations of state privacy laws. A Supreme Court decision issued this summer may allow employers defending such actions to show that some or all of the employees alleging these mere technical violations have not suffered any concrete harm and, therefore, their claims should be dismissed.

Significantly, the Supreme Court declined to address "[w]hether either Article III or Rule 23 permits a damages class action where the vast majority of the class suffered no actual injury, let alone an injury anything like what the class representative suffered."

In a divided 5-4 opinion addressing the right of consumers to sue a credit reporting agency for technical violations of the FCRA, the Supreme Court ruled, "Article III standing requires a concrete injury even in the context of a statutory violation." Thus, only those individuals whose inaccurate credit files were released to third parties had the requisite standing to seek damages under the FCRA since they suffered a concrete reputational injury. The remaining class members, whose inaccurate credit reports were not disseminated to third parties, did not suffer cognizable harm, and therefore, lacked standing to sue.

Writing for the majority, Justice Brett M. Kavanaugh concluded, "The mere presence of an inaccuracy in an internal credit file, if it is not disclosed to a third party, causes no concrete harm." Insofar as the plaintiffs whose credit files had not been disseminated argued that the inaccurate and defamatory alerts on their credit reports might yet be released to a third party, the Court majority suggested the proper approach to such alleged future harms would be to cross that injury bridge when they get to it. Justice Kavanaugh also addressed the plaintiffs' assertion that the forms of the disclosures they received were not compliant (a claim many employers face in expensive and burdensome class actions), ruling they failed to demonstrate the alleged deficiencies "caused them a harm with a close relationship to a harm traditionally recognized as providing a basis for a lawsuit in American Courts."

Significantly, the Supreme Court declined to address "[w]hether either Article III or Rule 23 permits a damages class action where the vast majority of the class suffered no actual injury, let alone an injury anything like what the class representative suffered." While the majority opinion ruled that every class member must show standing to recover individual damages in federal court, it did not address the question of whether Article III standing was required at the class certification stage.

FAA transportation worker exemption

In December, the Supreme Court granted certiorari to resolve whether the FAA's transportation worker exemption for classes of workers engaged in foreign or interstate commerce applies to an airline's ramp workers operating out of Chicago's Midway Airport. The Court will consider "[w]hether workers who load or unload goods from vehicles that travel in interstate commerce, but do not physically transport such goods themselves, are interstate 'transportation workers' exempt from the Federal Arbitration Act." The Court's holding will determine whether the workers will be able to pursue their overtime collective action in federal

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court or, rather, must arbitrate their claims on an individual basis pursuant to an arbitration agreement with their employer.

The Supreme Court previously had rejected two separate petitions for certiorari filed by an online retailer asking the justices to weigh in on the hotly contested issue whether gig drivers can be forced to arbitrate independent contractor misclassification claims. The question at hand was whether the transportation worker exemption applies to "last mile" delivery drivers who do not cross state lines in the course of making deliveries of out-of-state goods. The Supreme Court's decision not to take up the petitions had left a circuit split in place.

In recent years, the transportation worker exemption has emerged as one of the most significant issues in class action litigation, particularly as employers increasingly have adopted arbitration agreements with class and collective action waivers in an effort to rein in litigation costs and as wage and hour lawsuits have proliferated among employees and independent contractors who claim to fall within the exemption.

Litigation as arbitration waiver

The Supreme Court also will determine whether a plaintiff should be required to show prejudice when arguing that a defendant waived its right to arbitrate (pursuant to an arbitration agreement between the parties) by engaging in conduct that indicates an intent to litigate.

In the case below, a district court denied an employer's motion to compel a fast-food worker to arbitrate her FLSA overtime claims, finding the employer waived the right to compel arbitration by waiting eight months to do so. A divided Eighth Circuit reversed. The panel majority pointed out that four of those eight months were not spent actively litigating but waiting for the court to rule on the defendant's motion to dismiss. Moreover, the majority said, instead of focusing on the employer's delay in asserting its right to arbitrate, the lower court should have considered the *nature* of the motion to dismiss: The employer's motion focused on the "first-to-file" rule, so the parties spent no time litigating the merits of the case. Because no discovery was conducted, and there was no evidence the employee would have to duplicate her efforts during arbitration, the appeals court found the employee was not prejudiced by the employer's litigation strategy.

In reaching its determination, the Eighth Circuit joined eight other federal courts of appeals and most state supreme courts in requiring the party asserting waiver to show the waiving party's inconsistent acts caused prejudice. However, in her petition for certiorari, the employee argued that these courts have erred in grafting an additional requirement onto the waiver analysis when the contract at issue happens to involve arbitration. Ordinary contract principles have devolved into a "muddled mess" in the context of arbitration, the employee asserts. The petition notes that three other federal courts of appeal, and the supreme courts of at least four states, do *not* include prejudice as an essential element of proving waiver of the right to arbitrate. It further asserts the arbitration-specific requirement that the proponent of a contractual waiver defense must prove prejudice violates the Court's ruling in *AT&T Mobility LLC v. Concepcion*: that lower courts must "place arbitration agreements on an equal footing with other contracts." ■

On the JL docket

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

February 17, 2022	Long Island Breakfast Series: Reasonable Accommodation Basics 8:30 AM-10:00 AM EST
April 14, 2022	Portsmouth Spring Employment Law Update 8:30 AM-10:00 AM EST

NEXT UP

In our next issue of the *Class Action Trends Report,* Jackson Lewis attorneys will discuss the latest news in arbitration and the use of arbitration agreements to avoid costly class action litigation. The U.S. Supreme Court has taken up several important arbitration-related matters. Plaintiffs' attorneys have deployed new tactics to thwart individual arbitration. Legislative attempts to restrict arbitration rights persist. We will take stock of these developments and offer guidance on navigating the current terrain.

We'll also look at the latest developments in vaccine mandate class action litigation.

2022: THE YEAR AHEAD FOR EMPLOYERS

highlights the legislation, litigation, regulation and trends nationwide that will impact businesses in the coming months.

We hope the report will prove to be a useful resource as you consider employment issues and navigate the year. We look forward to connecting with you in 2022.

LOOK AHEAD WITH JACKSON LEWIS