



FOLEY
HOAG LLP

Annual Labor and Employment Update: A Look Beyond COVID-19

presented by

Allison Anderson

Jim Bucking

Jonathan Keselenko

Michael Rosen

- Increases the threshold amount from \$455/week to \$684/week
- Can now use up to 10% of non-discretionary bonuses and incentive payments (e.g., commissions) towards threshold
- HCEs increase from \$100,000 to \$107,432
- Salary basis is one component of 3-part test
 - Duties, salary basis, and salary threshold
- Beware higher requirements in some jurisdictions – e.g., NY and CA



- New rule clarifying what constitutes “regular rate” when calculating overtime
- Overtime is calculated as 1.5x “regular rate” of pay (not just hourly wage)
- Means “all remuneration,” with certain exclusions
 - Gifts, certain reimbursements, health insurance or pension contributions, daily overtime, holiday pay, and stock options
 - Unsettled question as to whether employers needed to include certain other perks and benefits in the regular rate calculation
- New rule provides clarity and adds a list of specific types of benefits that are excluded from the regular rate computation

These include:

 - ✓ Certain parking benefits, wellness programs, onsite specialist treatment, gym access and fitness classes, employee discounts, certain tuition benefits, adoption assistance;
 - ✓ Payments for unused paid leave;
 - ✓ Certain reimbursed expenses beyond expenses incurred “solely” for the employer’s benefit;
 - ✓ Certain sign-on and longevity bonuses;
 - ✓ Office coffee and snacks provided to employees;
 - ✓ Discretionary bonuses; and
 - ✓ Certain contributions to benefit plans.

- California AB-5 -- Codified *Dynamex* decision
 - Test identical to Massachusetts ABC test
 - Significant litigation, including injunctive actions
- New Jersey – increased penalties
 - \$250 per misclassified employee for the first violation
 - \$1,000 per employee for each subsequent violation
 - 5 percent of the misclassified worker's gross earnings
- Proposed Legislation in NY, CT, and elsewhere
- Federal Government approach dependent on party in power



- Massachusetts Wage Act – 3x damages
- Massachusetts Wage Act – Commissions owed when “due and payable”
- Employee terminated where commissions had not yet become “due and payable”
 - Claimed retaliation for making complaint about wages
- Although commissions did not become due and payable until after discharge, the Wage Act applied because of circumstances of termination
- “Commissions that are not yet due to be paid may nonetheless constitute lost wages if the employer’s violations of the act prevent payment of those commissions.”

Sullivan vs. Sleepy's Sunday Pay and Commissions

- Another Massachusetts Wage Act case where treble damages applied
- “Inside” sales persons – non-exempt per statute
- Employees were paid commissions only, which exceeded minimum wage and overtime and Sunday premium pay, but not accounted for separately
- SJC ruled that Sunday pay and overtime must be paid separately. Can't be lumped together and can't be retroactively reallocated

Lesson: Employer does not need to increase pay, but important to properly account for it

■ “New” MA Noncompete Law

- Applies only to non-competition agreements signed after 10/1/18
- Almost two years in, still many unanswered questions
 - Garden leave vs. “other mutually-upon consideration”
 - “Fair and reasonable” consideration when signed after hire
 - Nuvasive, Inc. v. Day (D. Mass. 2019): suggesting signing as condition of hire could be sufficient consideration, but First Circuit (April, 2020) did not address on appeal



- Non-competition agreements cannot be enforced against:
 - **Employees who are laid off or terminated “without cause”**
 - Strategies:
 - Broad “cause” definition
 - Separation agreement
 - Non-exempt (overtime eligible) employees
 - Employees aged 18 or younger and undergraduate or graduate students employed as interns

Courts will apply equity – standards of fairness – and public policy, meaning that noncompetes may be very difficult to enforce during challenging economic circumstances

Noncompetes: State Legislatures Have Been Very Busy



2019-20

Maine: prohibited for employees earning less than 400% of federal poverty level (about \$51,000), must disclose requirement “prior to offer” and provide copy three days before signing



New Hampshire: prohibited for employees earning less than 2x minimum wage (about \$30k annually)



Rhode Island: prohibited for employees earning less than 250% of poverty level (\$31,225)



Washington State: prohibited if earning less than \$100,000 annually, for laid off employees (unless paid base salary during period), and generally for periods longer than 18 months



Oregon: prohibited unless earning median family income; prohibited for non-exempt employees; advance notice required; copy must be provided within 30 days of termination

15 or so other states with proposed legislation scaling back noncompete enforcement

Noncompetes: State Legislatures Have Been Very Busy (cont.)

■ Need for Strategic Approach

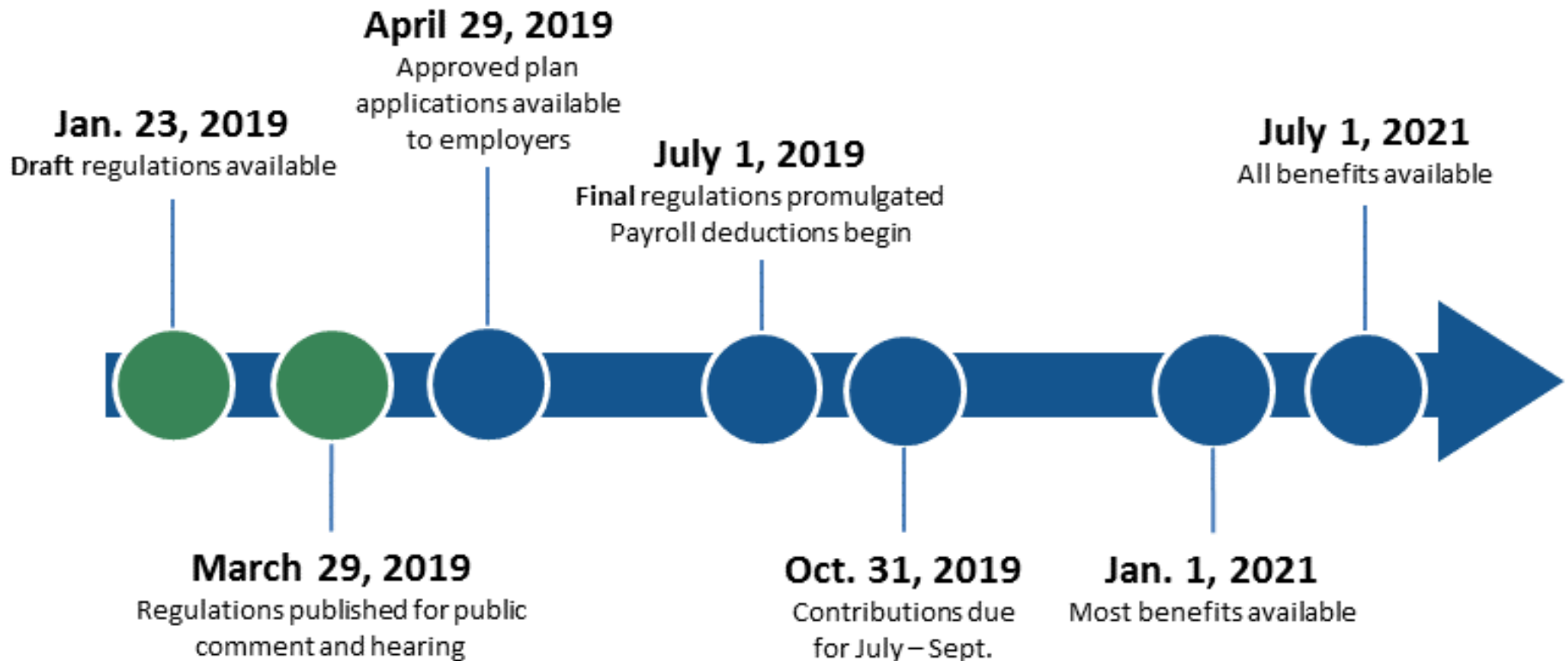
- Choice of law provisions may not be effective
- Global agreement or state-by-state?
- Activity in Congress and at Federal Trade Commission



- EEO-1 Form: annual filing for employers with 100 or more employees reporting number of employees by gender, race/ethnicity and position type
- In 2016, EEOC first sought to expand EEO-1 Form to include W-2 wages and hours worked (known as Component 2 pay data)
- Trump Administration froze rollout and after delay and litigation, EEOC ordered that employers submit by September, 2019 pay data for 2017 and 2018
- March, 2020: EEOC announced it would no longer seek to collect pay data as part of EEO-1 form
 - Not clear what happens to data already submitted
- May 8, 2020: EEOC announces delay in all EEO-1 data collection for 2019 due to the pandemic
 - Expects to begin collecting 2019 and 2020 information in March, 2021

Massachusetts PFMLA Update

- As a reminder – passed August 2018, originally scheduled to start contributions July 1, 2019 – extended until October 1, 2019
- By now we are into the 3rd quarter of contributions and deductions



- Two types of exemptions
 - Private Plan – via insurer
 - Self-Insured – self-implemented policy – initially only option
- September 2019 – DFML identifies list of a dozen approved carriers. Can submit Declaration of Insurance first, then later submit policy once added by carrier
- Benefits become available starting on January 2021



- May 8, 2020: DFML announced updates to the PFMLA regulations
 - DRAFT changes – Notice/comment hearings will be announced soon
- Some changes adding clarity or confirming prior changes in guidance – e.g. confirming that law does not apply to properly classified independent contractors
- Others are new:
 - Reimbursable paid leave does NOT include vacation, sick pay
 - Allowing employers not covered (e.g. religious organizations) to opt in
 - Extending exemption to apply to filing requirements, not just contributions
 - Exemption coverage must begin in quarter immediately following application
 - Limited appeal process for denied exemption application
 - Modified requirements for employee's application for benefits

- In December 2019, NLRB issued new union election procedures
Key Changes:
 - Shift from Calendar Days to Business Days
 - Pre-Election hearing scheduled 14 business days out, rather than 8 calendar days
 - Both parties complete pre-hearing statement of issues
 - Unit scope and voter eligibility issues, such as supervisory status, will now be resolved at the pre-election hearing
 - Elections not to be scheduled before the 20th day after direction of election
- Originally scheduled to go into effect in April 2020, but delayed until May 31, 2020
- Unions continue to file petitions for elections, and some offices are ordering mail ballot elections, in lieu of typical in-person voting



- Joint employer standard considers whether a business is an employer of employees directly employed by another employer
 - If yes, both businesses must bargain with the union that represents the jointly employed employees, both are potentially liable for unfair labor practices committed by the other, and both are subject to certain work stoppages (or other economic pressures)
- In February 2020, NLRB used rulemaking procedures to overturn Obama-era case, Browning-Ferris (2015)
- Current rule:
 - Must have “substantial direct and immediate control” over one or more essential terms and conditions of employment
 - Essential terms include: wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction
 - Indirect control or a reservation of rights to control, without more, is no longer enough to establish joint employer status

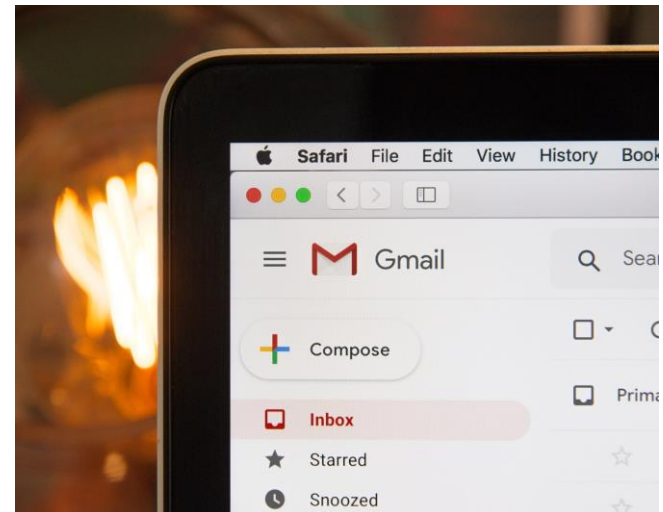
Apogee Retail, 368 NLRB No. 144 (December 17, 2019)

- Board analyzes workplace rules using a three-category approach: (1) those that are generally lawful; (2) those requiring individualized scrutiny, and (3) those that are unlawful to maintain
- A rule requiring employees to keep ongoing workplace investigations confidential is now a Category 1 rule, meaning generally lawful
- A workplace rule extending confidentiality after the investigation concludes is now a Category 2 rule, meaning employer must have a legitimate reason to extend the requirement in that particular case



Caesars Entertainment, 368 NLRB No. 143 (December 17, 2019)

- Board returned to prior rule that employers may prohibit use of company email for non-business purposes, including union organizing
 - Rule must be non-discriminatory, meaning cannot permit some non-work use but prohibit union-related use
 - Left open a “rare” exception for cases where employees have no other reasonable means of communication



Valley Hospital Medical Center 368 NLRB No. 139 (December 16, 2019)

- NLRB returned to longstanding rule that dues check-off provisions expire with the CBA
- CBA provisions that are uniquely contractual (e.g., no-strike, arbitration) expire with the contract. For decades, dues check-off was included in this list
- Obama-era Board decision from 2015 briefly reversed this requirement
- Now, employers may lawfully unilaterally cease deducting union dues from its employees' paychecks when a CBA expires

■ Families First Coronavirus Response Act (FFCRA)

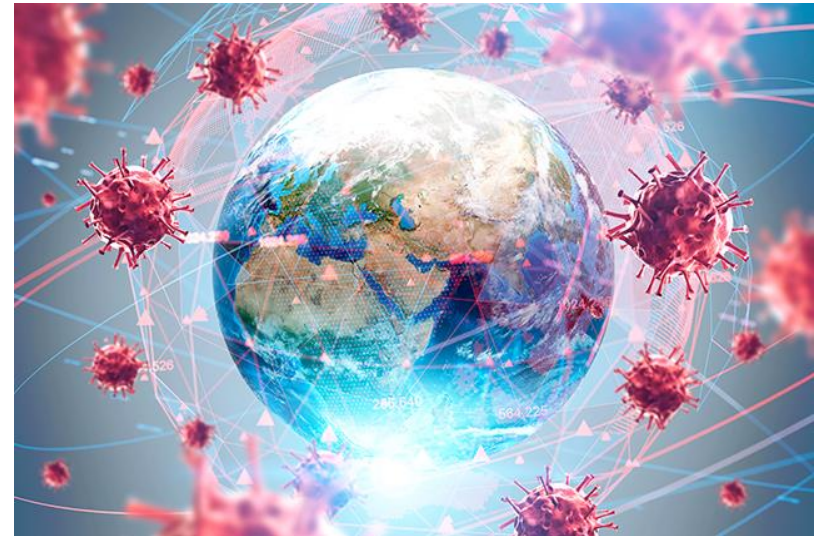
- Up to 2 weeks of paid sick time
- Up to 12 weeks of FMLA leave to care for children out of school/daycare
- Federally funded program, refundable through tax credits
- Applies to employers with < 500 employees

■ CARES Act

- Expands unemployment benefits to traditionally ineligible workers (e.g., self-employed, no wage history)
- Expands eligibility criteria for COVID-19 related reasons
- Provides additional \$600 benefit

■ Considerations under existing laws

- WARN Act
- ADA and other federal and state anti-discrimination statutes





Allison Anderson
Associate

617.832.1204
alanderson@foleyhoag.com



Jonathan Keselenko
Partner

617.832.1208
jkeselenko@foleyhoag.com



Jim Bucking
Partner

617.832.1182
jbucking@foleyhoag.com



Michael Rosen
Partner

617.832.1231
mrosen@foleyhoag.com