

# FYI<sup>®</sup> Roundup

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## Labor and employment developments 2020 – Fall edition

This *FYI Roundup* recaps workplace issues that have been front and center during a year unlike any other. Both the NLRB and DOL redefined joint employment. New federal overtime rules took effect. The DOL revised both the regular rate and overtime regulations and proposed a rule clarifying its independent contractor test under the FLSA. COVID-related leave and other entitlements were extended at both the federal and state level. In a landmark decision, the Supreme Court guaranteed broad workplace protections to LGBT employees.

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### FFCRA

Sweeping legislation enacted to deal with the coronavirus outbreak included new paid leave benefits and enhanced unemployment benefits, among other things.

#### President signs coronavirus bill

On March 18, the president signed the Families First Coronavirus Response Act (FFCRA) into law. The law provides pandemic-related paid leave benefits, enhances unemployment insurance benefits, institutes free COVID-19 testing, and provides certain tax credits to help cover benefit costs.

#### **COVID: six-month recap**

Please see our [September 11 FYI Roundup](#), “COVID-19 and the workplace: a six-month recap,” for more information on key multidisciplinary HR and benefit developments surrounding the pandemic.

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### Coronavirus bill provides new employee paid leave benefits

On March 14, the U.S. House of Representatives passed the Families First Coronavirus Response Act (H.R. 6201) in response to the spread of the coronavirus across the country. The bill includes, among other things, provisions relating to paid leave benefits.

### DOL revises FFCRA paid leave regulations

Revised regulations on the FFCRA's paid leave provisions clarify workers' rights and employers' responsibilities in light of a recent federal court ruling that found certain portions of the original regulations invalid.

### DOL issues back-to-school guidance on paid leave and unemployment benefits

On August 27, the DOL clarified the circumstances under which working parents may be eligible for FFCRA leave when their children start the new school year. Separately, it addressed the availability of unemployment benefits for students' caregivers as schools reopen.

### DOL issues FFCRA guidance for government contractors

On August 3, the DOL issued guidance for employers with federal contracts covered by the McNamara-O'Hara Service Contract Act or the Davis-Bacon Act on complying with the FFCRA. Q&As clarify government contractors' pay obligations to employees who take leave under its emergency paid sick leave and expanded family and medical leave provisions.

### DOL updates return-to-work guidance under the FFCRA

On July 20, the DOL's Wage and Hour Division (WHD) provided additional guidance on return-to-work issues under the FFCRA. New Q&As highlight certain reinstatement obligations, leave entitlements, and child care issues employers may have to navigate when bringing employees back from leave or furlough.

### DOL issues FFCRA guidance on camp closures

DOL guidance confirms that emergency paid leave under the FFCRA is available to employees who are unable to work due to COVID-related summer camp and enrichment program closures or cancellations.

### DOL issues guidance on paid leave benefits under Families First Coronavirus Response Act

The DOL's first round of guidance on the paid sick leave and paid family and medical leave provisions of the FFCRA addresses critical questions for employers, such as how to determine whether they are subject to the new leave requirements, how to count hours for part-time employees, and how to calculate the wages employees are entitled to under the new law.

## Return-to-work guidance

OSHA and the EEOC have issued guidance on an ongoing basis that focuses on reopening workplaces and bringing employees back to work safely.

### EEOC updates COVID-19 guidance

The EEOC has updated guidance on COVID-19 and the ADA, Rehabilitation Act, and other EEO laws, adding new Q&As that focus on testing and screening, disability-related inquiries, confidentiality of medical information and reasonable accommodations.

### EEOC issues COVID-19 return-to-work and antibody testing guidance

Supplemental guidance issued by the EEOC provides several critical clarifications on the ADA, accommodations, harassment and other COVID-19 related issues. It confirms that employers may not require antibody testing before allowing employees to re-enter the workplace.

### OSHA issues guidance on returning employees to work

OSHA return-to-work guidance for nonessential businesses provides a useful framework for reopening, focusing on the need for employers to incorporate basic hygiene, social distancing, workplace controls and flexibilities, and employee training into their return-to-work strategies.

## Paycheck Protection Program

In response to the COVID-19 crisis, the CARES Act created the Paycheck Protection Program (PPP), providing short-term loans to help small businesses avoid layoffs.

### Paycheck Protection Program loan application deadline extended

On July 4, the president signed a bill extending the deadline for small businesses to apply for short-term loans under the PPP from June 30 to August 8.

### Loan forgiveness expanded under the Paycheck Protection Program

The PPP provides short-term loans for small businesses to maintain payroll. The Paycheck Protection Program Flexibility Act of 2020 amends the Small Business Act and the CARES Act to make it easier for PPP loan recipients to qualify for loan forgiveness.

## Wage and hour

The DOL revised both the regular rate and overtime regulations, proposed a rule clarifying its independent contractor test under the Fair Labor Standards Act (FLSA), and clarified employer pay obligations during the COVID-19 emergency. California imposed new hiring and pay obligations on employers as the EEOC's expanded pay data collection for 2017 and 2018 finally ended.

### New federal overtime rules take effect. Who's exempt now?

The DOL's new overtime rule increased the annual salary thresholds for the executive, administrative, and professional exemptions from the FLSA's minimum wage and overtime requirements, effective January 1.

### DOL updates regular rate of pay regulations

The WHD issued a final rule to clarify and update the rules for determining employees' regular rate of pay under the FLSA, effective January 15.

### Proposed DOL rule clarifies FLSA's independent contractor test

On September 25, the DOL issued a proposed rule to clarify when a worker is an employee covered by the FLSA or an independent contractor. It aims to simplify worker classification by adopting an economic reality test that focuses on two core factors.

### DOL updates guidance on COVID-19 and the Fair Labor Standards Act

Updated guidance from the WHD in the form of Q&As highlights common telework, hazard pay, and exempt status issues employers may encounter when continuing or resuming operations during the COVID-19 emergency.

### DOL issues telework pay guidance in response to COVID-19

The WHD released Field Assistance Bulletin 2020-5 clarifying employers' obligations under the FLSA to track — and properly pay for — the hours of compensable work performed by nonexempt employees working remotely due to the COVID-19 emergency or otherwise.

### One more time – 9<sup>th</sup> Circuit rules salary history cannot justify pay gap

The San Francisco-based 9<sup>th</sup> Circuit Court of Appeals ruled that an employer cannot use prior salary history — alone or in combination with other factors — to justify a wage differential between male and female employees under the Equal Pay Act. The ruling impacts employers with operations in Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington.

### It's in the bag! California employers on the hook for security checks

On February 13, the California Supreme Court held that the time nonexempt employees spend waiting for, and undergoing, mandatory onsite bag checks or other security screenings is compensable as “hours worked” under state law.

### EEO-1 pay data collection ends

A federal judge ruled that the EEOC's collection of EEO-1 component 2 pay data for 2017 and 2018 is complete, allowing the reporting portal to close.

## Worker classification

New Jersey enacted new laws expanding employer liability for misclassifying workers as independent contractors.

### New Jersey targets worker misclassification

On January 20, New Jersey Governor Phil Murphy signed six bills into law aimed at reducing the use of contractors. Among other things, the new laws expand potential liability and impose harsher penalties for misclassifying workers as independent contractors.

### New Jersey issues worker misclassification notice for posting

On May 20, New Jersey's Department of Labor and Workforce Development issued a mandatory worker misclassification notice to be conspicuously posted in each of the employer's workplaces.

## State/local leave mandates

Employers faced new obligations as New York and Colorado enacted new paid sick leave laws. New Jersey finalized rules governing the state's Earned Sick Leave Law, and Pittsburgh's Paid Sick Days Act finally took effect after a nearly four-year legal battle.

### New York employers: Get ready for the state's new paid sick leave law

New York's new paid sick leave law will take effect on September 30 and allow employees to begin using accrued time on January 1, 2021. Benefits are in addition to COVID-19 leave benefits for employees under quarantine or isolation orders.

### NYC amends paid sick leave law

New York City amended its Earned Safe and Sick Time Act effective September 30. While most of the modifications are intended to better align NYC's law with New York state's recently enacted sick leave law, they also imposed new obligations on NYC employers.

### New York City updates safe and sick time model notice

On October 27, the New York City Department of Consumer and Worker Protection issued an updated version of its model "Notice of Employee Rights: Safe and Sick Leave" under the city's Earned Safe and Sick Time Act. Employers must conspicuously post the model notice at their place of business and provide the notice to current employees by January 1, 2021 and to each new hire at the commencement of employment.

### New York mandates paid sick leave for employees under quarantine or isolation orders due to COVID-19

On March 18, New York enacted legislation requiring employers to provide sick leave and job protection to employees who are subject to mandatory or precautionary quarantine or isolation orders

by New York state or other authorized entity due to COVID-19. The amount of leave that must be provided and whether it is paid or unpaid depends on the employer's size and net income.

### New York releases guidance on COVID-19 leave

FAQs posted by the state clarify employer obligations to provide sick leave and job protection to employees under quarantine or isolation orders as a result of COVID-19 and expanded employee eligibility for state paid family leave and disability benefits.

### Colorado enacts paid sick leave law

On July 14, Colorado enacted the Healthy Families and Workplaces Act, generally requiring Colorado employers to provide employees with up to 48 hours of paid sick leave per year beginning in 2021. In addition, employers are subject to a temporary mandate that extends COVID-related paid sick leave protections to employees not previously covered by the federal FFCRA.

### Complying with Colorado's new COVID-19 paid sick leave mandate

Guidance from the Colorado Department of Labor and Employment clarifies employer obligations under the COVID-19 provisions of the state's new Healthy Families and Workplaces Act.

### New Jersey finalizes paid sick leave rules

The New Jersey Department of Labor and Workforce Development released final rules governing the New Jersey Earned Sick Leave Law, which went into effect in 2018.

### Pittsburgh's Paid Sick Days Act to take effect at long last

In August 2015, Pittsburgh passed an ordinance requiring businesses to provide paid sick leave benefits for employees working within the city. Following a nearly four-year legal battle, Pittsburgh's Paid Sick Days Act will take effect on March 15.

## FMLA update

Updated DOL guidance and new FMLA forms clarify various leave administration issues.

### DOL offers additional COVID-19 guidance under the FMLA

Updated COVID-19 guidance from the WHD addresses qualifying for — and returning to work from — FMLA leave. Q&As focus on telemedicine and testing issues employers face in managing coronavirus-related leaves.

### DOL issues new FMLA forms

On July 16, the WHD issued new model forms for employers to use when administering employee leave under the FMLA and invited public comment on the effectiveness of current FMLA regulations. The revised model notice of rights, certification, and designation forms were effective immediately.

## New reemployment rights

The ongoing trend toward localizing employment laws created new reemployment rights, placing new hiring restrictions on San Francisco employers.

### San Francisco ordinance creates new reemployment rights

The San Francisco Board of Supervisors passed an emergency ordinance requiring employers with 100 or more employees to first offer reemployment to workers laid off for COVID-related reasons before rehiring for the same or similar jobs. The ordinance, which took effect on July 3, was to expire after 60 days but was extended through November 2.

### San Francisco issues guidance on new reemployment rights

San Francisco's "Back to Work" Emergency Ordinance requires employers that employ at least 100 employees to offer reemployment to workers laid off for COVID-related reasons before rehiring for the same or similar jobs. On August 7, the San Francisco Office of Economic and Workforce Development issued guidance on the ordinance along with FAQs and form notices employers may use to satisfy related reporting requirements.

## Nondiscrimination protections

The Supreme Court ruled that employment discrimination based on lesbian, gay, bisexual, and transgender (LGBT) status is unlawful.

### Supreme Court bars discrimination against LGBT workers

In a landmark ruling, the Supreme Court expands the definition of "sex" under Title VII of the Civil Rights Act of 1964 to include sexual orientation and gender identity, extending broad workplace protections to LGBT employees.

## Joint employment

Both the NLRB and DOL redefined joint employment through rulemaking for purposes of the NLRA and FLSA respectively.

### NLRB issues final joint employer rule

On February 26, the NLRB issued a final rule governing determination of joint employer status under the National Labor Relations Act. Effective April 27, the rule restores the direct and immediate control standard that had been in place for several decades prior to the 2015 Browning-Ferris decision.

### DOL narrows FLSA's joint employer standard

On January 16, the DOL issued a final rule clarifying its interpretation of joint employment under the FLSA and establishing a four-factor balancing test for determining whether two or more entities are

jointly liable for minimum wage and overtime pay violations. (Note: On September 8, part of the rule was invalidated by a New York federal judge. The Department of Justice filed a notice of appeal on November 6.)

## New employee benefits

While major cities such as San Francisco, New York and Washington, D.C. have required employers to provide programs that encourage employees to use public transit or carpool for some time, the first statewide mandate became operative this year.

### New Jersey employers must offer pretax transit benefits by March 1

Last year, New Jersey became the first state to enact a law requiring employers to offer a pretax transportation fringe benefit. The transit benefits law, which took effect upon enactment, is currently slated to become operative on March 1.

### New Jersey to require employers to provide severance pay

On January 21, New Jersey became the first state to mandate severance pay for employees impacted by plant closings, transfers, or mass layoffs. The mandate, which applies to businesses that lay off 50 or more employees within a 30-day period, was to start on July 19, but has been postponed during the health emergency.

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