
February 2022

Employment Law Trends Assessment: 2022 Edition

*By John P. Barry, Gary D.
Friedman, Nicholas J. Pappas, Ami
G. Zweig, and Celine J. Chan*

While pandemic-related employment law issues (which we have written about in prior *Employer Updates*) dominated the 2021 headlines, the year was also marked by important changes to the laws governing restrictive covenants, non-disclosure agreements, mandatory arbitration, whistleblower protections, and wage-and-hour laws. We also witnessed record-breaking jury verdicts and publicly-recorded settlements in 2021, suggesting the continued need for employers to focus on their compliance programs. In this special edition of the *Employer Update*, we will review these developments, and discuss our latest thinking around what we expect to see in 2022.

In This Issue

- 2 [Federal and State Legislative Activities Targeting the Use of Restrictive Covenants](#)
- 4 [California’s “Silenced No More Act” and Related Developments Nationwide](#)
- 5 [Courts Continue to Grapple With the Use of Mandatory Arbitration Agreements](#)
- 6 [Expanded Whistleblower Protection Laws and Enforcement Activities](#)
- 7 [Significant Regulatory and Judicial Developments Affecting Wage and Hour Practices](#)
- 10 [Significant Employment-Related Jury Verdicts and Settlements Highlight the Importance of Internal Compliance Efforts](#)

Federal and State Legislative Activities Targeting the Use of Restrictive Covenants

By Justin M. DiGennaro

In 2021, employers saw a host of federal and state legislative and regulatory efforts to limit the use of restrictive covenants, which we expect to continue into 2022. While proposed federal legislation – such as the [Freedom to Compete Act](#) and the [Workforce Mobility Act](#) – continues to languish in Congress, President Biden signed an executive order in July 2021 on [Promoting Competition in the American Economy](#) (the “Executive Order”), indicating that he would “encourage” the Federal Trade Commission to curtail the use of restrictive covenants unilaterally through administrative rulemaking.

Section 5(g) of the Executive Order states that:

[T]he Chair of the FTC is encouraged to consider working with the rest of the Commission to exercise the FTC’s statutory rulemaking authority under the Federal Trade Commission Act to curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility.

The Executive Order did not itself change federal law with respect to restrictive covenants, and further action by the FTC is needed to effectuate any bans or limitations. Consistent with the Executive Order’s directive, FTC Chairperson Lina Khan stated during a two-day [FTC/DOJ Workshop](#) held in early December 2021 that “asymmetric relationships can enable firms to impose take it or leave it contract terms, including for example, non-compete clauses. Recent lawsuits have also surfaced extensive no-poach agreements among employers, which further restrict workers and depressed wages.” This focus aligns with the [FTC’s Draft Strategic Plan for Fiscal Years 2022-2026](#), which references the agency’s intent to “[i]ncrease use of provisions to improve worker mobility including restricting the use of non-compete provisions.” We expect to hear more from the FTC in 2022.

At the state level, the list of states seeking to curtail the use of restrictive covenants continued to grow in 2021, with many new laws slated to take effect in 2022. The [District of Columbia](#) enacted legislation prohibiting employers, subject to a few limited exceptions, from requiring employees to sign post-employment non-competes and outlaws retaliation against employees for their opposition to and refusal to sign non-competes. But the D.C. legislation didn’t stop there – in a controversial move, it likewise banned “conflict of interest” provisions that called for employees to expressly agree not to be *simultaneously* employed or engaged by a competitor or third party during their employment. It applies only to non-competes entered into after April 1, 2022, and D.C. employers will need to provide specific written notice to their workers within 90 days of this effective date. Separately, the D.C. City Council recently announced that it is considering the [“Non-Compete Conflict of Interest Clarification Amendment Act of 2021,”](#) which would clarify that the new law does not prohibit “bona fide conflict of interest provision[s],” and would certainly also impact any limitations on the governance of simultaneous employment by current employees. We will continue to monitor D.C. law for developments.

[Illinois](#) amended its non-compete law by: (i) requiring a 14-day consideration period for a non-compete, (ii) mandating that employees be affirmatively advised to consult with an attorney prior to signing a non-compete, (iii) expanding the definition of non-competes to include financial forfeiture for competition provisions, (iv) codifying the trend of Illinois state courts in affirming that adequate consideration to support a non-compete requires at least two years of continued employment if not accompanied by “additional professional or financial benefits,” and (v) prohibiting employers from entering into non-competes with employees earning less than \$75,000 annually or employee or customer non-solicits with employees earning less than \$45,000 annually. These income thresholds will increase in regular increments every five years until 2037. In addition, the new law mandates the recovery of attorneys’ fees and costs if an employee prevails in a claim filed by an employer

seeking to enforce a restrictive covenant, vests Illinois courts with the power to reform or sever overreaching restrictive covenants, and vests the Illinois Attorney General with enforcement authority for employers found to repeatedly impose unenforceable restrictive covenants. The new requirements apply only to restrictive covenants entered into on or after January 1, 2022.

[Oregon](#) recently amended its non-compete law by reducing the maximum duration for non-competes from 18 months to 12 months. The amended law also prohibits entering into non-competes with employees earning less than \$100,533 in gross salary and commissions annually unless the employer agrees in writing to pay the employee the greater of 50% of the employee's gross salary and commissions or \$50,266.50 during the restricted period. The new salary threshold supplements the restrictions under the prior iteration of the law (which remain) that only employees exempt under Oregon wage and hour law can be subject to non-competes. The new requirements apply only to non-competes entered into on or after January 1, 2022.

[Nevada](#) amended its non-compete law by: (i) prohibiting non-competes for employees paid solely on an hourly wage basis exclusive of any tips or gratuities, (ii) extending Nevada courts' obligation to reform or sever overreaching non-competes from disputes initiated by employers only to include disputes initiated by employees, and (iii) mandating the recovery of attorneys' fees and costs under certain circumstances if an employee prevails in an action filed by an employer seeking to enforce a non-compete. The new requirements apply only to non-competes entered into on or after October 1, 2021.

Finally, [Colorado](#) recently enacted legislation that includes a provision making it a Class 2 misdemeanor for an employer to violate C.R.S. § 8-2-113—Colorado's non-compete law that voids restrictive covenants unless they fall within four specifically enumerated categories of contracts. Any violation of C.R.S. § 8-2-113 will thus be punishable by up to 120 days in jail, a fine of up to \$750, or both. These criminal penalties take effect on March 1, 2022.

As to what lies on the horizon, nearly 20 states have proposed, but not yet enacted, legislation that would limit the use of restrictive covenants in various different ways, including by:

- Prohibiting non-competes entirely or partially banning them for categories of employees such as, for example, medical practitioners, broadcasters, or non-exempt or low-wage workers (Connecticut, Hawaii, Indiana, Iowa, Louisiana, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, Ohio, Oklahoma, Rhode Island, Vermont, West Virginia).
- Limiting the duration of non-competes (Connecticut, Iowa, Louisiana, New Jersey, New York, Oklahoma, Vermont).
- Prohibiting the enforcement of non-competes based on the circumstances of employment termination (Connecticut, Iowa, Louisiana, New Jersey, Oklahoma, Vermont).
- Imposing advanced notice and procedural requirements for enforceable non-competes (Connecticut, Iowa, New Jersey, New York, Oklahoma, Vermont).
- Limiting the enforceability of non-solicits (Connecticut, Iowa, New Jersey, Oklahoma, Rhode Island, Vermont).
- Expanding the remedies employees may recover if successful in restrictive covenant actions, including through attorneys' fees, punitive damages, liquidated damages, etc. (Connecticut, New Jersey, New York, Ohio, Oklahoma, Vermont).
- Prohibiting certain choice of law and venue provisions in restrictive covenant agreements that are not tied to the state in which the employee lives or works (Connecticut, New Jersey, New York, Oklahoma, Vermont).
- Implementing government enforcement mechanisms in relation to restrictive covenants (Connecticut, New Jersey, New York, Vermont).
- Prohibiting judicial blue penciling (Connecticut, Oklahoma, Vermont).

- Applying new restrictions retroactively (Indiana, Oklahoma, Vermont).
- Limiting the enforceability of confidentiality provisions (New Hampshire, Oklahoma, Vermont).
- Mandating that employees receive salary and benefits continuation during restricted periods for enforceable non-competes (Connecticut, New Jersey).
- Limiting enforceability of forfeiture for competition provisions (Oklahoma, Vermont).
- Limiting prohibitions on moonlighting like the D.C. law discussed above (Connecticut, West Virginia).
- Prohibiting agreements that forbid or restrict any employer's ability to solicit or hire another employer's current or former employees (New York).

Like 2021, we thus anticipate that 2022 will be an active year in the restrictive covenant space.

California's "Silenced No More Act" and Related Developments Nationwide

By Lauren Kelly

On January 1, 2022, the "Silenced No More Act" (SB 331) became effective in California, requiring employers with operations in the state to make important updates to employment agreements or any "other document to the extent it has the purpose or effect of denying the employee the right to disclose information about unlawful acts in the workplace." The Act expands (i) California Government Code Section 12964.5 to also cover the use of such provisions in separation agreements, and (ii) California Code of Civil Procedure Section 1001 – which previously prohibited non-disclosure provisions in settlement agreements relating to harassment or discrimination based on sex – to now cover *any* workplace harassment or discrimination.

Significantly, the new Section 12964.5 requires that non-disparagement or other clauses in employment and separation agreements that restrict an

employee's ability to disclose information about workplace conditions include, in "substantial form," the following safe harbor language: "Nothing in this agreement prevents you from discussing or disclosing information about unlawful acts in the workplace, such as harassment or discrimination or any other conduct that you have reason to believe is unlawful." Additionally, when offering separation agreements that include such clauses, employers must notify employees that they have a right to consult an attorney and provide employees with at least five business days to seek counsel. An employee may choose to sign such an agreement within five days, so long as the employee's decision to do so is knowing, voluntary, and not improperly induced. However, these restrictions on the use of non-disparagement or similar provisions in employment and separation agreements do not apply to negotiated settlement agreements resolving a filed claim, so long as the agreement is voluntary and the employee was given an opportunity to seek counsel. Additionally, the new law does not prohibit non-disclosure provisions pertaining to the amount paid in a severance agreement, an employer's trade secrets, or other confidential information that does not involve unlawful acts in the workplace.

Beyond California, the trend towards limiting the use of non-disparagement, non-disclosure, and confidentiality agreements – sparked by the #MeToo Movement – is still ongoing. For example, New York previously enacted a law restricting the use of non-disclosure clauses in settlements of discrimination claims unless the condition of confidentiality is the "preference" of the employee, and in Illinois a new law went into effect in 2020 (the "Workplace Transparency Act," 820 ILCS 96) that prohibits employers from conditioning employment or continued employment on an agreement, clause, covenant, or waiver that is a unilateral condition of employment or continued employment that has the purpose or effect of preventing disclosure of unlawful acts in the workplace. Notable developments over the past year include:

- Nevada's new law voiding confidentiality provisions within settlement agreements that

restrict an employee from testifying at a judicial or administrative proceeding about criminal conduct, sexual harassment, discrimination, or retaliation that occurred during the course of employment. Nev. Rev. Stat. § 50 (2021).

- Washington’s pending legislation that would prohibit employers from requiring employees to sign any document that prevents employees from disclosing harassment, discrimination, sexual harassment, or sexual assault occurring at or in connection with the workplace. Wash. SB 5520.

As courts and state legislatures continue to examine provisions in employment and separation agreements, another area of focus may be on so-called “no re-hire” clauses. California previously enacted AB 749, which prohibits employers from using “no-rehire” clauses in settlement agreements with employees, but only if the employee has filed a claim against the employer in court, before an administrative agency, in an alternative dispute resolution forum, or through the employer’s internal complaint process (unless the employer has made a good faith determination that the employee engaged in sexual harassment or sexual assault, in which case the agreement may contain a no-rehire clause). Similarly, proposed New York State legislation (SB S766) would make the release of any claim by an employee or independent contractor against an employer unenforceable if the individual is prohibited from applying for or accepting future employment with the employer as a condition of the agreement. Notably, under this proposed new law, if a release provision is rendered unenforceable because of the inclusion of a no-rehire clause, the employer would still remain bound by all other provisions of the settlement agreement, including any payment obligations.

To maximize the enforceability of the employment, separation, and settlement agreements routinely entered into with employees, employers in California and New York should ensure that their agreements comply with the requirements established by recent state legislation. Moreover, employers nationwide should keep a close eye on further developments in

this area so that they can be prepared to adapt their employee agreements as necessary.

Courts Continue to Grapple With the Use of Mandatory Arbitration Agreements

By Omar Abdel-Hamid

In recent years, the use of mandatory arbitration agreements has been the subject of extensive litigation. Although the number of employment-related disputes resolved via arbitration grew by approximately 66% between 2018 and 2020 (Erin Mulvaney, *Mandatory Arbitration at Work Surges Despite Efforts to Curb It*, [Bloomberg Law](#) (Oct. 28, 2021)), judicial decisions and state legislative actions continue to challenge the role of arbitration in resolving employment disputes. Heading into 2022, employers should be mindful of a recent Ninth Circuit decision and two upcoming Supreme Court rulings that may affect an employer’s ability to enter into mandatory arbitration agreements with its employees.

In 2019, the California legislature passed Assembly Bill 51 (“AB 51”), prohibiting California employers from requiring employees to enter into arbitration agreements as a condition of employment, continued employment, or the receipt of any employment-related benefit. An Eastern District of California court enjoined enforcement of AB 51 as preempted by the Federal Arbitration Act (“FAA”), but on September 15, 2021 the Ninth Circuit reversed that decision, holding that AB 51 was not preempted in its entirety by the FAA because it “does not make invalid or unenforceable any agreement to arbitrate,” but instead mandates “that employer-employee arbitration agreements be consensual.” *Chamber of Commerce v. Bonta*, 13 F.4th 766 (2021). Because AB 51 prohibits employers only from *mandating* arbitration agreements and does not regulate or prohibit the enforcement of arbitration agreements, even those that were entered into in violation of AB 51 (*Id.* at 776), the court held that it does not pose an obstacle to the FAA’s “clear purpose to ensure the validity and enforcement of consensual arbitration agreements

according to their terms,” and is therefore enforceable. *Id.* at 779. Vehemently disagreeing with the majority’s ruling, the dissent interpreted U.S. Supreme Court precedent as holding that the FAA preempts state rules that burden the formation of arbitration agreements, characterizing AB 51 as a “legislative gimmick.” *Id.* at 785. The majority’s “tortuous ruling,” the dissent continued, “means that an employer’s attempt to enter into an arbitration agreement with employees is unlawful, but a completed attempt is lawful.” *Id.* at 791.

As of the publication date of this Newsletter, the Ninth Circuit’s ruling in *Bonta* is not final, as the Chamber of Commerce has filed a petition for rehearing *en banc*. If the decision stands, this issue may be ripe for U.S. Supreme Court review, as the Ninth Circuit’s holding creates a circuit split with the First and Fourth Circuits. See *Saturn Distrib. Corp. v. Williams*, 905 F.2d 719 (4th Cir. 1990) (holding that the FAA preempted a Virginia law prohibiting automobile dealers from including nonnegotiable arbitration clauses in franchise agreements); *Sec. Indus. Ass’n v. Connolly*, 883 F.2d 1114, 1117, 1125 (1st Cir. 1989) (holding that the FAA preempted a Massachusetts law prohibiting securities firms from requiring clients to agree to arbitration).

The Supreme Court also has two pending cases on its docket involving interpretation of the FAA’s contours. First, the Court will review *Saxon v. Sw. Airlines Co.*, 993 F.3d 492 (7th Cir. 2021) (discussed in the [May 2021 issue of Weil’s Employer Update](#)), in which the Seventh Circuit held that workers involved in loading and unloading cargo that crosses state lines are involved in interstate commerce and thereby included within the FAA’s transportation worker exemption, which excludes from the FAA’s coverage “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.” 9 U.S.C. § 1. Second, the Court granted certiorari in *Viking River Cruises, Inc. v. Moriana*, B297327 (Cal. Ct. App. Sep. 18, 2020) to review whether its ruling in *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), which upheld the validity of class action waivers in employment arbitration agreements, applies to arbitration

agreements prohibiting an employee from bringing representative claims under California’s Private Attorneys’ General Act. These two cases on the Supreme Court’s docket, together with the ongoing litigation over California’s AB 51, ensure that the subject of mandatory arbitration agreements will remain a hot topic for employment lawyers in 2022.

Expanded Whistleblower Protection Laws and Enforcement Activities

By Elizabeth J. Casey

Last year was a record-breaking year in terms of whistleblower awards. For example, in October 2021, the Commodity Futures Trading Commission (“CFTC”) issued a nearly \$200 million award to a confidential whistleblower who provided significant information which supported a successful enforcement action by the CFTC and two related actions by U.S. and UK regulators. Press Release No. 8453-21, CFTC, [CFTC Awards Nearly \\$200 Million to a Whistleblower](#) (Oct. 21, 2021). This award was reported as the *largest ever* paid under a governmental whistleblower program. Erika Kelton, [SEC and CFTC Whistleblowers Flex in 2021](#), FORBES (Dec. 22, 2021). The Securities and Exchange Commission (“SEC”) whistleblower program also had a banner year that included a \$110 million payout to a whistleblower in September 2021, reportedly the second highest in the program’s history. Press Release 2021-177, SEC, [SEC Surpasses \\$1 Billion in Awards to Whistleblowers with Two Awards Totaling \\$114 Million](#) (Sept. 15, 2021).

In 2021, the New York state legislature also passed expanded whistleblower protection legislation. Specifically, in late 2021, the legislature amended its state whistleblower protection law (see [November 2021 Employer Update](#)). The amended law lowers the legal standard for establishing whistleblower claims to require only that whistleblowers *reasonably believe* a violation has occurred (rather than showing an actual violation). The amended law also extends the statute of limitations for filing whistleblower claims from one

year to two years, broadens the definition of “employees” to cover former employees and independent contractors, and revises the employer notification requirement to require only that whistleblowers make a “good faith effort” to notify the employer of the violation prior to disclosure to authorities. It also provides for enhanced remedies, including recovery of front pay, civil penalty not to exceed \$10,000, and punitive damages in the case of willful, malicious or wanton violations. This amended law took effect on January 26, 2022, and will likely lead to an increase in whistleblower claims pursued under New York law.

At the federal level, in February 2021, the U.S. Department of Labor tapped the Occupational Safety and Health Administration (“OSHA”) Whistleblower Protection Program to investigate and enforce whistleblower retaliation complaints under the Criminal Antitrust Anti-Retaliation Act of 2019 (“CAARA”) and the Anti-Money Laundering Act of 2020 (“AMLA”). Press Release, U.S. Dep’t of Labor, [U.S. Department of Labor Announces OSHA will Investigate Complaints of Whistleblower Retaliation Under New Antitrust, Money Laundering Laws](#) (Feb. 19, 2021). The CAARA, signed into law in December 2020, protects employees who report criminal antitrust violations to their superiors or the federal government and prohibits retaliation against employees that assist in an anti-trust investigation or proceeding. Criminal Antitrust Anti-Retaliation Act, 15 U.S.C. § 7a-3. The AMLA, which went into effect on January 1, 2020, prohibits employers from retaliating against whistleblowers who report money laundering-related violations to their superior or the federal government or who assist in an investigation or proceeding related to a violation of anti-money laundering laws. Anti-Money Laundering Act, 31 U.S.C. § 5323.

Expanded state whistleblower legislation, coupled with OSHA’s additional enforcement responsibilities over whistleblower complaints, and potentially eye-popping awards issued by government regulators to whistleblowers will place employer compliance programs and procedures even further under the microscope in 2022.

Significant Regulatory and Judicial Developments Affecting Wage and Hour Practices

By Nicole J. Jibrine and Sahar Merchant

Wage and hour jurisprudence was alive and well in 2021. Set forth below is a discussion of recent and notable federal and state wage and hour activity that should be on employers’ radars in 2022.

Independent Contractor Classification

In 2021, California courts decided three cases that expanded the effects of the “ABC” independent contractor classification test articulated in the 2018 *Dynamex* decision and codified in California’s Assembly Bill 5 (“AB5”):

- First, on January 14, 2021, the California Supreme Court determined that the ABC test applies retroactively to worker classifications from before the *Dynamex* decision. *Vazquez v. Jan-Pro Franchising Int’l, Inc.*, 478 P.3d 1207, 1208 (Cal. 2021).
- Second, on April 28, 2021, the Ninth Circuit held that AB5 is not preempted by the Federal Aviation Administration Authorization Act (“F4A”). The F4A preempts state law “related to a price, route, or service of any motor carrier . . . with respect to the transportation of property.” 49 U.S.C. § 14501(c)(1). The Ninth Circuit reasoned that because AB5 “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,” the F4A does not preempt AB5. *California Trucking Ass’n v. Bonta*, 996 F.3d 644, 649 (9th Cir. 2021). The California Trucking Association’s petition for U.S. Supreme Court review of this decision remains pending.
- Third, on August 20, 2021, a California state court found Proposition 22 (a California ballot initiative exempting app-based drivers from AB5) to be unconstitutional because it limits the authority of California’s legislature to define app-based drivers as workers subject to California’s workers’

compensation law. *Castellanos v. State of California*, 2021 LEXIS 7285, at *17-18 (Cal. Super. Aug. 20, 2021). This decision is far from final, however, as the State has filed a notice of appeal.

At the federal level, the Biden administration rejected the Trump administration's proposed modification of the "economic reality" test for worker classification under the Fair Labor Standards Act, culminating in the Department of Labor's May 6, 2021 withdrawal of the proposed rule. Independent Contractor Status under the Fair Labor Standards Act (FLSA): Withdrawal, 86 Fed. Reg. 24303 (May 6, 2021). Accordingly, the DOL's longstanding guidance on employment relationships under the FLSA (see [WHD's Fact Sheet #13](#)) remains in effect – though this could change in 2022 if President Biden pursues his campaign pledge of seeking to mirror California's ABC test at the federal level. *The Biden Plan for Strengthening Worker Organizing, Collective Bargaining, and Unions*, JOE BIDEN FOR PRESIDENT: OFFICIAL CAMPAIGN WEBSITE (2020), <https://joebiden.com/empowerworkers/> ("As president, Biden will work with Congress to establish a federal standard modeled on the ABC test for all labor, employment, and tax laws").

Employers may soon see an uptick in federal enforcement activities in the worker classification area based on a December 8, 2021 [Memorandum of Understanding](#) ("MOU") in which the DOL and the National Labor Relations Board agreed to collaborate on investigations, enforcement activity, and data sharing related to violations of federal labor and employment law. The MOU specifically identifies "the misclassification of employees" as one of the target areas for data sharing and collaboration between the agencies. Moreover, the acting administrator of the DOL's Wage and Hour Division, Jessica Looman, stated in an interview that the two agencies acting together would help address workers, particularly in low wage sectors, from being misclassified as independent contractors. Rebecca Rainey and Ian Kullgren, *U.S. Labor Agencies Strike Deal to Share Enforcement Information*, BLOOMBERG LAW (Jan. 6, 2022), [https://news.bloomberglaw.com/daily-labor-](https://news.bloomberglaw.com/daily-labor-report/u-s-labor-agencies-strike-deal-to-share-enforcement-information)

[report/u-s-labor-agencies-strike-deal-to-share-enforcement-information](#). The agreement also modifies complaint referrals between the two agencies such that, based on their investigations, one agency will notify employees of their opportunity to file a charge with the other agency.

Exempt Salary Threshold Increases and Federal Contractor Minimum Wage

At the federal level, the DOL announced on December 10, 2021 that among the regulatory actions under "active consideration" by the agency (as part of the Biden administration's semi-annual agenda) are changes to the FLSA minimum salary threshold for exempt status (currently \$684 per week, or \$35,568 per year). Press Release, Department of Labor, U.S. Department of Labor Announces Upcoming Actions in Biden-Harris Administration Fall 2021 Regulatory Agenda (Dec. 10, 2021), <https://www.dol.gov/newsroom/releases/osec/osec20211210>; Office of Mgmt. & Budget, RIN 1235-AA39, *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees* (2021), <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202110&RIN=1235-AA39>. The Biden administration has not yet indicated any dollar amount for a proposed new threshold, though the Obama administration previously sought to increase this threshold to \$47,476 (an effort that was blocked by a federal court and then dropped by the Trump administration). The Biden administration has also sought to increase employee compensation through minimum wage updates, leading to the DOL's recent publication of a final rule that will, effective January 30, 2022, increase the minimum wage for employees of federal contractors from \$11.25 to \$15.00 per hour. This rule will apply to new federal contracts or new exercised options of existing contracts. Increasing the Minimum Wage for Federal Contractors, 86 Fed. Reg. 67126 (November 24, 2021).

While the federal salary threshold for exempt status remains unchanged at the moment, employers must keep in mind that many states have higher salary thresholds, several of which are increasing for 2022:

- **California:** Beginning January 1, 2022, the minimum salary threshold increased to \$58,240 per year for employers with 25 or fewer employees or \$62,400 per year for larger employers. See CAL. CODE REGS. Order Regulating Wages, Hours, and Working Conditions in Professional, Technical, Clerical, Mechanical, and Similar Occupations § 11040 2001(1)(A)(1)(f); CAL. LAB. CODE § 1182.12. California also established new salary exemption thresholds for computer software employees (\$104,149.81 per year), and for physicians and surgeons (\$91.07 per hour). *Overtime Exemption for Computer Software Employees*, CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS (Oct. 2021), <https://www.dir.ca.gov/opri/ComputerSoftware.htm>; *Overtime Exemption for Licensed Physicians and Surgeons*, CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS (Oct. 2021), <https://www.dir.ca.gov/opri/Physicians.htm>.
- **Colorado:** Beginning January 1, 2022, the minimum salary threshold increased to \$45,000 per year. 7 COLO. CODE REGS. § 1103-1 (2021).
- **Maine:** Beginning January 1, 2022, the minimum salary threshold increased from \$700.97 to \$735.59 per week or \$38,251 per year. *Per State Law, Maine's Minimum Wage to Increase to \$12.75 Per Hour in 2022*, STATE OF MAINE DEPARTMENT OF LABOR (Sept. 23, 2021), https://www.maine.gov/labor/news_events/article.shtml?id=5636664.
- **New York:** While New York City's salary threshold (\$58,500 per year) remains unchanged in 2022, as of December 31, 2021 that same threshold now applies in Nassau, Suffolk, and Westchester counties (which previously had lower thresholds), and the state-wide threshold increased to \$51,480 per year. See *New York Minimum Wage*, NEW YORK DEPARTMENT OF LABOR, December 2020, <http://www.fitnyc.edu/documents/hr/new-york-minimum-wage.pdf>; NY LAB. LAW § 652.
- **Washington:** Beginning January 1, 2022, the minimum salary threshold increased from \$821.40

per week for small employers (1-50 employees) and \$958.30 per week for large employers (more than 50 employees) to \$1,014.30 per week or \$52,712.80 a year for all employers (regardless of size). *Changes to Overtime Rules Q&A*, WASHINGTON STATE DEPARTMENT OF LABOR & INDUSTRIES, <https://lni.wa.gov/workers-rights/wages/overtime/changes-to-overtime-rules-q-a>.

California Employers Must Incorporate All Nondiscretionary Pay into Missed Meal, Rest and Recovery Breaks Pay Premiums

California employers should review their meal, rest, and recovery break policies after the California Supreme Court rendered its July 15, 2021 decision in *Ferra v. Loews Hollywood Hotel, LLC*, 489 P.3d 1166, 1178 (Cal. 2021). As California-based employers are well aware, the state's labor law requires employers to provide meal, rest, and recovery break periods to non-exempt employees, and to provide "one additional hour of pay at the employee's regular rate of compensation for each workday that the meal or rest or recovery period is not provided." Cal. Labor Code § 226.7. In *Ferra*, the court determined that the term "regular rate of compensation" includes not only hourly wages, but also other nondiscretionary pay (such as nondiscretionary bonuses and commissions). 489 P.3d at 1178. The court also held that its decision has retroactive effect. *Id.* Thus, employers with non-exempt workforces in California should ensure that their premium pay calculations going forward include all nondiscretionary pay, and should brace for the possibility of litigation if their past practices were inconsistent with the rule set forth in *Ferra*.

New York Pay Frequency Law Permits Private Right of Action

Employers should recall that in September 2019, New York's Appellate Division established a private right of action for manual workers to sue their employers under New York's manual worker pay frequency law, which requires employers to pay manual workers on a weekly basis. *Vega v. CM & Assoc. Constr. Mgmt., LLC*, 107 N.Y.S.3d 286 (N.Y. App. Div. 2019). For

purposes of the manual worker pay frequency law (NY Lab. Law § 191(1)(a)), the NY DOL considers “manual workers” to be those who spend more than 25% of their work time performing physical labor. NY Dep’t of Labor, Opinion Letter on Manual Workers (May 21, 2009). In addition to civil penalties, violations of New York’s pay frequency law can now result in private lawsuits seeking liquidated damages equal to the full amount of wages that the employee received late, even if he or she was paid in full. NY Lab. Law § 198(1-a). Employers with manual workers in New York should review their pay frequency practices to ensure compliance with this law, particularly in light of the newly established private right of action. Such employers may consider applying for a variance to the weekly pay requirement, which the law permits for employers that have employed an average of at least one thousand employees in New York for three years and that can provide “satisfactory proof” to New York’s labor commissioner of the employer’s “continuing ability to meet its payroll responsibilities.” *Id.* at § 191(1)(a)(ii).

Significant Employment-Related Jury Verdicts and Settlements Highlight the Importance of Internal Compliance Efforts

By Lauren E. Richards and Paulina A. Cohen

Over the past year, employers saw jury verdicts and settlements reach new highs in a wide range of employment matters. The underlying disputes ranged from single plaintiff to class action lawsuits, and from discrimination claims to wage and hour disputes, but all serve as an important reminder to employers to continue to focus on reviewing their own compliance efforts.

Many of the cases over the past year involve claims of discrimination, harassment and retaliation. Large monetary settlements and jury verdicts in connection with such claims highlight the potential risks associated with actual or perceived noncompliance on these types of issues. For example, in what has been reported as one of the largest publicly announced,

individual gender discrimination settlements, Pinterest settled gender discrimination and retaliation claims by its former Chief Operating Officer for \$22.5 million in December 2020. While the basis for this settlement has not been disclosed publicly, the complaint alleged that Pinterest fired the executive after she called attention to gender bias within the company’s male-dominated leadership team, and further stated that her termination “solidified Pinterest’s unwelcoming environment for women and minorities by imposing a high cost to challenging the men at the top.” Compl. at ¶ 2, *Brougher v. Pinterest, Inc.*, CGC-20-585888 (Cal. Super. Aug. 11, 2020), Dkt. No. 1. And in April 2021, a jury awarded nearly \$11 million (over half of which was attributable to emotional harm incurred as a result of the company’s actions) to a single manager at IBM whom the jury found to have been retaliated against after he complained about race discrimination against another employee. Verdict, Agreement & Settlement, *Kingston v. Int’l Bus. Corp.*, 2:19-cv-01488-MJP (W.D. Wash. Apr. 15, 2021), Dkt. No. 9.

These cases, and others, serve as a reminder to employers to invest in strengthening their policies and procedures to mitigate risk and to demonstrate actual commitment to compliance with law. Accordingly, employers should consider implementing a variety of measures to mitigate their potential risk in connection with these discrimination, harassment and retaliation issues, as follows:

- Strengthen written policies relating to discrimination, harassment and retaliation;
- Mandate robust employee and supervisor training programs;
- Develop a strategy for increasing diversity and inclusion;
- Assess Board parity and diversity of senior leadership;
- Establish flexible and equitable personnel policies;
- Establish uniform review, promotion, and compensation processes and regular audits;

- Maintain consistent written procedures for receiving and investigating complaints;
- Mandate training to supervisors and managers on how to respond to complaints; and
- Maintain complete records of all reports of discrimination, harassment, and retaliation, ensuing investigations, and corrective action taken.

Another category of significant payouts occurred in the context of wage and hour claims. For example, in April 2021, Nike agreed to pay \$8.25 million to settle employees' claims that they were not paid for time spent waiting for end-of-shift security checks.

Rodriguez v. Nike Retail Services, Inc., 5:14-cv-01508-BLF (N.D. Cal.), Dkt. No. 156 (settlement has been preliminarily approved as reasonable on its face). Numerous other companies entered into eight-figure settlement agreements in 2021 following allegations of wage and hour violations, particularly with respect to employees located in California.

These settlements illustrate the significant costs associated with failing to implement appropriate pay practices and regularly auditing those practices, as liquidated damages, statutory penalties and derivative claims can multiply employees' claims far beyond

what an employer would have or could have paid in wages alone. Employers, particularly those in states that impose more stringent wage and hour requirements than under federal law, should review their pay practices and further assess the impact that remote work has on monitoring compliance. For example, employers should evaluate:

- Whether employees are appropriately classified as exempt or non-exempt under federal and state laws, including whether job duties have shifted in a remote work environment;
- Whether employees are appropriately compensated for all working time, which may include certain pre- and post-shift activities, particularly in a remote working environment when employees may be called upon at home before and after shifts; and
- Compliance with other wage and hour requirements, including meal and rest break periods, particularly when the hourly workforce is remote.

The headlines of 2021 continue to serve as a reminder to employers to review and enhance internal compliance mechanisms to potentially mitigate the risk of significant liabilities.

Employer Update is published by the Employment Litigation and the Executive Compensation & Benefits practice groups of Weil, Gotshal & Manges LLP, 767 Fifth Avenue, New York, NY 10153, +1 212 310 8000, www.weil.com.

If you have questions concerning the contents of this issue, or would like more information about Weil's Employment Litigation and Executive Compensation & Benefits practices, please speak to your regular contact at Weil, or to the editors or practice group members listed below:

Practice Group Members:

John P. Barry
Practice Group Leader
New York
+1 212 310 8150
john.barry@weil.com

Frankfurt
Stephan Grauke
+49 69 21659 651
stephan.grauke@weil.com

London
Ivor Gwilliams
+44 20 7903 1423
ivor.gwilliams@weil.com

Miami
Edward Soto
+1 305 577 3177
edward.soto@weil.com

New York
Sarah Downie
+1 212 310 8030
sarah.downie@weil.com

Gary D. Friedman
+1 212 310 8963
gary.friedman@weil.com

Steven M. Margolis
+1 212 310 8124
steven.margolis@weil.com

Michael Nissan
+1 212 310 8169
michael.nissan@weil.com

Nicholas J. Pappas
+1 212 310 8669
nicholas.pappas@weil.com

Amy M. Rubin
+1 212 310 8691
amy.rubin@weil.com

Paul J. Wessel
+1 212 310 8720
paul.wessel@weil.com

Silicon Valley
David Singh
+1 650 802 3010
david.singh@weil.com

© 2022 Weil, Gotshal & Manges LLP. All rights reserved. Quotation with attribution is permitted. This publication provides general information and should not be used or taken as legal advice for specific situations that depend on the evaluation of precise factual circumstances. The views expressed in these articles reflect those of the authors and not necessarily the views of Weil, Gotshal & Manges LLP. If you would like to add a colleague to our mailing list, please [click here](#). If you need to change or remove your name from our mailing list, send an email to weil.alerts@weil.com.