



**Buchanan  
Ingersoll &  
Rooney PC**

# **Class Action Trends in 2020**

## ***An Ounce of Prevention Employers Can Take Right Now***

August 6, 2020

**ACC** Association of  
Corporate Counsel  
— NATIONAL CAPITAL REGION —



# Introductions



# Meet the Panelists



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**Amy Miller**  
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**John Cunningham**  
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# Agenda

- Overview
- Class Action Insurance
- Class Action Trends, Cases and Best Practices
  - Website Accessibility
  - Wage & Hour and New Virginia Employment Laws
  - ERISA Investment Plan Fees & Expenses
  - COVID-19-Related Concerns
    - Failure to Provide WARN Act Notices
    - Workplace Safety
- Corporate Compliance Checklist

The background of the slide features a series of concentric, glowing circles that create a tunnel-like effect, drawing the eye towards a bright light source at the center. The circles are composed of many thin, overlapping lines, giving a sense of depth and motion. The overall color palette is dark, with the light source providing a strong contrast.

# Overview



# Four Key Class Action Trends in 2020

1. Website Accessibility
2. Wage & Hour/New Virginia Employment Laws
3. ERISA Investment Plan Fees and Expenses
4. COVID-19-Related Concerns

# Proactive Mitigating Measures

- Effective Policies and Procedures
- Insurance Coverage
- Corporate Compliance/Proactive Risk-Assessment Strategies
  - Reduces legal spend
  - Reduces government scrutiny/investigations

## Plaintiffs' Bar

- \*Initiate suits across the nation, regardless of geography or market
- \*Strategic and coordinated approach among multiple plaintiffs' firms
- \*Defendant organizations are carefully targeted, researched and vetted before Plaintiffs file suit (or send initial demand letter)





# **Class Action Insurance Covering Bases Up Front**

# Class Action Insurance Coverage

- Do not assume class actions are covered
  - Check for exclusions of class actions or collective actions
  - Ensure policy covers scope of activities
  - Consider providing notice of events/circumstances for risk of claims
- Negotiate favorable terms at policy renewal
  - Watch out for added exclusions
  - Negotiate narrowest scope possible of any exclusion



# Sources of Class Action Insurance Coverage

- Commercial General Liability
  - Avoid “continuous progressive injury” exclusions
  - Avoid limited event coverage endorsements
  - Include supplementary payment provision to cover court costs/fees
- Director & Officers Liability
  - Negotiate elimination of “prior acts exclusions”
  - Negotiate “tail coverage” for expiring policy period
- Employment Practices Liability
  - Median limits
  - Typical practices – purchase coverage for big litigation
  - Purchase wage and hour coverage endorsements

# Sources of Class Action Insurance Coverage

- Errors and Omissions Liability
  - Avoid or limit exclusions for contract-related claims
- Privacy & Cyber Liability
  - Consider requiring vendors to obtain and verify coverage
  - Consider becoming additional insured under vendor policies
  - If additional insured, remove insured v. insured exclusion



# Structure Settlement to Maximize Coverage

- Negotiate settlement to frame case in terms of claims within the scope of coverage
- If contract liability exclusions cannot be avoided or narrowed, describe settled claims as torts, not as breaches of contract or warranty
- Characterize plaintiff demands as a “claim” and memorialize any written requests for damages
- Avoid describing dispute as “informal”

# Structure Settlement to Maximize Coverage

- Aggregate any monetary settlement payment to avoid argument that each class member's share results from a separate occurrence
- Do not use the terms "penalty" or "fine" in describing a monetary settlement payment
- Limit the use of non-cash settlements that insurers could argue are not "damages" compensable under the policies



The background is a dark, abstract composition. It features several vertical, glowing light streaks of varying thickness and brightness, creating a sense of depth and movement. A prominent diagonal line, possibly a light beam or a structural element, cuts across the lower-left portion of the frame. The overall aesthetic is modern and technological.

# Key Class Action Trends

A grayscale photograph of a hand typing on a keyboard, with the focus on the fingers and keys. An orange rectangular overlay is positioned in the lower right, containing the text '#1 Website Accessibility' in white.

# **#1 Website Accessibility**



# Website Accessibility Trends

- **Lawsuit influx:** Federal suits tripled in 2018, from 814 in 2017 to 2,258 (SHRM)
- **Basis of suit:** Not accessible to the blind or visually impaired
- **Industries:** Many industries impacted, including retail, hospitality, education, and streaming services like Hulu
- **WCAG standards:** Only 49% reported that their recruiting websites and intranets were compliant with the (WCAG) by the World Wide Web Consortium
- **Job advertisements:** Lawsuits involving discriminatory career sites and open job advertisements have slowly followed website accessibility suits

# Website Accessibility Key Cases

*Robles v. Domino's Pizza, LLC*, 913 F.3d 898 (9th Cir. 2019)

## Issue

- Plaintiff, a blind individual, alleged that Domino's website violated the ADA because its website was not compatible with Plaintiff's special computer software that verbally reads the contents of websites

## Holding

- The Ninth Circuit reversed the district court's decision to dismiss the action pending resolution by an administrative agency and reversed finding that holding Domino's liable would violate its Fourteenth Amendment DP rights
- Lack of specific guidelines does not alleviate a covered entity's obligation to comply with the ADA and is not a violation of Domino's Fourteenth Amendment due process rights



# Website Accessibility Key Cases

*Markett v. Five Guys Enterprises LLC*, No. 17-cv-788-KBF, Dkt. 33 (SDNY July 21, 2017)

## Issue

- Plaintiff, a legally blind individual, filed a claim on behalf of herself and a nationwide class alleging Five Guys' website violated Title III of the ADA because of "access barriers" that prevented blind individuals from completing online orders

## Holding

- SDNY denied Defendant's motion to dismiss because websites and applications are covered by the ADA
- Claims will not be dismissed for mootness simply because a defendant is in the process of updating website accessibility but has not yet fully integrated accommodations to the public

# Website Accessibility Key Cases

## *Facebook Ad Settlements*

### Issue

- Plaintiffs filed EEOC charges, alleging that Facebook permitted employers to post advertisements targeting certain individuals and excluding others based on age and sex
- Because Facebook tracks the data of users — such as age, race, and gender — employers are provided this information and given the option to select a population that can view the job advertisement

### Posture

- Claims are still pending against companies named in the suit that allegedly placed discriminatory advertisements on Facebook
- Charge of discrimination found at: <https://www.aclu.org/legal-document/facebook-eeoc-complaint-charge-discrimination>

# Website Accessibility Best Practices

- **WCAG 2.0:** Web Content Accessibility Guidelines (WCAG) 2.0 are the leading industry standards for website functionality and access
- **Screen reader compatibility:** Most operating systems today include built-in screen readers that employers can use to test their websites
- **Alternative text for images:** Ensure websites include adequate descriptions capable of being relayed by a screen reader
- **Color contrast:** Test design elements of website for proper color contrast using: (1) **chromatic vision simulator** (2) **VisionSim**
- **Keyboard accessibility:** Ensure that persons with disabilities can use your website and fill in forms without a mouse



# Website Accessibility Best Practices

- **Controls for moving content:** Avoid use of animations, slideshows, videos, with excessive blinking (which can induce seizures); include stop/pause button for users with visual-processing or cognitive disabilities
- **Captions:** Ensure videos have captions for hearing-impaired users
- **Controls for timed content:** Include options to turn off or extend time-limited pages
- **Labeled forms:** i.e. check boxes, data fields and option buttons
- **Accessible downloadable files:** Add all content directly to website in HTML

# Website Accessibility Best Practices

- **Plain language:** Contact info for technical support and other accommodations should be clearly listed
- **Drop-down menus:** Employers should avoid excluding certain groups in available drop-down menus (e.g., drop down only goes up to a certain age) when utilizing third-party platforms like Facebook and LinkedIn
- **Job criteria:** Employers should avoid attempting to define a class of potential applicants based on age, race, or sex. Instead, employers should clearly define the job criteria and qualifications needed for an applicant to be considered





# **#2** Wage & Hour New Virginia Employment Laws



# Wage & Hour Trends

- **Settlements:** \$449.05 million in wage and hour class action settlements in 2019, up nearly 50% from \$253 million in 2018
- **Plaintiffs' bar:** Plaintiff's bar prefers FLSA litigation because it is less difficult, more cost-effective and more predictable
- **Certification:** Plaintiff's bar can convert filings readily into certification orders and create the conditions for settlement over shorter periods of time
- **Plaintiff-friendly circuits:** High predominance of cases brought against employers in "plaintiff-friendly" jurisdictions, such as the Second and Ninth Circuits. Additional rulings in 2019 from the Fifth and Sixth Circuits favor workers over employers in conditional certification rulings
- **Awareness:** Ongoing migration of skilled plaintiffs' class action lawyers into the wage and hour sector and increase in lawsuits has contributed to heightened awareness of how employees are paid

# Wage & Hour Trends

- **Technology:** Pervasive influence of technology opened the doors for higher levels of advertising by the plaintiff's bar, increasingly alerts employees to potential
- **Social media:** Social media allows for virtual commercialization of wage and hour cases through digital technology
- **State court class actions:** Larger number of state court class actions in states with longer statutes of limitation: California, Florida, Illinois, Massachusetts, New Jersey, New York and Pennsylvania
- **Independent contractors:** Independent contractor misclassification claims more prevalent in 2019 than in previous years

# Wage & Hour Key Cases

*Perez v. Allstate Ins. Co.*, No. 11-cv-1812-AMD-AKT, Dkt. 193 (E.D.N.Y. July 2, 2018)

## Issue

- Misclassification exempt/non-exempt case

## Posture

- The litigation, beginning in 2011, is currently pending approval of a joint proposed settlement in the amount of \$3.85 million, not including attorneys' fees and costs, plus an additional \$50,000 for each named plaintiff asserting retaliation claims. See *Perez v. Allstate Ins. Co.*, 2019 U.S. Dist. LEXIS 59792 (E.D.N.Y. Mar. 29, 2019) (granting preliminary approval of proposed settlements)



# Wage & Hour Key Cases

*Van Dusen v. Swift Transportation Co.*, No. 10-cv-899 (D. Ariz. April 18, 2019)

## Issue

- Classification of Employees v. Independent Contractors

## Posture

- \$100 million settlement preliminarily approved by district court where plaintiffs, *drivers for defendant, were allegedly misclassified as independent contractors* and not paid overtime and job-related expenses

# Wage & Hour Key Cases

*Roberts v. C.R. England Inc.*, No. 12-cv-302 (D. Utah July 9, 2019)

## Issue

- Plaintiffs alleged that Defendant induced them to take driving courses with lure of full-time employment and high salaries. In reality, successful candidates were hired as independent contractors

## Posture

- Final approval granted for \$98.8 million settlement

# New Virginia Employment Laws

- **Increased protections for Virginia workers**

- New Virginia laws increase protections for employees and pending bills may open state courts to class actions

- ***More Damages for Unpaid Wages* (Va. Code § 40.1-29)**

- Up to 3x amount of unpaid wages, attorneys' fees and costs, and interest.
- Treble damages available for willful conduct

- ***Retaliation for Wages* (Va. Code § 40.1-33.1)**

- Code now allows for an employee to (1) get job back and (2) recover up to 2x the amount of lost wages if plaintiff can prove retaliatory termination



# New Virginia Employment Laws

- **Misclassification** (*Va. Code §§ 40.1-28.7:7; 40.1-33.1*)
  - Heightened penalties including: (1) lost wages and benefits; (2) expenses incurred covered by employer-provided insurance; (3) other lost compensation; and (4) attorneys' fees and costs
  - Additionally tax commissioner may seek civil penalties if the misclassification resulted in failure to pay appropriate taxes
- **Non-Competition Agreements** (*Va. Code § 40.1-28.7:8*)
  - Employees that earn less than the average weekly salary in Virginia are now exempt from such agreements

# New Virginia Employment Laws

- ***Discrimination*** (*Va. Code § 2.2-3900*)

- “Virginia Values Act,” discrimination lawsuits expanded to cover all employers with 15 or more employees
  - Coverage for gender identity, sexual orientation, and veteran status
  - Traits associated with race, such as hair texture, type, and styles
  - Damages for compensatory damages, punitive damages (\$350,000 cap likely still applies), and attorneys’ fees and costs now allowed (the previous law only allowed for back-pay and costs)
  - Accommodations must now be provided for pregnancy, childcare, and related medical conditions

*NOTE: the new law allows women to sue an employer directly for pregnancy-related discrimination rather than exhausting administrative remedies*

# New Virginia Employment Laws

- ***Retaliation*** (*Va. Code § 40.1-27.3*)

- Whistleblower statutes have been amended to cover both internal and external reports of state and federal violations
- Protected activity now includes
  1. Internal reports to supervisors/managers of violations of state/federal law
  2. Receiving request from government agency to participate in investigation
  3. Refusing to engage in a criminal act
  4. Providing info to a government agency or participating in an investigation, including by presenting testimony at a hearing
- Damages include
  1. Job reinstatement
  2. Lost wages, benefits, and compensation
  3. Interest
  4. Reasonable attorneys' fees and costs



# Wage & Hour Best Practices

- **Self-audits**

- Conduct regularly with assistance of legal counsel

- **Employee classifications**

- Review based on job descriptions, exempt and non-exempt classifications

- **Independent contractors**

- Assess work

- **Exempt employees**

- Avoid questioning about past overtime wages

- **Reclassification**

- Analyze primary duties to determine if appropriate

# Wage & Hour Best Practices

## ■ Time keeping

- Accurate and up-to-date systems to track hours worked and overtime hours

## ■ Meal breaks

- Avoid encouraging work-related tasks while off the clock or on break
- Ensure that all work functions are completed by the time the employee begins a meal break
- Properly document hours worked, rate of pay, pay periods, overtime hours, and overtime rates on all pay stubs provided to employees

# New Virginia Employment Laws Best Practices

- **Train supervisors and managers**-e.g., that employer agents may be personally liable for wrongdoing
- **Educate** HR and other company leaders on new protocols for claims filed with the Virginia Division of Human Rights (administrative forum for employee complaints in Virginia)
- **Amend employment handbook** and relevant policies and procedures
- **No retaliation** against participating in government investigations, including providing testimony or evidence
- **Disability accommodation** includes pregnancy, child care, and related medical issues



# New Virginia Employment Laws Best Practices

- **EEO laws:** Train supervisors and managers (as top priority) on the new EEO laws and additional protected classes to help ensure compliance (followed by employee training)
- **Update signage:** to include the new protected classes
- **Employee classification:** re-evaluate independent contractors
- **Disability status training:** Provide HR or ADA coordinators training on the new disability statuses
- **Non-compete agreements:** Revise company protocol on non-competition agreements
  - For employees that earn less than the Virginia average per week and who are subject to a pre-existing non-competition agreement, consider providing notice to the employee that the agreement is no longer binding



# **#3** ERISA Investment Plan Fees & Expenses

# ERISA Investment Plan Trends

- **Increase in settlement values** for ERISA class action settlements: \$376.35 million in 2019 from \$313.4 million in 2018
- **Better chance of denial class certification** in the context of ERISA welfare plans and ERISA defined contribution pension plans
- **Biggest issues in 2019:** defined contribution plan litigation (401k and 403b plan fees) & litigation concerning the appropriateness of the mortality tables used to calculate alternative forms of benefits paid from defined benefit plans
- **Reasonableness of fees and expenses**
- **Increase in fiduciary duties and implementation of options provided to employees cases**

# ERISA Investment Plan Trends

- Three Supreme Court cases in 2020 to watch
  1. ERISA's three-year "actual knowledge" statute of limitations
  2. When plaintiffs must plead to state an ERISA "stock drop" claim
  3. Whether participant in a defined benefit plan has standing to challenge the plan's investments if the plan remains fully funded and thus able to pay out plan benefits
- Increase in cases involving fiduciary duties and implementation of options provided to employees



# ERISA Investment Plan Key Cases

*Young Cho v. Prudential Ins. Co.*, No. 2:19-cv-19886-JMV-SCM, Dkt. 16 (D.N.J. Jan. 24, 2020)

## Issue

- Plaintiff alleged the defendant breached fiduciary duties and violated Employment Retirement Income Security Act of 1974 by offering enrollees of its 401(k) plan investment fund opportunities managed by its affiliates

## Defenses

- Inference of fiduciary breach does not arise when diverse investment options with varying levels of risk and return are offered under plan, as long as the options are reasonable and not offered to flood an enrollee with dozens of expensive but low-performing investments
- Plaintiffs should not be allowed to cherry pick underperforming investments in order to plead that a fiduciary acted imprudently

# ERISA Investment Plan Key Cases

*Dorman v. Charles Schwab Corp.*, 934 F.3d 1107 (9th Cir. 2019)

## Issue

- Plaintiffs brought ERISA claims; Defendant moved to compel arbitration

## Holding

- Ninth Circuit reversed the district court's decision to deny the motion to compel and remanded case for mandatory arbitration
- Ninth Circuit rejected the district court's reasoning that the claims were not subject to arbitration because (1) the agreement was added to the plan after plaintiff ended his participation, and (2) the plaintiff was suing on behalf of the plan, not individually, and could not waive rights belonging to the plan

# ERISA Investment Plan Key Cases

*Tholes v. U.S. Bank N.A.*, 2020 U.S. Dist. LEXIS 3030 (S. Ct. June 1, 2020)

## Issue

- ERISA claim for breach of breaching the duty of loyalty and poorly investing the plan's assets
- Defendant moved to dismiss for lack of standing

## Holding

- Supreme Court held that members of a defined-benefit plan, unlike members of a trust or defined-contribution plan, lack standing to sue under Article III because they do not have a stake in the lawsuit

# ERISA Investment Plan Key Cases

*Retirement Plans Committee of IBM v. Jander*, 140 S. Ct. 592 (2020) (per curiam)

## Issue

- Plaintiffs alleged that fiduciaries of IBM's retirement plan breached the fiduciary duty of prudence by investing in IBM stock that was artificially inflated and overvalued

## Holding

- Because the Second Circuit did not specifically consider the question whether ERISA can impose a duty to disclose where federal securities law does not, SCOTUS also declined to address the question. Further, SCOTUS noted that the SEC had not weighed in on this issue, and stated that its view “may well be relevant” in discerning ERISA duties in the ESOP context



# ERISA Investment Plan Best Practices

- **Match generously:** use of dollar-per-dollar matching of more than 3% of pay increased to 35.8% in 2019
- **Go automatic:** 61.2% of plans use automatic enrollment to boost employees' retirement savings. 75% of automatic-enrollment plans have an auto-escalation feature that increases plan participants' default deferral rates over time
- **Shrink wait times:** Nearly 50% of largest employer plans allow for immediate eligibility; even among the smallest employers, more than 33% of plans allow workers to become immediate participants. Nearly 40% of plans provide immediate vesting for matching contributions

# ERISA Investment Plan Best Practices

- **Get suggestive:** Nearly 33% of plans provide a suggested savings rate for participants, with more than 4-in-10 companies suggesting a rate of 10% or more
- **Play catch-up:** The number of eligible participants ages 50+ making additional catch-up contributions of up to \$6,000 has increased close to 30%
- **Use apps:** Use of mobile technology to provide plan services to participants has doubled since 2014 and is now used by 43.6% of companies

# ERISA Investment Plan Best Practices

- **Binding arbitration agreements** (where permitted)
- **Establish process** for evaluating and selecting funds
- **Multiple investment options** to Plan participants
- **Reasonable mix and range** of investments
- **TPAs:** Use third-party plan administrators
- **Compare fees** and charges
- **Monitor performance**



A detailed, grayscale microscopic image of COVID-19 virus particles. The particles are spherical with a textured surface and numerous spike-like projections (glycoprotein spikes) extending from them. They are scattered across the frame, with some appearing larger and more prominent than others. The background is dark and slightly out of focus, emphasizing the virus particles.

**#4**

# COVID-19-Related Concerns

## Failure to Provide WARN Act Notices

### Workplace Safety



# COVID-19 WARN Act Trends

- As companies grapple with the economic **impact of COVID-19**, many have had to furlough or lay off employees
- Wave of class actions brought by former employees who allege that they were laid off without the requisite **WARN Act notices**
- Expecting class action activity to grow in the coming months as COVID-19-related legal issues impact more businesses and organizations across industry sectors

# COVID-19 WARN Act Key Cases

*Benson v. Enterprise Holdings, Inc.*, No. 6:20-cv-00891 (M.D. Fla. May 27, 2020)

## Issue

- Plaintiffs claim they were not given proper notice under the WARN Act

## Posture

- Response to complaint not yet filed

# COVID-19 WARN Act Key Cases

*Scott v. Hooters III, Inc.*, No. 8:20-cv-00882 (M.D. Fla. April 16, 2020)

## Issue

- Plaintiffs allege they did not receive *any* advance notice of a layoff and that defendant could have sought a PPP loan but instead elected to conduct a mass layoff

## Posture

- Response to complaint not yet filed

# COVID-19 WARN Act Best Practices

- **Layoffs:** give as much notice as possible in writing
- **Notice less than 60 days** before the layoff/plant closure: reason for reduced notice period should be explained in detail within notice
- **Temporary layoff:** consider issuing a WARN notice since the future effects of COVID-19 on the employment relationship remain uncertain
- **State mini-WARN acts:** understand any state-specific requirements in locations where employees are located, often have lower thresholds for “employment loss,” require longer notice periods, and require additional information be included in the notice.
- **Lack of precedent:** Unclear how WARN Act affirmative defense – unforeseeable business circumstances, natural disasters, and faltering companies will apply in these suits



# COVID-19 Workplace Safety Trends

- **Retail, leisure, food service and production, and hospitality** sectors, face class actions for conducting business as usual despite knowledge of increased risk of COVID-19
- Lawsuits allege that companies and other organizations **failed to take adequate steps to maintain a safe work environment**
- Future suits could allege that businesses were **too quick to reopen and/or do not take adequate steps to protect their employees**
- **New Virginia COVID-19 Regulations**

# COVID-19 Workplace Safety Key Cases

*Rural Community Workers Alliance v. Smithfield Foods, Inc.*, No. 20-cv-06063-DGK  
(W.D. Mo. April 23, 2020)

## Issue

- Alleged that defendant failed to provide a safe workplace during the pandemic

## Holding

- Court granted the defendants' motion to dismiss, finding that the primary-jurisdiction doctrine applies and explaining that a determination by OSHA will ensure uniform application of joint guidance it issued in conjunction with the USDA regarding safety practices for meat processing plants

# COVID-19 Workplace Safety Key Cases

*Massey, et al. v. McDonald's Corporation*, No. 2020CH04247 (Il. Cook Co., May 19, 2020)

## Issue

- Plaintiffs alleged that Defendant failed to take adequate safety precautions or provide sufficient PPE

## Posture

- Circuit court denied a motion to dismiss, rejecting defendant's argument that federal, state, and local regulatory agencies have primary jurisdiction over worker safety and public health

# COVID-19 Workplace Safety Best Practices

## ■ Social Distancing

- **Six feet zones:** Demarcate flooring in six-foot zones to encourage employees and customers to remain at least six-feet apart
- **Directional signs:** Post in hallways and corridors to restrict movement
- **Signage:** Remind employees to remain six-feet apart
- **Limit number of people** permitted in elevators or other confined spaces
- **Masks:** Require employees to wear masks in public and/or highly-trafficked locations
- **Prohibit congregation** of employees in lunch rooms, conference rooms etc.
- **Physical barriers:** If employees work in an open space environment, install physical barriers such as clear plastic sneeze guards (if feasible)
- **Limited access:** Limit customers' and the public's access to the workplace



# COVID-19 Workplace Safety Best Practices

- **Telework:** Encourage employees positioned to telework to continue to work from home to limit workplace crowding
- **Limit travel:** Place documented limits on non-essential business travel
- **Hygiene:** Provide soap, water, hand sanitizer, and paper towels to employees and encourage frequent handwashing
- **Cleanliness:** Target high-traffic areas for increased deep cleaning
- **Employee self-monitor:** for COVID-19 symptoms and advise them to stay home if they are ill
- **Establish illness protocol:** If ill employee cannot leave workplace, provide designated area where that individual can self-isolate

# COVID-19 Workplace Safety Best Practices

- **Follow CDC guidance** for discontinuing self-isolation and returning to work after testing positive for COVID-19
- **Symptoms-based strategy:** Persons who tested positive for COVID-19 who had symptoms and were directed to care for themselves at home may end self-isolation when: “at least 3 days (72 hours) have passed since recovery defined as resolution of fever without the use of fever-reducing medications and improvement in respiratory symptoms (e.g., cough, shortness of breath); and, at least 10 days have passed since symptoms first appeared”
- **Testing-based strategy:** Persons who tested positive for COVID-19 who had symptoms and were directed to care for themselves at home may end self-isolation when: fever resolves without the use of medication, and respiratory symptoms improve, and COVID-19 test comes back negative



# **Corporate Compliance Checklist**

# Corporate Compliance Checklist: Website Accessibility

- Be aware that Web Content Accessibility Guidelines (WCAG) 2.0 are the leading industry standards for website functionality and access
- Take advantage of the fact that most operating systems today include built-in screen readers that employers can use to test their websites
- Ensure that persons with disabilities have the capability to use your website and fill in forms without a mouse
- Avoid use of animations, slideshows, videos, with excessive blinking (which can induce seizures); and include stop/pause button for users with visual-processing or cognitive disabilities
- Explicitly label form fields to tell users that they have encountered a field, explain what type of field it is, and provide additional information cues
- Do not omit certain groups in drop-down menus (e.g., drop down only goes up to a certain age) when using third-party platforms like Facebook and LinkedIn



# Corporate Compliance Checklist: Wage & Hour

- Conduct regular self-audit (with assistance of legal counsel, as necessary)
- Examine employee classifications based on job descriptions and review for exempt and non-exempt classifications
- Assess work done by independent contractors and avoid questioning exempt employees about past overtime wages
- Analyze primary duties to determine if reclassification is appropriate
- Communicate with counsel before implementing changes about legal implications
- Maintain accurate and up-to-date systems to track hours worked and overtime
- Avoid suggesting that employees should perform work-related tasks while off the clock or on break
- Properly document hours worked, rate of pay, pay periods, overtime hours, and overtime rates on all pay stubs

# Corporate Compliance Checklist: New Virginia Laws

- Train supervisors and managers without delay on the new laws and additional protected classes
- Educate HR and other company leaders on new protocols for claims filed with the Virginia Division of Human Rights
- Amend employment handbook and relevant policies and procedures
- Do not retaliate against participation in government investigations
- Be aware that disability accommodations include pregnancy, child care, and related medical issues
- Update signage to include the new protected classes
- Revise company protocols on non-competition agreements
- For employees earning less than the Virginia average per week and subject to a pre-existing non-competition agreement, consider providing notice to the employee that the agreement is no longer binding

# Corporate Compliance Checklist: ERISA Plan Fees & Expenses

- Evaluate use of dollar-per-dollar matching of more than 3% of pay
- Consider using automatic enrollment to boost employees' retirement savings
- Take action to shrink wait times with respect to eligibility and vesting
- Provide a suggested savings rate for participants (more than 4-in-10 companies suggest a rate of 10% or more)
- Integrate mobile technology to provide plan services to participants
- Consider binding arbitration agreements (where permitted) to resolve disputes with plan participants
- Provide multiple investment options to Plan participants with reasonable mix and range of investments
- Use multifunctional third-party plan administrators and monitor performance (duty of prudence)

# Corporate Compliance Checklist: COVID-19-Related Concerns

- For layoffs, provide as much notice as possible (in writing)
- Notice of less than 60 days before the layoff / plant closure should be explained in detail within the notice
- Consider issuing a WARN notice even for temporary layoffs since the future effects of COVID-19 on the employment relationship remain uncertain
- Learn all state-specific requirements in locations where employees are located, as they often have lower thresholds for “employment loss,” require longer notice periods, and require additional information in the notice
- Given the lack of precedent, plan accordingly for uncertainty around how WARN Act affirmative defenses (unforeseeable business circumstances, natural disasters, and faltering companies) may apply in these suits



# Corporate Compliance Checklist: COVID-19-Related Concerns

- Demarcate flooring in six-foot zones (social distancing)
- Post directional signs in hallways and corridors to restrict movement
- Limit number of people permitted in elevators and other confined spaces
- Require masks in public and/or highly-trafficked locations
- Prohibit congregation of employees in lunch rooms, conference rooms, etc.
- Install physical barriers such as clear plastic sneeze guards (if feasible)
- Limit customer and public access to the workplace
- Document limits on non-essential business travel
- Provide soap, water, hand sanitizer, and paper towels
- Ask employees to self-monitor for COVID-19 symptoms
- Follow CDC guidance for discontinuing self-isolation and returning to work after testing positive



Questions

# Contact the Panelists



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