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CLASS ACTION TRENDS REPORT

Ongoing pandemic brings new class action risks

The availability of vaccines and corresponding decrease in transmission rates, hospitalizations, and fatalities gave reason for hope that the end of the COVID-19 pandemic was imminent. However, the emergence of the Delta variant and ongoing national discord over measures to subdue the crisis has diminished the collective sense of optimism. Federal, state, and local governments have loosened restrictions, but have since grappled with difficult questions around whether to reinstate pandemic protocols, at least in part. Likewise, many employers have considered whether to slow their return-to-work plans, have adopted transitional "hybrid" on-site/remote work models, and have implemented other policies and procedures designed to promote the health, safety, and well-being of their employees, including mandatory vaccination and testing programs.

Even so, most employers have begun, at minimum, to plan for bringing employees back to the office and to contemplate how the workplace will be different in the post-COVID-19 "normal." The return-to-work stage brings new risks of legal exposure. Allegations regarding off-the-clock work — a perennial source of wage and hour class and collective actions — have surfaced in new, COVID-19-related contexts. Difficult decisions regarding which employees to bring back from furlough post-pandemic can spur systemic discrimination claims. Employers also are grappling with unanswered questions regarding the compensability of vaccination testing time, as well as state laws potentially requiring reimbursement of associated costs. And, for certain employers in a growing number of jurisdictions, recall decisions must factor in state and local right-to-return laws.

Post-COVID-19, disputes that were typically one-off matters involving individual employees may impact a broad segment of employees, turning a typical single-plaintiff claim into a potential class action. As COVID-19 has prompted employers to enact more formal rules and systematic approaches to such matters as remote work, for example, employers can anticipate that challenges to companywide policies will increasingly be brought on a classwide basis.

In this issue, attorneys in the Jackson Lewis Class Actions and Complex Litigation Practice Group discuss the liability risks arising from the latest phase of the pandemic. This issue also looks at the current status of COVID-19 class and collective actions, and what employers might expect in the way of new filings.

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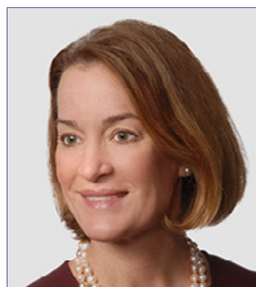
A WORD FROM MIA, DAVID AND ERIC


MIA FARBER

DAVID GOLDER

ERIC MAGNUS

As this issue of the *Class Action Trends Report* went to press, the Delta variant upended what most anticipated would be a triumphant return to a post-COVID-19 "normal." Expecting the pandemic would soon be behind us, most employers had begun, at minimum, the planning stages of returning to the office; many have undertaken varying steps toward reopening. Mask mandates were lifted briefly, then restored in many localities, much to the dismay (or outright anger) of employees and customers.

Essential workers (perhaps the weariest among us) continue to face the greatest risk of exposure, but now their COVID-19 bonuses and hazard pay premiums and "hero" accolades are largely in the past. Meanwhile, unparalleled numbers of employees have been working virtually for well over a year; they've gotten comfortable, and many are resisting the prospect of returning to a daily commute. This is a difficult time for employees.

Against this backdrop, employers must contemplate the future of remote work within their organizations and simultaneously coordinate the timing, logistics, and health and safety implications of a full reopening, all while navigating myriad new and ongoing legal risks. The Delta variant, the volatile politics of vaccines and masks and mandates, and the patchwork of everchanging laws and regulations create an environment fraught with risk. This is a difficult time for employers.

In this issue of the *Class Action Trends Report*, we discuss the numerous legal issues that employers must manage at this exhausting and uncertain stage of the pandemic and offer guidance to help minimize the risk. We also provide a snapshot of the COVID-19-related class action litigation that employers have faced in the 18 months since the declaration of a worldwide pandemic. It is our hope that we can help guide you through this challenging terrain.

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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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COVID-19 screening (no good deed…)

Since the onset of the pandemic, many employers have been requiring pre-shift temperature checks or other COVID-19-screening procedures, such as questionnaires regarding potential symptoms, prior to entering the worksite. These practices raise wage and hour liability risks and may run afoul of biometric privacy laws and other employee protections.

Is it compensable time? Failure to pay nonexempt employees for time spent undergoing temperature checks, waiting in line for such checks, waiting for test results (in instances where employers utilize rapid COVID-19 tests, for example), or undergoing other screening procedures before clocking in for work may give rise to class actions under state wage and hour laws, particularly in states with wage and hour statutes that do not adopt the Portal-to-Portal Act amendments to the FLSA. Indeed, a number of class action complaints already have been filed. For example, one $5 million class action brought in Arizona alleges that a national retailer required employees to arrive 10-to-15 minutes early for their shifts in order to undergo mandatory COVID-19 screening and did not pay them for that time.

These types of cases are just beginning to be litigated, and courts will grapple with the question of whether temperature checks and health questionnaires are "integral and indispensable" to the performance of employees' work such that employees cannot perform their work without also performing these duties. The answer may depend on the type of workplace, as for certain occupations (such as healthcare and education) a stronger argument might be made that screening is "integral and indispensable" to an employee's principal activity. Whether COVID-19 screenings are required by law, either due to the industry in which the employee works or because of state or local statutes, may also be relevant to the inquiry.

Case in point: A May 2021 complaint filed in a California federal court against an online retailer asserts that employees were required to wait in line on company premises to undergo a mandatory two-stage screening process before they were allowed to clock in. (The employer utilizes electronic clocking-in technology, but the feature is not accessible to employees until after screening is completed.) The employer required the screening, according to the plaintiffs, for the purpose of ensuring workplace safety and preventing a mass breakout of the virus infecting the facilities, products, or customers, and to ensure that COVID-19 did not disrupt the company's business operations or employees' ability to safely serve its customers.

However, the employer countered (in a motion to dismiss filed June 3, 2021) that the COVID-19 screenings are required of *everyone* entering the facility — not just employees; are conducted in compliance with government regulations; and are not primarily for the company's benefit, but for the benefit of the public at large. The employer also noted that the plaintiffs had conflated waiting time (which is non-compensable) with screening time.

If such screenings *are* compensable, the employer also must include the time spent in calculating the regular rate for overtime purposes. This may initially appear to be a minimal amount, but it quickly adds up in the class and collective context, particularly if an employer uses a rounding-up policy of clocking time worked. Employers should consult with counsel to determine whether, at least in certain jurisdictions, it may be best to implement a policy of paying employees for time spent in the pre-shift COVID-19 screening process. In addition, employers should identify practical ways to streamline the process at their facilities to reduce the (potentially) compensable time involved.

Biometric technology. Another landmine may lurk for employers that have adopted biometric technologies, such as thermal imaging, to check employee temperatures. Some technologies can run afoul of biometric privacy laws — a grave concern for employers with workers based in Illinois, which has a biometric privacy statute that allows individuals to bring claims for damages. Thousands of class actions have been brought under the Illinois Biometric Information Privacy Act (BIPA) in recent years. Plaintiffs can seek damages of $1,000-$5,000 per individual violation, *i.e.*, each instance an individual's biometric identifiers are recorded using such devices.

On-site COVID-19 screening already has spurred numerous class actions under BIPA against some of the nation's largest employers. These complaints allege that employees were required to undergo temperature scans and facial geometry

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scans, without prior consent, as required under BIPA when collecting biometric identifiers. One class action filed in July against the vendor of facial recognition technology claims that the device, used for detecting COVID-19 symptoms and whether the individual is wearing a mask, collects the biometric information from its customers' employees without the requisite notice and consent.

BIPA has tremendous reach, even beyond Illinois, along with the potential for massive damages for largely technical violations — as exemplified by a non-employment case in which a social media company agreed to settle a BIPA class action litigated in California (against a California-based defendant with Illinois consumers) for $550 million. Moreover, insurers have been pushing back on covering these claims of late, heightening the risk of exposure for employers.

Several other states have enacted biometric privacy laws, and new measures similar to the Illinois statute are pending in a number of state legislatures. Moreover, BIPA-like legislation previously introduced at the federal level may resurface in the Democratic-majority Congress.

There are many benefits to using biometric technologies in both the ongoing and post-pandemic employment setting, including COVID-19 screening and contactless shift check-ins. However, to ensure that these benefits outweigh the liability risks, employers should work closely with counsel to ensure compliance with applicable notice and consent requirements. Employers not yet subject to biometric laws should consider adopting notice and consent practices as a best practice and in anticipation of future compliance requirements.

Other privacy risks. COVID-19 screenings also can trigger multi-plaintiff suits under the Americans with Disability Act (ADA) or Genetic Information Nondiscrimination Act (GINA), depending on the type of data being collected and who collects it. A number of statutes regulate the collection, sharing, and storage of data gleaned from screening of employees. Employers may measure employee temperatures, take a job applicant's temperature as part of a post-offer, pre-employment medical exam, require employees to provide a doctor's note confirming they are COVID-19-free when returning to the workplace, or administer COVID-19 tests to employees before they can enter the worksite. However, employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA and adhere to other applicable privacy laws.

Return-to-work reluctance

Employers that have begun returning employees to the workplace are facing resistance from employees who had been working remotely since the onset of the pandemic. Employees with disabilities may seek continued remote work privileges, asserting that the ability to work remotely during the height of the pandemic demonstrates that telework is a reasonable accommodation under the ADA and its state-law counterparts. Indeed, the question of whether telecommuting amounts to a reasonable accommodation (one of the most salient legal issues related to disability discrimination in recent years) has been made more complex by the speed and relative facility with which many organizations transitioned to remote work when the pandemic struck.

Employers have faced an influx of such accommodation requests from employees with disabilities. While failure-to-accommodate claims are typically single-plaintiff cases, enforcing a blanket return-to-work policy and more formal remote work rules may open the door to more class action challenges to companywide telecommuting policies.

For employees who are disabled within the meaning of the ADA or state law, the standard reasonable accommodation and interactive process requirements apply. On the other hand, employees who object to returning to the office merely because they favor the flexibility of working from home likely have no legal recourse, unless the employer allows only certain employees to work remotely while requiring others to return to the worksite and does so in an unlawful discriminatory fashion.

Consider, however, that demographic data on remote work preferences show a sharp disparity by gender: Surveys on remote work attitudes indicate that female employees are 50 percent more likely to say they wish to work from home. Moreover, there is anecdotal evidence that remote employees are less likely to be promoted. Consequently, organizations also need to consider how their telecommuting policies align with their Diversity, Equity and Inclusion initiatives and to be cautious about a potential emergence of disparate impact discrimination claims as they weather the ongoing pandemic storm.

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On the flip side, employers face potential exposure based on who they choose *not* to bring back to work. Employers must avoid making decisions about which employees to return from furlough based on presumptions about who remain the most vulnerable from the ongoing pandemic; such considerations invite class claims of age and disability discrimination.

Pandemic risks persist

In addition to the challenge of complying with changing safety protocols, employers must be prepared to defend claims alleging these efforts were insufficient. Although a potential wage and hour compliance headache, COVID-19 screening is nonetheless an important tool for preventing the spread and employers that fail to take precautions when employees return to the worksite run the countervailing risk of classwide liability if segments of the on-site workforce fall ill.

Workplace safety and health is governed through agency inspections and enforcement by the federal Occupational Safety and Health Administration (OSHA) and corresponding state agencies in states with an OSHA state plan. However, since the onset of the pandemic, employers have faced a rash of private lawsuits claiming that employees are toiling in unsafe work conditions.

These lawsuits (often class actions) are usually brought under negligence or novel public nuisance theories (in part based on claims of "community spread" resulting from unsafe worksites) and other tort causes of action. In addition, plaintiffs in private negligence lawsuits can use evidence of an OSH Act violation as evidence of negligence (depending on the state, *per se* negligence). Typical allegations include:

- An employer did not sanitize full-body suits used by multiple workers each day and implemented work policies that made social distancing impossible. In another action against the employer, plaintiffs alleged managers pressured employees to make face-to-face deliveries and failed to provide sufficient personal protective equipment (PPE).
- A plant did not take safety precautions to prevent the spread of COVID-19 and did not provide on-site testing or sick leave that would allow infected workers to stay home.
- Gig workers were not provided with PPE, reimbursed for PPE purchases they were forced to make, or trained in its usage. They also were denied the opportunity for handwashing or social distancing despite their roles as essential workers.
- A fast-food restaurant did not make face masks mandatory. One department had sick employees exhibiting COVID-19 symptoms but they were not placed on medical leave.
- An employer forced sick employees to work and concealed outbreaks from coworkers. Another suit against the same employer alleged that 200 workers contracted the virus at its facility.

Some courts have been willing to entertain these suits; in other instances, courts have deferred to the jurisdiction of OSHA and dismissed the claims. In one case against a meat processing plant, for example, a federal court in Missouri held that OSHA was better positioned to determine whether the plant had created an unreasonably unsafe work environment and a public nuisance (as the plaintiffs alleged) and granted the employer's motion to dismiss. However, in another public nuisance action against a fast-food franchisee, an Illinois state court permanently enjoined an employer to enforce social distancing and mask policies and other protections for employees and patrons.

Given that private workplace health and safety suits are so often grounded in tort, it is not surprising they overwhelmingly are filed in state court. In fact there have been three times as many such lawsuits filed in state court than federal court since the pandemic began. Some states have enacted measures to protect employers from liability. In some states, workers' compensation laws provide the sole recourse. Elsewhere, though, a number of these class actions have survived dismissal or have ended in significant settlements. Most recently, a fast-food franchisee in Oakland settled a public nuisance case involving more than 25 employees who alleged they were not provided PPE and were told instead to wear dog diapers and coffee filters as masks. As part of the settlement, the employer agreed to adopt additional safety measures, such as providing sick leave and safety equipment and conducting contact tracing, and establish a worker safety committee. Weeks earlier, the national franchisor had settled a similar public nuisance claim at one of its Chicago restaurants, agreeing to implement protective measures to protect employees and minimize the "public nuisance." ■

The great vaccination dilemma

What role (if any) should employers play in mandating or encouraging COVID-19 vaccinations? This question has taken on greater urgency as the Delta variant wreaks new havoc and the Biden Administration moves to require vaccinations, especially in areas where vaccination rates remain low.

Many employers are weighing whether to require employees to get vaccinated or provide incentives to do so. Employers grapple with permitting vaccination alternatives, such as required testing protocols. Others are simply considering measures to keep track of who *has* been vaccinated, and imposing mask and testing requirements for unvaccinated employees. These decisions require careful consideration of employee morale (particularly in this competitive hiring environment), the political climate, the changing state of the pandemic, and applicable federal, state, and local law. Each strategy presents compliance challenges and the risk of legal exposure.

Vaccine mandates

Hard-line workplace vaccine mandates remained uncommon through most of the pandemic, but are now rapidly growing in popularity. The recent surge in infection rates, the Food and Drug Administration's grant of full authorization to one of the standard COVID-19 vaccines, and the Biden Administration's push to mandate vaccines have sparked a recent uptick.

On July 29, 2021, President Joe Biden announced that federal workers will have to show proof of vaccination or follow strict testing protocols to remain employed. Also, on September 9, 2021, President Biden declared that the U.S. Department of Labor is developing an emergency rule that will require all employers with 100 or more employees to ensure their workforces are fully vaccinated, or show a negative test at least once a week. And, on September 24, 2021, the administration released its guidance on mandated vaccination and mask protocols for federal contractors. A number of state and local governments have issued similar mandates or are considering doing so. At the same time, other states and localities have affirmatively *banned* vaccine mandates.

In recent COVID-19 guidance, the Equal Employment Opportunity Commission (EEOC) stated that federal equal employment opportunity (EEO) laws do not prevent an employer from requiring all employees physically entering the workplace to be vaccinated for COVID-19 — provided, of course, that disability or religious accommodations are granted. (The agency was silent on remote workers.)

The courts, including the federal courts of appeal, also have begun to weigh in. So far, vaccine mandates have been upheld for healthcare employees and for college students returning to campus. The legal dispute is by no means settled, however. The first federal court to decide the issue in the employment context came

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Accommodation laws apply

Vaccination requirements are subject to the reasonable accommodation provisions of Title VII of the Civil Rights Act, the ADA, and other EEO considerations.

When evaluating disability-based accommodation requests, an employer should consider whether it can demonstrate that a mandatory vaccine requirement is job-related and consistent with business necessity, and whether an employee who is not vaccinated due to a disability poses a "direct threat" in the workplace.

The much bigger issue for employers of late has been requests for exemptions based on religious beliefs or personal conscience. Religious accommodation requests have proliferated; in some cases, large groups of employees have objected en masse to employer mandates, citing religious objections to COVID-19 vaccines. Several lawsuits already have been filed challenging vaccine mandates on religious grounds. Navigating religious accommodation requests can be especially challenging in this contentious environment. If your organization adopts a mandatory COVID-19 vaccination policy, partner with employment counsel to implement a system for fielding and responding to religious objections that complies with Title VII and any other federal or state provisions that apply.

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out in favor of the employer in a June 2021 decision dismissing hospital workers' challenge to their employer's mandatory vaccination policy. However, that case is on appeal in the U.S. Court of Appeals for the Fifth Circuit. (Moreover, a court's analysis may differ when it comes to employers outside the healthcare industry.) Also, although the U.S. Court of Appeals for the Seventh Circuit has upheld a district court's decision dismissing a student challenge to a public university's mandatory vaccination policy, another case recently was filed by undergraduates in Massachusetts.

Employers (healthcare organizations in particular) routinely face lawsuits by individual plaintiffs for refusing to grant a religious or disability-related exception to mandatory flu vaccines. COVID-19 vaccinations present contentious political issues and elicit a far greater number of holdouts. As a result, the stakes are much higher, and the causes of action more expansive. One recent complaint by employees who work remotely asserts, in addition to accommodation claims, that their employer's vaccine mandate violates their privacy rights under the U.S. and California Constitutions and under the common law.

Additional class litigation is sure to be filed, asserting novel claims and legal theories. A class action filed in late-August 2021, for example, alleges that a public university implemented a COVID-19 vaccine requirement for students and staff without allowing for "a natural immunity medical exemption" for individuals who already have had COVID-19 and thus, the plaintiff contends, have antibodies that make them immune to COVID-19 infection.

On-site vaccines. For employers that provide on-site immunizations, there are additional considerations if they opt to make vaccines mandatory. Pre-screening questionnaires required as part of the vaccination procedure will include medical inquiries. Generally, employers that administer vaccines (or contract with a third party to come on-site to vaccinate employees) can only mandate the vaccine if the pre-vaccination screening questions do not include inquiries about genetic information and vaccination is job-related and consistent with business necessity.

Vaccines: the wage and hour considerations

If an employer requires vaccination as a condition of employment, the time spent obtaining the vaccine may be compensable depending on whether the vaccinations are on-site or off-site, and on whether the employer dictates the where, when and how employees are vaccinated. Similar compensability questions apply to mandatory testing programs for employees that have chosen not to get vaccinated.

Is an employer required to factor a vaccine incentive into employees' regular rate of pay for overtime purposes? While discretionary bonuses typically must be included in the regular rate, the U.S. Department of Labor (DOL) has taken the position that such incentives are in the nature of gifts and fall under the statutory exception at Section 207(e)(2) of the Fair Labor Standards Act (FLSA) for "similar payments to an employee which are not made as compensation for his or her hours of employment." Therefore, such payments may be excluded from the regular rate of pay.

Vaccine incentives

Other employers have opted for an incentive approach — either a reward or penalty, such as a bonus payment or paid time off — to encourage vaccination. The EEOC guidance advises that such incentives, if tied to a vaccine provided by the employer or its agent, must not be "so substantial as to be coercive." The agency warned that "a very large incentive could make employees feel pressured to disclose protected medical information." However, the EEOC did not elaborate, leaving it unclear what the terms "substantial" or "very large" will mean in practice. The EEOC noted that, for a vaccination to be truly voluntary, an employer may not take an adverse action against an employee for refusing to participate in an employer-administered vaccination program.

More recently, some employers have incentivized COVID-19 inoculations by imposing a surcharge on monthly premiums

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for company-provided health insurance, pursuant to a company "wellness" program, for employees who choose not to get vaccinated. (One large self-insured employer that implemented the surcharge reported that COVID-19-related hospitalizations of unvaccinated employees had cost the company about $50,000 per employee. The company also indicated that it only will provide its COVID-19 pay protections to employees who are fully vaccinated but are experiencing a breakthrough infection.)

Employers should consult with counsel when designing a wellness program with "carrots or sticks" incentives attached. Assess the appropriateness of the incentive and be prepared to identify and provide reasonable accommodations for persons with disabilities and religious objections to vaccination.

Privacy pitfalls

Employers must take into account the myriad privacy considerations if collecting employees' vaccine-related personal information. Employers may seek proof of vaccination. Merely asking whether an employee has been vaccinated is not a disability-related medical inquiry under the ADA, the EEOC has stated. However, such information must be treated as confidential medical information. Moreover, the EEOC has advised that employers may provide incentives for employees to voluntarily provide documentation of vaccination. If the employer is offering the vaccine (or having an agent administer the vaccine) on-site, though, then a pre-vaccination inquiry *may* be a disability-related medical inquiry and more stringent compliance requirements apply.

Navigating the privacy and confidentiality requirements related to collecting and handling information related to employees' health and vaccination status is a complex compliance challenge. A number of statutory and regulatory considerations are implicated — particularly when employee benefits issues are involved, as when vaccination incentives are offered pursuant to an employer's voluntary wellness programs. An employer should consult with an employee benefits counsel to ensure such programs are properly administered and fully compliant with the ADA, GINA, The Health Insurance Portability and Accountability Act (HIPAA), and other provisions.

Preferential treatment

A developing issue is whether employers can face liability for engaging in preferential treatment of vaccinated employees or job applicants. As organizations make difficult policy decisions that distinguish between the vaccinated and unvaccinated, they risk allegations of systemic discrimination tethering "non-vaccinated" status to a legally protected class. The most obvious example is terminating or refusing to hire individuals who have not been vaccinated. Lesser slights, such as requiring (only) unvaccinated employees to wear masks indoors, may also raise concern.

The EEOC points out that all employment policies are subject to disparate impact allegations, and so would a vaccine mandate. The EEOC guidance warns that a mandatory vaccine requirement invites disparate impact concerns. When the EEOC wrote its guidance in the spring, the agency advised employers to "keep in mind that because some individuals or demographic groups may face greater barriers to receiving a COVID-19 vaccination than others, some employees may be more likely to be negatively impacted by a vaccination requirement." Currently, the Centers for Disease Control and Prevention's website states, "Covid-19 vaccines are free and available to anyone who wants one." Compulsory mask use (a more common employer response) and required daily or weekly COVID-19 tests for the unvaccinated invite similar risk.

As organizations make difficult policy decisions that distinguish between the vaccinated and unvaccinated, they risk allegations of systemic discrimination tethering "non-vaccinated" status to a legally protected class.

State laws also come into play. Montana, for example, made it unlawful for employers to discriminate against an individual based on their vaccination status. The

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Reducing the risk

The COVID-19 pandemic is in a precarious stage and the long-term litigation fallout is unpredictable. Consider these strategies to minimize the risk of exposure:

- Evaluate the best plan for your worksite with respect to vaccines, masks, remote work, and social distancing. Identify (and control for) the risks of each.
- If adopting a vaccine mandate, request supporting information when evaluating whether a disability accommodation is appropriate. However, when considering a religious accommodation, requests for supporting documentation are not advised, unless there is an objective reason for doubting the sincerity of the employee's request. Consider requiring a simple attestation from the employee specifying their religious belief.
- Maintain reasonable safeguards to protect personal health information obtained for COVID-19 screening purposes, when providing worksite vaccinations, or when requesting proof of inoculation. Make sure that employees understand the privacy safeguards implemented and provide informed consent.
- Consider streamlined processes for pre-shift COVID-19 screening. In certain jurisdictions, it may make sense simply to compensate employees for this time.
- Employers that utilize biometric technologies for screening must carefully review the privacy laws that apply in the relevant jurisdictions. Provide required notice and obtain the necessary consents. Consider taking these measures as a best practice, even where the law in the jurisdiction does not (yet) require them.
- If returning only some employees to the worksite, clearly articulate the criteria for deciding who will be required to work on-site based on departments, job functions, or other operational reasons. When mandating return-to-work, provide employees the business case for why.
- Review all policies and procedures, including meal and rest period policies, to ensure they are also written from the lens of remote employees.
- Revisit your expense reimbursement policy to ensure it is legally compliant and meets the changing needs of an increasingly virtual workplace.
- Ensure supervisors are trained to look for class and collective action warning signs and to manage discord related to vaccination and return-to-work mandates.
- Remember that rigorous wage and hour compliance remains the most effective buffer against outsized class action exposure.

New questions and compliance obligations will arise: Can employers mandate booster inoculations? Will the rapid move to remote work spur a trend in state expense reimbursement laws? Will resentment over return-to-work requirements provoke an uptick in class litigation? Flexibility and diligence are essential as the pandemic, pandemic safeguards, and the legal and regulatory environment are in flux. It is also advisable to partner with counsel who can offer needed guidance in responding to these challenges.

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legislation provides limited exemptions for certain "health care facilities." Industries in which public health and safety is of top concern (*e.g.*, hospitals and public transportation) may be better prepared to defend a mandatory vaccination program. Other employers will likely face stricter scrutiny.

Bottom line

COVID-19 inoculation will play a crucial role in ensuring a safe return to the workplace. However, there are a host of legal and practical considerations to take into account to minimize the risk of class litigation when implementing your organization's vaccination strategy. ■

COVID-19-related class actions: Where are they now?

Hundreds of COVID-19-related class actions have been filed against employers since the start of the pandemic. What is the status of COVID-19 employment litigation?

A (temporary?) fall-off

The number of new court filings dropped across-the-board during the pandemic, owing in part to the practical difficulties of filing court complaints during a quarantine and a general reluctance to litigate in the midst of an outbreak. Employment cases fell by 13 percent from 2019 to 2020, according to data from Lex Machina. Yet, despite the fall-off in the aggregate, Lex Machina found an increase in employment cases based on COVID-19 during November 2020 to December 2020. Still, COVID-19 cases represent only 3 percent of employment cases filed in 2020, Lex Machina reports. Moreover, of these, only about 4 percent are class actions, according to Jackson Lewis' COVID-19 Employment LitWatch.

Is it possible the anticipated wave of COVID-19 class actions will not come to pass? It is too soon to tell, given the ongoing state of the pandemic, the delay in return-to-work and the legal claims that may rise accordingly, the typical lag time between an alleged offense and complaint filing, and the impact of courts having lifted tolling periods that were suspended during the height of the pandemic.

Below is a sampling of COVID-19 class action lawsuits that employers have faced so far.

Wage and hour suits

More than 3,000 lawsuits related to COVID-19 were filed from March 2020 to August 2021. Hundreds of these suits have been brought as putative class or collective actions — a clear majority of which asserted wage and hour claims. About 125 COVID-19-related wage and hour class and collective actions have been filed in federal courts, according to data from Lex Machina; of these, nearly one-third have been resolved (ending in likely settlements). The Jackson Lewis COVID-19 Employment

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COVID-19 takes a litigation toll

Some 20 states (and individual courts) had temporarily suspended tolling periods due to the pandemic. The duration varied greatly: Virginia pushed deadlines back 21 days, but in New York, where an initial suspension was extended month to month, tolling periods were suspended for a total of 228 days. In one class action filed in federal court in May 2021, the plaintiff restaurant servers cited "COVID tolling" in asserting claims under New York Labor Law for unpaid spread-of-hours premium and call-in pay, unlawfully withheld gratuities, and failure to provide proper wage notices and wage statements. The parties reached a settlement that the court approved in August, resolving the case.

While some states suspended only the limitations period that would have expired during the designated period of emergency, in other jurisdictions, the tolling period was extended even for limitations periods that expired after the emergency period ended.

In their wake, challenges remain:

- **Confusion.** Perhaps due to the haste with which such tolling periods were issued, in some instances, it is unclear whether the tolling provision was a grace period that ended upon the date established for lifting the suspension or, rather, whether the directive tacked on additional time in which to file state-law claims.
- **Forum shopping.** Plaintiffs may look to file in a state that extended the tolling period in an attempt to pursue claims that otherwise would be time-barred. For their part, defendants may want to consider filing a motion to transfer actions brought in a state that had suspended its tolling periods during the height of the pandemic.

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LitWatch shows an equal number of state-court wage and hour class action filings have been filed.

Like all wage and hour class actions, these suits pose a risk of significant exposure and defense costs if they survive early dismissal. There are a variety of factual allegations underpinning these claims. Examples include:

COVID-19 screening

- A trucking company required California-based class members to wait in line without pay for mandatory COVID-19 temperature checks before starting their shifts. The plaintiff in the case then brought a separate representative action seeking penalties under the California Private Attorneys General Act (PAGA).
- A motion to dismiss is pending in a suit alleging a Wisconsin senior living facility did not pay proper minimum wage or overtime to a class of employees for time spent taking their temperature and filling out a symptom questionnaire before clocking in.
- A suit filed in a Missouri federal court in February 2021 alleges a national retailer required employees to undergo unpaid mandatory screening before clocking in; the same allegations were raised against the employer in a suit filed a month later in a federal court in Arizona.
- In a class action filed in August 2021 in California state court, employees of a home improvement chain alleged the employer failed to provide a safe work environment because it ceased using temperature checks and COVID-19 symptom questionnaires about a month after the COVID-19 pandemic began.

Pandemic premiums

- A suit filed in federal court in June 2021 alleges an Illinois liquor store franchisee agreed to provide workers premium pay to work through the COVID-19 pandemic, but then failed to properly calculate or pay overtime accordingly. Also in June, a similar lawsuit was filed in Illinois on behalf of skilled nursing workers who were offered higher pay to care for COVID-19 patients and work through the pandemic, but the employer allegedly did not follow through.
- In a lawsuit filed in late-August 2021 against a retail chain under the California Labor Code and PAGA, California-based employees alleged the employer did not identify the correct pay rate and earnings on their wage statements as the recorded wage rate did not reflect the hourly premium they were paid during the height of the pandemic.
- A meatpacking company paid a “responsibility bonus” both to employees who worked during the height

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- **State vs. federal claims.** Federal courts will likely apply a state’s tolling order only to a plaintiff’s state-law claim, but not a federal claim arising from the same alleged conduct. (One federal court in North Carolina, for example, refused to extend a state tolling order to a plaintiff’s discrimination claim under Title VII.) Consequently, different limitations periods may apply to the federal and state claims.
- **Lack of uniformity.** Because states, and even individual courts, exercised their own authority to suspend tolling periods as they deem proper, defendants in nationwide or multistate class actions may have to grapple with the effects of a maddening patchwork of provisions. In some instances, it may be advisable to enter into a uniform tolling agreement with the plaintiffs.
- **Increased exposure.** Perhaps most vexing: it is unclear, in some jurisdictions, whether the tolling order simply extends the deadline in which to file or also means a longer liability period — particularly as to wage and hour class actions.
- **Legal challenge.** In some jurisdictions, tolling periods were suspended by virtue of an executive order from the governor; in other instances, the state supreme court issued the directive. In both instances, the suspensions may be susceptible to challenge on separation-of-powers grounds as statutory limitations periods typically fall within the constitutional authority of legislatures.

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of the pandemic and to those who were sick with COVID-19 and utilized available sick days, but it did not factor the bonus into the overtime rate. The company argued that the bonus was akin to a gift and that the bonus did not need to be factored into the overtime premium because it was paid to employees whether they worked or not. That question will remain unanswered, however, as the district court in September 2021 granted final approval to a settlement resolving the dispute.

- A breach-of-contract claim contending an employer failed to pay a premium during the pandemic in accordance with a company policy of awarding premium pay during emergencies was dismissed after the employer pointed out disclaimers that made clear the company policy was not binding.
- According to a class action suit filed in a Philadelphia court, a pharmaceutical company breached its promise to provide a 15-percent hazard pay premium at its vaccine plant through the course of the pandemic to technicians required to work 40 hours a week. A motion for summary judgment is pending.

Overworked due to COVID-19?

- County correctional officers sued alleging they were denied pay for regular and overtime wages for work done during the COVID-19 crisis, which required them to work extensive extra time following sanitation and hygiene protocols. The case was filed in April 2020; a motion to dismiss was filed in September 2020 and is pending.
- Police department employees alleged they were not paid for emergency compensatory time worked during the early months of the pandemic.
- Fast-food workers filed suit contending their employer refused to let them take their meal and rest breaks because the restaurant was too short-staffed as a result of the pandemic.

Expense reimbursement

(These claims invariably have been filed in California.)

- An employer required employees to work from home but failed to reimburse expenses, including use of personal cellphones and the purchase of masks and other related expenses, according to a suit filed in October 2020 in a state court in California.
- A state court complaint filed in January 2021 alleges an employer required workers to sign illegal contracts that require them to pay for necessary business expenses and failed to reimburse home office expenses when employees were required to work from home because of the pandemic.
- A March 2021 state court complaint against an online retailer asserts that after stay-at-home orders were imposed in California, class members worked from home and were not paid "electricity, internet, and office infrastructure which should be reimbursed."

Claims arising from federal COVID-19 response

- Restaurant servers contend their employer began paying higher hourly wages as it revised its operations due to the pandemic so that it could receive forgiveness for loans it received from the Paycheck Protection Program, but then refused to allow the servers to keep their tips and failed to pay them overtime. The lawsuit, filed in an Ohio federal court in April 2020, was voluntarily dismissed a month later, perhaps due to private settlement.
- A suit filed in an Illinois federal court in April 2020 contends the employer received $5 billion in federal funds to protect employees during the pandemic by agreeing it would not make employees take a temporary suspension or unpaid leave or reduce their pay or benefits. However, management and administrative employees were then required to take 20 unpaid days off. A motion to dismiss is pending.
- A collective action filed in a Florida federal court in January 2021 alleges an employer failed to pay employees two weeks' pay while they were forced to quarantine due to a diagnosis or exposure to COVID-19, in violation of the paid sick leave provisions of the Families First Coronavirus Response Act. The case is in mediation.

Discrimination claims

The overwhelming majority of COVID-19-related lawsuits are single-plaintiff cases. According to complaint filings compiled in LitWatch, there are nearly 600 discrimination-related cases brought by individual

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employees. However, a number of class actions claiming discrimination have been brought, including several suits filed quite recently.

- A hospitality employer fired a 64-year-old employee, and other similarly situated older employees, citing COVID-19 restrictions and lower hotel occupancy levels, according to a suit filed in August 2021 in a federal court in New York.
- An August 2021 complaint against a Massachusetts hospital contends that only Black employees were assigned to clean COVID-19 rooms. When asked why, one white supervisor replied, "we do not clean COVID rooms." The plaintiffs are seeking $2 million and equitable relief to cease the unfair treatment.
- A suit under the Uniformed Services Employment and Reemployment Rights Act brought on behalf of a nationwide class of employees who were or are serving in the Armed Services or National Guard alleges their employer failed to provide equal pay and benefits under its COVID-19 emergency time off program to employees who were or are still on military leaves of absence.
- An employer offered half-pay during the pandemic to all employees on military leave but denied the pay to those whose military leave began before the pandemic started, according to a suit filed in July 2021 in a federal court in Maryland.
- An online retailer provided COVID-19 protections to managers, who are overwhelmingly white, while failing to take safety measures like temperature checks for other employees (most of whom are non-white) or to instruct them to quarantine after close contact with a coworker who tested positive for COVID-19. A motion to dismiss the suit is pending.
- A class action pregnancy discrimination suit filed in a California state court in May 2020 contends the plaintiff was fired for refusing to meet with customers face-to-face during the pandemic.

Layoffs: split decisions on WARN

Fears that employers would face a sharp spike in class actions under the Worker Adjustment and Retraining Notification (WARN) Act have been largely unrealized. So far, a small number of cases have been filed — the majority of which are class actions.

The WARN Act requires employers to provide written notice at least 60 days before closing a plant or implementing a mass layoff, if at least 50 full-time employees (comprising at least one-third of the full-time workforce at a single site) will face an "employment loss," defined as an involuntary termination (other than a for-cause discharge), a layoff exceeding six months, or a reduction in work hours of more than 50 percent, during each month of any six-month period.

An exception to the 60-day notice requirement exists if the plant closing or mass layoff is due to a natural disaster such as a flood, earthquake, or drought; *or* is the result of "unforeseeable business circumstances" — a sudden, unexpected event outside the employer's control. If the exception does apply, then the 60-day notice requirement is excused but not waived altogether; the law requires "as much notice as is practicable." With respect to COVID-19, the legal dispute has centered largely on whether the pandemic satisfies an exception to the WARN Act's notice requirements.

The two courts to consider the issue have been split. In one class action in Florida, a federal court denied an employer's motion to dismiss WARN Act claims on the basis of "the unprecedented economic upheaval" unleashed by COVID-19. The defendant employer argued, "If those circumstances do not qualify for the WARN Act's exemptions for unforeseeable business circumstances or natural disasters, it is not clear what would." However, the court disagreed. Although it assumed the pandemic qualified as a "natural disaster," it found the defense did not apply in this case because the employer did not establish the layoffs were the direct result of a natural disaster. "This isn't a situation where, for example, a factory was destroyed overnight by a massive flood—that would be a 'direct result' of a natural disaster," the court explained. "This is an indirect result—more akin to a factory that closes after nearby flooding depressed the local economy."

As for the unforeseeable business circumstances exemption, the court explained that whether the six days' notice provided in this case was as much notice

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as practicable under the circumstances was a "hotly contested factual issue" to be resolved at a later stage in the litigation. However, as the appeal was pending, the parties on September 15, 2021, notified the trial court that they had settled the case. The bottom line is that, if the U.S. Court of Appeals for the Eleventh Circuit had adopted the district court's reasoning in the case, employers in the circuit would be unable to dispose of WARN Act claims arising from COVID-19 without at least some litigation..

Several other COVID-19-related WARN Act cases are being litigated; several litigants had moved for stays pending the resolution of these questions by a circuit court. Meanwhile, new cases continue to be filed. ■

Washington watch

Independent contractor rule withdrawn. In an expected move, on May 5, 2021, the U.S. Department of Labor (DOL) officially withdrew the Trump-era final rule addressing independent contractor status under the FLSA. The rule, which never took effect, would have established a uniform standard for determining a worker's status under the FLSA by reaffirming an "economic reality" test to determine whether an individual is in business for themselves (independent contractors) or is economically dependent on a potential employer for work.

The DOL had already delayed the final rule's effective date and, on March 11, 2021, issued a proposal to withdraw it. Proponents of the rule generally believed it provided a clearer and preferable analysis for determining employee or independent contractor status, while its opponents have argued it would have facilitated the exploitation of workers reclassified or misclassified as independent contractors. Because the DOL's withdrawal took effect *immediately*, the judicial precedents and DOL regulations and guidance that were in place prior to the final rule's publication continue to apply.

Paycheck Fairness Act fails to advance in Senate. On June 8, 2021, Democratic efforts to cut off debate, prevent a filibuster, and force a vote in the U.S. Senate on the latest iteration of the Paycheck Fairness Act were defeated by a 49-50 vote against cloture that fell along party lines. A two-thirds majority vote — 60 in favor — was needed to move forward.

This latest version of the Paycheck Fairness Act, which cleared the U.S. House of Representatives on April 15, 2021, by a 217-210 vote, would address wage discrimination based on sex, defined to include sex stereotypes, pregnancy, sexual orientation, gender identity, and sex characteristics.

DOL officially yanks joint employer rule. On July 29, 2021, the DOL announced that it is rescinding, effective September 28, 2021, the joint employer rule issued under the Trump Administration. Viewed favorably by employers, the 2020 rule provided updated guidance for determining joint employer status under the FLSA and provided 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. Opponents supporting rescission of the rule believed it improperly narrowed the test for joint-employer status and conflicted with decades of DOL interpretation, the text of the FLSA, and Congressional intent.

The move came as no surprise, as the DOL had proposed to rescind the Trump-era rule on March 12, 2021. Among other things, the DOL pointed to the lawsuit brought by 17 states and the District of Columbia challenging the lawfulness of the rule. On September 8, 2020, the federal district court in New York overseeing the litigation vacated most of the rule after concluding it violated the Administrative Procedure Act. The case, which may now be declared moot, is being appealed to the U.S. Court of Appeals for the Second Circuit.

Other class action developments

Massive wage and hour judgment reversed. In a significant victory for California employers, the U.S. Court of Appeals for the Ninth Circuit vacated a $102 million award against a major retailer in a suit alleging that the employer violated the California Labor Code's wage statement and meal-break provisions. The federal appellate court's opinion provides an important clarification of the cognizable harm required to establish Article III standing under the PAGA and the Labor Code's wage statement requirements, explaining that the employee does not have standing to bring PAGA claims in federal court for alleged Labor Code violations that the employee himself did not suffer, and that 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.

Motor carriers suable under CA classification law. The Ninth Circuit reversed a district court's order preliminarily enjoining enforcement of California's Assembly Bill 5 against any motor carrier doing business in California. The federal appeals court rejected the lower court's finding that a trucking industry group showed a likelihood of success on the merits of their preemption claim, instead ruling the plaintiff was unlikely to succeed since AB 5 is not preempted by the Federal Aviation Administration Authorization Act of 1994 (F4A). Because AB 5 is a generally applicable labor law that affects a motor carrier's relationship with its workforce and does not "bind, compel, or otherwise freeze into place the prices, routes, or services of motor carriers," it is not preempted by the F4A, the Ninth Circuit concluded.

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'No concrete harm, no standing,' U.S. Supreme Court reaffirms

In a divided 5-4 opinion addressing the right of consumers to sue a credit reporting agency for technical violations of the Fair Credit Reporting Act (FCRA), the U.S. 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."

Critical class action issue remains. 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.

Takeaway. In recent years, many employment class actions have been premised on technical statutory violations, including actions alleging defective FCRA notices issued when conducting preemployment background checks, defective COBRA election notices, and violations of state privacy laws. Employers defending such actions may now be able 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.

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Rideshare drivers must arbitrate claims. In a suit by Massachusetts rideshare drivers alleging they were misclassified as independent contractors (and transferred by the defendant to a federal court in California), the Ninth Circuit ruled an arbitrator must decide that issue for drivers whose contracts with the rideshare company contain mandatory arbitration provisions. Concluding the drivers did not fall within the interstate commerce exemption to mandatory arbitration under the Federal Arbitration Act (FAA), the appeals court affirmed the district court's order compelling arbitration in a class action requesting a preliminary injunction prohibiting the defendant from classifying drivers in Massachusetts as independent contractors. It directed the defendant to classify its drivers as employees and comply with Massachusetts wage law.

Court misapplied FAA exemption to last-mile drivers. Reversing a district court's order denying a final-mile delivery company's motion to compel arbitration of its drivers' FLSA claims under the FAA, the Eleventh Circuit ruled the lower court misapplied the test for determining whether the transportation worker exemption applied and erroneously concluded it did. Focusing on the movement of the goods and not the class of workers was erroneous because in the text of the exemption, "engaged in foreign or interstate commerce" modifies "workers" and not "goods." The court remanded the case for the district court to determine whether the drivers were in a class of workers employed in the transportation industry and whether the class was actually engaged in foreign or interstate commerce.

Section 16(b) authorizes "dual capacity" suits. The Seventh Circuit has ruled that a district court erred in concluding an employee who filed a collective action but failed to file her own opt-in consent was barred from pursuing an individual action. The employee filed suit under the FLSA alleging that her employer misclassified her and similarly situated employees. More than 100 employees filed consents; the plaintiff, however, did not. The district court deemed this a fatal flaw for both her collective and individual actions and dismissed the case in its entirety. Vacating in part, the Seventh Circuit found the district court erroneously concluded the facts alleged by the employee related only to the collective action. It held that Section 216(b) of the FLSA authorizes "dual capacity" suits, in which a plaintiff sues simultaneously as a group representative and as an individual. Further, the operative complaint put the employer on notice that she intended to sue in both an individual and a representative capacity. The appeals court left open the question whether FLSA, Section 256(a), requires that written consent to be in a separate document or if it is enough that the complaint itself clearly indicates the intent of the plaintiff to proceed collectively. Seventh Circuit caselaw is inconsistent on the question, and the circuits are split on the issue. The court concluded the state of the law was far too unsettled for it to decide the issue with limited briefing in this case.

Conclusory willfulness allegations cannot save FLSA claim. A divided Second Circuit panel ruled that a FLSA plaintiff relying on a theory of willfulness to invoke the three-year statute of limitations to save an otherwise untimely claim must plead facts that make entitlement to that exception plausible. Affirming dismissal of the employee's FLSA lawsuit asserting he was unlawfully denied overtime pay, the appeals court resolved a split among its own district courts and joined the U.S. Court of Appeals for the Sixth Circuit on its side of the circuit court split, ruling a conclusory assertion of willfulness will not be sufficient for a plaintiff to benefit from the extended three-year limitations period. Though this case involved an employee's individual FLSA action, it will also be helpful for employers defending FLSA collective actions in the Second Circuit.

Pennsylvania law requires pay for security checks. Answering certified questions from the Sixth Circuit, a divided Pennsylvania Supreme Court laid to rest arguments by an online retail giant that the Pennsylvania Minimum Wage Act did not require employers to pay their workers for time spent waiting to undergo, and undergoing, on-site security screenings. 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 high court concluded the security screenings constituted "hours worked" under 34 Pa. Code § 231.1 and "there is no de minimis exception."

Related security-check case ends for $13.5 million. In another case that is part of the same multidistrict litigation, a federal district court gave final approval to a $13.5 million settlement of class litigation alleging employees that worked in the online retail giant's Nevada warehouses were entitled to compensation for time spent during security checks.

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This case had been pending for over a decade, during which time there was significant adversarial motion practice and discovery, with the litigation having reached both the U.S. Supreme Court and the Sixth Circuit. The multimillion settlement includes individual payments averaging $642 to over 4,000 class members who submitted claims, $4.5 million in attorney fees, a range of $15,000 to $20,000 in incentive payments to three named plaintiffs, and $130,000 to the settlement administrator.

Retailer's website not a "place of public accommodation." In a non-employment case, a divided Eleventh Circuit panel held that a supermarket chain's website was not "a place of public accommodation under the ADA." The appeals court held the absence of screen reader software on the grocery chain's website did not act as an intangible barrier that resulted in a vision-impaired customer being discriminatorily "excluded, denied services, segregated or otherwise treated differently than other individuals" in the physical stores. The statutory language of Title III defining "public accommodation" is unambiguous and clear and describes public accommodations as tangible, physical places. Further, in the absence of congressional action that broadens the definition of "places of public accommodation" to include websites, Title III does not apply to the plaintiffs' claim, it explained. Thus, the Eleventh Circuit declined to extend ADA liability to the facts of this case where there was no physical barrier to access.

Victims of intra-office data disclosure lack standing. 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 California, Florida, Maine, New Jersey, New York, and Texas. 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.

Circuit courts address *Bristol-Myers* jurisdictional issues

In its 2017 decision in *Bristol-Myers Squibb Co. v. Superior Court of Cal.*, the U.S. Supreme Court ruled that a state court could not exercise specific personal jurisdiction over nonresident plaintiffs' claims against a nonresident company. There were questions left unresolved by the Court, though, including whether the holding applies to collective actions.

Three courts of appeal have addressed the question in recent decisions. In "It's been a busy month for Bristol-Myers," Jackson Lewis attorneys Eric Magnus and Noel Tripp take a detailed look at these rulings and the current state of the law on the issue.

ADEA collective conditionally certified. Former IT employees who alleged they were unlawfully discharged as part of a multiyear restructuring initiative won preliminary certification of nationwide Age Discrimination in Employment Act collectives in a suit against two employer entities. The employees claimed the restructuring resulted in the firing of thousands of older workers and the hiring of thousands of younger workers to replace them. The employees claimed the entities shared the common goal of making the entire organization younger, as evidenced by the CEO's stated desire to "recalibrate and reshape" the workforce with a "whole host of young people." A federal district court in California ruled the plaintiffs met their burden in showing employees who were 40 years or older when they were terminated were similarly situated for the purposes of conditional certification of the proposed collectives.

Wage-fixing suit settled. Under a proposed settlement agreement, a poultry processor would pay $29 million to resolve potential class allegations that it, along with other leading poultry processors, conspired to fix and depress wages of workers at chicken processing plants, in violation of the Sherman Act. The putative settlement class includes hundreds of thousands of current and former chicken processing workers. The company also agreed to provide material cooperation to the plaintiffs against the remaining defendants. The defendants have denied the wage-fixing allegations. ■

On the JL docket

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

October 6, 2021	Unconscious Bias and Understanding the Importance of "E" in Diversity, Equity & Inclusion
October 12, 2021	Connecticut Sexual Harassment Prevention Training Programs for Supervisors and Managers
October 14, 2021	Connecticut Sexual Harassment Prevention Training Programs for Non-Managers
October 14, 2021	ICBA/Jackson Lewis DEI 3-Part Webinar Series: Program One
October 20, 2021	Portsmouth Semi-Annual Employment Law Update
October 21, 2021	ICBA/Jackson Lewis DEI 3-Part Webinar Series: Program Two
October 28, 2021	ICBA/Jackson Lewis DEI 3-Part Webinar Series: Program Three
November 4, 2021	2021 Workplace Safety Review
December 7, 2021	What a Year! 2021 Wrap Up

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Join our Jackson Lewis panelists:

John Sander
The New Frontier of Cross-border Remote Work
Tuesday, October 19th
2:00 - 3:00 p.m.

Stephanie Adler-Paindiris
Employment Law Update
Tuesday, October 19th
4:30 - 5:30 p.m.

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