



TUETH KEENEY
COOPER MOHAN JACKSTADT P.C.

ACC St. Louis Labor & Employment Webinar What to Expect in 2021!

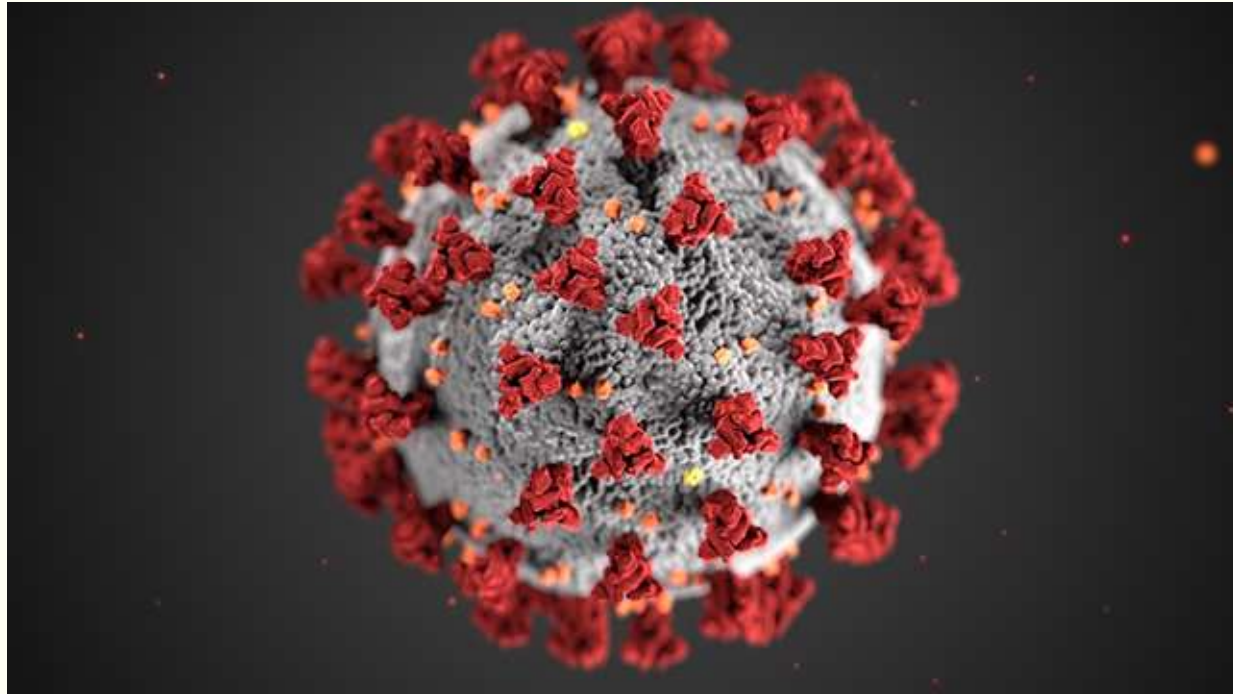


Date:
December 16, 2020

Agenda

- COVID Update
 - State of the Courts
 - State of the Law
- Missouri discovery rules
- Anticipated court decisions and proposed legislation
- Independent Contractor v. Employee
 - DOL Rules
 - State Court Decisions
- Anticipated Changes in Immigration Law





COVID Update

State of the Courts & State of the Law



STATE OF THE COURTS

COVID-19 Cases

- Presiding Judge Burton St. Louis County:
 - Courthouse Staff: Some of us who work here have COVID. More than usual.
 - DJS Jail Residents and Staff: Some new guests have COVID. And some staff.
 - Detention Center Residents and Staff: No new COVID here.
- St. Louis County: COVID has been up in this county this month – by a lot. Everybody knows somebody who has it. Positivity rate is too high as well.
- St. Louis Region: Hospitals are filling up. Hospital staff is leaving. Getting burned out and angry at mask non-wearers. Dr. Garza is very upset.
- Missouri: Our state is setting records – and not good ones. We are doing better than the Dakotas -- which is not saying much. Transmission rates are bad.
- St. Louis County Executive Action: Dr. Page issued some simple orders. Some people are following them. Some people are taking him to court – and losing.

COVID-19 Cases

- Other considerations: The U.S. is setting records, but unfortunately not in an enviable way. Making India and Brazil look good. People flew all over the country for Thanksgiving. Dr. Fauci is angry.
- IN CONCLUSION
 - There are no surprises here. (Did you read the above? And are you wearing a mask?)

COVID-19 Cases

- Current state of the Courts
 - Phases
 - Jury trials
 - Bench trials and other hearings? Moving online?
- Long-term impact: continued, expanded use of remote proceedings
 - Inching toward remote
 - Mo Supreme Court is forcing the issue—and not just during COVID



STATE OF THE LAW

State COVID-19 Cases

- Accommodation claims (including leave)
- Layoff/furlough/position elimination claims
- Contract claims
- Non-employment cases
 - Class actions against higher education institutions and private K-12 schools for tuition

Federal COVID-19 Cases

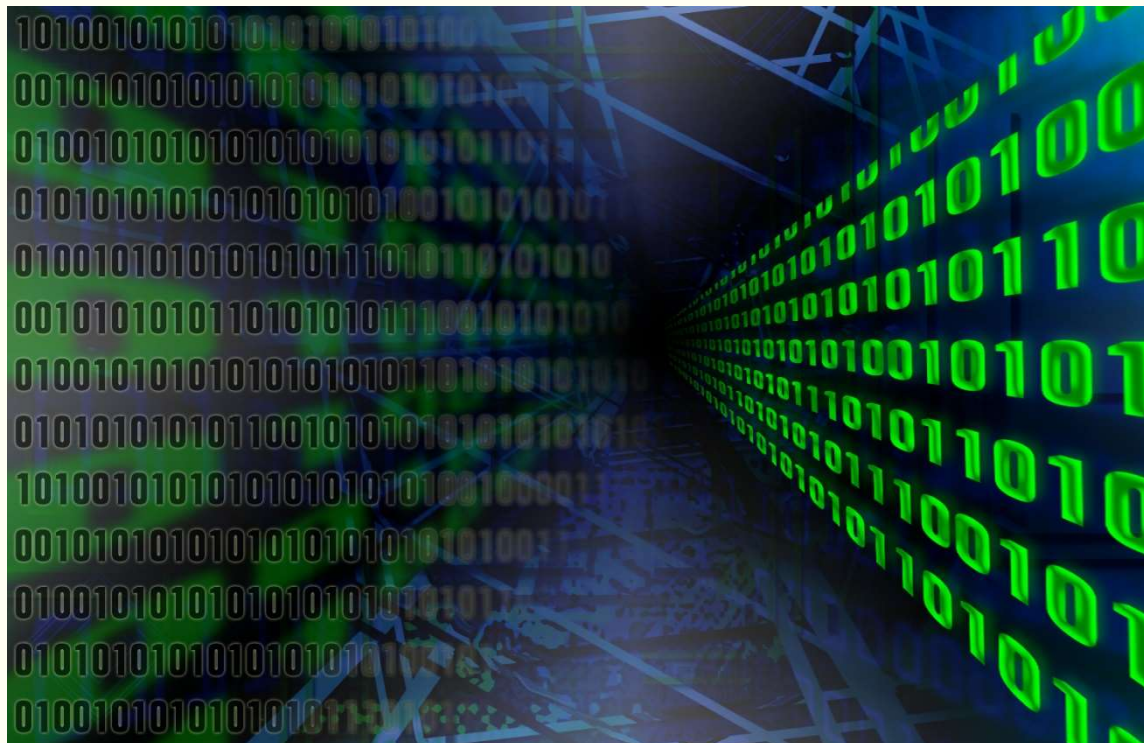
- Leave claims
- Confidentiality claims
- WARN Act claims
- Non-employment cases
 - Insurance coverage disputes (business interruption, etc.)
 - Class actions for tuition
 - Workplace safety claims

Takeaways/Best Practices

- Communication is key
- Accommodations claims – engage in interactive process
- Update and stick to policies (even in an emergency)
- Regularly check COVID guidance (CDC, EEOC, DOL, OSHA)
- Document, document, document

Takeaways/Best Practices

- Legal defenses:
 - Exclusive remedy provision of WPA/amended MHRA
 - Stay of discovery pending issuance of RTS
 - Request for accommodation \neq protected activity
 - Policy, CBA, and contractual defenses



Discovery Issues: Conflict Between Missouri Legislature and Supreme Court

Senate Bill 224

- During the 2019 session, the Missouri legislature passed Senate Bill 224 (SB 224), which was designed to bring the Missouri Rules of Civil Procedure in line with the Federal Rules.
- SB 224 was signed by Governor Parsons on July 10, 2019 and took effect on August 28, 2019
- OR DID IT????

Changes to Rule 56

- Addition of ediscovery
- Addition of proportionality and other limitations on burdensome ediscovery
- Addition of language allowing for cost-shifting
- Addition of language allowing parties to stipulate to timing of discovery

Changes to Rule 57

- Limitation to number of Interrogatories (25 total, including subparts)
- Limitation to number of depositions (10 per party)
- Limitation on length of deposition (one day of 7 hours)
- Addition of language allowing sanctions for impeding deposition

Changes to Rule 58

- Limitation on production for items within party's possession, custody, or control
- Addition of language allowing native production requirement
- Addition of language requiring specific objections and items being produced

Changes to Rule 59

- Limitation to number of Requests for Admission (25)
- Addition of language regarding genuineness of documents

Missouri Supreme Court Response

- Supreme Court typically issues new rules or rule amendments every six months
- Still has not updated with language from SB 224
- On Supreme Court website, on the page for each rule, bottom of page notes: “SB 224 (2019) purports to amend this Rule.”
- Counsel for the Supreme Court would not say if the Court planned to strike the rules down but noted that all citations to the Rules should clearly note which version is being cited

Effect of Senate Bill 224

- Article V, Section V of the Missouri Constitution notes that any rule may be “amended in whole or in part by a law limited to the purpose.”
- Some judges accept the new rules, some do not
- Counsel has not located any published cases, to date



Upcoming Employment Law Cases and Legislation

Upcoming cases

- Argued and awaiting decision in the Missouri Supreme Court:
 - *MNEA v. MoDOLIR*—constitutionality of 2018 Public Labor Law
 - *Raizada Group v. Torrance*--personal jurisdiction over a foreign limited liability partnership organized under Florida law whose business and investments are managed by its general partner in California.
- Federal employment cases in a Biden administration?
 - New administration can drop suits and change positions
 - Not employment, but in USSC:
 - Funding for The Wall
 - Immigration cases

Upcoming cases

- Likely areas for change:
 - LGBTQ rights
 - Religious liberty

Upcoming legislation Federal

- Senators McConnell and Cornyn, "Safe to Work Act"
- Raise the bar on filing COVID-19 suits for 5 years

Upcoming legislation State

- Missouri special session
 - Call:
 - Amending Section 44.045, RSMo to provide liability protection for health care providers who provide care as necessitated by a declared state of emergency;
 - To add a new section to Chapter 537, RSMo to provide products liability protection for any person who designs, manufactures, labels, sells, distributes, or donates products in direct response to a declared state of emergency;
 - To add a new section to Chapter 537, RSMo to provide premises liability protection for exposure claims related to a declared state of emergency;
- Dropped
- No bill until 2021? Ban on retrospective legislation



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Worker Classification – Employees and Independent Contractors

Proper Classification is Important

- Properly classifying workers as employees or independent contractors is important
- For Workers:
 - Independent contractors are not entitled to the benefits and protections of the Fair Labor Standards Act (FLSA), including minimum wage and overtime requirements.
- For Employers:
 - An employee who is mischaracterized as an independent contractor may expose the employer to liability under federal and state laws.

Proper Classification is Important

- Properly classifying workers in certain industries and circumstances can be difficult.
- The “gig economy” has forced administrative, legislative, and judicial changes to the rules for classifying workers.

Proper Classification is Important

STATE & LOCAL UPDATES

Uber and Lyft Face Employee Misclassification Lawsuit in California



By Lisa Nagele-Piazza, J.D., SHRM-SCP
May 6, 2020

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Instacart may have misclassified workers under gig law, judge says

This is the first court decision since California's new gig worker law went into effect and it could lead the way to enforcing the law.



Dere Kerr Feb 25, 2020 2:41 p.m. PT



LISTEN - 02:55



Instacart may be forced to reclassify its California shoppers as employees.

Exotic dancers sue New Orleans club owners over employment status, wages and tips

BY ANTHONY MCAULEY | STAFF WRITER NOV 6, 2020 - 10:24 AM 2 min to read

417 Pet Sitting, LLC, v. Division of Employment Security

- Recent Missouri case regarding worker classification
- 417 Pet Sitting, LLC offers in-home pet care and pet-sitting services to clients
- The company classified its pet sitters as independent contractors
- The Western District of the Missouri Court of Appeals held that pet sitters were misclassified, and should have been considered employees and not independent contractors

417 Pet Sitting, LLC, v. Division of Employment Security

- The Court applied a **20-factor** “right-to-control” test to review the employment status of the pet sitters
- This test, which is utilized by the IRS, attempts to ascertain whether an employer has sufficient control over workers to establish an employer-employee relationship.

417 Pet Sitting, LLC, v. Division of Employment Security

- The factors considered include:
- (1) instructions; (2) training; (3) integration; (4) services rendered personally; (5) hiring, supervising, and paying assistants; (6) continuing relationship; (7) set hours of work; (8) full time required; (9) doing work on employer's premises; (10) order or sequence set; (11) oral or written reports; (12) payment by hour, week, month; (13) payment of business and/or traveling expenses; (14) furnishing of tools and materials; (15) significant investment; (16) realization of profit or loss; (17) working for more than one firm at a time; (18) making service available to general public; (19) right to discharge; and (20) worker's right to terminate.

417 Pet Sitting, LLC, v. Division of Employment Security

- The Court determined that 13 of the 20 factors indicated that 417 Pet Sitting, LLC exerted control over the manner and means of the pet sitters' performance sufficient to establish that the sitters were engaged as employees.
- The case illustrates the difficulty of classifying workers as independent contractors and the risks of misclassification.

Proposed DOL Rule Changes

- The FLSA does not include a definition of “independent contractor”
- Because there is no statutory definition, the courts and U.S. Department of Labor (DOL) have used a multifactor test to determine whether a worker is an employee or an independent contractor
- However, this test has become less clear and consistent over time as courts have applied the test on a case-by-case basis

Proposed DOL Rule Changes

- The DOL recently announced a proposed rule clarifying the definition of “employee” under the FLSA as it relates to independent contractors.
 - “The Department’s proposal aims to bring clarity and consistency to the determination of who’s an independent contractor under the Fair Labor Standards Act,” said Secretary of Labor Eugene Scalia. “Once finalized, it will make it easier to identify employees covered by the Act, while respecting the decision other workers make to pursue the freedom and entrepreneurialism associated with being an independent contractor.”



Proposed DOL Rule Changes

- The proposed rule adopts an “economic reality” test to determine whether a worker is an independent contractor or an employee for the purposes of the FLSA.
- This test has five factors – two core factors and three additional factors that can assist in making the determination.
 - No one factor of this test is dispositive.
 - However, the two “core factors” are afforded greater weight in the analysis.

Proposed DOL Rule Changes

- The two “core factors” are:
 - 1) the nature and degree of the worker’s control over the work, and
 - 2) the worker’s opportunity for profit or loss based on initiative and/or investment.
 - The Department accords these “core factors” the most weight in this test as it considers them the most probative in determining whether, in economic reality, a worker is dependent on another’s business or is in business for himself or herself.

Proposed DOL Rule Changes

- The three additional factors are:
 - 3) the amount of skill required for the work;
 - 4) the degree of permanence of the working relationship between the worker and the potential employer; and
 - 5) whether the work is part of an integrated unit of production.
 - These factors serve as “guideposts” in evaluating a worker’s status but are considered less than the “core factors.”

Proposed DOL Rule Changes

- Notably, this rule would only change the DOL's interpretation of independent contractors for wage and hour purposes, such as minimum wage requirements, overtime, and the maintenance of employee records.
- Interpretations by other agencies at the state and federal level are not affected.
- The proposed rule will similarly have no effect on the classification of independent contractors under various state laws, including workers' compensation statutes, unemployment benefits, and, in some states (such as California), state wage and hour requirements.

Biden's Proposed Labor Plan

- The DOL's proposed rule change may not become final, as President-elect Joe Biden recently announced a labor plan that focuses on combatting intentional misclassification and stricter enforcement of existing laws
- Biden's plan may withdraw the DOL's proposed rule and instead expand the definition of who qualifies as an employee under federal law.
- This expansion will likely make it harder business to classify individuals as independent contractors as oppose to employees.

Biden's Proposed Labor Plan

- From Biden's website:
 - The epidemic of misclassification is made possible by ambiguous legal tests that give too much discretion to employers, too little protection to workers, and too little direction to government agencies and courts.
 - States like California have already paved the way by adopting a clearer, simpler, and stronger three-prong "ABC test" to distinguish employees from independent contractors.
 - As president, Biden will work with Congress to establish a federal standard modeled on the ABC test for all labor, employment, and tax laws.

Biden's Proposed Labor Plan

- California's ABC test
 - A worker is considered an employee and not an independent contractor, unless the hiring entity satisfies **all three** of the following conditions:
 - The worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact;
 - The worker performs work that is outside the usual course of the hiring entity's business; **and**
 - The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.



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Immigration Update What to Expect in 2021

Presidential Proclamations

- What is the status of Presidential Proclamations and Impact on International Travel for Employees?
- Status of So-Called “Muslim Ban”
 - Presidential Proclamation 10052: H, L, and Other Visa Holders
 - National Interest Exceptions (“NIEs”) – Standard and Process
 - Status of Litigation – Chamber Case
 - Expiration on December 31, 2020?

Presidential Proclamations

- Presidential Proclamations 9993 (Schengen Countries), 9994 (Brazil), 9996 (UK and Ireland) and Others – Prohibition on Direct Travel
 - 14 Day Quarantine in Other Countries
 - National Interest Exceptions- Procedure
 - Impact on ESTA and other Practical Issues
 - Is there an expiration date for these proclamations?
 - What to expect in 2021

DHS Proposed H-1B Regulations

- What is the status of DHS Proposed Regulations regarding H-1B Visas?
- October 8, 2020 – DHS Proposed Rules restricting the definition of “specialty occupation”
 - Degree “always” required – degree “directly” related
- Proposed restrictions related to 3rd Party Worksites
- Status of Litigation – *Chamber of Commerce v. DHS* and other cases
- What to expect in 2021?

H-1B DOL Proposed Regulations

- What is the status of DOL Proposed Regulations regarding prevailing wages?
 - Impact on nonimmigrant visas: H-1Bs, H-1B1s, and E-3s
 - Impact on PERM Labor Certification Process
- Proposed Regulation significantly increased prevailing wage levels for all occupations across the country overnight!
- Status of Litigation and change in DOL position on wages
 - Labor Condition Applications and prevailing wage determinations
- What to expect in 2021?

H-1B DHS Proposed Regulations

- What is the status of the DHS Proposed Rules regarding the H-1B Lottery?
- Proposed Rules published November 2, 2020 with only a 30-day comment period
- Proposed Rule “Prioritizes” H-1B registrations based on the level of salary
- Impact on hiring recent graduates
- What can we expect in 2021?

DHS Proposed Regulation - Students

- What is the DHS Proposed Rules regarding F and J Student Visas?
- Change period of admission from “duration of status” to admission for a fixed period of time
- Impact on institutions of higher education
- Over 30,000 comments
- What to expect for 2021?



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QUESTIONS?





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If you have any questions, please reach out to a Tueth Keeney attorney.

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