



Class Action Trends Report, Summer 2020: Class Action Risks in a Pandemic

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A Word From the Authors

The world can change quickly. A few months ago, a new decade beckoned, the economy was thriving, and hiring was humming. Then an unprecedented pandemic threw the planet off its axis. Millions have fallen ill; far too many have died. The economy slammed to a halt, and U.S. businesses were shuttered, by circumstances or government edict. Millions of employees became telecommuters almost overnight; millions more were suddenly unemployed.

Meanwhile, employers have had to contend with the economic fallout, grapple with a maze of local, state, and federal mandates, and make painful personnel choices. As companies gradually reopen, more challenging decisions await.

“These times are fertile grounds for the plaintiffs’ bar. The class action floodgates have not yet opened, but they will,” said Stephanie L. Adler-Paindiris, Co-Leader of the Jackson Lewis Class Actions and Complex Litigation Practice Group. “Once the dust settles, we will have a full-blown overgrown garden of potential class and collective claims. It’s critical for employers to think about what might be coming and how they can take steps now to minimize exposure.”

In this issue of the *Class Action Trends Report*, we discuss the types of employment claims likely to skyrocket as a result of the coronavirus pandemic and the resulting economic downturn. We focus particularly on those claims most at risk of classwide liability, and offer tips on how best to minimize these risks.

It is our sincere hope that you, your employees, and your organization are healthy and safe, that the worst of the crisis is behind you, and that you have begun in earnest to reimagine your workplace in a post-COVID-19 world.

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Class Action Risks in a Pandemic

Employers continue to grapple with an ongoing, unprecedented public health crisis caused by the COVID-19 pandemic and its after-effects, which have profoundly disrupted the nation's economy and U.S. workplaces. With little advance warning, employers were forced to close worksites, transition employees to home offices, furlough or lay off large segments of the workforce, and protect "essential workers" from the hazards of a global pandemic. U.S. businesses also had to quickly interpret and comply with official directives from state, local, and federal governments, an especially challenging endeavor for multistate employers navigating varying and complex mandates at several locations. With the U.S. economy ramping up again and businesses cautiously reopening, employers must determine who, and how many, to recall; return homebound staff to the office; and implement new safety practices and protocols, often in the face of employee resistance.

Employers must reimagine the workplace in order to manage litigation risk in this post-COVID-19 "new normal." They must revisit and update existing employment policies and practices as the evolving nature of the global pandemic unfolds. As employers strive to operate a business and manage a workforce amid a volatile economic climate and evolving pandemic, they simultaneously must consider what is sure to be a surge in COVID-19 related class litigation in the coming months.

In this issue of the Class Action Trends Report, attorneys in the Jackson Lewis Class Actions and Complex Litigation Practice Group discuss the most pressing workplace class action litigation risks arising from the COVID-19 pandemic, and how best to minimize them.

Disability and leave-related challenges

As employers turn their attention to reopening, they must contend with new laws and rules at the federal, state, and local levels. As a result, novel disability accommodation and employee leave issues are arising that, if not handled properly, could open the door to class litigation. Disability accommodation and employee leave cases typically arise as individual employee actions. However, with the pandemic comes a heightened risk of multi-plaintiff cases, threatening potential classwide liability if employment policies and practices are not up to par.

The nature of COVID-19 means there is a real possibility that groups of workers may fall ill, or take (and return from) leave to care for themselves or others. Legislation has been rushed through Congress with little time for employers to prepare. Indeed, employers already are defending claims alleging they failed to provide required leave under newly enacted federal law.

Is COVID-19 a disability? The law is unclear whether COVID-19 is itself a disability under the Americans with Disabilities Act (ADA). However, employers must avoid regarding employees who are diagnosed with COVID-19, or have recovered from the virus, as being disabled or having a record of a disability, and taking adverse actions against them based on those perceptions.

In fact, officials in the New York district office of the Equal Employment Opportunity Commission (EEOC) noted that the agency had received an increasing number of charges relating to the COVID-19 pandemic, all of which alleged violations of the reasonable accommodation mandate of the ADA. The New York State Division of Human Rights, and its New York City counterpart, also indicated a growing number of such complaints, many of which were brought by workers with disabilities who contend their employer refused to recall them due to health and exposure concerns.

"Regarded as" disabled. Because there is no clear guidance on whether COVID-19 is a disability under the ADA, it's also unclear whether regarding someone as having COVID-19 would be a violation of the law. Employers can expect litigation surrounding these issues. We expect to see regarded-as-disabled claims by employees who are perceived to have pre-existing conditions, are immunocompromised, or have COVID-19.

To avoid the potential for classwide "regarded as" or "record of" claims, managers should be trained not to automatically assume that employees who return after recovering from COVID-19 are unable to perform their duties fully. Handle each employee's situation individually. Allow vulnerable employees to self-identify if they fall within a "high-risk" category.

Requests not to return to work. As states and municipalities loosen their stay-at-home rules and employers begin to reopen, employers are fielding employee requests not to return to the workplace, for reasons varying from a disabling medical condition to generalized fear. While these requests may be unique to the COVID-19 crisis, the rules around reasonable accommodation have not changed, and they apply in this setting. Employers may request that the employee provide a reason(s) for the request not to return to the workplace so that it can determine if the apprehension is due to a valid physical or mental medical condition.

Begin the interactive process if the employee's stated reason for refusing to return to work is due to: (1) the individual's status as part of a vulnerable population; (2) being a caretaker or residing with someone who is part of a vulnerable population; or (3) having been advised by a medical care provider to isolate due to a medical

condition. Even if there is not a documented medical reason for an employee's reluctance to return, the employer should nonetheless treat the matter with sensitivity and consider temporarily allowing telecommuting or unpaid leave, if feasible.

Requests not to use personal protective equipment (PPE). Can an employee refuse to wear a mask, or other PPE, if company policy requires this safety measure? Mask-wearing has become a politically charged topic, and some individuals are adamant about not wearing one. An employer need not honor philosophical objections, particularly given the risk posed to other employees.

However, some requests to be excused from a mask requirement may be based on legitimate medical reasons. An employer should treat such requests as it would any other accommodation request. Follow the same steps, including documentation. Even if there is a disability at issue, allowing the employee to come to work without a mask or other PPE may pose an undue hardship if it puts other employees at risk. In this instance, working from home or unpaid leave may be an option.

Reasonable accommodations. Is telecommuting a reasonable accommodation for a disability? Has the employer operated successfully with administrative staff working remotely due to shelter-in-place orders? If so, the employer may want to reconsider restrictive blanket policies against telecommuting and be mindful when relying on the undue burden defense as a reason to deny an employee's request to continue telecommuting as an accommodation.

Other possible accommodations in addition to telecommuting include paid or unpaid leave, and implementation of additional safety precautions at the employee's worksite that will allow the employee to safely perform the essential job functions. Also, keep in mind that the duty to accommodate does not cease just because employees are working from home.

How long must an accommodation be in place? Determining the duration of an accommodation presents another challenge, particularly given the unpredictability of COVID-19 itself. Like all accommodation analyses, the duration of this accommodation must be evaluated based on the particular workplace and the individual employee's needs, not a companywide policy.

FFCRA presents novel leave issues. With the swift passage of the Families First Coronavirus Response Act (FFCRA), employees have expanded rights to seek protected leave or reasonable accommodations. Employers covered under the FFCRA are required to make Emergency Family and Medical Leave and Emergency Paid Sick Leave available to employees. Employers already face suits alleging that emergency FMLA or paid sick leave

What if an employee refuses to return?

- Request the employee provide reason(s), in writing.
- Consider the reason(s).
- Determine whether any state/local or federal leave laws would apply.
- If protected leave is not applicable, should you consider a disability accommodation analysis?
- If so, engage in the interactive process.
- Consider an unpaid leave of absence or eligibility for benefits.
- If the employee has safety concerns, advise the employee of all the safety protocols and policies the company has put in place.

should have been granted under the new law but they were denied — or worse, were discharged in retaliation for seeking leave.

There is also litigation addressing the threshold question whether an employer is covered under the federal statute. Scrutiny of whether an employer was subject to the requirements of the FFCRA will be ongoing. The statute's 500-employee rule, which limits statutory coverage to employers with fewer than 500 employees, has been applied differently by different companies. Some have grouped subsidiary or parent companies together to meet the numerical threshold, for example; this will likely result in a legal challenge.

An employee may not be entitled to leave under the FFCRA while on furlough; however, recalling employees can trigger leave entitlements. An employer cannot simply place a recalled employee on furlough if the employee indicates they are unable to return due to an FFCRA-covered reason, such as to take care of a vulnerable family member or a child who is unable to attend school or daycare due to the pandemic. In these instances, the employer can request information from the employee, including the identifying characteristics of the child and their school, and require the employee to certify that there is no other suitable person available to care for child.

Discrimination claims

As employers reorganize their workplace, they are forced to make difficult decisions, about layoffs, furloughs, and which employees will be brought back once operations resume. These decisions, which necessarily treat some employees more favorably than others, are always subject to legal challenge; the sheer number of furlough and layoff

Exposed employers

Either due to the types of claims that are amenable to class treatment or the essential nature of the employer's operations, certain industries are most acutely affected by the pandemic, and the litigation surge:

- Healthcare
- Retail employers
- Restaurants and hospitality
- Casinos, movie theaters, and entertainment
- Airlines, cruise lines, and other travel businesses
- Gyms and other membership organizations
- Colleges and universities

decisions necessitated by COVID-19 increases the risk of class actions by magnitudes.

Layoffs and furloughs. Employers may face disparate impact discrimination claims if layoff and furlough decisions disproportionately affect certain groups of employees based on a protected characteristic. Claims arising out of mass layoffs typically allege discrimination based on age, gender, and disability. The risk of a claim is greater when employers are forced to lay off or furlough a small segment of a larger workforce; the risk tends to drop when such decisions affect whole departments or the entire company.

Recalling employees. With reopening, employers must consider which positions must be restored to work, and adopt neutral, nondiscriminatory selection criteria — such as seniority, performance, or job classification — in deciding which employees to return to fill those positions. Make sure that return-to-work policies and selection criteria do not have a disparate impact on a protected category of individuals. Do not assume that certain employees cannot or should not return based on childcare needs or caregiving responsibilities, for example; these assumptions may lead to discrimination claims.

Employers also may not keep from recalling individuals they perceive to be at heightened risk of contracting COVID-19 or suffering severe complications from the virus, due to their age, disability or preexisting health condition, or pregnancy. Those considered particularly vulnerable to COVID-19 include people over 65 years of age; people who are immuno-compromised; and those with a serious heart condition, severe obesity, diabetes, or liver disease. An employer may not ask an employee if they have one of these conditions; however, if the employee requests a COVID-19-related accommodation, the employer may inquire into whether the employee has a condition that makes them vulnerable.

This can get tricky, particularly given the unusual amount of discussion at present about employees' medical conditions and current symptoms, which provides more opportunity for missteps. Moreover, it may seem intuitive to want to protect vulnerable employees. However, the instinct to do so exposes the employer to disparate impact claims (as well as individual disparate treatment actions). Consult legal counsel for guidance in addressing safety concerns about high-risk employees and about the proper handling of accommodation requests.

Wage and hour pitfalls

Without warning, COVID-19 forced employers to quickly cut payroll costs, leaving them with hard choices. For some, widescale layoffs were inescapable; others were able to implement full or partial furloughs, curtail overtime, or cut wages. Employers also were faced with the equally critical need to ensure that employees who remained on the payroll were kept safe from the dangerous virus to the fullest extent possible.

The difficult choices made, both to control costs and protect employees, bring potential wage and hour liability. Class wage and hour claims are always fertile ground for plaintiffs' lawyers; however, employers can anticipate a surge in the number and variety of wage claims arising from the pandemic and the strategies pursued by employers in response.

Exempt employee errors. The biggest wage and hour risk with respect to exempt employees is that a COVID-related change to duties or salary will result in those employees losing their overtime-exempt status. Committing these errors in an effort to control payroll expenses in the short term can wind up costing a significant amount in the long term if employees are inadvertently converted to nonexempt (and overtime-eligible) status:

- **Slashing salary.** Employers have cut exempt employees' pay in order to contain costs in the short-term. But if the reduction drops their pay below the Fair Labor Standards Act (FLSA) salary threshold of \$35,568, they are no longer exempt.
- **Botching the salary-basis test.** For the FLSA overtime exemption to apply, an employee must be paid on a "salary basis." Employers that adopt partial-week furloughs, and link a reduction in pay to a corresponding reduction in work hours, will fail the salary basis test. Exempt employees must get paid for the entire week, even if they are moved to a four-day workweek during the pandemic.
- **Performing too much nonexempt work.** Exempt managers have been taking on more nonexempt duties to cover staff who were laid off or had their hours cut,

stocking store shelves, performing administrative tasks, and other functions. When nonmanagerial activities take up too great a share of an exempt employee's time, then the manager's primary duty may no longer be management, and they are no longer exempt. In a July 20 guidance, the U.S. Department of Labor (DOL) indicated that "during the period of a public health emergency declared by a Federal, State, or local authority with respect to COVID-19, otherwise-exempt employees may temporarily perform nonexempt duties that are required by the emergency without losing the exemption." Unclear, however, are which duties will be deemed "required by the emergency," how long this temporary reprieve will last, and what criteria will be used to mark its expiration.

- **"Outside salespersons" who are not travelling.** Due to stay-at-home orders, other travel restrictions, and closures of customer facilities, outside salespersons may no longer be spending the requisite amount of time away from their employer's place of business engaged in sales activities. Restrictions on travel and on visiting actual and prospective customers may therefore cause these salespersons to fall outside of the "outside salesperson" exemptions available under the FLSA and various state laws.

Off-the-clock concerns. Nonexempt hourly workers are taking on additional productive work, and preventive work, in light of the pandemic, for which they may require extra compensation. Consider these workplace scenarios currently unfolding:

- **Donning, doffing, temperature checking.** Getting ready to work takes longer due to COVID-19. In one class complaint already filed, for example, county correctional officers claimed they weren't being paid for the 20-30 minutes they spent each shift, at the beginning and end of their shifts, sanitizing themselves, their uniforms, and their PPE, tasks made essential by the pandemic. Consider the extra time employees will spend donning masks, gloves, or other protective gear pre-shift, or sanitizing their workspace post-shift. Many employers will require employees to undergo temperature checks before entering the jobsite. Is this time compensable, or will it be so brief as to be "de minimis"? It will depend in part on the facts: How quickly can you move employees through the temperature screening? How long must they wait in line before getting their foreheads swiped? It will also depend on the law, including which state's "de minimis" principle applies to waiting-time claims.
- **Tracking telework.** Administrative employees working from home maximize their safety and the safety

of on-site staff. However, when nonexempt employees telecommute, productive time may intrude on off-the-clock time. Are employees answering emails well into the night? Are they attending Zoom meetings through lunch? Insist that they carefully document their time, and prohibit them from working overtime without prior approval. Make it clear that failure to document work time or working extra hours without supervisor approval will be grounds for disciplinary action. (If an employer knows or has reason to know about employees' extra work time, it likely will be compensable.)

- **Post-pandemic training.** How has the work, and the workplace, changed because of COVID-19? Will employees require training on new "contactless payment" devices and procedures, or additional safety measures now required of them? Employees must be compensated for the time spent in training.

State-law provisions. Compliance with state-law mandates is a particular challenge for employers that operate in numerous states, especially when those states include California, New York, or other jurisdictions with significantly more employee-protective wage and hour laws. Here, too, COVID-19 adds to the complexities.

- **Meal and rest breaks.** With social distancing restrictions, lunch and break time will be markedly different. Break rooms may be off-limits to deter employees from gathering in close proximity. Lunch periods may be staggered to eliminate crowded cafeterias. Some employees will be wary of going out to a restaurant for lunch; some employers are carefully restricting what comes into the workplace, including takeout food. And some employees will simply find it's not worth the bother to don and doff PPE to take their lunch hour. The end result is many employees will work through lunch, taking lunch at their desks and being interrupted by coworkers who don't know they're on their lunch hour. The situation is ripe for meal and rest-period claims.

- **Expense reimbursements.** Many states have statutes that govern employer reimbursement for the costs of telecommuting, such as internet, laptops, and cell phones. Employees working on-site may have to be reimbursed for mandatory PPE. While employers are hard-pressed to take on added operational costs right now, the failure to reimburse these incidental expenses can be even more costly, particularly when computed on a classwide basis.

- **Payment upon termination.** State laws govern when employees must be paid, including when they must be given their final wages, and unused, accrued time off. Such compensation is typically required within

a certain time after termination of employment. But compliance is not straightforward, particularly when employers are grappling with whether furloughed employees will be called back or finally be terminated. When a furlough becomes a layoff, final payment due (of any accrued vacation pay, and the like) may be deemed untimely.

Nonpayment of wages. Abrupt business shutdowns caused by COVID-19 have left a historic number of employees without work. Regrettably, many former employees have been left without paychecks for hours already worked. (Indeed, the DOL has reported a sharp uptick in such claims.) Nonpayment of wages is a fairly clear-cut violation of the law, and can typically be addressed through state and federal labor agencies. However, some state laws provide a private right of action for employees who were denied their final paychecks, allowing additional relief above backpay.

New and novel claims. In one recent minimum wage and overtime complaint, a class of tipped servers and bartenders sued their employer, which operates a chain of restaurants in Ohio. The employees are usually paid at the tip-credit rate (a sharply reduced minimum-wage rate for employees who earn a portion of their earnings through customer tips) and retain the tips they receive from customers. However, they allege that since May, the employer has been paying them a set weekly rate, rather than the reduced tip-credit rate, and keeping 100 percent of the tips paid to them by credit card. In addition, they now must share their cash tips with nontipped employees (a violation of the FLSA's tip-credit provisions). The employees claim that the employer altered the compensation scheme so as to maximize its COVID-19 loan forgiveness under the federal Paycheck Protection Program (PPP). By compensating tipped employees in set wages (and cutting the portion of pay they earn in tips), the employer is looking to compensate these employees using solely forgivable PPP money — while shorting them on pay, they contend.

In addition, the FFCRA contains a wage and hour trap for the unwary. The statute provides that violations of its paid-sick leave provisions constitutes a failure to pay minimum wages, creating yet another potential cause of action for employers to heed. It is vital that employers stay abreast of these and other unique, COVID-19-specific potential claims.

Amenable to class treatment? The wage claims that arise in the context of the COVID-19 shutdown are particularly susceptible to class and collective actions because they tend to be based on sweeping, company-wide decisions, affecting large numbers of employees on a common basis. Therefore, for wage and hour violations, the stakes

are quite high. As employers reopen, it is essential they pay close attention to ensuring their wage and hour practices are fully compliant.

WARN Act suits

COVID-19 has forced many employers to abruptly shutter their operations or lay off large numbers of workers, making a steady rise in Worker Adjustment and Retraining Notification (WARN) Act class actions likely. WARN Act claims already have been filed by workers alleging they were terminated during the pandemic without receiving advance notice, as required under the WARN Act, and there will be more coming in the next six-to-12 months. For example, employees of a restaurant chain sued, on behalf of a putative class of nearly 700 employees, after restaurant closures prompted their layoff without notice. A rental car franchise faces a class action by employees who were initially furloughed, then terminated, without proper WARN Act notice. Such lawsuits are not surprising in this sudden, drastic economic downturn.

As employers continue to adjust the size of their workforce during this uncertain business climate, understanding the WARN Act's notice obligations and implementing layoff decisions with an eye to warding off potential WARN Act liability is critical.

The WARN Act requires employers with at least 100 employees to give 60 days' notice before closing a plant, on a temporary or permanent basis, or before conducting a mass layoff lasting for more than six months. There are a multitude of legal issues in dispute in WARN Act cases, including whether the employer's action was a "plant closing" or "mass layoff" (i.e., affecting 33% of the workforce or at least 500 employees, excluding part-time workers) that triggers the notice requirement, and whether the given actions amounted to an "employment loss" (under the statute: job loss exceeding six months, or a reduction in hours of more than 50% in each month).

Unforeseen business circumstances? The question that looms largest is whether the COVID-19 pandemic is an "unforeseen business circumstance," to which an exception to the WARN Act notice requirement applies. Under WARN Act regulations, an "unforeseen business circumstance" is not reasonably foreseeable; the "circumstance is caused by some sudden, dramatic, and unexpected action or condition outside the employer's control."

The WARN Act regulations do not clearly state what does, or does not, constitute an unforeseen business circumstance. The regulations provide examples of unforeseeable business circumstances, however, such as "an unanticipated and dramatic major economic downturn." At first glance, this example would suggest the pandemic,

stay-at-home orders, and economic downturn would easily provide an unforeseen business circumstances defense against a WARN Act claim. While the pandemic arguably would qualify, the question will be litigated, and employers should not assume a court will automatically accept this defense. Whether the exception applies is decided on a case-by-case basis, depending on an employer's unique business circumstances.

Importantly, the unforeseen business circumstances exemption does *not* relieve employers from providing WARN Act notice altogether; rather, it allows employers to provide less than 60 days' notice. The employer must give layoff notice as soon as practicable. Whether timely or "as soon as practicable," employers should document when they give the requisite notice to employees.

What of the widely anticipated "second wave" of the COVID-19 pandemic? Even if phase one of the pandemic seemingly arrived out of nowhere, whether a second wave can be considered "unforeseen" under the WARN Act at this point will perhaps be a thornier question for employers to contend with.

Telecommuters and multiple worksites. Even before the COVID-19 pandemic, a growing number of employees performed work outside of their employer's physical location. According to the Bureau of Labor Statistics, more than 26 million people worked from home, at least some of the time, in 2018. The COVID-19 pandemic, of course, has added exponentially to the ranks of telecommuters.

However, for WARN Act notice requirements to apply, a mass layoff or plant closing must have occurred at a "single site of employment." This raises the question of where telecommuters fit into the "single site" analysis. WARN Act regulations state that for workers who are outstationed, or whose primary duties involve work outside any of the employer's regular worksites, the single site of employment is:

- the location to which workers are assigned as their home base;
- the location from which workers are assigned duties; or
- the location to which they report.

On its face, it may appear that a potential class of telecommuters could establish a single site of employment. However, federal courts disagree on whether the WARN Act applies to teleworkers at all. For example, the Fourth Circuit has held that the single site of employment regulation only applies to "mobile workers" who lack a regular, fixed place of work, not a telecommuter who works at home. The answer thus may vary by jurisdiction. Employers should confer with counsel to determine whether WARN Act protection extends to telecommuters in their jurisdiction.

Rolling layoffs. The WARN Act's 90-day aggregation rule requires employers to prepare for subsequent rounds of layoffs. Under this "look back" provision, if a subsequent round of layoffs related to the first round passes the numerical threshold for WARN Act coverage, an employer may be liable for failure to provide notice during the first round.

Many employers understandably have chosen to furlough employees given the uncertainty, but as those furloughs approach six months, the WARN Act will come into play and likely be the subject of litigation. When "furloughs" become layoffs, the duty to provide notice may arise. Given the present economic uncertainty and the impending second wave, employers should prepare for the possibility of additional layoffs in the coming months that may implicate the aggregation rule, and continue to evaluate their potential WARN obligations in a rolling fashion until the employer's normal operations are fully restored.

Practice pointers. Consider these measures to protect the organization from WARN Act liability:

- **Documentation.** Carefully document and maintain all information relied on in making furlough and layoff decisions, include the decision-making timeline.
- **Provide notice as soon as practicable.** The WARN Act exemptions and defenses do not relieve an employer from the law's notice requirements; they simply allow employers to provide less than 60 days' notice. Even with the unpredictable nature of the COVID-19 pandemic, employers should provide notice of closings or layoffs as soon as practicable.
- **Conditional notice.** Employers can provide conditional notice when it is unclear whether layoffs will occur. The notice must specify the event that would trigger layoffs. Given the uncertainty of the COVID-19 pandemic, employers, especially those that have remained open or have recently reopened, should discuss the possibility of providing conditional notice to employees.
- **Follow "mini-WARN" laws.** Many states have their own WARN statutes which have unique notice periods for plant closings and mass layoffs, or a different threshold of employment losses before notice requirements are triggered. Determine whether your organization is subject to any "mini-WARN" mandates and ensure compliance with any state-law requirements that are more stringent than the federal WARN Act. (Some states have suspended temporarily their WARN law's notice requirements in light of the public health crisis.)

A global pandemic of this magnitude is unlike anything in modern history; consequently, there is little guidance

or precedent upon which employers (or courts) can rely in deciding complex WARN Act issues. However, one reliable constant is that these cases turn on factual inquiries. In analyzing COVID-19-related layoffs under the WARN Act — and in particular, whether the public health crisis excused compliance with notice requirements — courts will consider the company’s own fiscal health, as well as the state of the economy, directives from local, state, and federal government officials, and the state of the pandemic itself.

COBRA notice actions

Even before the onset of the COVID-19 pandemic, employers were contending with an explosion of class litigation under the Consolidated Omnibus Budget Reconciliation Act (COBRA). COBRA notice claims have emerged as the latest “gotcha” causes of action (much like the Fair Credit Reporting Act wave that preceded it) alleging purely technical violations of a complex statute resulting in little harm to the plaintiffs. In fact, COBRA notice class actions have been growing more rapidly than almost any other type of ERISA litigation.

Many employers have responded to the economic turmoil brought on by COVID-19 by furloughing employees and keeping them on their company’s benefits plan (and paying the premiums). Still, class actions can be expected over whether notices should have been provided when employees were furloughed and whether employees are covered by their employer’s insurance policies. Many other employers have had no choice but to eliminate staff, spurring a wave of COBRA-qualifying events (including *classwide* qualifying events) and, with it, a new wave of claims. At present, new class action COBRA suits are being filed every week.

Employees can lose employer-provided health benefits when they are laid off or terminated; they also can lose employee benefits when their work hours are cut from full-to part-time. COBRA entitles these individuals to continue coverage for a temporary period (although they must pay the employer’s share of premium contributions toward coverage). Employers must notify covered employees of that entitlement in timely fashion following the qualifying event.

COBRA and its implementing regulations require employers to provide specific forms of notice to covered individuals. The DOL has a model COBRA notice that employers can use in its entirety and be confident they have satisfied their statutory notice obligations. Commonly, though, employers tailor the model notice for clarity, or to strike provisions that seemingly don’t apply. Herein lies the risk. Although there is no case precedent holding

that an employer’s notice must be identical to the model notice in order to comply with the COBRA regulations, class action suits have charged that these deviations from the model render the employer’s notice “deficient.” According to these complaints, the employer’s notice did not include a termination date, did not clearly identify the plan administrator, or were otherwise allegedly insufficient.

For plaintiffs’ counsel, the appeal in bringing such claims are the statutory penalties: \$110 per day, per person, for violations. These can rapidly amount to millions of dollars in damages. COBRA complainants also seek equitable relief and medical expenses incurred after expiration of their coverage. However, employers have strong defenses to these claims on the merits, on standing (particularly, no showing of harm or prejudice to plaintiffs), and as to the propriety of class certification.

Many COBRA cases *have* survived motions to dismiss, however, which means employers must continue to incur the considerable costs of defending such claims. Consequently, it’s essential that employers take steps to mitigate exposure:

- Know what notice is required under COBRA and its regulations, and stay abreast of regular changes to these requirements.
- Look carefully at the DOL’s model notice to ensure that any deviations in form or substance nonetheless conform to the essential notice requirements reflected therein.
- Work closely with your third-party COBRA vendor to ensure compliance.
- Finally, don’t lose sight of the employee benefits implications of the workplace strategies you undertake as you steer the organization through the current crisis.

Privacy and data security threats

Privacy and data security breach litigation also was rising sharply pre-COVID-19 and, with the current crisis, the upward trajectory will be steeper. Pre-COVID-19, there were many factors driving such claims, including new statutory protections, which have ushered in new causes of action; expanded uses of technology; and new forms of cyber-criminal activity, leaving employees’ and consumers’ private information more vulnerable to hacking. With COVID-19 and the economic downturn, several other factors have come into play, including the sudden, rapid growth in telework; the reliance on video conferencing for work, church, and social activities; and the collection and dissemination of protected health information to control the spread of the virus.

Government stay-at-home orders have forced millions of U.S. workers to work remotely. However, the emergency transition gave employers little lead time to institute

protection protocols, implement written data security policies, train employees in remote cybersecurity best practices, and prepare for the spike in IT demand. This presents a ripe opportunity for data hackers, especially given that the typical home office will have far fewer cybersecurity protections than the on-site work environment.

No organization is immune from cyberattacks. Every employer, large and small, has sensitive data of interest to hackers: employee Social Security numbers, direct deposit account information, and other valuable information. Moreover, every employer is subject to the double jeopardy of a data breach class action on top of the cyberattack. More about these risks, and how to avoid them, can be found in the Summer 2019 issue of the *Class Action Trends Report*.

Video meetings. Video conferencing has allowed individuals to conduct work and personal business, to meet virtually with friends, to attend remote church services and graduation ceremonies. The technology also has allowed for legal depositions, Congressional hearings, and nightly cable punditry. However, the security of video conferencing has been called into question. Recently, a class action lawsuit was filed in California under the California Consumer Privacy Act (CCPA) alleging a video conferencing company failed to properly safeguard the personal information of its users. The proposed class included “all persons and businesses in the U.S.” whose personal information was collected or disclosed to a third party “upon installation or opening” the app. This is just the beginning of these kinds of claims.

Employers should review their video conferencing procedures and platforms and other technologies used to support work-from-home arrangements. Read the fine print in those vendor agreements. Employers not only want to avoid class action lawsuits, but also to protect their company’s proprietary information and the personal identifying information of their employees and customers.

Contact tracing. Contact tracing can play a crucial role in helping ensure a safe and healthy workplace. The practice entails using tools and processes to determine who in the workforce has had close contact with an employee known or suspected to have COVID-19. However, before implementing such technology, employers must study the privacy considerations and legal risks. Employee health information should generally be treated as confidential, attendant with the requirements of a host of employment laws, such as the ADA and Genetic Information Nondiscrimination Act (GINA), among others.

To guard against employee medical privacy claims, carefully consider who will be permitted to access and view the personal health information collected through

Assessing contact tracing devices

Consider the following when evaluating whether to adopt contact tracing applications or devices:

- What information is being collected and is all the information necessary for this purpose?
- If an app is installed on an employee’s personal device, will the app collect information beyond that needed to determine close COVID-19 contacts, e.g., cookies or other personal information?
- If an app or device collects data on an employee’s location outside of work, will it give employers information they do not need or want?
- Where is the data stored, how long is it stored, and can the collection be limited to the minimum amount of data necessary?
- Do current employment policies and procedures address contact tracing, or affect the implementation of contact tracing?
- Will the employer notify affected employees directly, or will affected employees receive automatic notice through the app?

contact tracing. Organizations still need to be mindful of the ADA’s confidentiality requirements, potential for discrimination, and state laws that prohibit employers from making adverse decisions based on employees’ lawful off-duty conduct (which may be exposed during the COVID-19 monitoring process). A confidentiality agreement addressing privacy and security obligations is one way of alleviating these concerns.

Workplace safety violations

Employee health and safety, of course, has been employers’ dominant concern throughout the pandemic crisis, as evidenced by their actions to ensure the well-being of their workforce, including temporarily ceasing operations. Certainly, there will be employees who fear the employer is not doing enough to protect them; of course, there will be employees who contract COVID-19 on the job or elsewhere. Claims arising from workplace safety concerns are typically not the purview of class action defense counsel; these matters are routinely addressed through the Occupational Safety and Health Administration (OSHA) or state-agency equivalents. In addition, workers who suffer actual on-the-job injuries find recourse in state workers’ compensation systems.

However, the coronavirus pandemic has spawned novel classwide theories of liability for alleged safety breaches. One recently filed litigation against a public employer, involving 10,000 corrections officers, asserts a cause of action under

Higher education at risk

More than 200 class actions have been filed thus far by students against colleges and universities challenging their institutions' responses to the COVID-19 crisis. The students argue they are entitled to refunds because the institution failed to provide them with all the benefits of an on-campus education for which they paid. They are challenging their institutions' responses to the COVID-19 crisis in putative class-action lawsuits seeking reimbursement for tuition, room and board, and more following campus closures due to COVID-19.

These putative class action lawsuits generally allege: (1) the students paid for amenities such as room and board, dining plans, and access to facilities, which they cannot receive because they are not on campus; (2) the quality of their education has been lessened by the forced, online curricula because studies show that students learn better in classrooms than online and because they are unable to gain the benefit of personal connections with faculty and classmates; (3) their degree will be less valuable to them in the marketplace because a degree from an online program is not as valuable as a degree from an in-person program.

Jackson Lewis' team dedicated to defending these claims for higher education clients nationwide consists of members from the Class Actions and Complex Litigation and Higher Education Groups. Our team includes seasoned class action litigators, as well as higher education attorneys with decades of experience defending claims brought by students against colleges and universities. If you have any questions, please reach out for more information.

the state constitution. The officers contend that, as a result of COVID-19, they were forced to work additional overtime with insufficient rest between shifts. They also claim that their employer failed to mandate that coworkers who have contracted COVID-19 test negative for the virus before returning to work. Consequently, they allege, they suffered a constitutional threat to their bodily integrity.

Numerous class action suits have been filed by fast-food employees who contend that their franchise employers have not adequately protected them from COVID-19.

In an effort to evade the preemptive reach of workers' compensation laws, the employees brought their claims under a "public nuisance" theory. They hope to force employers to beef up safety precautions and provide compensatory damages to employees who have fallen ill. These cases have had some traction: in one case, a judge denied the employer's motion to dismiss and granted a preliminary injunction ordering it to enforce mask wearing

and social distancing requirements. The ruling came just days after a California judge entered a TRO in a public nuisance case alleging the franchise employees were told to wear coffee filters as masks.

It is the hope that these lawsuits are anomalies, spirited more by public sentiment over the pandemic than traditional legal principles; courts generally find that compliance with OSHA standards and guidance from other enforcement agencies demonstrates good faith by employers sufficient to defend against liability.

Other COVID-19 claims

Businesses are facing both class and individual litigation over myriad COVID-19-related issues, including:

- Negligence actions by families of deceased employees who allegedly contracted COVID-19 on the job
- Class action suits brought by furloughed and laid-off employees alleging their employer misused CARES Act funds on expenditures other than payroll costs
- Class reimbursement claims against gyms and other membership-based businesses whose members are seeking return of fees assessed while the facilities were shut down
- Whistleblower and retaliation suits alleging an employer disciplined or terminated an employee for raising concerns about an unsafe workplace
- Independent contractor "gig" workers seeking "employee" status so they may be eligible for certain paid leave protections and reimbursement for masks, hand sanitizers, and other COVID-19 necessities
- Suits against assisted living facilities under Title III of the ADA and its precursor, Section 504 of the Rehabilitation Act, contending a failure to safeguard residents' health and safety
- "Price-gouging" class actions against online and brick-and-mortar retailers that allegedly hiked prices on hand sanitizers, disinfecting wipes, and other high-demand products
- Breach of contract actions against suppliers that, due to COVID-19-related supply chain difficulties, failed to satisfy delivery obligations
- Commercial and residential landlord-tenant lease disputes over pleas for rent forgiveness in light of the COVID-19-related economic downturn
- Class actions against universities by students seeking reimbursement for the costs of room and board for the period after residence halls were closed down.

In the litigation life cycle, the COVID-19 pandemic is still fairly young. Expect to see a variety of novel cases, which stand to impose significant liability, as the pandemic crisis continues to unfold.

These are the class litigation trends we anticipate as the pandemic persists and the economy responds in earnest. However, these are uncharted waters. The current state of affairs is ever-changing, and many of the legal issues in play are as yet unsettled. Employers must continue to stay abreast of the state of the pandemic and of new COVID-19-related laws and litigation.

Follow these emerging developments at the Jackson Lewis COVID-19 resource center.

Best practices are the best defense

“There will likely come a day when every employer will need to defend one or more decisions made during this pandemic,” said Adler-Paindiris. “In order to do so, employers must ensure they maintain clear and contemporaneous documentation to support every decision, provide sound reasons for the decisions made, and are able to competently back up the reasons why the employer took the actions it took.”

Employment litigation post-COVID-19

The COVID-19 pandemic has affected virtually every aspect of our lives. How will the pandemic change employment litigation and jury trials?

COVID-19 has changed the way attorneys work, particularly litigators. As a practical matter, depositions, oral arguments, witness interviews, and settlement negotiations must take place by phone or videoconferencing, altering the dynamics of the interaction, hindering the ability to assess witness credibility, and requiring the use of other subtle tools of persuasion and communication.

As for trials, it is uncertain when they will resume; the answer will vary by region and with the ebbs and flows of the pandemic. What will those trials look like?

With an eye to reopening, the U.S. courts’ COVID-19 Judicial Task Force on June 4, 2020, issued guidance on conducting jury trials and convening grand juries during the pandemic. The guidance notes that each tribunal will set its own rules for jury trials based on location, budget, and courtroom facilities. However, the task force offered recommendations applicable to all courts regarding ensuring jurors of their safety; the use of PPE in the courtroom; the possible use of virtual *voir dire*, with prospective jurors participating from home; the use of apps to conduct sidebars, and other means of limiting physical contact between litigants; and courtroom modifications to maximize social distancing.

Practical considerations aside, the pandemic will have a significant *substantive* impact on jury trials — as it will have a profound effect on jurors.

“There will not be a single juror who was unaffected by this pandemic, either due to a job loss or a loved one who was ill or passed away,” said Stephanie L. Adler-Paindiris, Co-Leader of the Jackson Lewis Class Actions and Complex Litigation Practice Group. The critical question for litigants: “Will jurors be sympathetic to employers that are struggling to stay afloat to employ people, or will they be viewed harshly and in an untrusting light?”

What factors may have shaped (or will reveal) jurors’ perceptions of the claims and the parties?

- Whether they reside in an area hard-hit by the pandemic, or a region that suffered comparably minimal impact
- Whether they contracted COVID-19
- Whether a loved one fell ill or died from the disease
- Whether they or a family member were furloughed or laid off
- Whether they were eager or reluctant to return to work
- Whether they were front-line essential workers or safely working from home
- Whether their employer was shut down; and if so,
- whether due to the economic downturn or a government mandate
- Whether their own employer adopted ample safety measures and provided paid leave to affected employees
- Whether they wore masks and followed social distancing protocol or believed the COVID-19 panic was overblown.

Counsel for both parties will query the jury pool to glean how potential jurors’ personal experience of the pandemic may form their impressions of the case before them.

Other class action developments

Important developments in class litigation since our last issue:

Putative class members are nonparties. Addressing a significant procedural issue, a divided federal appeals court panel held that a district court cannot dismiss putative class members in a not-yet-certified class action because, absent class certification, those individuals are not parties before the court. Denying a grocer’s motion to narrow the putative class in a lost wages suit, the court noted that unnamed class members are treated as nonparties for other purposes in litigation. Furthermore, the U.S. Supreme Court has held in *Smith v. Bayer Corp.* that putative class members “are always treated as nonparties.” Thus, the employer’s motion was premature.

Court won’t enjoin 10,000 individual arbitrations. A federal district court held that an app-based delivery service was unlikely to succeed on the merits of its argument that a court should enjoin the arbitration demands

in a misclassification claim brought by a single law firm on behalf of 10,356 couriers because they constitute a *de facto* class arbitration in violation of the arbitration provisions of the company's agreement with its couriers. The question whether the arbitration demands violate the arbitration provisions is one that should be decided by the arbitrator; thus, the court denied the company's emergency TRO motion. Further, the court was not persuaded that the company's \$4.6 million in arbitration fees or the possibility of arbitrating a dispute that was not covered by their agreement would result in irreparable harm. Litigation expenses alone, even if not recoverable, are not irreparable harm.

Decade-long litigation battle goes to arbitration. A federal court has ruled that 1,000 putative class members in a lengthy gender discrimination suit against a multinational investment bank will have to arbitrate their claims individually, pursuant to the arbitration agreements they signed as part of their separation, promotion, or compensation agreements. However, employees who may have been misled into agreeing to arbitrate as part of their equity award agreements — more than six years after the suit commenced — will be given the chance to opt out. A magistrate judge rejected the employees' contention that the employer waived its right to compel arbitration, finding all four categories of operative arbitration agreements were enforceable. The employees also failed to convince the court that the arbitration provisions in all 1,220 agreements that were entered into by class members after this action was filed should be voided pursuant to the court's duty to manage communications with putative class members under Rule 23(d).

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

Employer to pay \$8.7 million for "shift-jamming." A federal district court preliminarily approved an \$8.7-million settlement of a class action lawsuit asserting that under state law, a retailer owed 30 days' wages to approximately 4,300 class members who were terminated during the company's "shift-jamming" period. During this time, employees were required to work shifts beginning less than 16 hours after the end of their previous shift. In addition,

employees were not paid daily overtime within 30 days. The court found the significant risk of continued litigation and the lawsuit's "specific, nuanced, and complex legal issues," some of which had been litigated and some of which the settlement would avoid, supported the proposed settlement amount. The court also approved an attorneys' fee award of \$2.9 million — about one-third of the class settlement amount — finding it "well within the range of reasonable attorney fees in such cases."

IT workers get nod for \$5.7-million settlement. Employees of an information technology company were granted preliminary approval of a proposed \$5.7 million settlement to resolve their class claims for overtime pay. A federal district court found the proposed settlement was the product of serious, informed, noncollusive negotiations; it had no obvious deficiencies; it did not improperly grant preferential treatment to class representatives of segments of the class; and it fell within the range of possible approval.

Restaurant settles misclassification claim for \$4.6 million. A federal court certified a settlement class of assistant managers for a restaurant franchisee who alleged they were misclassified as exempt and, therefore, denied overtime pay. The parties had reached an agreement on settlement after multiple mediations and sought final certification and approval from the court for a settlement of over \$4.6 million, including a "clear sailing" agreement regarding attorneys' fees. The court approved the settlement agreement, although it modified the enhancement awards sought, as well as attorneys' fees, costs, and expenses.

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

Company-wide policy not enough to show predominance. A federal court rejected the bid for class certification of wage claims filed by an employee of an e-commerce company on behalf of himself and fellow shift managers. He contended the managers, who were treated as exempt and denied overtime wages, were in fact entitled to such wages under state law. However, the court

concluded the employee failed to show that common issues predominated over individual ones. The existence of a policy treating the managers as exempt was not enough on its own to establish predominance. The managers' job description set forth key duties that did not include the types of nonexempt, manual labor the managers alleged they were required to perform.

Procedural BIPA violation not enough for standing. An employee lacked Article III standing to pursue a lawsuit alleging her former employer violated the Illinois Biometric Information Privacy Act (BIPA) by requiring workers to scan their fingerprints in its biometric time-tracking system. Her original complaint asserted only a procedural violation of the law. She claimed the employer failed to inform her in writing of the purpose for which her fingerprints were collected. And she admitted she was not alleging any "disclosure of biometric data to a third party such as a payroll company" and was not "presently aware of any data breach, identity theft, or other similar loss." Because she failed to allege an injury-in-fact as required by federal courts, a federal district court remanded the case to state court.

Delivery driver's class claims tossed under first-filed rule. A delivery driver for an e-commerce company's contractor could not advance her FLSA overtime lawsuit

as a collective action since she sought to represent many of the same drivers already covered by a similar FLSA action that was filed before hers and had been conditionally certified. Allowing the named plaintiff in that prior lawsuit to intervene for limited purposes, a federal district court, joined by the federal judge overseeing the other lawsuit, dismissed the driver's collective action without prejudice under the first-filed rule, and denied her motion for conditional certification and settlement approval. She and the sole opt-in claimant were also given a deadline to decide if they would proceed with their individual claims or opt into the other action.

No refund of pre-*Janus* agency fees. A federal appeals court held that a lower court properly dismissed putative class claims brought by a nonunion teacher seeking reimbursement of "agency" fees collected by a teacher's union prior to the U.S. Supreme Court's 2018 *Janus* decision outlawing such fees. The appeals court concluded that private parties may invoke an affirmative defense of good faith to retrospective monetary liability under 42 U.S.C. §1983 when they acted in good faith in following existing state law and prior Supreme Court precedent, which had expressly permitted the union fees. The appeals court also affirmed the dismissal of the employee's state-law conversion claim.

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