Emerging from the Pandemic: Labor & Employment “Hot Topics” for Life Sciences Companies

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Protecting Your Assets

Key Updates for Employee Confidential Information and Inventions Assignment Agreements

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Agenda

- Confidential Information and Inventions Assignment Agreements & PAGA Penalties
- Confidential Information and Inventions Assignment Agreements & Definition of “Confidential Information”
- Status of Nonsolicitation Provisions
- Inventions and Assignments

Confidential Information and Inventions Assignment Agreements & PAGA Penalties: Background on PAGA

- Private Attorneys General Act (PAGA): California statute that authorizes an "**aggrieved employee**" to file a representative action against his/her employer to recover **civil penalties** on behalf of him/herself, other employees and the state of California, for violations of the California Labor Code. CA Labor Code Section 2698, et seq.
- There are over 100 different Labor Code violations for which a PAGA action can be brought, including: meal and rest break violations (Labor Code § 226.7); wage-statement violations (Labor Code § 226); waiting-time violations (Labor Code § 203).
- PAGA penalties differ from, **and are in addition to**, statutory damages and other penalties that an employee may recover individually for alleged Labor Code violations, because **relief under PAGA is intended to benefit the general public**, not the party bringing the action.
- If the penalty is not specified in the applicable Labor Code section, the penalty is **$100** per aggrieved employee per pay period **for each initial violation** and **$200** per aggrieved employee per pay period **for each subsequent violation**.

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What Does PAGA Have to Do With Confidential Information and Inventions Assignment Agreements?

- Demand letter from attorney for former employee citing:
  - Labor Code § 925: choice-of-law provision – California unless exception applies.
  - Labor Code § 232: prohibition on restricting employees from disclosing wages.
  - Labor Code § 232.5: prohibition on restricting employees from disclosing information about the employer's working conditions.

Confidential Information and Inventions Assignment Agreements & Definition of "Confidential Information"

- *Brown v. TGS Management Company*, 57 Cal.App.5th 303 (2020):
  - Employment Agreement / Employee bonus claims in Arbitration.
  - Arbitrator entered award in employer's favor, and ordered employee's forfeiture of earned deferred bonuses due to employee's alleged breaches of "Confidential Information" provisions of agreement.
  - Employer moved to confirm award, and employee moved to vacate award.
  - Judge Gastelum (Orange County Superior Court) confirmed and employee appealed.
- Court of Appeal applied Bus. & Prof. Code § 16600, and found that definition of "Confidential Information" was too broad, a de facto noncompete provision:

"[…] we conclude the confidentiality provisions in the Employment Agreement on their face patently violate section 16600. Collectively, these overly restrictive provisions operate as a de facto noncompete provision; they plainly bar Brown in perpetuity from doing any work in the securities field, much less in his chosen profession of statistical arbitrage. Consequently, we conclude the confidentiality provisions are void ab initio and unenforceable." *Id.* at 318-19.

Status of Nonsolicitation Provisions Post-Employment: Customers / Employees

- Confidential Information and Inventions Assignment Agreements frequently prohibit employees (post-employment) from soliciting the former employer's customers or employees.
- Bus. & Prof. Code § 16600 voids contract provisions that restrain anyone from engaging in a lawful profession, trade or business and generally blocks agreements between commercial parties not to hire away the other's employees.
- Nonsolicitation provisions are disfavored in California, and should be drafted with caution.
- California law related to the enforceability of employee nonsolicitation agreements has evolved. *See AMN Healthcare, Inc. v. Aya Healthcare Servs., Inc.*, 28 Cal.App.5th 923, 939 (2018); *Barker v. Insight Glob., LLC*, 2019 WL 176260, at *3 (N.D. Cal. Jan. 11, 2019); *WeRide Corp. v. Kun Huang*, 379 F. Supp. 3d 834, 847 (N.D. Cal. 2019);
- Tie the nonsolicitation provisions in trade secret protection — even for nonsolicitation of employees. Example: "You agree that after your employment with the Company terminates for any reason, ***you will not, directly or indirectly, use any Trade Secrets of the Company***, to solicit or recruit …."

Inventions and Assignments

- Include Appendix to Confidential Information and Inventions Assignment Agreement for employee regarding Written Disclosure to Employee under CA Labor Code § 2870.
  - e.g., Any provision in this Agreement requiring employee to assign rights to an Invention does not apply to any invention that qualifies under California Labor Code § 2870, which section is reproduced in the attached Appendix "A" ("Written Notification to Employee.") — Appendix A should reproduce § 2870.
- Include Appendix to Confidential Information and Inventions Assignment Agreements for employee to list ideas, inventions and improvements outside of scope.
  - e.g., I have no inventions or other intellectual property that are owned by me or in which I have an interest and were made or acquired by me prior to my date of first employment with Company, that may relate to Company's business, or to any actual or demonstrably anticipated research or development of Company, except the following: (if none, please so state)
- Watch out for statutory employee vs. independent contractor classification issues in Confidential Information and Inventions Assignment Agreements with "works made for hire" within the meaning of the Copyright Act of 1976 as amended. See CA Unemployment Insurance Code § 686.

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Revisiting Arbitration Agreements

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Agenda

- Status of Assembly Bill 51
- Key Pros and Cons of Arbitration Agreements
  - Should Employers Continue to Roll Out Arbitration Agreements?

Status of Assembly Bill 51 (AB 51)

- AB 51: Law that Governor Newsom signed in October 2019, essentially banning mandatory arbitration in employment agreements in most instances (FEHA and Labor Code).
  - Opt-outs not allowed.
  - *Should not impact* arbitration agreements entered into prior to January 1, 2020.
  - Does not apply to post-dispute settlement agreements or negotiated severance agreements.
  - Provides that "[n]othing in this section is intended to invalidate a written arbitration agreement that is otherwise enforceable under the Federal Arbitration Act."
  - Governor Brown had vetoed similar bill because of preemption issues.
- AB 51 was challenged by business groups led by Chamber of Commerce based on preemption. AB 51 never took effect because temporary injunction issued by Judge Kimberly Mueller (Fed Ct. for ED of CA) in December 2019, followed by preliminary injunction in Feb. 2020.
- AB 51 is currently on Appeal with 9th Circuit. Oral arguments were heard in December 2020. Injunction remains in place for now.

Key Pros and Cons of Arbitration Agreements

- Employers generally favor arbitration because it:
  - Can eliminate or reduce the risk of employment class-actions for wage-and-hour.
  - May be more cost-effective because discovery and motion practice is sometimes more limited in scope than in court proceedings.
  - May be faster and provide finality sooner than litigation because of the limited right to challenge arbitral awards.
  - May reduce the risk of a “runaway” jury awarding high emotional distress or punitive damages.
  - Provides a more private forum with less publicity than court proceedings do.
  - Allows the parties to select an arbitrator with subject matter expertise and retain some control over the arbitrator selection process, rather than the random judge assignments that happen in court.
  - Is more flexible procedurally because the parties can customize the rules governing discovery and hearing.
  - May be more convenient for the lawyers and witnesses on scheduling issues.
  - Provides easier access to the arbitrator when discovery or other disputes arise between the parties during the proceedings, such as allowing for communications by email or phone calls for a quick resolution.

Key Pros and Cons of Arbitration Agreements (cont'd)

- There are some potential disadvantages for employers:
  - Arbitration fees can be substantial, especially because the employer has to bear the full cost of arbitration (plaintiff's attorneys use this in settlement negotiations).
  - The employer may have to defend multiple arbitrations.
  - Discovery costs can remain high, especially in cases that involve substantial e-discovery or where the arbitrator is permissive about discovery motions.
  - Arbitrators can be less likely to grant dispositive motions, such as motions for summary judgment or motions to dismiss, increasing the likelihood that a claim may proceed to hearing.
  - Desirable arbitrators may have full calendars, which can create scheduling difficulties, or the parties may have difficulty agreeing on an arbitrator.
  - Arbitrators may be less likely to accept certain procedural defenses.
  - Arbitrators are more likely to allow certain evidence that a judge in a court of law will exclude; this particularly applies to hearsay and irrelevant evidence.
  - Not all employment claims are subject to arbitration: e.g. PAGA claims.
  - Courts generally do not reverse an arbitrator's award.

Should Employers Continue to Roll Out Arbitration Agreements?

- Depends on how risk averse an employer is.
- Remedies for violation:
  - Attorney's fees, injunctive relief, remedies available under FEHA (*see* Labor Code § 432.6(d): "In addition to injunctive relief and any other remedies available, a court may award a prevailing plaintiff enforcing their rights under this section reasonable attorney's fees."
  - Criminal sanctions – imprisonment in county jail, fine or both – see Labor Code § 433.
  - *Potential* for PAGA penalties?

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Reimagining/Redefining "Remote/Flexible Work"

How Has COVID-19 Changed the Legal Considerations?

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Predictions: Hybrid Work for Most – 15%–20% Full-Time Remote

- Age >40 want to stay remote; Age <40 want to return to the office
  - https://www.bucknell.edu/sites/default/files/college_of_management/covid-19_telework_study_report.pdf
- One study shows more black “knowledge” workers want to stay home
  - https://futureforum.com/2021/03/11/dismantling-the-office-moving-from-retrofit-to-redesign/
- Location-agnostic recruiting
  - What does that mean for setting pay and pay equity?
- Employees will leave if denied hybrid/remote work
  - https://envoy.com/blog/envoy-survey-finds-employees-want-companies-to-embrace-hybrid-work-and-mandate-covid-vaccines/

Big Picture Challenges

- Adjusting Performance Management
  - How do you measure success/strong performance/productivity?
    - Old measures – attendance, hours in the office/HCP in-person visits, etc.
    - New measures – project outcome, virtual customer/HCP engagement, using technology to improve access/reduce cost
    - Have you provided equal access to training/upskilling?
- Impact on Company Culture
  - Retention
  - Compliance challenges
    - Silos vs. implementing uniform expectations
    - Reporting mechanisms
    - Whistleblowing vs. constructive engagement to a consensus

Practical Challenges: Compliance with Applicable State Laws

- State and local tax issues
- Registration to do business in a location with a home office
- Paying into state unemployment compensation fund
- Compliance with paid sick leave/family leave/other leave laws based on work location
- Employee expenses for home offices
- Enforceability of restrictive covenant agreements
- New meal and rest break obligations/paycheck reporting obligations
- Duration of hybrid/remote arrangement
- Any impact on benefits?
- Notify workers' compensation carriers
- Converting outside sales to inside sales
- Updated handbooks, policies, postings, pay data reporting etc.
- Immigration issues – compliance with international laws

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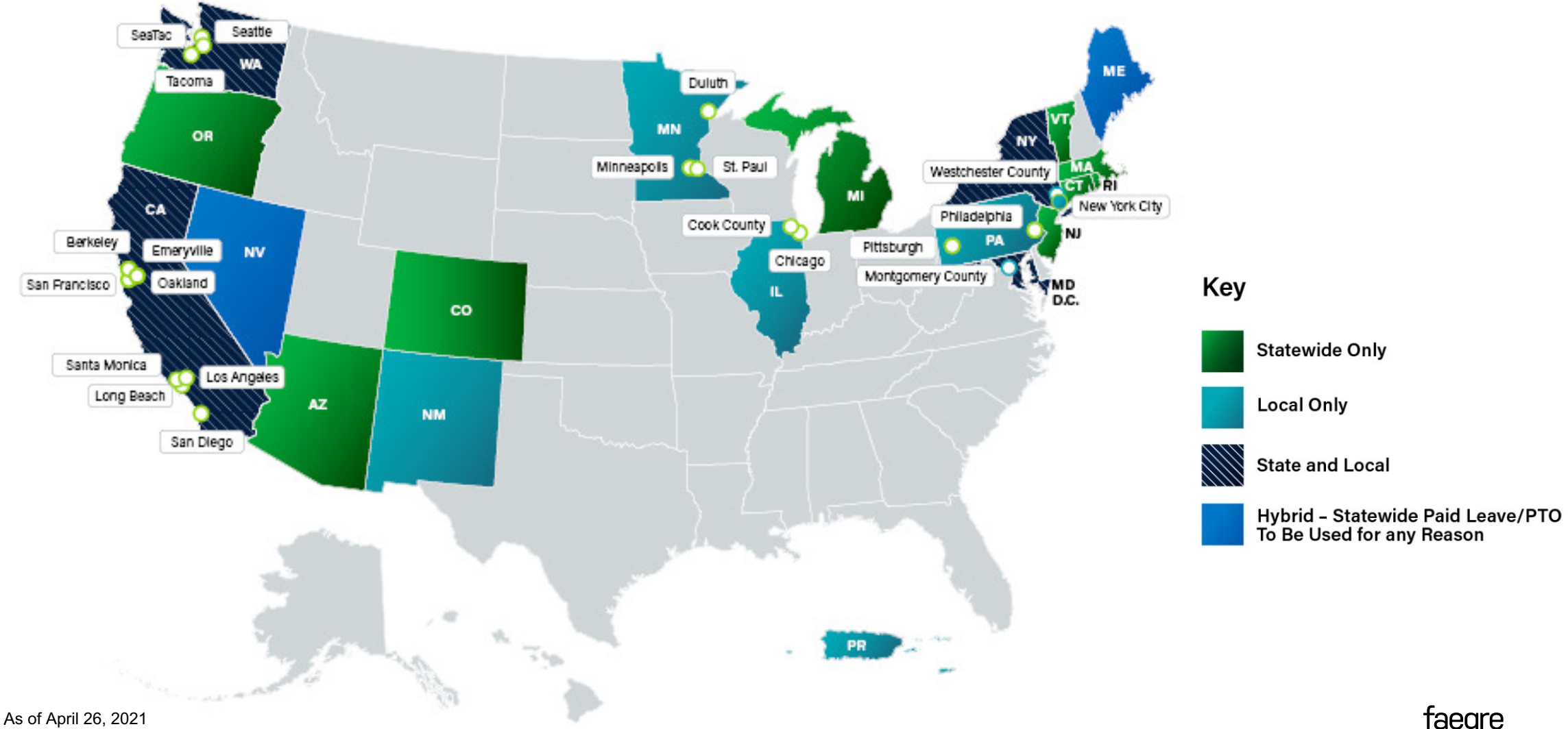
States With Paid Sick and Safe Leave Laws Covering Private Employers



As of April 26, 2021

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Family Medical Leave

From the National Conference of State Legislatures website: https://www.ncsl.org/research/labor-and-employment/state-family-and-medical-leave-laws.aspx

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Remote Workers and Pay Data Reporting

- California - SB 973
  - Effective 1/1/21 – pay data report required annually starting 3/31/21
  - Must include employees assigned to CA establishments but working outside CA
  - Must include employees assigned to establishments outside CA but working within CA
- Illinois – SB 1480
  - Pay data reporting as of 2023, equal pay registration certificate to be obtained by 3/24/2024.
  - TBD: appears to apply to any workers in the state
- Pending Pay Data Legislation
  - New York: 2021–22 Session: S453 – A1988

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Telework Location and Taxes – Questions to Consider

- Does the state impose a nexus for taxing wages if an employee is telecommuting from their state?
  - CA – appears to be no
- What does the state consider “regular place of work”?
  - CA – state from where employee is telecommuting (i.e., employee’s home state)
- Has the applicable state issued any guidance?
  - See CA Franchise Tax Board, COVID-19 Frequently Asked Questions for Tax Relief and Assistance.
  - Short Answer: If you remotely work in CA, you need to file CA personal income tax return.

Telework Location and Taxes – How Other States Handle These Questions

- Does the state impose a nexus for corporate income tax if an employee is telecommuting from their state?
  - MA, NJ, PA, AZ – not during the state of emergency, but once lifted, presence of employee will trigger tax consequences
  - ID – yes
- What does the state consider "regular place of work"?
  - MA, NJ, NY, PA – employee's regular place of work (i.e., employee's home state)
- Has the applicable state issued any guidance on tax implications of employee working remotely during pandemic?
  - MA – https://www.mass.gov/regulations/830-CMR-625a3-massachusetts-source-income-of-non-residents-telecommuting-due-to-the
  - NJ – https://www.state.nj.us/treasury/taxation/covid19-payroll.shtml
  - NY – https://www.tax.ny.gov/pit/file/nonresident-faqs.htm
  - PA – https://www.revenue.pa.gov/COVID19/Pages/Telework.aspx

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What is the Impact of the "COVID-19 Remote Work Experiment" on Disability Accommodations?

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Biden's Campaign Promises

"Biden will prioritize enacting and implementing policies that break down the barriers to access for people with disabilities living and succeeding in their chosen communities, which means good jobs in competitive, integrated employment …."

Source: www.joebiden.com/disabilities/ (4/23/21)

"Americans with disabilities are no less worthy than any other person affected by the pandemic. A Biden Administration will aggressively enforce non-discrimination protections in the ADA and other civil rights laws…"

Source: www.joebiden.com/covid19-disabilities/ (4/23/21)

EEOC

- 36.1% of all charges filed with the U.S. Equal Employment Opportunity Commiss in 2020 included alleged violations of the Americans with Disabilities Act.
  - An increase of nearly 11% since 2010.

www.eeoc.gov/statistics/charge-statistics-charges-filed-eeoc-fy-1997-through-fy-2020 (4/23/21)

EEOC

Home » What You Should Know » What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws

What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws

Technical Assistance Questions and Answers - Updated on Dec. 16, 2020

Source: www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws (accessed 4/23/21)

What Does It All Mean?

- You still need to engage in the interactive process on an individualized basis to identify reasonable accommodations that permit the individual to perform the essential functions of the job.

- It will be very difficult to defend a denial of remote work as an "unreasonable" accommodation given the COVID-19 experience:
  - IF the job was performed remotely during COVID
  - IF the job is still being performed remotely now – even on a hybrid basis

The Biden Administration's Impact on Joint Employer Liability and 1099 Status

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The Status of the DOL's Joint Employer Rule

- Two Types of Joint Employment
  - Vertical: staffing agency relationship
  - Horizontal: working for two related employers
- 1/2020 – Joint Employment Rule Under Trump DOL Published
  - Four-factor test to determine vertical joint employment – did other employer:
    - Hire/fire the worker – determine rate/method of payment
    - Supervise/control the work schedule or conditions – maintain employment records
- 2/2020 – 17 States and D.C. sued to challenge JE Rule – N.Y. Federal Court
- 8/2020 – Court vacated Rule's Vertical Joint Liability Standard
- 3/11/2021 – Biden DOL Proposes to Remove 2020 JE Rule. https://aboutblaw.com/WbZ
  - Return to the "economic realities test" approach to determine scope of joint employment under the FLSA

The Status of the DOL's Independent Contractor Rule

- 1/7/2021 – Trump DOL publishes Independent Contractor Rule to go into effect 5/7/2021
  - Proposes a new "economic dependence" test based on 5 factors, not exhaustive, and no one factor would be dispositive – easier to classify workers as 1099s.
- 3/12/2021 – Biden DOL proposes to withdraw Trump DOL Rule with 30-day comment period
  - Biden DOL also rescinded Trump DOL Opinion Letters FLSA 2021-9 and 2021-8 based on Rule
- What to Do Now? DOL recommends relying on Fact Sheet 13 for classification guidance: https://www.dol.gov/agencies/whd/fact-sheets/13-flsa-employment-relationship
- California State Law Standard: ABC Test – AB 5 signed into law 9/2019, modified by Prop 22 in 2020 for app-based workers
- 9th Circuit Standard – Economic Realities Test
  - (1) The degree of the employer's right to control the manner in which the work is to be performed; (2) the worker's opportunity for profit or loss depending upon his or her managerial skill; (3) the worker's investment in equipment or materials required for his or her task, or employment of helpers; (4) whether the service rendered requires a special skill; (5) the degree of permanence of the working relationship; and (6) whether the service rendered is an integral part of the employer's business. No individual factor is conclusive and that the ultimate determination depends upon the circumstances of the whole activity.

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What Does the PRO Act Mean For Joint Employment and 1099s?

- Protecting Right to Organize Act (PRO Act)
- Passed House on 3/9/2021
  - Now in Senate Health, Education, Labor and Pensions Committee
  - Includes a number of amendments to the NLRA that are viewed as pro-Labor
- Adopts ABC Test for determining 1099 Status
    - A) whether the worker is free from the hiring party's control over performance; B) whether the work is outside of the hiring party's usual line of business; and C) whether the worker is engaged in an independent trade. All three of the factors must be answered affirmatively to rebut the presumption and to classify a worker as an independent contractor.
- Codifies Joint Employer Doctrine codified in *Browning-Ferris Industries of California 362 NLRB 1599* (2015)
    - Indirect or reserved control, standing alone, would be sufficient to support a finding of joint employment

What Can We Expect From Secretary Walsh and the DOL?

- Joint Employment
  - Expect to be deemed responsible for wage disputes with staffing agency employees
  - Practical Advice:
    - Be sure the staffing agency is financially sound, FLSA compliant and provides defense and indemnification
    - Be sure they are “employing” rather than “contracting with” the workers they provide
- Independent Contractors
  - Broaden the scope of 1099 workers classified as employees
  - Increase in misclassification enforcement actions

Restructuring Checklist

Key Considerations for Remote Workforces and Other Issues Relating to Organizational Realignment

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Where Do Remote Employees “Work” for WARN purposes?

- No Clear Legal Authority for Assigning Remote Employees to a “Single Site of Employment”
- During COVID
  - Reasonable to assign employees working temporarily from home to their former physical worksite
- WARN’s “Outstationed” Regulation
  - For employees whose primary duties involve work outside the employer’s regular employment sites – they can be attributed to either:
    - Their assigned home base
    - The location from which their work is assigned (typically where the manager is located)
    - The location to which they report
- When Remote Work Is Permanent
  - Make a plan and be consistent – the “outstationed” analysis can get complicated if managers are also remote
  - Consider state WARN laws and how employees are “counted” if analysis is different

Presenter Biographies

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Employers nationwide make Cheryl Orr their first call for their most complex employment law matters. Cheryl's litigation practice focuses on strategically resolving federal and state class, collective and California Private Attorneys General Act (PAGA) actions, as well as particularly sensitive and thorny single-plaintiff matters. Her litigation experience positions her to work with employers to prevent and/or remedy underlying issues. She and her team provide the full range of employment law counseling, investigation, training and audits (wage and hour, pay equity and human resources compliance) services. Cheryl leads the firm's international labor & employment practice, and its San Francisco office.

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Lynne has a long history of working with life sciences/ pharmaceutical clients. She is an experienced jury and bench trial lawyer with a track record of success in whistleblower/retaliation cases, discrimination claims and restrictive covenant disputes. Lynne's litigation background provides the insight to effectively counsel clients who are dealing with frontline employee issues. She is a proud BioNJ member and Co-Chair of the BioNJ's HR Committee and a founding member of Inspiring Women of STEM. She also serves on the BioNJ COVID-19 Vaccine Task Force. Lynne is a member of Faegre Drinker's life sciences committee.

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As a trusted adviser, Pascal Benyamini teams up with employers to defend them against employment law claims and to advise them on compliance, claim prevention, investigations and employment best practices. With a diverse skillset, he also represents manufacturing clients in regulatory matters and litigates shareholder and business disputes. As a former hockey player, Pascal applies the teamwork and tenacity he learned on the ice to his client relationships and advocacy.

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Jennee DeVore is Senior Director and Counsel, Legal Affairs at Exelixis, where her practice advises numerous business units, including Human Resources. She spent the past 15 years advising biomedical companies, including over a decade of legal counseling with increasing responsibility. She has dual undergraduate degrees in Integrative Biology and Legal Studies from University of California, Berkeley, and a JD with an International Law Certificate from Santa Clara University. Jennee also serves as the Chair of the Life Sciences Committee for the San Francisco Bay Area Chapter of the ACC.

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Faegre Drinker's Labor & Employment Group

Fiduciary Governance: We can help you develop best practice fiduciary governance structures, navigate the fiduciary litigation landscape, and manage complex prohibited transaction issues.

Retirement Plans: We help you design, implement, and administer a broad spectrum of qualified and other tax-favored retirement plans, breaking down complexities and concerns to elemental issues.

Executive Compensation: We advise on a broad range of executive- and equity-based incentive arrangements, including executive employment agreements, nonqualified deferred compensation plans, supplemental executive retirement plans, severance arrangements, change-in-control agreements, and omnibus equity incentive plans.

Health and Welfare Plans: We help clients attract, incent, and retain employees by designing appealing, compliant health and welfare benefit plans and providing comprehensive and constructive counsel to plan sponsors, plan fiduciaries, and benefits plans on issues that may arise from plan design, administration, and operation.

ERISA Litigation: Applying our nuanced knowledge of statutes, regulations, and case law, we vigorously and efficiently defend plans, plan sponsors, plan fiduciaries, and service providers in complex disputes involving health, welfare, and retirement plans.

Value-Added Services: We partner with our clients to understand their unique business and cultural needs, and develop personalized client trainings around those topics. We also routinely provide updates on new and important benefits developments through webinars, our *Spotlight on Benefits* blog, and client alerts.

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Thank You

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