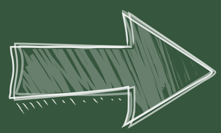

Inaugural Report of Littler's Global Workplace Transformation Initiative

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IMPORTANT NOTICE

This Littler Report is not a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual issues that inevitably arise in any employment-related dispute.

Executive Summary

The COVID-19 pandemic required nearly every employer around the globe to take stock of its workforce, policies and practices, and adapt to a rapidly changing and unpredictable environment. COVID-19 will eventually pass, but transformative issues laid bare by the pandemic—which were already in motion—will remain, likely at an accelerated pace.

Remote work for many is here to stay. By the end of 2021, it is predicted that over a quarter of the workforce will remain remote. Employers that continue providing a remote work option will need to contend with *Wandering Workers*—those employees who perform their job functions in a different state or even country from their employer's brick-and-mortar location, or who frequently move job locations while employed. The Wandering Worker phenomenon raises a host of employment considerations:

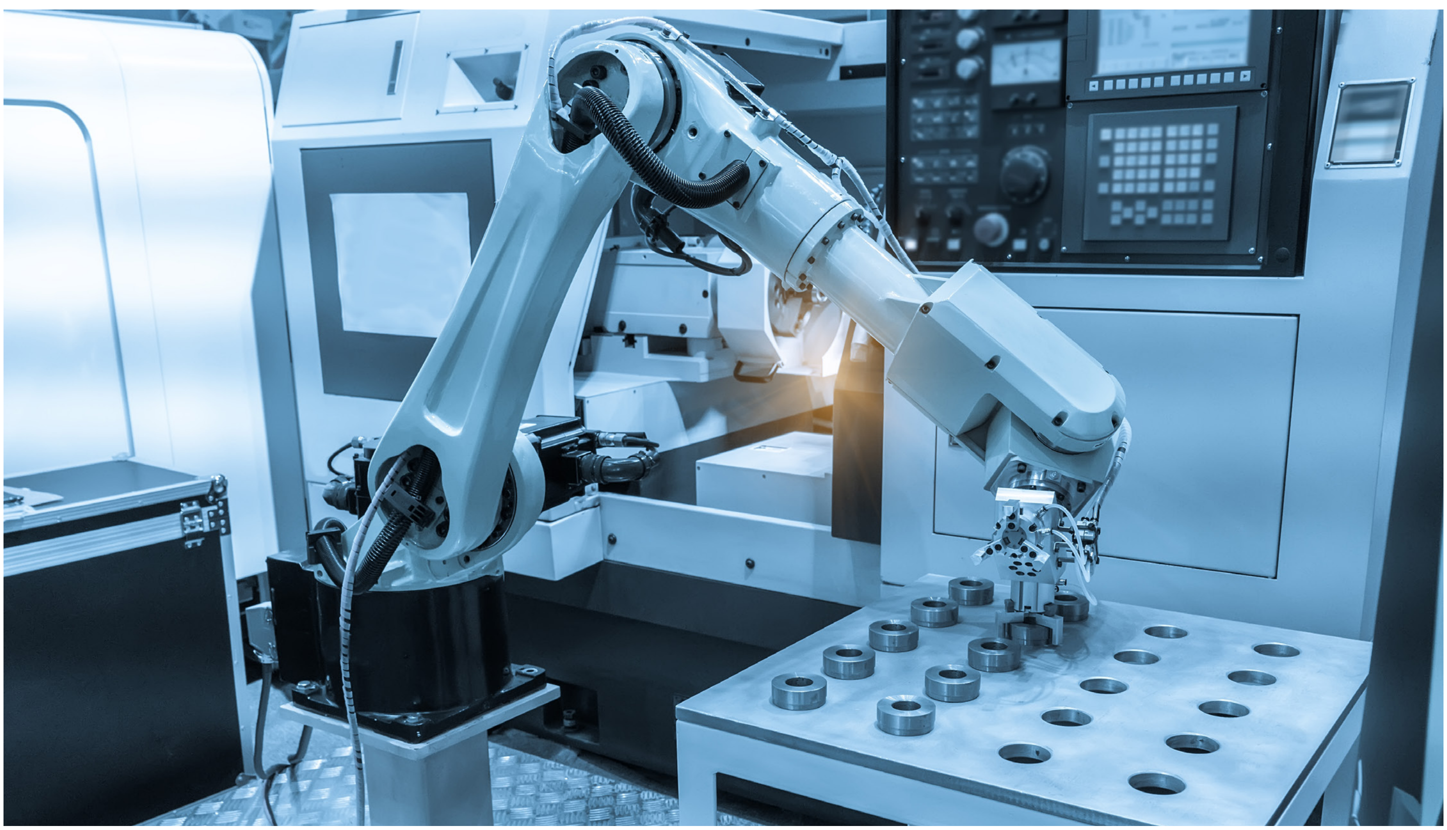
- Recruiting, hiring, onboarding, managing, and firing employees is going virtual.
- Employment taxes and withholding become increasingly complex when the employer and Wandering Worker do not work in the same location.
- Determining which state and local benefits apply is particularly tricky.
- Employers are struggling to implement systems for tracking and compensating working and travel time for non-exempt employees, among other wage and hour concerns.
- Privacy and data security issues emerge, particularly as the trend towards global workforces accelerates.
- Union organizing is rapidly adapting to the new work regime.

Those performing work at the employer's worksite are contending with an increasingly automated environment. As the worksite becomes more automated with robots, cobots, and other automated machines, employers must be cognizant of safety and health hazards that could be introduced, as well as privacy considerations.

The pandemic has accelerated job displacement. In October 2020, the World Economic Forum reported that 43% of the businesses it surveyed were planning to reduce their workforce because of the increased use of technology. As the workplace transforms and becomes more dependent on technological platforms and initiatives, business leaders must reevaluate how to deliver new business models in the post-pandemic era, and be prepared to address the host of labor and employment law issues that arise when workers are displaced. Given these recent developments, employers will face more business restructurings for the purpose of (a) acquiring new talent and (b) enhancing technological capabilities. And when initiatives lead to worker displacement, employers will need to navigate a variety of labor and employment issues to mitigate risk.

The workforce of tomorrow needs new skills today. Certain jobs hit hard by the lagging economy will never return, and others will eventually be performed by machines. One recent report predicted that a quarter of the workforce may need to change industries by the year 2030. To that end, workers will need to gain new skillsets to work in an environment where AI and automation is on the rise, or switch industries entirely.

The workplace needs to recognize and prepare for these changes. Employers will need to reevaluate how, where, and when employees work, and take affirmative steps to facilitate necessary changes. This workplace transformation will require careful planning and deliberation. A primary goal of this Report is to highlight the myriad and overlapping labor and employment issues that arise as the workplace transforms, and the imperative that successful solutions will require significant cross-disciplinary collaboration.



I. Introduction

Long before the COVID-19 pandemic, public consciousness was increasingly turning to an issue that will reshape and redefine the nature of the American (and global) workplace: the technology-induced displacement of employment, or as we call it, the coming TIDE.™ To that already daunting challenge, we are now presented with a second workplace transformation by way of virus-induced displacement of employment, or VIDE. All evidence suggests that COVID-19 will serve to accelerate this trend, and speed the transformation of the workforce. As the executive director of the Massachusetts Institute of Technology's task force on the future of work explained succinctly in a recent article in the Financial Times, COVID-19 "has accelerated the use of robotics and other technologies to take on tasks that are more fraught during the pandemic… It is fair to assume that some firms have learnt how to maintain their productivity with fewer workers and they will not unlearn what they have learnt."[1]

A. TIDE Was Already Displacing Workers

In a ground-breaking 2017 report, *A Future that Works: Automation, Employment, and Productivity*,[2] the McKinsey Global Institute (MGI) estimated that almost half of today's work activities could be automated by 2055, if not sooner, depending on various economic conditions. They estimated that the job functions most susceptible to automation were those involving physical activities in highly structured and predictable environments, as well as data collection and processing. According to MGI, these activities make up 51% of activities in the economy accounting for almost $2.7 trillion in wages, and are most common in the manufacturing, accommodation and food service, and retail trade sectors, as well as some mid-skilled jobs.

Subsequent analyses have come to similar conclusions. Quantifying the scope of the impact of the rising TIDE, in January 2019, the Brookings Metropolitan Policy Program issued its own analysis, *Automation and Artificial Intelligence: How Machines Are Affecting People and Places*.[3] Consistent with MGI's prior findings, Brookings found that jobs that involve predictable physical, and cognitive tasks are the most vulnerable to displacement by automation; perhaps not surprisingly, these are most often positions that already pay the lowest wages. In contrast, the jobs Brookings found to be least threatened by automation are those requiring a bachelors' degree and a series of non-routine and "softer" skills. As their report summarized:

> Among the most vulnerable jobs are those in office administration, production, transportation, and food preparation. Such jobs are deemed "high risk," with over 70 percent of their tasks potentially automatable, even though they represent only one quarter of all jobs. The remaining, more secure jobs include a broader array of occupations ranging from complex, "creative" professional and technical roles with high educational requirements, to low-paying personal care and domestic service work characterized by non-routine activities or the need for interpersonal social and emotional intelligence.[4]

In the near term, it is clear that the AI revolution will disrupt and potentially eliminate a substantial number of jobs. A 2018 University of Maryland study prepared for the National Bureau for Economic Research found that, broadly speaking, robots eliminate more jobs than they create. It concluded that each robot takes the job of 5.6 workers. By that analysis, the approximately 250,000 robots that have been added to the economy since 1999 have resulted in the elimination of 1.4 million jobs.

B. The Pandemic Has Accelerated Job Displacement

If one thing is plain, it is that the pandemic has accelerated these trends. Where once viewed more as a matter of simple economics (using AI and automation to reduce labor costs), in the pandemic environment, employers are also looking to automation as a way of continuing operations safely; minimizing potential illness in its workforce. In October 2020, the World Economic Forum reported that 43% of the businesses it surveyed were planning to reduce their workforce because of the increased use of technology.

There is no shortage of how automation, spurred by the pandemic, has increased worker displacement:

- The Pennsylvania Turnpike Commission eliminated 500 jobs for humans as a result of installing electronic tolling systems in March 2020.
- In jobsites ranging from hotels to grocery stores to hospitals, robots are now being used to do the routine cleaning previously done by janitorial staff.
- Globally, the use of robots as a means of delivering "telehealth" has increased exponentially.

In January 2021, one company published a detailed analysis of how the pandemic has already changed the workplace.[5] Key takeaways included:

- The shift toward remote work has accelerated during the pandemic, highlighting issues of structural inequality along a host of lines: the ability to work remotely; the uneven impact of layoffs due to COVID-19; inequalities inherent to returning to the workplace; and the impact on the labor market with respect to gender, caregiving responsibilities, and persons with disabilities.
- The shift to remote work has increased meetings, stretched workdays, and has fundamentally changed the way we communicate in the workplace. For many, longer workdays were a burden; for others, the flexibility of remote work was a net positive in terms of balancing work and family obligations.
- Issues around productivity, security, and technology became more prevalent, as remote work was necessary almost immediately, and implemented without the time to explore these issues fully.

Moreover, an even more recent MGI report[6] found, among other things:

- Jobs with the highest physical proximity to co-workers and customers are likely to be most disrupted.
- E-commerce has grown two to five times faster than before the pandemic, fostering growth in delivery, transportation, and warehouse jobs.
- Many jobs impacted by the pandemic will not return. As a result, a quarter of the workforce may need to change industries by the year 2030.

A review of how the workplace is transforming has never been so urgent. To that end, this Report will first address the employment implications stemming from the move to more permanent remote work. Next, the Report will examine how the changing workplace is affecting work that is performed on-site. Other issues that will be covered include how businesses are restructuring in the wake of workforce transformation, how litigation is evolving in a digital workplace, the importance of workplace training and diversity, equity and inclusion efforts as the nature of work transforms, and the global implications of these significant changes.

II. Permanent Remote Work

A. Onboarding and Separating Employees in a Remote Environment

According to one recent survey, 41.8% of Americans are still working remotely, though that percentage is expected to drop to 26.7% by the end of 2021.[7] By 2025, that same survey estimates that 36.2 million Americans will work remotely, an 87% increase over pre-pandemic levels. Of course, in that same time frame, firms will hire millions of people, quite possibly without ever having met that newly hired employee face-to-face. In expanding their remote workforces, businesses may seek to adopt technologies in their recruiting processes, such as artificial intelligence (AI), to augment their efforts. In doing so, however, firms must be mindful to vet carefully the technologies they seek to deploy, and understand both the benefits and risks of doing so.

1. Mitigating Risk when Deploying AI to Augment Recruiting

The use of algorithms to review résumés and perform other recruiting functions is becoming much more commonplace. Novel solutions include games-based tools that seek to measure aptitude, tools that conduct interviews and evaluate candidates, and tools that scrape publicly available social media content. The promise of AI-based recruiting tools is to eliminate possible implicit bias of decision-makers and expand the pool of potential candidates. In this way, firms can leverage Big Data to identify and recruit optimal candidates. Reasons firms may turn to predictive recruiting tools include efficiency and cost savings by automating at least part of the recruiting process and identifying quality candidates who will stay for the long term. AI-based tools have the potential to promote diversity, equity, and inclusion by expanding the applicant pool and focusing on candidates' abilities versus well-worn proxies for talent such as academic achievement, work history, and employee referrals, all of which are capable of perpetuating historical biases. Deploying algorithmic tools is not risk-free, however, and should only be done carefully, with the involvement of all key stakeholders, and with the assistance of qualified counsel.

Utilizing algorithmic tools introduces a new potential bias into the hiring process—bias that might be unintentionally built into the algorithm and derives from the way algorithms are coded and trained. Machine learning is one way to harness large amounts of data and develop algorithms with predictive power. Generally, machine learning is the process through which algorithms are built and trained to improve their accuracy over time without being programmed to do so.[8] Machine learning can be supervised or unsupervised. In supervised learning, humans label the data and the algorithm derives patterns. In unsupervised learning, the algorithm looks for patterns in unlabeled data. In either case, the quality of the data is paramount to building an algorithm with predictive power.

Data that reflects historical human biases can lead to an algorithm that reflects and amplifies those biases. Even if data reflecting protected characteristics, such as race, national origin, sex, and religion are carefully excised from the training data, there remains a possibility that the algorithm could identify other characteristics that strongly correlate to a protected class. This is especially possible if the algorithm utilizes "deep learning," and is able to reconstruct the protected characteristic through redundant coding in the data set.[9] Were that to occur, use of that algorithm could amplify historical biases at scale.

Imagine, for example, an algorithm is constructed to identify the top performers in a given job classification. Based on the data set, the algorithm "learns" that the top performers have been consistently employed for a number of years with no gaps of employment or leaves of absence. When applied to a recruiting set, the algorithm scores applicants with a gap in employment lower than applicants who have worked continuously. In this way, the algorithmic tool contains a latent bias—a bias based on historical trends in the data or one that already exists in society.[10] This latent bias in the selection tool could have an adverse impact on female candidates who are historically more likely to have an employment gap for the birth of a child. Or, imagine that the algorithm "learns" that top performers all live within a certain set of zip codes where the population is predominantly white, and the algorithm begins scoring candidates who live within other zip codes lower.

If a candidate selection process disproportionately excludes people of a protected classification, a firm could face disparate impact claims. A common defense in a disparate impact claim is to demonstrate that the challenged practice is job-related and consistent with business necessity. To prevail, an employer must establish that the challenged selection process is valid. Historically, with paper and pencil tests and other selection methods, courts and litigants have looked to the Uniform Guidelines on Employee Selection Procedures (Uniform Guidelines) adopted in 1978. As algorithmic selection tools become the subject of litigation, novel legal questions will surface. For example, if the algorithm is developed through deep learning, it may be impossible to determine which attributes were determinative in the algorithm's decision—it is essentially a black box, making validation difficult, if not impossible. And if the algorithm uses machine learning, constantly adapting to new information, it will undoubtedly be even more difficult to attempt to map the decision(s) at issue. Moreover, trying to unwind the decision and identify determinative attributes may violate the trade secret and intellectual property rights of a third party that developed the tool. Given the risks, firms must carefully vet algorithmic selection tools before deploying them. Employers are already well aware of the risks of using pre-hire assessments, and should recognize that algorithmic selection tools have the potential to amplify those risks due to the sheer volume of potential decisions.

In the not-too-distant future, we are also likely to see regulators begin attempting to address the challenging issues posed by the use of algorithms in hiring. Jenny R. Yang, former chair of the U.S. Equal Employment Opportunity Commission and current director of the Office of Federal Contract Compliance Programs, testified on behalf of the Urban Institute before the Civil Rights and Human Services Subcommittee, Committee on Education and Labor, U.S. House of Representatives in 2020. Director Yang's testimony emphasized, "Employers need to ensure that both the criteria for selection and the performance measures are both fair and job-related. This requires a rigorous job analysis to determine the skills and abilities for which to screen."[11] Director Yang further testified that algorithmic tools must be tested for validity and bias, that employers should understand what steps the developer has taken to de-bias the algorithm, and called for transparency—that algorithmic screening tools be designed to document the reasons for decisions so those decisions can be explained.[12]

With the foregoing in mind, there are key steps that employers considering deploying algorithmic hiring tools should take. First, become an educated consumer. To understand the potential and limits of the tools you are reviewing, key stakeholders must be involved to develop a tool that will: 1) meet the businesses recruiting objectives; and 2) comply with legal obligations. Second, know your data. As noted, decisions will largely be a function of the training data, so firms must have a strong grasp of the types of information they use to train an algorithm—are there objective measurements of performance, or subjective summaries? Are there historical hiring patterns evident in the data that the firm wishes to correct? Third, after adoption, review your processes. A "set it and forget it" mindset will undoubtedly create risk. Moreover, one of the best uses of algorithmic processes is to run an algorithmic program in tandem with human recruiters to augment, and not replace the process. In this regard, the algorithm can help to identify hidden gems that human recruiters may have missed. Lastly, firms preparing to deploy algorithmic hiring tools should familiarize themselves with data privacy laws, which will impact the types of data that may be collected and may require notice and consent or other legal obligations. The sheer power of algorithms and computing has the capability to fundamentally improve the recruiting process, but great care must be taken to ensure firms obtain the desired results and do so in compliance with existing and developing law.

2. Hiring, Managing, and Terminating Employees You've Never Met in Person

Firms hiring remote workers will necessarily have to alter and digitize their onboarding processes. First, there is no doubt that certain forms must be completed—I-9 verification, tax forms, policies, etc. To the extent the forms contain sensitive personal information, firms will need to devise secure methods for the forms to be returned. Additionally, employee training and orientation will be conducted virtually, and firms may consider using a computer-based learning management system to present training at scale and monitor employee completion. According to a 2018 Gallup poll, only 12% of employees strongly agreed that their organizations do a great job onboarding new talent.[13] And the Society for Human Resource Management reports that employee turnover can be as high as 50% in the first 18 months of employment.[14] Clearly, employee onboarding and engagement is even more challenging in a remote environment. One key factor in employee engagement is creating a culture of connectedness.[15] With remote employees, this should start with onboarding. While nearly a year into the pandemic Zoom meeting fatigue has set in, it is crucial to develop a connection with newly hired remote employees to reinforce a culture of connectedness. Remember that your newly hired remote employees are enthusiastic and eager to contribute, so provide them channels to do so.

As noted throughout this Report, as the workplace expands globally, employers have to contend with the employment-related laws of all the jurisdictions within which they have employees. This means that employers will need to have an understanding of the varied anti-discrimination requirements in places where they have employees, including any mandatory postings. Employers will also need to understand the wage and hour requirements of the places where they have employees, and model their policies accordingly. For example, does the firm now have employees in jurisdictions that require specific information be listed on a pay stub? What are the pay frequency requirements? Are there expense reimbursement requirements? What are the minimum wage requirements? In many ways, hiring one employee in a jurisdiction new to the employer requires the same analysis the employer would undertake were it to open a new office. Just as importantly, in a remote environment, employer information-security policies are critical. In this regard, not only should firms adopt robust security policies, remote employees must be provided a secure way to connect.

Firms often require new employees to execute agreements that protect the firm in the event the employee departs. Such agreements include confidential information agreements, non-solicitation agreements, non-compete agreements, and arbitration agreements. Jurisdictions vary widely on the enforceability of such agreements, and some restrict the provisions that may be included. Consequently, when hiring an employee in a new jurisdiction, employers must ensure that their agreements comply with the laws of the jurisdiction where the employee will be working.

While initial reports suggest that employee productivity increased when a large portion of the workforce was required to work from home, monitoring and managing productivity in a remote environment is challenging.[16] A manager can no longer walk down the hallway and get a sense of whether employees are engaged. If questions about an employee's productivity do arise, there are a variety of surveillance tools an employer can deploy to ascertain whether the employee is working.[17] This could be as simple as checking logs to determine when and for how long the employee was logged in and when the employee's computer was idle, or a more in-depth analysis of the employee's email and chat traffic. In all cases, when conducting surveillance, the employer will need to ensure it is complying with the privacy laws of the jurisdiction where the employee is located. As with any performance issue that leads to discipline or termination, documentation will be key if the employee subsequently challenges the decision. Consequently, if an employer suspects an employee is not performing to expectations, it is important to have a paper trail. Especially in a remote environment, it is crucial not to make assumptions; rather, an employer should have documented evidence of the employee's shortcomings.

In many ways, disciplining and separating a remote employee can present fewer challenges. Termination conversations are never easy, but the distance can help de-personalize the conversation. In circumstances where the employer anticipates the employee may become hostile, an employer may not need to take the same security precautions it would take in a multiple-employee work setting to protect the safety of other employees. Securing return of company property will be more challenging, however. Employers should immediately send the employee shipping materials to return company property. Also, since the employee's access to company systems will be immediately terminated, employers must obtain alternative contact information from the employee in order to provide any required documentation. The employer will also need to take heed of any mandatory final pay practices where the employee is located.

B. Tax and Registration Issues to Consider

As previously noted, a year into the pandemic, a large portion of the workforce continues to work from home or at a location other than the employer's brick-and-mortar facility. While many of these wandering workers will eventually return to the workplace when it is deemed safe to do so, it is clear that for some, teleworking is here to stay.

The move to permanent remote work will have several implications for employers. This section addresses the tax-related issues that arise when employees work in a jurisdiction other than the employer's physical location.

1. Physical Presence "Doing Business" and Registration Requirements

When is a company considered to be "doing business" in a state for tax purposes? In *Filmakers Releasing Organization v. Realart Pictures*,[18] the court noted, "[T]his much seems to be clear . . . the greatest amount of business activity is required to subject a corporation to the state's statutory qualification requirements." Therefore, where a corporation's activities in a state are sufficient to require qualification, it follows that the corporation will also be amenable to service of process and to being taxed by the state.

Using Maine as an example, the state defines "doing business" for corporate income tax purposes as:

Without limitation, a foreign corporation does business in Maine if it engages in any of the following activities in this state:

- Maintains an office or other place of business;
- Executes a contract;
- Exercises or enforces contract rights;
- Buys, sells or procures services or property; or
- Employs labor.[19]

In *South Dakota v. Wayfair, Inc.*,[20] the U.S. Supreme Court, in striking down the physical presence standard necessary to establish presence for purposes of sales and use tax obligations that had been established by *Quill Corp. v. North Dakota*,[21] stated that "[t]his Court should not prevent States from collecting lawful taxes through a physical presence rule that can be satisfied only if there is an employee or a building in the State. ... it is not clear why a single employee or a single warehouse should create a substantial nexus while 'physical' aspects of pervasive modern technology should not."[22] While arguably *dicta*, the Court's rhetorical question makes clear that the presence of a "single employee" in a state would appear sufficient to create a physical presence for at least sales and use tax.

Maine does not define "doing business" by a foreign corporation for purposes of registration. Rather, it states: "A foreign corporation may not transact business in this State until the foreign corporation files an application for authority to transact business with the Secretary of State."[23] It then defines what "activities do not constitute transacting business within the meaning of subsection" to include:

- Maintaining, defending or settling any proceeding;
- Holding meetings of the board of directors or shareholders or carrying on other activities concerning internal corporate affairs;
- Maintaining bank accounts;
- Maintaining offices or agencies for the transfer, exchange and registration of the 'corporation's own securities or maintaining trustees or depositories with respect to those securities;
- Selling through independent contractors;
- Soliciting or obtaining orders, whether by mail or through employees or agents or otherwise, if the orders require acceptance outside this State before they become contracts;
- Creating or acquiring indebtedness, mortgages and security interests in real or personal property;
- Securing or collecting debts or enforcing mortgages and security interests in property securing the debts;
- Owning, without more, real or personal property other than agricultural real estate;
- Conducting an isolated transaction that is completed within 30 days and that is not one in the course of repeated transactions of a like nature;
- Transacting business in interstate commerce;
- Engaging as a trustee in those actions defined by Title 18-C, section 7-103 as not in themselves requiring local qualification of a foreign corporate trustee; or
- Owning and controlling a subsidiary corporation incorporated in or transacting business within this State.[24]

As this exclusionary list demonstrates, having employees in-state is not expressly exempt from the definition of what constitutes "doing business." Assuming then that having an employee living and working in a state is sufficient to constitute "doing business" that creates a presence within the state, the question becomes: what obligations does that trigger?

While again the requirements vary slightly, all states require foreign corporations to register to do business. Generally, this requires a simple registration form and payment of a fee. For example, Maine requires the filing of two-page Form MBCA-

12 and the payment of $250 filing fee.[25] The failure to register properly means that the business can be subject to a fine of $500 per year, and it may not maintain a proceeding in any court until it files its application.[26]

Based on the foregoing, it seems likely that having an employee in Maine would subject a business to not merely corporate income tax and sales tax presence, but registration requirements as well. As such, the business is better off, notwithstanding the administrative burden, registering as a foreign corporation to transact business in states in which it has remote employees working.

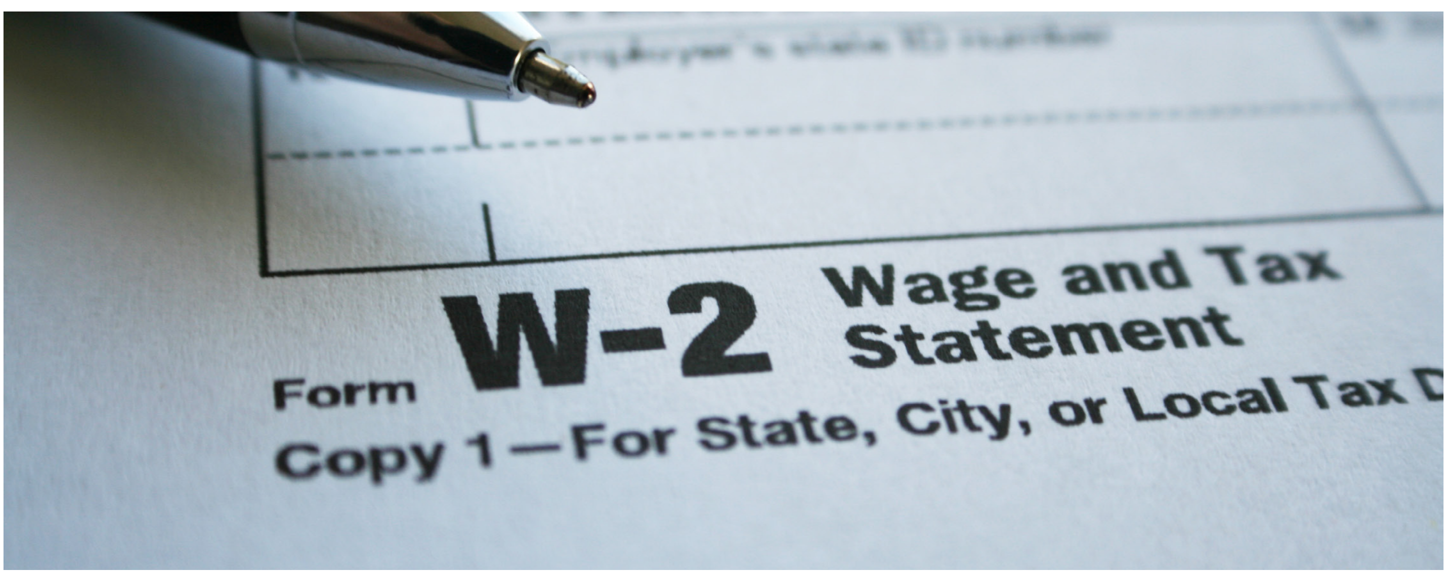
Further, even if the business has remote workers in states in which it otherwise is not operating or "doing business" for tax purposes, it still must register as an employer and file quarterly and annual state payroll tax returns as required by the state. While this may create additional administrative burdens when there is only one employee in the state (this is an assumption for remote workers in certain states, such as Maine), there is no basis for avoiding such tax reporting.

2. Employment Taxes

When employees work remotely, the first issue for employers is determining to which state employment taxes must be paid. In most cases, an employer is concerned only with state unemployment insurance taxes, although in several states there are additional taxes. For example, California also has state disability insurance taxes and an employment training tax. Regardless of how many states an employee works in, unemployment insurance taxes are paid only to a single state. All states use the same four-part test to determine the proper state to report and pay unemployment insurance taxes:

- localization;
- base of operations;
- place of direction and control; and
- state of employee's residence.

This test must be applied in hierarchical order; that is, it must first be determined if the work is localized to a particular state. An employee's services are "localized" in a particular state if all or most of the employee's services are performed in such state, with only incidental services performed elsewhere (for example, where the out-of-state service is temporary or transient in nature or consists of isolated transactions). Where the services performed outside of the state are either permanent, substantial, or unrelated, it cannot be treated as localized to a particular state.



If an employee's services are not localized to a particular state (because, for example, they spend 33% of their time in three separate states), then the next test to apply is the base of operations. Under this test, unemployment insurance taxes are paid to the state in which the employee has their only base of operations. A base of operations is generally considered to be a more or less permanent place from which the employee starts work and customarily returns to receive employer's instructions, to receive communications from customers or others, to replenish stocks or supplies, to repair equipment, or to perform other functions relating to the rendition of services. For example, if an employee telecommutes but is assigned to an office location, where they come for meetings, obtain supplies, etc., such office location would be considered a base of operations.

If the employee's services are neither localized nor subject to a base of operations, the third test is the place of direction and control. Under that test, if an employee performs some services in a state and it is also the place from which employer exercises basic and general direction and control over all the employee's services, then unemployment insurance taxes are sourced to such state.

Finally, if none of the previous three tests applies, then unemployment insurance taxes are sourced to the employee's state of residence. For states that have other employment taxes (such as state disability insurance taxes (SDI) in California), they are sourced according to the same rules that apply to unemployment insurance taxes. Thus, for example, if an employee works both in California and Oregon, if it is determined that unemployment taxes should be sourced to California, then the employee must also pay California SDI taxes. If unemployment taxes must be sourced to Oregon, however, then the employee does not pay California SDI taxes.

3. Multistate Income Tax Withholding

Individuals are subject to tax in a jurisdiction based on two general grounds: *first*, residency; and *second*, when performing services in such jurisdiction. Thus, an employee who is a resident of California but performs some services in Kentucky is subject to income taxes on all services performed in Kentucky, while also being subject to income taxes on all income (and not just wages) in California. These taxes may be owed regardless of whether an employer withholds and remits taxes, or may not be owed even if an employer withholds and remits taxes.

Of course, employers are generally obligated to withhold and remit income taxes owed by employees on the wages the employer pays them. Using the same example as above, an employer would be obligated to withhold California income taxes on wages paid to the employee for any services in California, and may be obligated to withhold Kentucky income taxes on the wages paid to the employee that are for the services performed in that state. To determine such income, generally an employer must look at the days worked in the state over the total workdays. Thus, if 121 workdays are in California and 121 workdays are in Kentucky, the employer would be liable to withhold Kentucky income taxes on 50% of the employee's wages.

The states have very different rules about when an employer is obligated to withhold income taxes. For example, New York and Connecticut both have a 14-day rule that states if an employee is working in the state for 14 days or less, then there is no income tax withholding. If the employee works 15 days or more, the employer is obligated to withhold income taxes. Arizona and Hawaii use a 60-day rule. Other states use a dollar threshold. For example, Massachusetts uses $8,000 in income, which requires knowing both the days worked in Massachusetts and compensation earned. Several states have no threshold, meaning that the withholding obligation begins at one dollar of wages paid for services performed in the state.

In addition, some states have reciprocity agreements. For example, if an employee lives in New Jersey but works in Pennsylvania, the employer is not required to withhold Pennsylvania income taxes under an agreement between New Jersey and Pennsylvania, provided the employee gives the employer the correct exemption paperwork. Also, there are nine states that do not tax compensation paid to employees: Alaska, Washington, Nevada, Texas, Florida, Tennessee, New Hampshire, South Dakota and Wyoming.

As noted, income taxes may be payable to two states on the same wages. For example, if an employee is a resident of a state with higher withholding rates than the state in which the employee is working and taxable, then at least in theory, the employer must withhold for the work performed in that state and the difference for the resident state. For example, assume a California resident is working in Illinois. Further, assume that the withholding for Illinois is $5 and the withholding for California would be $9 if the employee were working in California. The employer is supposed to withhold $5 for Illinois and $4 for California: the $9 that should be withheld for a California resident minus that $5 withheld for Illinois. This should be done on a pay-period basis, requiring employees to report their worked-in states each pay period. This process alleviates the double taxation caused by multistate withholding, but is difficult to implement in practice.

4. Business Expenses

Another tax consideration is reimbursement of business expenses to employees, which has become an increasingly important issue as employees shifted from brick-and-mortar offices to home offices during the pandemic. There are also wage and hour issues stemming from expense reimbursement, which will be discussed in part D of this Report.

Section 162(a)(2) of the Internal Revenue Code (Code) permits a deduction for ordinary and necessary travel expenses incurred while temporarily away from home in the pursuit of a trade or business. The deduction for expenses incurred while away from home is intended to mitigate the burden of a taxpayer who, because of the travel requirements of the trade or business, must maintain two places of abode and therefore must incur duplicate living expenses.[27] In order to be allowed a deduction under section 162, a taxpayer must establish that the travel expenses were: (1) reasonable and necessary, (2) incurred while away from home, and (3) incurred in pursuit of a trade or business.[28]

Generally, a taxpayer's "home" for purposes of section 162(a) is the city or location of their principal place of business and not where their personal residence is located.[29] A taxpayer's residence can be their principal place of business if it qualifies as a home office for purposes of section 280A(c)(1)(A).[30] Further, an employee without a principal place of business may treat a permanent place of residence at which they incur substantial continuing living expenses as their tax home.[31]

The Supreme Court in *Flowers v. Commissioner*[32] stated that the taxpayer must be "away from home" to deduct travel expenses. This has been determined to mean that a "sleep or rest rule" or "overnight rule" must be satisfied. This requirement is satisfied if the taxpayer must be away from home for "substantially longer than an ordinary day's work, the employee cannot reasonably be expected to make the trip without being released from duty for sufficient time to obtain substantial sleep or rest while away from the principal post of duty, and the release from duty is with the employer's tacit or express acquiescence."[33]

The courts, in considering questions involving deductions for traveling expenses, have frequently stated that each case must be decided on its own particular facts. Furthermore, there appears to be no set distance requirement for what constitutes "away from home." Section 162(h)(4) of the Code requires state legislators to reside 50 or more miles from the capitol building of the state in order to deduct traveling expenses. While this is a useful guide, it is not determinative and this statutory exception is applicable for state legislators only.

Thus, when an employee lives in Phoenix, Arizona, for example, but works each week in San Jose, California, the employee's tax home is likely San Jose, not Phoenix. If the company pays to house the employee in San Jose each week, that likely constitutes the payment of personal living expenses and not reimbursable travel expenses. As such, while the

employer is entitled to pay such expenses, they must be treated as additional wages to the employee and taxed as such.[34] This can often have unintended consequences if not properly communicated to employees.

In sum, employment-related taxes can be a thorny issue even absent the added complications brought about by the changing nature of work and work locations.

C. Benefit/Leave Risks and Implications When Allowing Employees to Work in States Where the Company Does Not Normally Conduct Business

The breadth and variety of state and local employee benefit laws, including laws mandating employee time off or leaves of absence for assorted reasons (and, in certain instances, granting paid benefits during such time off) creates a minefield for the unsuspecting employer. Not only do the laws differ from state to state—and in some instances, municipalities—but some jurisdictions are silent on certain issues, such as how state and local benefits are managed for an employee who works in a state where the employer generally does not conduct business.

The confluence of location of work, on the one hand, and state laws related to employee benefits, on the other, have generated myriad quandaries when an employee requires time off from work. Which state law applies: the law of the state where the employer is located, the law where the work is based, or the law from where the employee is actually working?

Take, for example, the employee "based" out of the city of Philadelphia, Pennsylvania who has been working from her home in New Jersey for the past eight months. She informs her employer that she is pregnant and needs time off for doctor's appointments. A question arises as to whose paid sick leave law applies: the city of Philadelphia's or the state of New Jersey's? The employer, however, punts on that issue and just provides that paid time off. Then she requests 10 weeks of leave under the federal Family and Medical Leave Act (FMLA) for her pregnancy and childbirth-related disability (four weeks before birth, six weeks after) and an additional 12 weeks of bonding leave under the New Jersey Family Leave Act, which, by law, does not begin to run until *after* her disability leave ends.

The employer is stunned—Pennsylvania does not have its own state version of FMLA, like New Jersey does. Suddenly, the employer that was expecting a request for 12 weeks of time off must decide how to handle a request for 22 weeks off. New Jersey law offers no clarity and does not distinguish or seem to care where the employee is based or from where she receives her work. Out of an abundance of caution, the employer approves the leave. Then, another hit: the employee applies for paid family leave benefits from the state of New Jersey. Because the employer considered the employee Pennsylvania-based, however, the employer did not withhold payroll taxes (including taxes for the New Jersey paid family leave benefits fund) from the employee's paycheck. Hence, her claim is denied. Is the employer now liable to pay her such benefits, which can exceed $10,000 (*i.e.*, up to a maximum of $903.00 per week for up to 12 weeks)? Will New Jersey now seek future (or past) penalties and/or taxes on her behalf from the employer?

Because of traps like this, employers must be vigilant about monitoring the leave/benefit consequences surrounding where their employees work and must be aware of the issues that may arise in various jurisdictions when navigating employee benefit laws.[35]

1. Leave of Absence Issues / Paid State Family Leave

Sixteen states have some form of leave of absence law that mirrors or supplements the FMLA. Ten states offer paid family leave, which may or may not be tied to the right to leave in the first instance. For those that have such laws, the differences are significant.

The initial inquiry for an employer is generally a determination of **whether** the employer is required to comply with these laws. Even this fundamental requirement differs drastically across states that have leave of absence laws. For example, in Oregon, the Oregon Family Leave Act[36] only applies to employers with 25 or more employees in the state of Oregon. In contrast, Washington and California paid family leaves—except for very limited circumstances—apply to employers of *any* size.

Further, the majority of jurisdictions that mandate some form of paid or unpaid state family or medical leave are outdated in that they do not reflect business in the modern era. Today—especially during the midst of a global pandemic—businesses are changing the way they operate. In New Jersey, the paid family leave law specifically accounts for the changing business environment—namely, remote work. For example, in determining whether a business is required to comply with the state family leave law, New Jersey law provides that all "employees" of an "employer" are eligible. State boundaries are not discussed. Thus, if a New Jersey company has employees working remotely in Pennsylvania and New York, those individuals arguably may be eligible for leave under New Jersey law, same as the employee who is working in New Jersey for a New York employer. That, however, also does not end the inquiry of whether that employee may be eligible under another state's law.

After determining if the statute applies to your business, the next inquiry is which of your employees are covered. This determination often involves calculation of wages to date and number of days worked. In some instances, however, a state allows *all* employees to be covered. This is the case in California—where you live *does not* affect your eligibility. In Rhode Island, most individuals, including those living out of state, are eligible for leave under the statute. In other jurisdictions such as Connecticut, only employees who have earned wages of at least $2,325 in the highest-earning quarter of the first four of the five most recently completed quarters (the "base period") and who are currently employed with a covered Connecticut employer, are eligible for leave.

Importantly, one of the biggest risks of this cornucopia of state leave laws is that employers could be subject to litigation by employees or even the state for failing to provide leave and/or for not properly funding the leave program. In states such as California, Connecticut, New Jersey, and New York, employers must withhold a specified percentage[37] of an employee's wages. In contrast, Massachusetts, Oregon, and Washington have leave laws that are funded by both the employer and the employee. Improper funding can lead not only to litigation, but also can be extremely time consuming for an employer because it will have to sift through endless amounts of accounting records to properly determine improprieties.

How long an employee can be out on leave also varies across states. Embedded within this determination are also the reasons *why* employees are allowed to take leave under any given state or local law and whether the state's law runs concurrently with the federal FMLA. The amount of leave may vary in conjunction with its specific purpose. For example, Massachusetts distinguishes the amount of leave on whether it is a family or medical leave of absence. For family leave, an employee can receive up to 20 weeks per year, while employees are only entitled to 12 weeks per year for family leave. Conversely, Rhode Island only permits up to four weeks of leave under the state statute.

The economics of paid state family leave also have a significant impact on businesses. One of the country's most aggressive state family leave policies—Oregon's—will commence in 2023. There, if the eligible employee's average weekly wage is equal to or less than 65% of the average weekly wage, the employee's weekly benefit amount will be 100% of the employee's average weekly wage. Although weekly benefits will be capped at $1,215.00, this could have dramatic implications for employers in more blue-collar industries that traditionally have workers who have lower wages.[38]

Similarly, Washington also has an aggressive paid family and medical leave law. In Washington, employees will receive up to 90% of their weekly pay (capped at $1,206.00). Employees receive the maximum weekly benefit amount for any week they claim the full week. Washington does, however, preclude workers from receiving wages or paid time off at the same time as paid family and medical leave *unless* the paid time off is designated as a "supplemental benefit." Lastly, California's weekly benefits range from $50.00 to $1,357.00.[39] Among the three aforementioned states, the expenses associated with paid family and medical leave for companies is significant. This combined with the fact that states have been sluggish to alter legislation and regulations to adapt to a changing workforce, creates significant economic risks for businesses. It is important employers understand the state laws in which they are located as well as neighboring states in order to properly plan in an effort to avoid financial hardship or legal disputes over the governing law for an individual employee.

a. Paid Sick Leave Mandates

i. State vs. Local Laws; Defining Employers and Employees

As with state leave laws, most jurisdictions across the United States do not have paid sick leave. In several larger states that have legally mandated paid sick leave (*e.g.*, California and New York), the state has its own paid sick leave law *and* larger cities have their own local ordinances mandating paid sick leave. For example, in California, Berkeley, Emeryville, Los Angeles, Oakland, San Diego, San Francisco, and Santa Monica all have different guidelines. Similarly, New York State has its own paid sick leave law, as does New York City.

The differences between state and local laws governing paid sick leave are significant and failure to appreciate them can lead to headaches for an employer. For example, all of the above-mentioned municipalities in California require that eligible employees (among other things) must have worked at least two hours within that locality. Nevertheless, the statutes are silent as to whether an employee who works *remotely* for a business with a license in a specific municipality constitutes an individual who "worked" at least two hours in that municipality.

Likewise, this same issue appears when employers are attempting to determine whether their business falls within the statute and thus, must comply with paid sick leave mandates. For example, San Francisco's law mandates employers calculate the number of employees located *anywhere*, while Los Angeles' law states only that the employees have to be "covered." Other cities in the United States, namely St. Paul, Minnesota, are even more

specific than a city such as San Francisco. For example, St. Paul requires employers to count all employees in St. Paul *and* whose physical location is in St. Paul.

ii. Reason for Taking Paid Sick Leave

Generally, states that have paid sick leave laws tend to be in alignment with each other on the reasons for which employees may take paid sick leave. Common permissible uses of paid sick leave include, but are not limited to: physical or mental illness, injury, or medical condition; preventive medical care; and care or treatment of a family member's mental or physical condition. Additionally, most states also provide for safe time for medical and mental health attention following domestic violence or sexual assault.

The implications of states having such broad definitions related to reasons for use is that employers are often left puzzled as to whether scenarios employees face are, in fact, permissible uses under the applicable law. Employers are then left to guess on how to proceed, and the consequence could be a dispute between a disgruntled employee and the company.

In light of COVID-19, attention has turned to whether states that have paid sick leave permit employees to take leave if they are sick due to a public health emergency. In Arizona, a covered employee can take paid sick leave if their child's school or place of care, by order of a public official, closes due to a public health emergency. Additionally, in early 2020, Colorado enacted the Healthy Families and Workplaces Act, which requires Colorado employers to provide three types of paid sick leave. One of these paid sick leaves requires employers to provide a supplemental public health emergency paid sick leave (up to a maximum of 80 hours).[40] A significant question yet to be answered is, post-COVID-19, will states such as Colorado reform what "public health emergency" means and more importantly, will they modify this law to be more business-friendly in light of the fiscal concerns associated with this policy?

Ultimately, it is dependent upon state legislatures, administrative agencies, and in some cases, courts, to clarify the scope of what constitutes a permissible reason to take paid sick leave under a state.

iii. Accrual Rates, Accrual and Use Caps, Front Loading

Differences between U.S. states and municipalities are important to note. Regarding accrual rates, accrual and use caps, and front loading, certain jurisdictions may be risker than others, such as in Washington where there is no accrual cap and in San Francisco where there is no use cap. In such jurisdictions, pure frontloading (*i.e.*, where employers are relieved of the obligation to track leave accrual and carry over unused leave at year-end if they provide a certain amount of leave each year) is really not available as an option.

San Francisco allows an accrual cap of 72 hours max bank and requires carryover up to a max of 72 hours; however, there is no use cap. For example, if an employee has 72 hours left at the end of 2019, legally, you would have to allow them to carry over up to 72 hours. Assuming you—the employer—do allow the "carryover" and they use 48 hours of sick time in the first two weeks of January 2020, the employee's leave bank has 32 hours left. Per San Francisco law, you would still have to allow employees to "accrue" paid sick leave at a rate of 1 hour for every 30 hours worked in calendar year 2020 until they hit that max bank again of 72 hours (the accrual cap). Additionally, employees could still use the remaining 72 hours in the calendar year (*i.e.*, 120 hours total) because, as noted, San Francisco does NOT allow a use cap. Thus, conceivably, an employee, with carryover and accrual, could use up to 152 hours in a calendar year. Similarly, using Washington as an example (where there is no accrual cap) and where employees accrue time as hours are worked, most sick leave policies do not provide enough time to match the accrual requirements of someone who works an excessive amount of overtime hours.

Additionally, similar risks are at issue when contrasting New Jersey and New York. In New Jersey, employees can carry over up to 40 hours; however, in New York State, there is no express carryover cap, but in New York City—depending on the number of employees in a particular business—the carryover cap is either 40 or 56 hours.

The permitted carryover cap is also notably different in states that have paid sick leave laws. For example, in Rhode Island and New York State (excluding New York City) there is *no express* cap on the carryover permitted by employees. In stark contrast, employees working for companies with 14 or fewer employees in Pittsburgh, Pennsylvania, are permitted to carry over 24 hours only.

Complying with paid sick leave laws can be very challenging when employers have a handful of employees in many different jurisdictions. The above issues are common complications with trying to have one uniform paid sick leave policy, which often is just not feasible.

b. FMLA and Similar State Leave Laws

Aside from the implications and risk involved with FMLA, the following jurisdictions have state leave laws similar to the FMLA: California, Connecticut, District of Columbia,[41] Hawaii, Illinois, Maine, Maryland,[42] Massachusetts, Minnesota,[43] New York, Oregon, Rhode Island, Vermont, Washington, and Wisconsin. Additionally, Georgia and Texas have statutes limited to kin care. In general, these state law laws allow individuals to take a leave of absence from work for events including, but not limited to, birth or adoption of a child, seeking medical care for physical or psychological injury, or caring for a family member such as a parent or grandparent.

Notably, New Jersey's state leave law has a provision providing for emergencies declared by public health officials. Specifically, an individual may exercise their rights under the New Jersey Family Leave Act to take leave for oneself or a family member if a determination is made, including mandatory quarantine, requiring or imposing responsive or prophylactic measures as a result of illness caused by an epidemic of a communicable disease or known or suspected exposure to the communicable disease. Such a provision is unique and requires employers to adapt their procedures as soon as an emergency occurs, just as employers had to do at the beginning of COVID-19.

Other portions of similar state leave laws that can create issues for employers are various obligations mandated for businesses to follow. Almost all of the states that have FMLA-type leave of absence laws require some form of reinstatement and prohibit discrimination of any kind. Additionally, some state leave laws require employers to post certain notices of employee rights in various parts of the workspace. State leave laws also have employee obligations that employers must take note of to ensure they do not overstep on employee rights. For example, in Connecticut, employers may require that a leave taken due to a serious health condition of an employee is supported by a certification issued by a health provider. Such documentation is fairly common across state leave laws. Issues often arise, however, in determining when such certification is necessary and when an employer can ask for recertification. In Washington, the statute does not prohibit an employer from requiring an employee on leave report periodically to the employer on the employee's status and their intention to return to work. Issues such as these that hinge on ambiguous language are often causes of employee-employer disputes.

Most jurisdictions with state leave laws similar to the FMLA allow for up to 12 weeks of family leave during any calendar year. Yet, other states are more restrictive with leave. In Hawaii, eligible employees are only allowed up to four weeks of leave per calendar year. In Illinois, an employer may limit an employee's use of personal sick leave for kin care purposes to an amount not less than the person's sick leave that would be accrued during six months at the employee's then-current rate of entitlement. Employers in Illinois that base personal sick leave benefits on an employee's years of service instead of annual or monthly accrual may limit the amount of sick leave to be used to care for a family member to *half* of the employee's maximum annual grant. Moreover, other states offer paid sick leave that ranges from up to six workweeks in a 12-month period (Maryland), or up to eight weeks for the birth or adoption of a child, including in the aggregate for two employees entitled to such parental leave for the same child (Massachusetts). This Massachusetts rule could potentially raise a multitude of issues beyond paid leave (*e.g.*, was disclosure of the relationship between the two employees required to human resources or is/has the relationship adversely affected work performance).

Lastly, the issue of reinstatement is quite common across state leave laws. Most states mandate that individuals must simply be reinstated to their position or a similar position with the same status, pay, and length of service, credit and seniority (as of the date of the leave). Intertwined with this requirement, employers are often required to post notices in the workplace describing employee rights and obligations under the applicable state leave law, as well as provide a copy of policies to all employees. One of the most notable exceptions to a state family leave law is in New Jersey. There, the exception is that an employer may deny family leave to an employee if:

> (i) the employee is a salaried employee who is among the highest paid 5% of the employer''s employees or the 7 highest paid employees, whichever is greater; (ii) the denial is necessary to prevent substantial and grievous economic injury to the employer''s operations; and (iii) the employer notifies the employee of its intent to deny leave at the time the employer determines denial is necessary. If, however, the leave has already begun, the employee must return to work within 10 working days of the notification.[44]

This New Jersey exception does not, however, apply when, in the event of a state of emergency declared by the governor or when indicated to be needed by the commissioner of health or other public health authority, the family leave is for an epidemic of a communicable disease, a known or suspected exposure to a communicable disease, or efforts to prevent spread of a communicable disease. This exception is of particular importance in a time such as COVID-19.

There is no doubting that leave laws—paid sick leave, state family and medical leave laws, paid family leave law and other leave of absence laws—are complex and vary significantly in each jurisdiction. As the workplace continues to change and business evolve into smarter, leaner, more efficient organizations, it is important to understand what is at stake in managing employee benefits.

D. Wage and Hour Challenges

The move to remote work has created a host of wage and hour complications. Employers must be cognizant of these changes and develop strategies to adapt as necessary.

1. Which Law Applies?

As employees are working remotely, many are moving around the country to improve their "work from home" experience. This causes a number of challenges for employers, because of a critical threshold question: which law applies? The geographic location of an employee carries with it tax implications, compliance requirements with state or local wage and hour laws, as well as paid sick leave laws, which vary widely from place to place. For example, an employee originally residing in Fort Worth, Texas, and earning $7.25 per hour there (minimum wage) decides to visit their parents in Los Angeles, California for three months, and work remotely. Because the employee is physically performing work in California, the employee will actually need to be paid the higher minimum wage of $14.00 per hour (minimum wage), and will need to be provided paid sick leave as well. If the employee was classified as exempt under the applicable law in Texas (which follows the FLSA), that exempt status may be improper in California (which has its own exempt classification requirements separate from the FLSA).

Consequently, when workers "wander," an employer must evaluate the impact that relocation will have on a variety of labor and employment compliance topics: everything from required notifications to employees (such as wage theft notices and advance notice of pay changes) and mandatory training, to applicable salary thresholds, minimum wage, and paid sick and family leave entitlements. Even when assessing compliance obligations in one jurisdiction, however, remote work adds particular challenges to wage and hour considerations, described herein.

2. Expense Reimbursement

Employers should consider federal law, and the patchwork of various state laws affecting expense reimbursement, particularly in instances involving mandatory telework as opposed to telework requested by the employee.[45]

Ascertaining expense reimbursement obligations is one of the most challenging aspects of implementing a compliant telework program. Expense reimbursement obligations are not always clearly defined in statutory code. In some states, expense reimbursement obligations are evolving by judicial decision. In states where the expense reimbursement obligation is addressed by statute, there may still be a lack of guidance as to how to apply the statute to specific circumstances.

Most states that follow the FLSA do not have a robust statutory or common law requirement to reimburse; they merely require reimbursement of home-office expenses to the extent unreimbursed business expenses would bring compensation below the applicable minimum wage. The FLSA provides, "if an employee is required to provide tools of the trade to be used in or are specifically required for performing an employer's particular work, an employer would violate the [FLSA] in any workweek when the tools' cost cuts into the minimum or overtime wages an employee must be paid."[46]

Some states and municipalities have specific laws requiring reimbursement for necessary, out-of-pocket expenses incurred by employees to perform their work, including those teleworking. California's statute is the most restrictive and has served as a model for others. It requires employers to reimburse "all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of duties or obedience to the employer's directions." Although the law is not entirely settled, only California courts have held that an employer should reimburse a reasonable percent of the expense for things used to perform the work, even if the employee would have incurred the same expense without having used the item for business (*i.e.*, no incremental cost to employee such as existing home internet or use of personal cell phone that is on an unlimited plan).

Some states have a statutory requirement that an employer pay the cost of providing certain tools and equipment and others set particular requirements and limits on an employer's ability to *deduct* the cost of tools and equipment from employee wages. There appears to be a growing trend in court interpretations of "deduction" rules and expense reimbursement obligations together. In some jurisdictions, depending on the factual circumstances, there is a possibility that a failure to reimburse necessary out-of-pocket expenses will be interpreted as a failure to pay wages owed to the employee, or an improper deduction.

3. Compensable Time

a. Timekeeping for Non-Exempt Employees

Timekeeping for employees working at home is particularly tricky due to (1) decreased supervision or ability to verify hours worked, (2) access to work applications on personal devices, and (3) if employees are being provided company-issued devices, that off-the-clock work is being prevented given that the home-work boundaries are now blurred. In a remote environment, monitoring off-the-clock work is particularly challenging as the workday for many has stretched, and managers do not have line-of-sight visibility to their subordinates—one cannot look over the cubicle walls to make sure everyone has left for the day.

Before advancing a robust telework policy, employers should ensure that there is appropriate infrastructure for the logistics of accurate timekeeping: If a timekeeping system is used, are adjustments required so it will function properly remotely? If timesheets are used, how will they be returned by remote employees, and reviewed and approved by managers, and how will revisions be verified by the employee when teleworking? Are there reliable methods for cutting off access to work materials outside scheduled working time, to prevent off-the-clock work by non-exempt employees in the remote workplace?

As with all wage and hour topics, employers need to ensure that they have robust policies and training to ensure all compensable time is recorded. Robust training for managers supervising non-exempt employees working remotely is strongly recommended. Out of sight does not translate to out of mind. Managers can be trained to recognize the potential company perils brought about by remote-working non-exempt employees, in particular such risks that the managers can possibly prevent—*e.g.*, by not sending emails to non-exempt workers after hours, not reducing time on a timesheet without a clear record of the reason and agreement from the employee, and more.

b. Travel Time

Telework also raises challenges related to compensable travel time. If non-exempt employees can work from a home office and from an employer's office, the time spent getting from one location to the other in the course of a day might be transformed from a non-compensable home-to-work commute to a compensable trip from one worksite to another. For this reason, employers should consider directing non-exempt employees to work in only one work location each day or, if developing a specific program involving multiple work sites in a day, work directly with wage and hour counsel to develop programs to address potentially compensable travel time.

Ultimately, with a significant number of non-exempt employees working remotely, or newly empowered to work in multiple locations, compliance with timekeeping obligations will require robust policies, appropriate communication and training to both supervisors and the non-exempt workforce, and appropriate monitoring and enforcement of those policies.

4. Exempt Status

Employers should review any changes to job duties resulting from remote work, particularly for exempt employees. An employee might, for example, take on more or fewer, or different, duties than they would if they were in the office, which

may affect the employee's primary job duty and, consequently, exempt status. One particular area of concern is sales activities in the home office—such activities may not amount to "outside sales" with respect to the FLSA's exemption for outside salespersons. When evaluating altering the duties performed by a remote worker, employers must remain cognizant of the applicable salary and duties tests for exempt classification and the risks associated with improper classification.

E. Privacy and Telework

Remote work naturally invites employer surveillance of employees. Employers have compelling reasons to worry about risks to data security in the remote work environment. Employers also want more information about employee productivity to compensate for the lack of in-person supervision. To manage productivity and data security risks, employers can now choose from an increasingly sophisticated array of surveillance technologies. These technologies, however, can violate privacy and other laws if used improperly. The following section addresses common privacy issues that arise in the context of surveilling a remote workforce and strategies to manage the attendant risks.

1. Electronic Surveillance

Tracking technologies can now collect data about an individual's behavior on the employer's electronic systems at an extraordinarily granular level. For example, using commonly available tools, the employer can capture each employee keystroke, screen shots from the device used by the employee, time spent on computer applications, and every web page the employee visits. This information can add up to a highly detailed and useful picture of how the employee works. The employer can, for example, use the information to improve corporate applications, to train employees to use company resources more effectively and securely, and, in some cases, to discipline employees.

As a general matter, the company should provide the employee with notice about the types of surveillance it conducts, especially if the employees would not reasonably expect the surveillance. Providing notice undercuts an employee's reasonable expectation of privacy in activities on the employer's electronic resources and thereby reduces the risk of invasion of privacy torts. Such notices should be clear and explicit and employers should ensure that employees actually read them.

In addition, employers should obtain employee consent for three common types of surveillance:

a. Intercepting Communications

First, intercepting the content of employee communications in real time can violate state and federal wiretap laws if the employer does not collect prior employee authorization.[47] The consent requirement applies even if the employee uses the company's systems to send the communication. While wiretap laws tend to bring to mind listening in on telephone calls, courts have interpreted wiretap laws to apply to a much broader range of technologies. For example, courts have held that logging keystrokes, auto-forwarding emails, and capturing instant messages can violate wiretap laws.[48] Other types of commonly used surveillance technologies also raise the risk of civil and criminal penalties under wiretap laws, such as capturing screen shots at a high frequency or deploying data loss preventing software that intercepts emails in transit at the company's firewall.

b. Accessing Personal Devices

Second, accessing an employee's personal computer without permission could violate state and federal computer trespass laws. The Computer Fraud and Abuse Act (CFAA) creates civil and criminal liability for gaining unauthorized access to a "computer."[49] Courts have interpreted "computer" so broadly that many electronic devices used for work would fall within that term's scope, such as smartphones, iPads, and laptops.[50] All 50 states have enacted "computer trespass" laws, which largely parallel the CFAA.[51]

Computer trespass laws set particular pitfalls for employers when employees use personal devices for work ("dual-use devices"). In that case, employees may store a significant amount of company data on dual-use devices. Employers typically need access to that data for an array of legitimate business reasons: litigation holds, investigations, data security, etc. In some cases, determining the scope of employer access and corresponding need for consent is straightforward. The company may ask the employee for consent so that the company can manually review information on the dual-use device.

Mobile device management software, however, can make the extent of employer intrusion into the personal device unclear to both the employer and employee. This software may automatically review files on a smartphone or even completely wipe the smartphone's memory, including the employee's personal data, if the smartphone is reported lost or stolen. Employers should ensure they understand the technology and scope of access and obtain clear, prior consent from employees, ideally in written form.

c. Accessing Personal Online Accounts

Third, as a general rule, employers should not access employee's personal online accounts without the employee's prior authorization. Failing to obtain consent could violate the federal Stored Communications Act (SCA), which prohibits unauthorized access to communications stored with an electronic communications provider.[52] Like the CFAA, the SCA is a criminal statute with civil remedies that may be used by an employee to bring a claim against the employer.

For example, if an employer uses the teleworker's dual-use device to access the teleworker's personal Gmail account without the teleworker's prior authorization, the employer may be exposed to claims under the SCA.[53] As a result, it is critical to obtain remote workers' consent before, for example, clicking on an app that provides direct access to the employee's personal email account. The same reasoning may apply to the many forms of remote, cloud-based storage available to users of mobile devices, such as Dropbox, Google Drive, and Evernote. Companies need to ensure they have the teleworker's consent before accessing data stored with such services.

2. Videoconferencing

The dramatic increase in videoconferencing during the pandemic likely will persist as employees continue to work remotely at rates higher than pre-pandemic. The advantages of a face-to-face conversation at a distance, however, come with legal risks. In particular, videoconferencing can inadvertently reveal personal and home-life information that the remote worker may consider private or that provide the employer with legally protected information.

With regard to legally protected information, a manager or supervisor may see indicia of the employee's religious beliefs, or the medical condition of the employee or a family member, in the background of the video conference. The Americans with Disabilities Act (ADA) generally prohibits inquiries about an employee's medical conditions unless doing so is consistent with business necessity and is job-related.[54] Similarly, the Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers from seeking information about "the manifestation of a disease or disorder in a family member …."[55] While employers do not violate the ADA or GINA by inadvertently obtaining medical history, employers may not follow up with questions about that medical history.[56] Also, regardless of how the employer obtains information about medical conditions, the employer must not use that information to unlawfully discriminate against the employee.[57] Information about an employee's religion raises similar concerns about discrimination. Title VII, as well as many state laws, prohibit an employer from discriminating against an employee based on the employee's religion.[58]

Even inadvertently collecting information about religion or health carries risk for the employer. If the company later terminates the employee's employment, or subjects them to some other adverse employment action, then the employee potentially could claim that the employer took the adverse action based unlawful discrimination, even if the employer had a legitimate reason for the action.

Finally, if employees are not aware that they are being recorded, the company could capture the employee's private moments or those of the employee's family. This could satisfy the elements of an invasion of privacy claim under state law.

The company can take practical steps to reduce these risks. First, the employer should communicate the importance of maintaining a business-appropriate workspace that can be used for videoconferencing with colleagues, supervisors, and customers. In particular, employees should know to remove personal items from view of the webcam. Second, an employer should require employees to deactivate their web cams when they are not working. While an employer might be willing to accept the risks of inadvertently capturing a remote worker by the webcam when they are working, an employer should ensure that this issue does not arise when the remote worker is off duty.

3. Location Tracking

While today GPS has become so common that it is a component of most smartphones and many common consumer electronics, the use of GPS and other forms of location tracking to monitor remote workers can result in unintended consequences. Indeed, because of the flexibility in location for the performance of work by the remote workforce, GPS tracking can collect information regarding a teleworker's home and activities performed during their non-work time.

In *Carpenter v. United States*, the U.S. Supreme Court ruled that surreptitious real-time location tracking invades a person's reasonable expectation of privacy in the context of Fourth Amendment searches.[59] Following the Supreme Court's lead, an increasing number of state courts have found that such tracking also violates a reasonable expectation of privacy under state law torts of invasion of privacy.[60] Therefore, to undermine a reasonable expectation of privacy and reduce the risk of privacy claims, employers should provide prior notice to employees of real-time location tracking. In addition, several states require consent for location tracking.[61]

Further, and distinct from tracking during work time, employers should avoid tracking the employee's location while they are off-duty. Doing so risks over-collecting information that could give rise to potential liability. For example, if the tracking shows that an employee receives medical care after work for a serious medical condition, collecting that information could violate the ADA.

4. Data Protection Laws

In addition to the data-specific issues outlined above, employers must consider their obligations regarding the data that they collect from their workforce across the various data sources from increased robotics in the workplace. For example, under the California Consumer Privacy Act (CCPA), employers may be required to provide a notice at, or before, collecting personal information from the workforce describing (a) the categories of personal information the employer will collect, and (b) the purposes for which the employer will use that information.[62] Moreover, California recently passed the California Privacy Rights and Enforcement Act of 2020 (CPRA), which will require more detailed notices, including disclosure of how the employer shares personal information, handles sensitive personal information, and retains personal information.[63] This will create substantially more ability for employees to scrutinize and collect information about the employer's surveillance program. While California is the only state with such a comprehensive law on the books, other states are considering similar laws. And globally, firms must contend with comprehensive privacy regimes like the European Union's General Data Protection Regulation (GDPR).

Finally, employers should scrutinize what data they capture from employees, especially health information, and how long they retain the data because of the risk of a data breach, which may give rise to liability. As a result, we recommend only keeping the data as long as necessary, and then purging the data in accordance with local laws.

F. Labor Relations Issues

1. Organizing Efforts

a. What is a Bargaining Unit: Independent Contractor vs. Employee

With the gig economy expanding beyond ride-sharing and home services apps and as other employers attempt to understand and cater to the millennial and generation Z workforce, who communicate and interact differently, employers must assess their recruiting, engagement, and compensation practices. It is no longer enough to rely upon traditional payment methods or industry past practices/norms to classify and treat service providers as independent contractors or employees. The legal risks and potential financial exposure are too great for employers to ignore this evolving area of law, including the NLRB's 2019 *SuperShuttle decision*.[64] The NLRB's influence goes beyond the union versus non-union question, and its *SuperShuttle* decision impacts all employers engaging individuals to provide services outside of the traditional employer-employee paradigm.

Section 2(3) of the NLRA, which defines an "employee," excludes from its coverage "any individual having the status of an independent contractor."[65] Therefore, the difference between an independent contractor and a statutory "employee" is jurisdictional, meaning the Board has no authority over independent contractors. If an individual providing services for an employer is an independent contractor under the NLRA, then the employee is excluded

from the NLRA's coverage. If the individual is an employee under the NLRA, then the employee may utilize the NLRB's processes, foster unionization along with co-workers, and/or engage in protected concerted activity.

For decades, the Board assessed whether a service provider is an independent contractor or employee under the traditional common-law agency test found in the Restatement (Second) of Agency §220. Under that test, the Board would determine if an individual is an employee or independent contractor by reviewing the following factors, assessing and weighing them, with no one factor being outcome determinative:

- The extent of control, which by agreement, the master may exercise over the details of the work.
- Whether or not the one employed is engaged in a distinct occupation or business.
- The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision.
- The skill required in the particular occupation.
- Whether the employer or the workman supplies the instrumentalities, tools and the place of work for the person doing the work.
- The length of time for which the person is employed.
- The method of payment, whether by the time or by the job.
- Whether or not the work is part of the regular business of the employer.
- Whether or not the parties believe they are creating the relation of master and servant.
- Whether the principal is or is not in business.[66]

In 2014, under the Obama administration, the Board decided to "refine and restate" the independent contractor versus employee test by adding a new factor: "rendering services as part of an independent business."[67] Under this new factor, the Board limited the focus on "entrepreneurial opportunity" by claiming that it was just "one aspect" of the newly created factor.[68] The Board further stated that this new "independent-business factor" includes whether the contractor has significant, actual entrepreneurial opportunity for gain or loss; and "(a) has a realistic ability to work for other companies; (b) has proprietary or ownership interest in her work; and (c) has control over important business decisions, such as the scheduling of performance; the hiring, selection, and assignment of employees; the purchase and use of equipment; and the commitment of capital."[69] Furthermore, the Board stated that it should consider evidence that "the employer has effectively imposed constraints on an individual's ability to render services as part of an independent business. Such evidence would include limitations placed by the employer on the individual's realistic ability to work for other companies, and restrictions on the individual's control over important business decisions."[70] The Board's holding changed the test from "entrepreneurial opportunity" to a test of "economic dependency." Simply put, the Board altered its analysis to make a lot harder for a service provider to be deemed an independent contractor.

In *SuperShuttle*, the Trump Board overruled the Obama Board's 2014 *FedEx* decision by returning to the common-law agency test in determining whether a worker is an employee or independent contractor.[71] The Trump Board highlighted that the *FedEx* decision changed the independent contractor test into an "economic realities" assessment, thereby diminishing the entrepreneurial opportunity analysis and overemphasizing the right-to-control test.[72]

By reverting to the common-law test, the *SuperShuttle* Board noted:

> entrepreneurial opportunity is not an independent common-law factor, let alone a "superfactor" . . . . Nor is it an "overriding consideration," a "shorthand formula," or a "trump card" in the independent-contractor analysis. Rather . . . entrepreneurial opportunity, like employer control, is a principle by which to evaluate the overall effect of the common-law factors on a putative contractor's independence to pursue economic gain. Indeed, employer control and entrepreneurial opportunity are opposite sides of the same coin: in general, the more control, the less scope for entrepreneurial initiative, and vice versa.[73]

The Trump Board also made clear that the principle of entrepreneurial opportunity is not to be mechanically applied to each of the 10 common-law factors. Instead, the Board may "evaluate the common-law factors through the prism of entrepreneurial opportunity when the specific factual circumstances of the case make such an evaluation appropriate."[74]

While this area of the law continues to evolve, the NLRB's *SuperShuttle* decision provides a temporary reprieve for employers with its clarity on the employer versus independent contractor issue. The *SuperShuttle* decision seems to be based more on the modern workforce and is more adaptable to assessing business relationships formed in the gig economy.

Despite the *SuperShuttle* decision, however, the future of the independent contractor versus employee analysis is far from set in stone. For example, the *SuperShuttle* decision was issued by the three members of the Republican-majority NLRB, the composition of which is set to change under the Biden administration. It is likely that the Biden Board will resort to a test similar to that under the Obama Board.

Furthermore, the Protecting the Right to Organize Act of 2021 (PRO Act), which recently passed the House, would change the entire labor landscape, including the debate on independent contractor versus employee debate. By limiting NLRA coverage to "employees," Congress deliberately chose to exclude independent contractors. With the continual growth of the gig economy, the PRO Act seeks to revise the NLRA to incorporate the "ABC test" and reclassify millions of independent contractors as "employees" with the rights guaranteed under the NLRA. The ABC test is restrictive and precludes independent contractor status unless "(A) the individual is free from control and direction in connection with the performance of the service, both under the contract for the performance of service and in fact; (B) the service is performed outside the usual course of the business of the employer; and (C) the individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the service performed."

California implemented this ABC test in Assembly Bill 5, which became law in 2019, and instantly resulted in a backlash from employers. Prong B of the ABC test made it much harder for a worker to be classified legally as an independent contractor. Essentially, California employers had to assume all liability associated with an employer-employee relationship or stop using the services of independent contractors who do not pass muster under the ABC Test. In response, in November 2020, California voters passed Proposition 22, supporting gig workers and rejecting the efforts to force pro-labor agenda on others. Proposition 22 allows workers at Transportation Network Companies (TNCs) and Delivery Network Companies (DNCs) to retain their status as independent contractors, but provides them certain "benefits" that are similar in many respect to the fringe benefits provided to traditional employees. Essentially, app-based drivers remain independent contractors if the company (1) does not unilaterally prescribe their schedule or a minimum number of hours; (2) does not require drivers to accept any specific ride or delivery request to maintain access to the network; and (3) allows drivers to work for other network-based companies or hold other jobs.

Through the PRO Act, Congress is attempting to decide who is an independent contractor and who is an employee. As seen in California, implementation of the ABC test through the PRO Act would force employers to make extremely tough decisions: terminate independent contractor relationships, which would cost millions of people their livelihoods or carry the heavy financial burdens of converting independent contractors to regular employees despite many contractors' preference to remain independent.

b. Minority Unions

Minority unions are organizations made up of groups of individuals (including traditional employees, temporary employees, and even contractors) who want to advocate for social justice and worker rights issues in the 21st century workplace. Minority unions are not traditional unions in the sense of formal organizing, NLRB certification, and exclusive collective bargaining rights.

Throughout 2020, social justice issues showed themselves in the workplace more than in the past few decades, and unions are capitalizing on these issues to garner interest from employees in unique ways. Workplaces may never go back to the way they were before the pandemic. For example, while many employees will return to their offices, others will continue to work remotely. Indeed, many large tech companies are embracing the permanent remote workplace. Further, as the gig economy expands, labor rights issues will continue to be a focus, with increasing pressure to treat these workers more like traditional employees, with traditional rights under the NLRA. Whether labor unions can capitalize on these trends is up in the air, but growing advocacy in the new workplace, will present unprecedented and difficult challenges for employers.

Regardless of whether there is any change to the NLRA through passage of the PRO Act or other legislation, we will likely see a return to the previous Obama-Board approach of promoting and protecting concerted activity and collective bargaining in the workplace. In 2021, however, the new workplace is vastly different from what it was during 2008 to 2016. For example, in the past four years, the United States has faced unprecedented social unrest over racial, socioeconomic, and political issues. Activism on these issues is at an all-time high, and this activism is showing up in the workplace as never before. In some instances, an employer's own programs and efforts to address these social issues have nurtured and encouraged employee activism in this regard — particularly in social media. The activism can also originate among the employees or from outside sources. Because of social media, the ability to instantly communicate with broad groups of employees and employee supporters around the world, as well as ready access to information, and more remote workers or gig economy workers, the ability to encourage activism has never been easier. This is especially true with the younger workforce that is highly educated, more progressive thinking, and/or tech-savvy.

There has already been an increase in collective action in this demographic, especially in the high-tech sector, which is a white-collar work environment that is not typically associated with unions and collective action. These employees understand their rights, how to advocate for those rights, and have the technological knowhow to use the modern communication tools broadcast their message. These employees are often encouraged by their employer's culture to advance these issues.

Interestingly, these employees are not focused on the traditional topics that tend to drive union organizing in other sectors. Generally, this demographic of worker is well paid, has benefits, and is comfortable with their working conditions. These employees generally do not suffer from the affliction of poor or non-responsive management. Instead, single or ad hoc issues such as the use of company products/services, sales to a particular customer, or a strategic business decision often serve as the rallying points for collective action. Similarly, the employees are not as concerned about wages, benefits, or even workplace safety. Instead, these workers focus on access to executive leadership or even a company's Board of Directors and other stakeholders to address key social justice issues. In this vein, these workers seek to have a voice in the strategic direction of the organization, not only as it relates to employees, but as it relates to customers, vendors, suppliers, the community, and the world, at large. It is not just employers that struggle with this collective action; traditional unions also struggle because this collective often does not fit neatly into the typical package of mandatory terms and conditions of employment that employers and unions must bargain over.

Thus, the increase in this atypical activity raises the issue for employers and unions as to how they can best address these employee concerns. For unions, they form minority unions where the labor organizations are not confined by either the traditional organizing model or the traditional bargaining that focuses on one discrete bargaining unit at a time.

Although there is no one-size-fits-all solution for employers, there are some overarching guidelines that employers should keep in mind when dealing with minority unions.

First, employers must recognize that collective action under Section 7 of the NLRA, whether initiated by a group of employees or by an individual on behalf of others, is protected. Taking adverse action against employees for engaging in such conduct is unlawful because it runs afoul of the NLRA.

Second, employers should be wary about giving in to these demands or negotiating with small groups of employees. If a particular minority union has not been designated by a majority of employees in an appropriate bargaining unit, it does not have the same representation rights as a majority union, and the employer cannot be compelled to bargain with the minority union.

Third, employers must be careful to avoid creating collective issues that may result in larger problems. For example, many high-tech companies promote free thought and expression and often encourage social justice advocacy. These goals are laudable, but they also may backfire because these advocates might target the company, the company's customers, its products/services, or other company decisions or actions.

Fourth, it is critical that employer follow developments on minority unions, such as gig worker legislation, the PRO Act, anticipated changes at the NLRB, and initiatives undertaken by the Biden administration to strengthen worker rights and promote union representation. These changes will lead to the blurring of traditional distinctions between independent contractors and employees, and may have the greatest impact on the gig economy.

Fifth, understand that while minority unions cannot compel an employer to sit at the bargaining table and negotiate, a minority group of activists (employees and contractors separately or together) may pressure employers and advocate through other powerful means including work stoppages, harmful public relations campaigns, and other activities.

Sixth, while a minority union does not have the same representation rights as a majority union, and negotiating with such a group about wages, hours or working conditions for all employees is illegal, members-only agreements, which are in essence based on minority support, are not unlawful under the NLRA. Such agreements are not given the same protections under the NLRA as traditional bargaining agreements and companies must balance the rebuffing of these groups' demands against maintaining credibility within a workforce that consists of activist employees and maintaining credibility with broader external audiences that are paying close attention to how the company responds.

Finally, while minority unions may prove more influential in 2021 and beyond in advancing employees' rights to engage in some types of collective action, organized labor might not benefit. Thus, while more workers may look to unions to support their social activism, it is unclear whether traditional unions can effectively adapt to utilizing a minority representation model to advance employee social justice objectives. It is also unclear whether this model will satisfy the unions' need to increase their revenue sources. Moreover, even if these minority are effective in advancing employees' objectives, minority unions may prove to be a double-edged sword for organized labor by undermining support for the more costly, traditional labor unions which would do more harm to organized labor.

c. Electronic Authorization Cards

On September 1, 2015, the NLRB's general counsel (GC) issued a guidance memorandum on using electronic signatures to support a showing of interest related to a union petition. Prior to the GC's guidance memorandum, a union had to submit signed and dated authorization cards or a signature list and the Board presumes the signatures are valid absent objective evidence to the contrary. The GC concluded that the same standards could be applied to electronically signed documents.

The GC imposed further requirements for electronic signatures. Electronic signatures must contain the following:

- signer's name,
- email address or social media account,
- phone number, agreed authorization language,
- date, and
- the employer's name.

The signature cannot contain personally identifying information including the signer's date of birth or Social Security number. The union that submits the electronic signatures must provide a declaration attesting to the methods used to validate the signature.

Electronic authorization cards are not going anywhere anytime soon. For example, electronic authorization cards are accessible on many union websites, including the IBEW[75] and the SEIU.[76] The PRO Act would take this one step further by allowing not only the use of electronic authorization cards, but also the conducting of electronic voting in union elections. The practical impact of the guidance is that unions may use email and social media to gather signatures with limited review of their authenticity.

d. Social Media Organizing Efforts

While social media has become so popular that roughly three out of every four Americans use some type of social media, the popularity of social media has resulted in unions using social media to increase outreach and enhance organizing efforts.

i. Social Media Statistics

According to Pew Research Center, as of 2019, American adults used the following social media platforms:

- 73% use YouTube;
- 69% use Facebook;
- 37% use Instagram;
- 28% use Pinterest;
- 27% use LinkedIn;
- 24% use Snapchat;
- 22% use Twitter;
- 20% use WhatsApp; and
- 11% use Reddit.[77]

A further breakdown of these statistics show that different age ranges prefer different social media platforms:[78]

- Ages 18-29
  - 91% use YouTube;
  - 79% use Facebook;
  - 67% use Instagram;
  - 62% use Snapchat;
  - 38% use Twitter;
  - 34% use Pinterest;
  - 28% use LinkedIn;
  - 23% use WhatsApp; and
  - 22% use Reddit

- Ages 30-49
  - 87% use YouTube;
  - 79% use Facebook;
  - 47% use Instagram;
  - 37% use LinkedIn;
  - 35% use Pinterest;
  - 31% use WhatsApp;
  - 26% use Twitter;
  - 25% use Snapchat; and
  - 14% use Reddit
- Ages 50-64
  - 70% use YouTube;
  - 68% use Facebook;
  - 27% use Pinterest
  - 24% use LinkedIn;
  - 23% use Instagram;
  - 17% use Twitter;
  - 16% use WhatsApp;
  - 9% use Snapchat; and
  - 6% use Reddit.
- Ages 65+
  - 46% use Facebook
  - 38% use YouTube;
  - 25% use Pinterest
  - 11% use LinkedIn;
  - 8% use Instagram;
  - 7% use Twitter;
  - 3% use WhatsApp;
  - 3% use Snapchat; and
  - 1% use Reddit.

ii. Organizers and Social Media

The increase in the number of people on social media as well as the Board's position on electronic signatures has driven an increase in union organizing efforts via social media, also known as "virtual labor organizing." Social media has created new ways for unions to connect with and persuade potential members—reaching them on their phones and in their homes, away from the employer's work site. In fact, the media director of the IBEW, Mr. Mark Brueggenjohann, stated that "[s]ocial media is a way for [unions] not only to directly communicate with [union] members—and potential members—but to get real-time feedback on their interests and issues."[79] Mr. Brueggenhohann further stated that "in today's fractured workplace, social media is a vital tool to help grow the labor movement."[80] In fact, a lot of unions including the IATSE,[81] the CWA,[82] the UAW,[83] the IBT,[84] and the SEIU[85] all have policies and tips on using social media as a form of organizing. In fact, the IAFF recently developed its SMART program, which teaches organizers how to "engage their members in a wide variety of ways; including email, text, social media, and calls to action."[86] The IAFF describes SMART as "the ideal tool for union engagement" because "Two-way conversations get members . . . [to] become more active and committed, and are more likely to engage in . . . organizing efforts."[87]

Virtual organizing has become an even more valuable tool for unions during COVID-19 because organizers can reach employees when they are working from home. While labor organizing has historically been face-to-face, the pandemic has forced unions into the 21st Century. For example, in San Jose, California, "teachers at all four of the Downtown College Prep system schools . . . were all organized virtually."[88] Further, the International Alliance of Theatrical Stage Employees in Washington, the International Association of Machinists and Aerospace Workers in Louisiana, the United Steelworkers in Pennsylvania, and Unite Here have all had success organizing virtually.[89]

Virtual organizing has opened numerous doors to local union organizers.

First, social media allows employees to discuss and campaign away from the workplace. Employees can discuss the issues they have in the workplace and discuss with each other and unions on how organizing might be able to address their concerns. It also allows organizers the ability to sidestep obtaining workplace access from the employers.

Second, social media allows employees to begin organizing on their own in a grass-roots fashion. Employers like to paint unions as outsiders, but because of social media, employees can organize on their own and undermine this argument.

Third, employees can use social media to instantly connect with all their co-workers, not just those co-workers who have the same shift. Employees having the ability to communicate with a larger pool of their coworkers can allow them to build and maintain momentum while organizing.

Fourth, employees can coordinate with the national labor unions. Social media allows the employees access to the best and most experienced organizers around the country. These organizers can share tips on best practices and strategies. Access to these resources allows local organizers to use the collective knowledge of the best organizers around the countries.

Fifth, organizers can set up virtual rallies that can be attended not only by employees, but also by supporters from around the country. For example, the United Steelworkers held a virtual rally for "a union campaign by workers at the Carnegie Museums of Pittsburgh, which 14,000 people tuned in to."[90]

Last, the organizing process can be streamlined and more efficient. Unions can use social media algorithms to target industries and businesses that are susceptible to union organizing and to help identify any potential employee demands.

Virtual organizing has been hastened by the COVID-19 pandemic, but because of the success unions have had with virtual organizing it does not appear to be going away. Employers must be ready, willing, and able to respond to virtual organizing campaigns.

iii. Employers Communicating with Employees via Social Media

Social media usage and union organizing through social media is increasing. Employers need to embrace the use of social media as a form of communicating with their employees. If not, employers risk falling out of touch with the workforce and potentially losing more union organizing campaigns. This is especially true when workers are working remotely and there is not as much face-to-face interaction between the employer and its employees.

Crafting a social media campaign that keeps the employees interested and engaged requires consistent effort and authenticity. Employers should consider a campaign on external sites (Facebook, Instagram, twitter, a website set up for the campaign) and may also want to provide an internal webpage or intranet page where employees can ask questions and receive answers from the employer.

2. TIDE

The pandemic has rapidly progressed the technology-induced displacement of employment, or as we call it, the coming TIDE. For example, according to the World Economic Forum's Future of Jobs survey, "Forty-three percent of businesses anticipate reducing their workforce because of new technology."[91] Further, the pandemic has "caused seven out of 10 board of directors to accelerate their digital business."[92] While millions of new job categories are likely to arise from automation, "companies estimate that around 40% of workers will require reskilling,"[93] and unfortunately, the needed training and vocational education programs are far too few and do not properly leverage the educational potential of modern technology. Preparing the workforce of today with the knowledge and skills needed to participate in the workplace of the future represents the greatest human talent challenge of the last 100 years.

Employers and employees have already begun bargaining over TIDE issues, *i.e.* employees being displaced by AI and robots. For example, UNITE HERE has bargained with various employers to give employees a voice in implementing technology that could displace union workers.[94] To combat displacement, the contract provides employees replaced by automation with preference for openings at other hotels before the employer can hire someone new.[95] The contract also required the employer to pay an employee's tuition if the employee must attend school for training.[96]

3. Communications with a Remote Workforce

The pandemic has changed the ways employers communicate with their workforce. Now, with remote work, hallway and lunch room conversations are a thing of the past, and employers must engage proactively with their employees through many channels: video, email, chat, phone, and other platforms. To try to avoid workforce disengagement, employers should communicate and engage with their teams frequently and effectively. In our experience, employees are generally less likely to engage in unionization efforts if they're engaged and listened to, and involved. Employers can connect with their employees by:

- scheduling frequent, recurring team meetings;
- asking employees their communication preferences;
- making video calls a priority; and
- maintaining the culture and values of the company.

Scheduling recurring team meetings creates consistency and allows coworkers to connect at a time when people are unable to connect. These meetings also facilitate team building, which can get lost in the shuffle of working remotely and alone.

It is important for employers to understand how their employees prefer to communicate. A one-size-fits-all approach could lead to a downturn in productivity and morale. Instead, if an employer tailors their communications by preference of their employees, it can streamline communication and enhance productivity.

Employers should prioritize video calls. Prior to the pandemic, the majority of employees were seeing their coworkers and supervisors on a daily basis. Since the pandemic, a large portion of the workforce has been working remotely. Remote work can make employees feel isolated, which can drive down productivity and morale. Video calls allows for the face-to-face interaction, while also keeping everyone engaged.

Most importantly, employers need to maintain their culture. While the focus has been justifiably been on "steering the ship" during the pandemic, culture is very important in maintaining morale, productivity, and staving off union vulnerability. This can be done by scheduling informal events such as virtual happy hours, lunches, office parties, or other team-building events.

G. Remote Work and Potential EEO Issues

COVID-19 is likely to have lasting effects on certain aspects of discrimination law long after workplaces begin to return to pre-pandemic models of operation. One area we expect to see an impact is the degree to which remote work becomes viewed as a "reasonable" accommodation under the Americans with Disabilities Act and state non-discrimination laws. Since 1999, the Equal Employment Opportunity Commission has taken the position that allowing an employee with a disability to work from home may be a form of reasonable accommodation under the ADA. In 2003, the agency issued guidance[97] as to its views regarding whether and when working from home (or otherwise remotely) can be a reasonable accommodation under the ADA. At the same time, courts have grappled with the question of whether physical "attendance" is an essential function of any particular job, often coming to different conclusions based on the different facts presented. While an employer is able

to require that an employee is able to perform (and *does* perform) the essential functions of their job, the ability to require physical attendance (versus, say, virtual "attendance to the work") has not been as clear.

In general, the ADA requires an employer to provide "reasonable accommodation" to a worker's disability, if doing so would allow the worker to perform the essential functions of their job, and not cause "undue hardship" to the employer. "Undue hardship" is generally viewed by the EEOC to mean significant difficulty or expense, with the focus on the resources and circumstances of the specific employer and the specific accommodation requested. While it is obvious that for many employees "remote work" is simply not feasible (*e.g.*, a worker in the manufacturing sector whose job is hands-on on the plant floor), we expect that we will see an increase in requests from employees to perform their work from home or otherwise remotely. It may be increasingly difficult for an employer to argue that remote work for a given worker is not reasonable, or an undue hardship—particularly where, during the course of the pandemic, that worker may have performed all of the essential functions of their job in a satisfactory manner off-site. Put another way, an employer's preference for workers "in their seats" may be more difficult to justify the denial of a remote work option. Of course, there are myriad other considerations that may support an employer's position. Allowing an employee to telework from a state or locality in which the employer does not otherwise conduct business may raise a host of concerns that could support an employer's position to deny a remote work accommodation, for example. But employers should be prepared with very specific reasons (and evidence to support them) with respect to specific requests, rather than a broad "one size fits all" telework accommodation policy.

The degree to which telework or other remote work accommodations become more prevalent is also likely to raise issues of equity and potential disparate impact. Workers whose jobs require them to be physically "on site" may tend be clustered in lower-wage occupations, such as retail, hospitality, or food service. Historically, women and people of color have been overrepresented in these industries and jobs, suggesting these workers may face a structural disadvantage with respect to the ability to work remotely. Employers will want to make certain their remote work policies, and requests for off-site work as a potential accommodation, are addressed consistently and in a non-discriminatory fashion.

Another potential unknown for employers: as remote work becomes more common, what does that mean for issues relating to workplace harassment, such as employee reporting mechanisms and "virtual" investigation of harassment complaints? In its seminal 2016 report on workplace harassment,[98] the EEOC provided a number of recommendations for employers in assessing the strength of their workplace harassment reporting and investigation systems. Many of these recommendations and best practices are fully applicable even in the face of workforce transformation. Some are particularly resonant, however. For example, the EEOC's report identified a number of "risk factors" for workplace harassment, including decentralized workplaces, or work situations in which workers are isolated. While the presence of these risk factors do not mean that discrimination is necessarily occurring, the EEOC does suggest that employers may wish to pay closer attention where these risk factors are potentially at play (for example, periodically "checking in" with workers in these situations).

Similarly, employers will want to be certain that their systems for investigating and responding to claims of discrimination (or other workplace misconduct) are nimble enough to be effective in a "virtual" environment. Human resources and other personnel tasked with investigating and responding to claims of discrimination should be well-versed in the challenges of fact-finding virtually, and investigators may wish to work with IT personnel to determine whether employer-provided technology can be of assistance in investigating a claim (subject, of course, to relevant legal obligations relating to employee privacy).

H. Data Security

Permanent remote work creates and amplifies several data-security challenges for employers. The common trigger for these challenges is the shift from communal maintenance of standards and centralized enforcement of policies to a paradigm of self-regulated and self-managed workplaces. Equipped with a laptop and an Internet connection, an employee can theoretically work "everywhere." While this flexibility can reduce overhead, increase efficiency and generate new opportunities, it also poses potentially serious risks of misuse or diversion of corporate data, intellectual property, and customer or employee information. In a world where we can neither look out for each other nor look over each other's shoulders, employers must rely on new (or newer) tools and protocols to achieve data-security objectives.

The first, and perhaps most obvious, new risk is that of physical-asset loss. Depending on the nature of their duties, a remote worker may be issued more than a laptop, whether a cell phone, a tablet, a mobile hotspot, a photocopier, a printer, a scanner, a fax machine, a camera, or some other specialized device. Most of these devices store a range of corporate information as well as access keys to other centrally stored corporate information, and are now beyond the security provided by a shared brick-and-mortar office. Employers can take three steps to help protect the data and data access on these devices: implement a robust asset management program to maintain an inventory of authorized devices (including digital device-tracking where feasible), use hard-drive encryption and industrial-strength password/log-in protocols to deny easy access to data on a stolen device, and install MDM (Mobile Device Management) or other remote data-wiping software to minimize the availability of corporate information on a lost device.

As an extension of this principle, employers should minimize opportunities for the transfer of corporate information from these physical assets to devices and data repositories that cannot be tracked or wiped. This requires a combination of hardware lockdowns (such as preventing the use of USB drives and writeable CDs) and software prohibitions (such as denying access to cloud storage and outflows of data to personal email accounts).

The next issue is the greater potential of data theft even when remote-work devices are being used in secure and authorized manner. Remote workers must use a less-secure personal or public data channel to connect with corporate systems, and employers have minimal control over the security of home and coffee-shop networks. Employers can, however, control the manner of access to corporate information and thus reduce risk by, for instance, requiring use of a VPN (Virtual Private Network) or other encrypted connection; using multi-factor authentication and other identification measures to confirm authorized access; limiting access to IT-approved company servers; installing sturdy anti-malware programs; and preventing local saving or other outward transfers of data.

The final consideration for remote-work devices is end-of-cycle risk, *i.e.*, what becomes of a device when it is replaced, or when employment ends. In either instance, devices need to be returned promptly to IT, but an additional wrinkle when a remote worker leaves is the time lag between separation and return of devices. To minimize risk in the interim, remote-wiping tools should be used to delete corporate information resident on the device. (Note, however, that employers should not wipe data subject to a litigation hold or other preservation obligation.)

Permanent remote work also increases software-driven data risks. Remote workers require new, third-party tools to collaborate, communicate, and transfer data. Before introducing these tools to the corporate data ecosystem, employers must test each tool to ensure data-flow and access security. Much of this scrutiny may need to happen before the company deploys a remote workforce to begin with, but ongoing monitoring of the reliability of these applications is equally essential, as new vulnerabilities and so-called "exploits" emerge. Further, employees are likely to use unauthorized applications, including for personal needs as home life merges with work life. Rather than relying solely on self-regulatory mechanisms and policy prohibitions, employers should take steps to scan for such unauthorized use, and determine whether to prevent installation of software outside the company's approved list or add more apps that are in regular use.

In the same vein, employers should be cognizant of the risks created by remote workers' tendency to use personal devices for corporate work. UYOD (Use Your Own Device) activity may be driven by convenience, need, or company policy (akin to BYOD or *Bring Your Own Device* policies in place at many employers today)—and employers must address all these eventualities by balancing operational needs against security risks. Whatever the decision, whether to permit controlled use of such devices or to forbid any such use, employers must have a documented UYOD policy binding all employees, as well as reasonable IT oversight to regulate the flow and storage of data on these devices, including the option of remotely wiping corporate data as required.

In addition to a UYOD policy, employers shifting to a remote workforce need to bolster and expand several other policies to account for this shift. Many of the prescriptions noted above require documentation and training to be effective. Employees will need to be educated on a range of new expectations, from password requirements, VPNs, and secure device use to remote wiping, hardware lockdowns, and use of authorized software only. Employees will also need guidance on setting up a secure work environment, recognizing phishing attempts and other cyber attacks (which have burgeoned in pandemic times), keeping household members from using company devices, and generally minimizing personal use of these corporate assets. Employers may benefit from a comprehensive remote-work data-security policy addressing all these points, as part of the company's overall business continuity plan.

Employers should prepare for the fire-hose impact on IT infrastructure. The torrent of remote-access connections and data flow will necessitate strength-and-scale testing of VPN, MDM and other structural software, to ensure that network end-points are sufficiently hardened against data leaks and unauthorized access. Employers should consider increased use of DLP (Data Loss Prevention) software and other internal tools to track sensitive data and head off any compromising activity. As noted throughout above, IT will be called upon to implement numerous other security protocols and enterprise-level systems to manage the flow of data, as well as data *about* data, all of which will require adequate staffing and resources to achieve the aimed-for outcomes.

Finally, if these or other business operations are outsourced, employers must confirm that those third parties' shift to remote work does not generate collateral data risks. All vendors, from concessionaires to law firms, have had to adjust to increased remote work, so employers should audit all entities with access to their sensitive data to ensure downstream data security.

Not only do these data security measures help safeguard company data, they also protect against potential liability if there is a data security incident. Indeed, as noted previously, under California's Consumer Protection Act (CCPA), any employer may be found liable for failing to "implement and maintain reasonable security procedures and practices appropriate to the nature of the information to protect the personal information," which would subject them to statutory damages of $100 up to $750 per person. Similarly, New York's Stop Hacks and Improve Electronic Data Security Act, which amended New York's data security law, now requires any person or business owning or licensing computerized data that includes the private information of a resident of New York to implement and maintain reasonable safeguards to protect the security, confidentiality and integrity of the private information. While the Act does not require specific actions, it sets forth examples of administrative, physical, and technical safeguards that companies should be implementing in their data security plans. We can expect that more states will pass similar legislation in the future.

I. Does this New Reality Potentially Accelerate the Gig Economy and Independent Contractor Work?

1. Realities of an Automated World and Working from Home

Beginning with the industrial revolution, technology has led to the fast-paced growth and development of processes that make it more efficient for companies to conduct business and allow workers greater autonomy in how they get the job done. Technological advances continue to surpass expectations and are rapidly changing how we operate in the workplace today. Companies are now using artificial intelligence and automation in ways never before imagined. From the use of artificial intelligence in making employment decisions to the use of automation to connect instantly buyers and sellers in the open market to the emergence of the gig economy, technology is making waves in how companies and their employees approach everyday tasks.

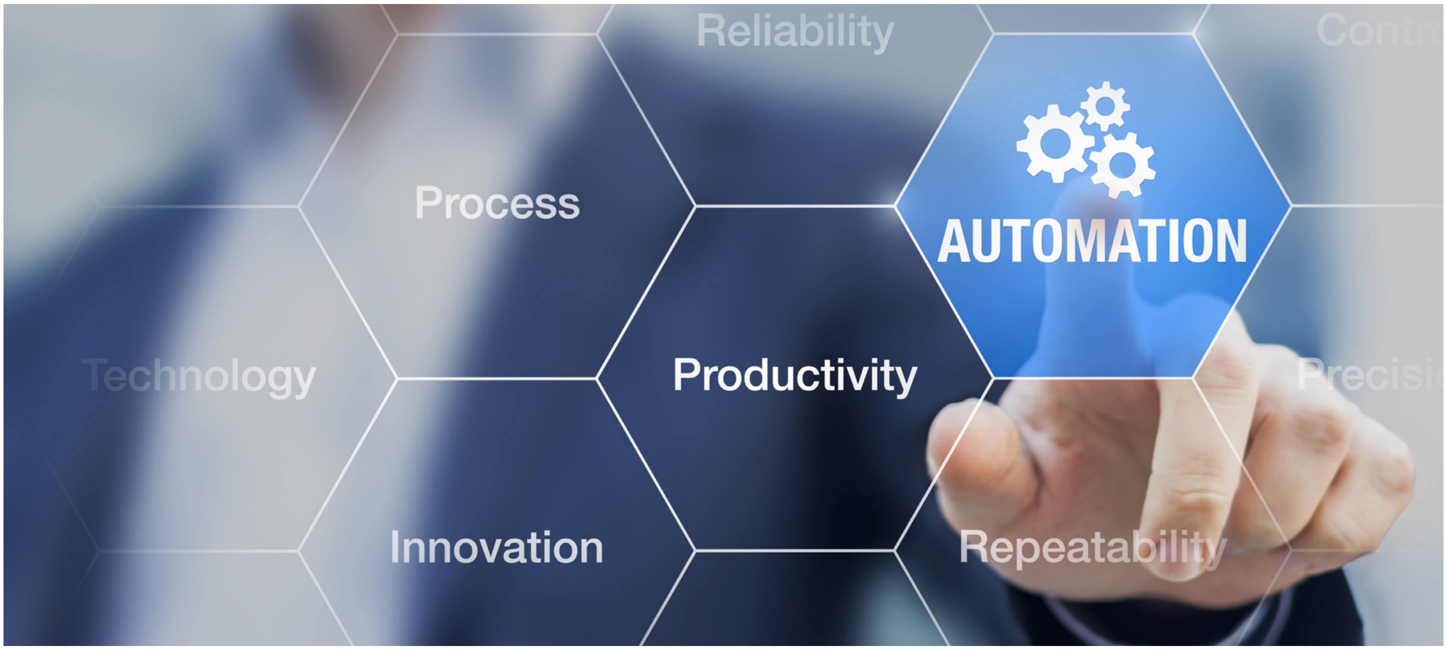
With advances in technology, artificial intelligence and automation, it is becoming easier for people to be able to work from anywhere in the world. With the increasing expectation that employees be able to address the needs of the business and the needs of customers nearly instantaneously, the ability to work from home is also becoming more necessary and expected. The need for workers to be able to work remotely has only been accelerated by the recent coronavirus pandemic. The flurry of shutdowns and stay-at-home orders precipitated by the pandemic have forced technology into high gear to keep up with an increasingly remote world.

As the demand for remote work capabilities has amplified, companies are realizing the efficiencies in allowing employees to work from home. Companies are seeing changes in real estate costs, commuter reimbursements and expenses. Coupled with rises in productivity levels and attrition, it is becoming more apparent that remote work is here for the long term. Indeed, it is estimated that even after the pandemic has subsided, approximately 22% of U.S. employees could work remotely three to five days a week without affecting productivity.[99] Another 17% of U.S. employees could work remotely one to three days a week while maintaining the same level of productivity as though they were in the office full-time.[100] In a survey of 2,500 workers surveyed by the Stanford Institute for Economic Policy Research, 80% stated they wanted to work from home one day or more a week after the pandemic, with the median wanting to work from home two days a week and over 24% wanting to work from home full time.[101]

It is inevitable that as companies continue to shift their reliance to a remote workforce, they will also realize a greater ability to more easily outsource more flexible functions of the workplace. Information technology, accounting and finance, software development, web development, customer service and administrative support are all functions that companies will progressively outsource to independent contractors.

2. The Impact of Automation on the Gig Economy

The utility of having independent contractors who can take on job tasks big and small has led to the burgeoning gig economy that we see today. Technology and automation have made it possible to connect buyers and sellers without the need for intermediaries. They have also made it easier for companies to connect with independent contractors and gig workers and ensure that those workers are the right fit to accomplish what the company needs. With the rise of the gig



economy, we have seen workers having more fluidity in location, scheduling, and autonomy, increased innovation, and greater flexibility in the type of work they are able to do.

Although innovation has led to increased opportunities for workers to pursue varied avenues for earning a living, technological advances will eventually outpace the need for gig workers. This will not be an immediate transformation. However, we are already seeing advancements in automation and artificial intelligence that may one day be used to replace gig workers. Drones are already being tested for delivering packages and robots are already being utilized to perform household tasks. The shift towards automation may one day see self-driving vehicles delivering for retail and food service providers or providing pick-up and drop-off services for the everyday commuter.

While gig worker jobs may eventually be supplanted by artificial intelligence and automated technology, the loss of those jobs may be offset, at least partially, by the creation of new independent contractor work due to the technology itself. Companies at the forefront of developing these processes may look to independent contractors for designing, maintaining, implementing, marketing, and disseminating automated technology.

3. The Current and Future Legal Landscape for Independent Contractor Work

As we have continued to see increases in the demand for independent contractors and gig workers, the legal landscape has shifted to accommodate the needs of these workers. The law has seen a growing trend in states making it more difficult for companies to classify workers as independent contractors. In 2018, the California Supreme Court announced the ABC test for classifying independent contractors.[102] Under the ABC test, a worker is considered an employee unless the hiring entity can demonstrate that: (a) the worker is free from the company's control and direction in how they perform their work, (b) the worker is performing a job that is outside the normal business activities of the company, and (c) the worker is typically engaged in independent work of the same type they are performing for the company. This a much more stringent bar to meet than the former *Borello* test, which was a multi-factor test that focused on the company's control over a worker's manner and means of accomplishing the job.[103]

Though California has loosened its limitations on the classification of workers as independent contractors by the passage of legislation that broadens exemptions for the types workers considered employees,[104] California's "ABC" test is still viewed as a gold standard in protecting workers' rights. So much so that as part of his campaign, President Joe Biden expressed his desire to see a "federal standard modeled on the ABC test for all labor, employment, and tax laws" implemented across the United States.[105]

Despite the shift towards the passage of legislation making it more difficult for companies to classify workers as independent contractors, it is apparent that the gig economy will persist. Several states, including California, have passed legislation that makes it possible for companies to classify gig workers as independent contractors or as their own unique category of worker somewhere in between employee and independent contractor.[106] The passage of California's Proposition 22 has catapulted the push towards greater legislation across the country that exempts gig workers from certain independent contractor classification requirements. With big-name companies spearheading the charge, we are sure to see increased legislation brought to voters that will provide avenues to limit gig workers from being classified as employees.

There is no question that the reality of working from home will accelerate the use of independent contractors in the workplace. Technological advancements, however, may start to reduce the need for independent contractors, and the Biden administration's desire to utilize the stringent independent contractor test nationwide may hinder the ability of companies to engage with independent contractors.

J. Global Impact

1. Works Council Issues

There are special considerations for companies with "works councils," a mechanism utilized in many jurisdictions (particularly, European countries) which requires, by law, a voice for the workforce in a company's deliberations and actions. Apart from any relevant rights of trade union representatives, works council requirements may establish certain information and consultation and codetermination rights relating to a change in company policies and practices, including those that may relate to remote work.

In certain European countries, works councils have a general right to receive information and documentation necessary for the body to perform its statutory duties, which can include monitoring of employer compliance with applicable laws and other rights established for the protection of employees. Depending on the specific national framework, employers may be required to inform works councils during the planning stages of changes contemplated for technical operations, as well as working methods and procedures, and to the workplace itself. In many instances, obligations to engage in these consultations require communication and dialogue before any changes are put in place.

By way of illustration, if an employer contemplates a remote work policy, obligations to provide information and engage in consultations may cover changes or application to working time (*e.g.*, start and end of work, establishment of a core working period, break times and other details), monitoring employees' performance or behavior and any additional compensation employees may receive when working from home. Health and safety measures often are the subject of codetermination obligations, and may include remote work settings; also relevant would be any software or other means of technology that has the capability of monitoring employee work or activity.

Of course, a change from office work to working from home also implies a change to the employment conditions. This is even more the case in the event that an employment agreement stipulates where employees should perform their duties. In that case, requiring employees to work from home is not just an alteration in the conditions but a change of the agreement between the employer and employee. Either the employee or the works council will specifically need to agree to such a change.

How to manage this issue in a collective way was shown by a major European bank, which in the height of the pandemic entered into a "joint declaration" with its European works council, agreeing on the standards of working remotely for its 90,000 employees both during the pandemic and in an ordinary regime, when the pandemic is over. Topics included, among others, the voluntary basis of teleworking, the right to disconnect, respect for workers' privacy, protection of personal and professional data and equal profession and economic conditions.

As might be imagined, any remote work plan that results in fundamental changes to the organization—including those that will result in multiple terminations for those unwilling to work remotely—may trigger extensive discussion before implementation. In some cases, obligations may be imposed to negotiate a reconciliation of interests and a social plan (*e.g.*, payment of severance and/or retraining programs).

Changing to a remote working environment can also have practical implications for the works council itself. Even though the European Works Council Act allows participation in meetings "by means of new information and communication technologies," in Germany a special law had to be adopted to ensure that virtual works council meetings and resolutions passed were not considered to be null and void and that resolutions passed via video or telephone conference, Webex or Skype meeting were considered effective, regardless of whether only one or all works council members were connected virtually.

A final word of caution: it is advisable, when entering into a Working From Home agreement with the works council, to reserve the right to revocation. If after a certain period of time the employer wants repeal the Working From Home agreement for all employees for operational reasons or for a certain category of employees because of negative impact on the performance, the absence of such a clause would require completing the information, consultation or codetermination process all over again.

2. Immigration Issues (Living in One Country and Working for Another)

Beyond labor and employment law compliance obligations that an employer may have in an employee's home country, the organization must remain cognizant of the legal obligations and constraints attendant to global movement, particularly the immigration laws of all relevant jurisdictions. The employee's movement, residence and work location may have an impact on current or future citizenship applications in the country in which the individual first was employed by the company. In addition, if the individual previously was employed in the first jurisdiction under a work permit, the employee's absence or relocation may result in the permit status being revoked. Moreover, in the pandemic environment, it is not at all unlikely to think that an employee who has left the initial working jurisdiction may find return denied, delayed or otherwise made difficult (even if a citizen of that first country).

While it may take a good amount of work to obtain accurate information and temptations may exist to ignore signals or confirmation of employee relocation to a different country, employers benefit from maintaining awareness of the location of employee work. Employment rights, tax obligations, working hours, social security and pension accrual/rights, health and safety compliance and multiple other factors are influenced by legal and regulatory regimes around the world. Potential liabilities, both financial and otherwise, may attach to employers (in addition to complexities for the individual employee's movement and status in the host jurisdiction) if their employees are found to be working outside the bounds of local requirements.

To avoid unforeseen complications, employers should make best efforts to verify the work locations of remote workers. In some instances, the terms of hire, employment contracts or company policies specify the location of work, and—even if remote work is authorized—the employer should verify the current site of work. It can consider if the employee has obtained work visas or other local authorization to authorize work, and understand any potential consequences for

working status in the United States or other home jurisdiction. Coverage under insurance programs at the initial site of employment well may change in the event of long-term relocation, and coverage by local social programs may have limited application to foreign nationals.

With this knowledge and other information, the employer can make an informed decision about whether and to what extent remote work can be permitted from an international location, and all of its consequences. It can and should prepare documentation (even by letter agreement) that confirms any time limit on remote work, specifies working hours and their management, as well as any changes to job duties, compensation (including payroll) and benefits, insurance and other arrangements. This will allow the employer to better manage its remote workforce, with knowledge of its compliance obligations and potential complications for the company, and the remote workers.

3. Global Privacy Laws

Although a full discussion of international data protection laws extends beyond the scope of this Report, multinational employers face considerably more hurdles in monitoring employees than U.S.-only employers. Most nations with highly developed economies now have comprehensive data protection laws. These countries include our neighbors Canada and Mexico, the United Kingdom (UK), the members of the European Union (EU), Japan, South Korea, Taiwan, Brazil, and Russia. Comprehensive data protection laws impose substantial restrictions and administrative burdens on employers. The following describes four key aspects of comprehensive data protection laws with respect to employee monitoring.

First, data protection laws generally require that surveillance of employers balance the employer's legitimate interests against the privacy interests of the employees. For example, regulatory authorities in the EU routinely fine companies for what they deem excessive video surveillance and other forms of monitoring employees. The rapid expansion of remote work multiplies the privacy issues forced onto employers' agendas, as some countries impose—by statute or interpretation—rules on businesses utilizing work-from-home mechanisms. These include requirements, as part of telework regimes in certain jurisdictions, that monitoring of employee work be constrained with specified limit and/or that they incorporate a "right to disconnect," putting limitations on job contact and tasks. Such boundaries well may be enhanced, as remote work remains and expands as a critical component of global business activity.

Second, under comprehensive data protection laws, any collection of personal information from employees requires prior notice and, in some countries, consent. These notices typically must cover the purposes for which the company will use the employees' data, the parties with which the company will share the data, whether the company will transfer the data to other countries, and a description of employees' rights with respect to the data.

Third, employees typically have the right to access the personal information that their employer collects about them. In many countries, they also have the right to correct and delete their information and to stop the employer from processing their information, subject to legal limitations.

Fourth, data protection laws only allow companies to transfer personal data to other countries under limited circumstances. This is an important consideration for U.S. multinationals, which often run surveillance programs from computer systems located in the United States or store the data collected on U.S. servers. Many countries require explicit consent for data transfers. The EU and the UK generally find employee consent invalid in the employment context due to the disparity in power between employee and employer. Instead, employers in the EU and UK must rely on a data transfer mechanism, such as standardized contracts approved by regulatory authorities and executed by the data exporter and data importer.

4. Transformational Changes

Global employers must be mindful of the ways the work life will dramatically change within the next few years. This is partially due to COVID-19 and will be strengthened by the possibility of an approaching recession. It is also the result of a movement that has been going on for a long time, however. Flexibility, both regarding the content of the work and the place where the job can be performed, is a requirement more and more talented employees demand from their employer. A combination of working from home (or otherwise remotely) and having office facilities when needed is considered ideal by many.

Remote working allows more flexible hours; the 9-to-5 shift in an office environment is no longer the norm. The benefits of this shift for employers are obvious. Companies can save in real estate costs by downsizing their offices space. Also, traveling for business will almost stop both domestically and internationally. Employers and employees have come to realize that reduced travel not only limits the risk of health issues surrounding travelling, but also that options such as Zoom, Skype, and Webex work so well that they can easily replace most physical meetings.

Yet with the constant availability to work because the office is now in most employees' homes, other issues arise. There will be issues such as health and safety, working times regulations, data security and protection, possible mental health issues and productivity concerns. A key focus during this transition should be the training of those in management roles. Effective managers will need to learn how to manage employees remotely, such as identifying when employees are not coping with their work or are suffering from mental health issues, team building and developing new products and services in a virtual world.

There are adjustments employers can make to their policies and procedures for remote workers that can largely benefit their businesses. For example, employers should build a culture of connection. Collaboration and communication are the biggest challenges remote workers face. Employers should be proactive about these concerns, as they can directly affect employees' productivity and mental health and therefore their longevity within the business. One of the solutions we advise employers to focus on is to train workers on building long-lasting relationships virtually. Skill development regarding mental health is also essential for remote work success.

Employers should also consider flexibility policies. This way, remote employees can utilize the maximum flexibility to perform their job even when in various time zones. Investing in quality collaborative software is another area employers can improve. Collaborative software includes chat functions, video meetings, screen sharing, and digital whiteboards.

Employers will notice that when they invest in the abovementioned issues, and facilitate remote workers, they will gain a larger applicant pool for talent and specialized skills by opening their businesses to remote workers. There is significant value in attracting and retaining these applicants. Employers can accomplish this by accommodating their lifestyle and preferences.[107]

III. Work that is Still Performed at "Work"

A. What Safety Obligations Does an Employer Have When it Adopts Robots, Cobots, or Other Automating Machines?

As the worksite becomes more automated with robots, cobots, and other automated machines, employers must be cognizant of safety and health hazards that could be introduced. Automation can bring a reduction in certain hazards, particularly those associated with musculoskeletal disorders (MSDs), but it can certainly introduce other hazards.

Recognizing the increased use of robotics and the potential for risks associated with it, in 2019 OSHA issued a Request for Information (RFI) on the Control of Hazardous Energy (Lockout/Tagout) and overall use of robotics.[108] The RFI sought "information regarding two areas where modernizing the Lockout/Tagout standard might better promote worker safety without additional burdens to employers: control circuit type devices and robotics."[109]

The importance of the RFI is significant. In issuing the RFI, OSHA recognized that use of robotics, cobots, and automated machinery—around employees—could create hazards that are not easily addressed through OSHA's Lockout/Tagout standard or its machine guarding standard. Many commenters participated in the rulemaking process. Commenters noted to the Agency that intrinsic safety measures installed with new automated machinery have a level of protection equivalent to that required by OSHA's Lockout/Tagout standard. Commenters also noted that employers must consider the interaction of robots, cobots, and automated machinery with the workforce when installing and utilizing it.

As employers continue to integrate automation into their worksites, it is critical that they evaluate any potential interaction of the equipment with employees. Key OSHA standards to consider, in addition to Lockout/Tagout and machine guarding, are OSHA's electrical utilization standards, walking-working surfaces standard, exit routes, occupational noise exposures, personal protective equipment, and fire safety standards. At this time, servicing and maintenance of robots, cobots, and automated equipment should be performed in accordance with OSHA's Lockout/Tagout standard.

B. Privacy

Employers must still consider the general risks of monitoring discussed in the section on monitoring remote workers. In addition, when employees work in close physical presence with machines, employers should consider the following issues that arise with an increase of robotics in the workplace.

1. Health Information

A growing number of companies deploy robotics and related technologies in the workplace, such as wearable devices, automation of tasks by robotics, and artificial intelligence. The principal privacy risk in these situations relates to information collected by these devices about individual workers. For example, sensors on automated technologies that collect health information about employees, such as an employee's tremor, heart rate, or temperature, run the risk of violating the ADA. The ADA prohibits conducting medical examination unless the exam is job-related and consistent with business necessity. Further, if the technology is part of a health initiative, such as a wearable fitness tracker to offer further health benefits, then the information collected could be subject to the Employee Retirement Income Security Act (ERISA),[110] which would require compliance with the Health Insurance Portability and Accountability Act (HIPAA).[111]

2. Biometric Information

Robotics in the workplace also may collect a wide range of other information about the employee, including biometric identifiers. Biometric identifiers are physical markers that uniquely identify an individual, such as fingerprints or retina scans. Employers may use biometrics as a method for authenticating the identity of employees for mobile devices, laptops, tables, and time clocks. At least two states—Texas and Illinois—impose strict limitations on the collection of biometric identifiers.[112] The biometric identifier in these states must also be protected as confidential information and destroyed within a reasonable time.[113] Further, multiple states have additional regulation of biometric information pending, which will further impose restrictions on the use of biometrics in the workplace.

3. Strategies to Reduce Risk

To help mitigate these risks, as well as employees' concerns regarding the invasion of their privacy, employers should consider applying the following three key lessons from past efforts to introduce new technologies into the workplace: (1) use should be fully voluntary, at least at first; (2) employers should provide robust notice to the affected employees; and (3) information collected by the device should be de-identified, if possible.

IV. How Businesses are Restructuring

A. Acquisitions for the Purpose of Acquiring Talent and Technology

With technology and the COVID-19 pandemic transforming society and the "traditional" workplace, we expect the deal-making environment to change also. Even before the COVID-19 pandemic, studies showed that approximately 14% of the global workforce would have to switch occupations or acquire new skills by 2030 because of automation and artificial intelligence.[114] Now, the pandemic has quickly changed the way that companies are functioning. For example, a pharmaceutical company with more than 10,000 sales representatives switched from completely offline to 100% remote-working once the pandemic hit in February of 2020.[115] Now the company plans to make a 30% online and 70% offline working model permanent to leverage the freshly developed skills of its workers.[116] Once 5G is broadly rolled out, the promise of Internet of Things (IoT) will come into full bloom, with further dramatic changes in what work is performed by humans and what work is performed by machines abetted by artificial intelligence. The landscape for businesses and their employees is transforming rapidly and we see the pace of change accelerating through the coming decade and beyond. Companies must rethink their business and employment models to find ways to remain competitive and to be attractive places to work for their employees.

As the workplace transforms and becomes more dependent on technological platforms and initiatives, business leaders must reevaluate how to deliver new business models in the post-pandemic era. Given these recent developments, we expect to see more restructurings for the purpose of (a) acquiring new talent and (b) enhancing technological capabilities. And, of course, sometimes the two are related.

1. Acquisition of Talent

Businesses are only as good as their people. With the technological transformation in workplaces, however, businesses are finding that they are not equipped with the proper talent to meet these demands. In a recent McKinsey Global Survey, 87% of executives said they were experiencing skill gaps in the workforce or expected them within a few years.[117] To remedy this gap, companies may seek to gain access to highly skilled employees through an acquisition.[118] Frequently the acquisition of talent also serves to strengthen and broaden the acquirer's product offerings. For example, Dropbox recently acquired HelloSign, an e-signature and document workflow platform, to add to the capabilities of the Dropbox product suite.[119] While obviously expanding the technological capabilities of the Dropbox platform, in announcing the deal, Dropbox's CEO expressed his excitement in welcoming HelloSign's talented team.[120]

It is no surprise that companies will consider acquiring teams from other corporations to revamp their business models and add talent where they may otherwise be deficient. Further, as a result of the COVID-19 pandemic, we expect to see corporations finding ways in which to reskill and upskill their workforce. In a recent study, 31% of business leaders indicated that acquiring and developing talent was their top business objective.[121] Many of the restructuring projects Littler has assisted clients with in recent years have involved upgrading talent, either by bringing in new talent that simply does not exist in the existing organization, upskilling existing employees, or quite often a combination of the two.

2. Acquisition of Technology

Given the rapid changes in technology, companies also feel competitive pressure to build digital capabilities, and are pursuing acquisitions to that end.[122] Over the past few years, we have seen three broad trends in M&A related to technology and the transformation of work. First, many technology companies are acquiring other technology companies to expand their technology service offerings through strategic acquisitions. The Dropbox acquisition of HelloSign, cited above, is an example of this. And, of course, many of the greatest technology companies of the day became dominant in part through shrewd acquisitions that filled out and enhanced their offerings to create an entire ecosystem for work and other endeavors. Second, many companies that are in industries not traditionally viewed as technological have acquired technology companies to dramatically change the way they do business. Examples include retailers building platforms for e-commerce and customer analytics, and restaurants building platforms for mobile ordering, take-out and delivery. Finally, some M&A is now driven by the need to leverage the success of a company in an industry that has succeeded in immersing technology into its business model. At some point, other firms that have not kept pace have to either acquire, or be acquired by, the successful front-runners in order to survive. In many cases, this may also involve the merger of successful companies that determine they need "scale" to afford the investments in technology required to remain competitive as technology drives innovation and market share in their industry. A good example is the merger of successful regional banks, to create a larger asset base that better enables the combined bank to develop and invest in new technology.

In these three situations, the nature of work—who (or what) performs it, how and where—is changing in ways that greatly enhance the competitiveness of the goods or services being offered. The rate of change is likely to continue to accelerate as new technologies (think 5G, for example) converge with existing technologies to reshape increasingly the workplace and the skillsets required for success.

3. Due Diligence Considerations

Whether driven by a desire to acquire talent or technology, the following are some key considerations in M&A due diligence in this evolving environment:

- **Accurate Employee Census Data** - As noted elsewhere in this Report, as increasing numbers of employees are working remotely, it is critical to determine the seller's employees' residence and work location in due diligence, as this may drive decisions about what state law applies to those employees once they are on-boarded with the buyer. This in turn will drive all sorts of on-boarding activities, from notice requirements for new hires in an asset transaction, to the enforceability of pre-existing or new restrictive covenants. Further, as discussed in the Immigration section of this Report, accurate information about employees acquired who are working outside of their country of citizenship is critical to assess their ability to continue working for the buyer based on their existing work authorization status.
- **Independent Contractor Arrangements** - Many technology-focused companies and some entire business models are heavily dependent on independent contractors. It is crucial in due diligence to understand the scope and role of independent contractors in the seller's business and ensure that the services of critical independent contractors can be retained by the buyer. In addition, as noted in the Independent Contractor section of this Report, the whole independent contractor model is eroding with a broadening adoption, at both the state and federal level, of the ABC test for determining whether workers are properly classified as employees or independent contractors. Adoption of the ABC test can disrupt some entire business models in the gig economy, and it can also affect the go-forward arrangements that a buyer may need to consider to retain talent crucial to the success of an acquisition.

- **Non-Compete and Other Restrictive Covenants** - This issue cuts two ways. First, a buyer has to be certain that the talent being acquired is not prohibited from working for the buyer because of pre-existing restrictive covenants the talent pool may have signed with the seller or even a prior employer. These restrictive covenants need to be released as part of an asset transaction where they exist. Second, the buyer will want to implement its own non-compete, confidentiality, non-solicitation and other restrictive covenants for the talent being acquired, to get the benefit of the acquisition. In a stock deal, the seller's pre-existing restrictive covenants would normally flow through automatically, but the buyer will want to make sure they are enforceable and appropriate in the context of the employees' new employment settings as part of the buyer's organization. These are state-law driven issues that require careful and thorough due diligence and at times require some modifications to align the scope of pre-existing restrictive covenants with the employees' new roles with the buyer. In an asset transaction fresh restrictive covenants will need to be drafted and executed as part of the on-boarding process, again with careful attention to the applicable state law and the employee's role with the buyer.
- **Assignments of Patents and Inventions** - Critical in the acquisition of talent and technology is to ensure that the seller has in place enforceable assignments of intellectual property so that the buyer can actually acquire what it thinks it is buying. If software products and services are involved, it is essential to determine in due diligence that the seller actually owns everything being acquired, including all source code, or if not, what portion is licensed from others that may affect the transaction and its value to the buyer.
- **Data Privacy and Salary History Laws** – U.S. and international data privacy laws increasingly come into play in governing the disclosure process of employee information in the context of corporate transactions, and this is made more complex with dispersed employees working remotely in many states and countries. There are also a growing number of state and local salary history laws in the United States that limit the ability of a new employer to learn the current salary and salary history of employees coming over as part of an acquisition. These laws are designed to stop the perpetuation of what may be historical pay discrimination. While there are workarounds to enable buyers to make thoughtful and legal compensation decisions for newly acquired employees, they require more planning and work than in the past.
- **Post-Closing Talent Retention** - It does no good to acquire great talent only to see it walk out the door after a deal closes. While restrictive covenants may hamper an exodus of newly acquired talent, key employees need to have their interests aligned with the new employer or acquiring entity. This can be done through retention incentives, earn-out arrangements as well as new post-closing employment agreements that keep key employees focused on driving the kind of innovation and building value that put them on the buyer's radar screen in the first place. And if the acquirer plans not to retain unwanted or duplicative talent of the seller, it must of course consider severance and change-of-control clauses in a target's contracts with key employees.
- **Pay Equity Considerations** - An often overlooked issue in due diligence, but one of increasing importance, is pay equity. The legal issues derive from the federal Equal Pay Act, Title VII of the Civil Rights Act of 1964, and often more robust state equal pay laws. Literally every state, except Mississippi, now has some type of equal pay law and many of them have been expanded recently to become even more employee-protective. For example, the damages in New Jersey for violating its equal pay law are especially significant as they include treble damages (three times the compensatory damages) and attorneys' fees.[123] Considering New Jersey's six-year statute of limitations, the treble damages provision should give employers significant pause. Similarly, the New York Equal Pay Act also provides a six-year statute of limitations, and includes damages equal to the pay differential, liquidated damages equal to three times the pay differential, attorneys' fees, costs, and interest.[124] The issue in due diligence is two-fold. First, is the company being acquired in compliance with the applicable pay equity laws? This is particularly important in a stock acquisition where the buyer will inherit the seller's compensation scheme "as is." Second, if the employees of the buyer and seller are going to be merged post-closing, does the inevitable disconnect between two pre-existing compensation schemes suddenly create a pay equity problem? Aside from legal liability, the buyer has a potentially explosive employee morale problem if workers perceive that they are

not fairly compensated relative to others doing the same (or in some states, similar) work. Pay equity audits can help address these issues as well as limit damages under some statutes. Such audits can be valuable in helping companies identify pay equity problems before closing, and in some cases can allow the company to delay the integration of an acquired company to address the pay disparities before the work forces are formally merged into the same corporate entity.

B. Reductions in Force and WARN

1. RIFs

A detailed discussion of reductions in force (RIF's) and the federal Worker Adjustment and Retraining Notification (WARN) Act and various state law counterparts is beyond the scope of this Report, but a few subjects are worth highlighting in the context of the transformation of work. When a reduction in force becomes necessary, a significant legal risk is disparate impact on protected classifications of employees. To obtain a valid release of age claims under the Age Discrimination in Employment Act, an employer must prepare an Older Worker Benefit Protection Act (OWBPA) disclosure schedule that lists employees by decisional unit, indicating the job titles and ages of those who were selected for layoff and those who were retained. Even before remote work became increasingly prevalent, defining the decisional unit—that is, the universe of employees who were evaluated in making the decisions to select those to be laid off—was often a difficult threshold issue. In the past, it may have been an office-by-office selection, but with remote work the decisional unit may be much broader, as the location of workers becomes less relevant to many operations. The stakes are high, because failure to delineate the right decisional unit in the OWBPA disclosure schedule renders a release of age claims invalid. The transformation of work will increasingly require employers to revisit past assumptions about the definition of decisional units.

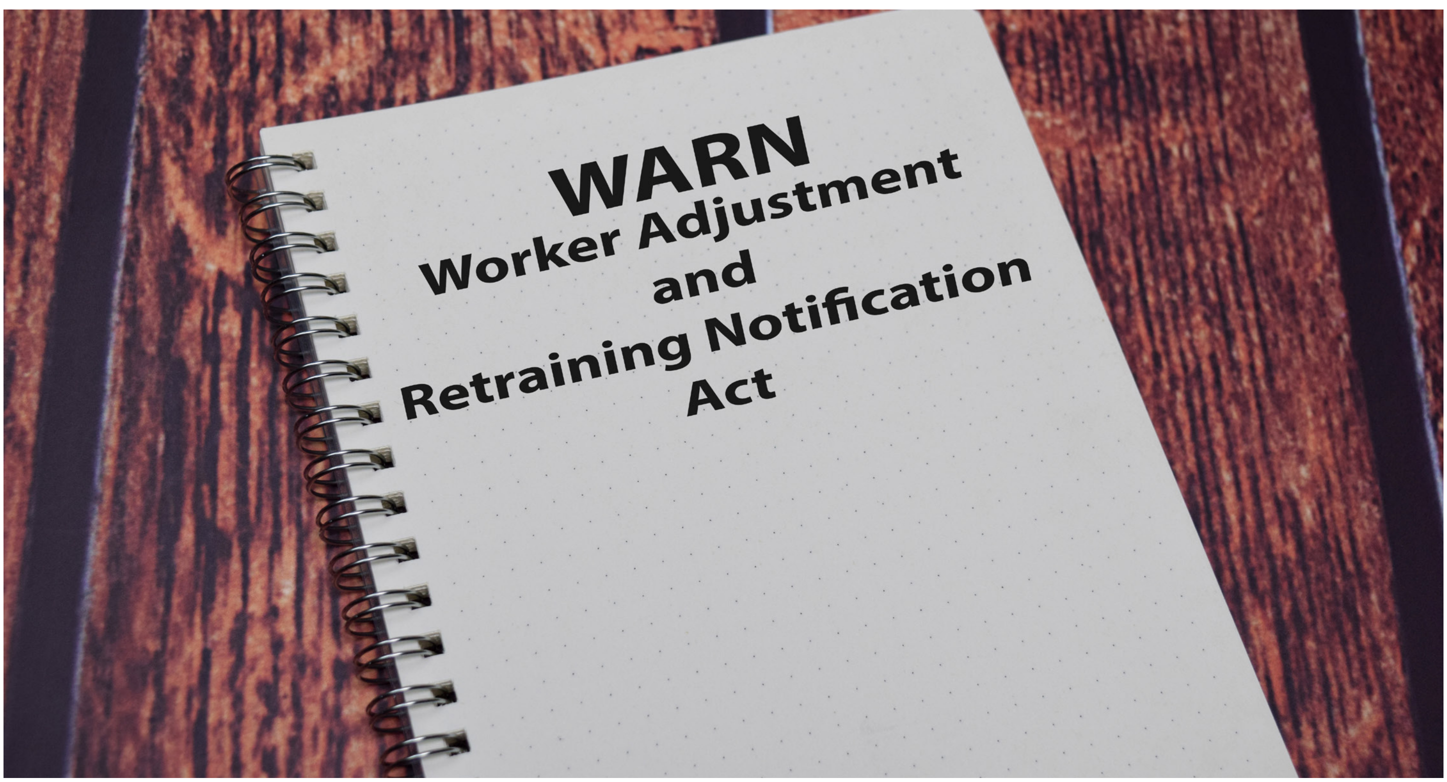
Of course, drafting of releases has itself become an increasingly challenging task for employers, even those with robust in-house employment law capabilities. With employees increasingly working remotely, often outside the state to which they would normally report, employers are finding that they need multi-state compliant releases. Meanwhile, so-called #MeToo legislation requiring varying carve-outs from confidentiality and non-disparagement clauses, which differ from state to state, continues to proliferate.

Further, while OWBPA often focuses employers on "age," disparate impact claims may be based on any protected category that is adversely impacted more than others. As employers approach a potential RIF, many options should be explored, including reskilling employees and voluntary resignations or retirements, among others. But where an involuntary reduction is inevitable (as is often the case with redundant functions after a merger), an employer should carefully analyze whether there is any disparate impact on employees in protected classifications. Where the employee population at issue was at all large, this used to require time-consuming, laborious analysis of spreadsheet data. This was especially the case, and nearly impossible to determine, when several different factors were used to determine which employees were selected for layoff—any one of which factors might itself have an illegal disparate impact. Sometimes it is perfectly legitimate (for example, RIFs by seniority mandated by a collective bargaining agreement). Other times it is driven by selection criteria that, on reflection, have little or nothing to do with performance (for example, educational level that may have no statistical relationship with job performance within the decisional unit). The RIF Assessment Tool allows decision-makers to identify and analyze disparate impact as they are making decisions, in real time, under cover of attorney-client privilege, and if appropriate to adjust selection criteria in a legal manner to eliminate the disparate impact. This enables thoughtful and legally compliant decision-making that was never possible before, given the press of time attendant to many RIF decisions.

2. WARN

The federal and state WARN Acts require advance notice of layoffs that constitute a "plant closing" or "mass layoff" at a "single site of employment." The numeric thresholds vary between the federal and many state laws, but the federal and most state laws count the threshold headcount reductions that trigger a notice obligation by a "single site of employment." In an increasingly fluid work force where employees work remotely throughout the country (or the world, in many cases), the question naturally becomes what is the "site of employment" for an employee who works remotely. Although Congress could not have envisioned the existing post-pandemic flexibility in work locations when it passed the WARN Act in 1988, the implementing regulations provide some guidance for this situation: "For workers whose primary duties … involve work outside any of the employer's regular employment sites (*e.g.*, railroad workers, bus drivers, salespersons), the single site of employment to which they are assigned as their home base, from which their work is assigned, or to which they report will be the single site in which they are covered for WARN purposes."[125]

These regulations have been construed to require an employer to consider the employee as sited in any one of these three sites (if they are different) as their "site of employment"—whichever is more advantageous to the employees making a claim that the required WARN notice was not provided. Thus, in considering WARN thresholds and which employees must receive WARN notice, an employee who works largely from home in Denver but is assigned to Salt Lake City as their "home base," but who gets direction from an office in San Francisco and reports up to a Senior VP in New York City, must be considered at each of these sites of employment for purposes of analyzing whether a sufficient headcount reduction is triggered under WARN. To make the analysis more confusing, some courts have held, in some situations, that an employee assigned to work at a home office is sited at their home, and is not a remote worker for purposes of the regulation. This analysis, which used to be common for outside sales representatives, is now increasingly being used to evaluate whether a RIF triggers a WARN notice obligation as large groups of employees work remotely.



C. Increasing Risk of Bankruptcy

Not all firms will survive the increasingly rapid pace of technological change that is transforming the way work is performed. Some will die from lack of vision and leadership, some for lack of capital to invest in new technology, and others will be eliminated because entire industries will be disrupted and replaced by new means of providing goods and services (who would have known 10 years ago that the confluence of 4G and other technologies would make ridesharing services possible, radically transforming the nature of work in the personal transportation industry and lead to the demise of the traditional taxi industry?).

There has been a wave of bankruptcy filings as a result of the COVID-19 pandemic, and although reopening of the economy is in sight later this year as a result of widespread vaccinations in the United States, we will continue to live with the cycle of life and death of companies as the power of technology is unleashed through virtually every industry and endeavor in everyday life. We do not anticipate a shortage of bankruptcy filings post-pandemic given the heightened technological shift that our society and workplaces are experiencing. As a result, corporations should be prepared to tackle the various employment law issues that can arise should they file for bankruptcy. Here is a non-exhaustive list of some of the potential issues.

- **Automatic Stay** – evaluating what triggers the automatic stay and how that impacts pending employment claims and litigation;
- **Treatment of Claims** – analyzing whether employee claims, such as wages, salaries, commission, or other benefits, among others, will be given priority treatment in the bankruptcy or whether it will be treated as a general unsecured claim;
- **Collective Bargaining Agreements (CBA)** – assessing an employer's options under section 1113 of the Bankruptcy Code for modifying or rejecting a CBA;
- **Pension Plans** – determining the priority and termination options for the different types of pension plans and navigating the role of the Pension Benefit Guaranty Corporation;
- **Retiree Benefits** – navigating the procedures for paying or modifying payments for certain retiree benefits under section 1114 of the Bankruptcy Code;
- **Severance Packages** – determining the treatment of severance payments, including understanding when an employee actually "earns" their severance payment;
- **WARN Act** – navigating the unique issues that arise in a bankruptcy as it relates to the priority treatment of WARN Act claims, applicable defenses, and other related issues;
- **Incentive/Retention Plans** – understanding the requirements for properly incentivizing employees to remain with the company through Employee Incentive Plans and Key Employee Retention Plans;
- **Director and Officer Liability** – assessing whether directors and officers will be liable for any wage and benefit claims;
- **363 Sales** – analyzing various employment issues, including the treatment of employee claims, CBA modifications, and successor issues, that arise in a 363 sale (*i.e.*, a sale free and clear of interest and liabilities); and
- **Confirmation** – navigating any other employment issues that may arise in a bankruptcy to ensure that the company can confirm a Chapter 11 plan of reorganization and emerge from bankruptcy successfully.

The above-listed issues may involve additional layers of complexity depending on the structure of one's business and workforce.

V. Litigation Impact of Data Proliferation and Warehousing

A. Leveraging New and Abundant Data to Defend Employment Lawsuits

Employees in a digital workplace increasingly rely on electronic tools to replace the structures and set-ups of the brick-and-mortar office. Employers do so as well. The proliferation of new systems—and therefore, of new data and data sources—spans the office-environment gamut:

- laptops and personal cell phones replace desktops and business lines;
- on-screen meetings replace conference rooms;
- cloud-based document repositories are increasingly used where paper sufficed;
- log-ins take the place of badge-swipes and sign-in sheets;
- in-office collaboration is now conducted via remote collaboration platforms;
- in-person employee training, supervision and management is now all online;
- and critically, the water cooler is replaced by any number of social-networking applications, both corporate and personal.

The COVID-19 pandemic and its related lockdowns have led to near-universal adoption of these technologies, causing a fundamental shift in how modern society functions. These technologies, and the data explosion they represent, are here to stay.

For employment litigators, the widespread adoption of these technology solutions is having a profound impact. These technologies have become a critical source of evidence, generating data that, when aggregated and analyzed, allow us to understand the factual underpinnings of cases faster and in ways that have previously been extraordinarily difficult, if not impossible.

For example, wage and hour class-action cases—cases where a group of plaintiffs allege they worked unpaid hours, were not properly compensated for the overtime hours they worked, or were improperly compensated for missed meal or rest breaks—are a type of litigation that has been notoriously difficult to resolve on its merits. Historically, organizations defending against these claims have been forced to rely primarily upon time clock and related "punch" data. This body of evidence, however, is often deficient because of inadequate or badly designed time punch systems, incomplete or inconsistent record keeping, data retention failures, or individual employees failing to adhere to time keeping policies.

The ubiquity of remote work and work-enabling technologies provides us a method for enriching deficient time punch data, because these systems generate log files that can be aggregated and analyzed to understand when employees are logged into and active in the systems they require to do their jobs. For instance, in a case involving call center employees and claims of missed meal and rest breaks and unpaid overtime, we might collect logs from the Virtual Private Network application employees use to access the employer's network, the softphone systems they use to service customers who contact the call center, email systems and chat systems they use to communicate with other employees or escalate calls to supervisors, and the Customer Relationship Management (CRM) system used to resolve and keep records of customer issues. Overlaying these log files allows us to paint a digital picture of a given employee's daily activity, which can be used to supplement and provide context to traditional time punch data. If an employee is logged out of or inactive in all of the systems they require to do their job during the noon hour every day, that is reasonable evidence they took a lunch irrespective of any missing meal break time punches. Similarly, activity in critical systems that goes on for eight hours a day or less is potential evidence undermining claims that employees were working unpaid overtime hours.

Coupled with the early use of liability analysis and damages modeling, this kind of "day in the life" analysis allows employers to quickly and more completely understand the factual underpinnings of cases. This in turn allows for a more complete understanding of additional information that might be needed in discovery—creating a more refined, streamlined, and less expensive discovery process—and a better understanding of the strategic options available for resolving the matter.

So-called "gig economy" cases are another space where this type of data analysis can be extraordinarily helpful. In recent years, there has been a significant increase in cases where individuals working as independent contractors sue organizations claiming they are actually employees. Many independent contractors access the gig economy via applications that connect them to available jobs allowing them to select the order they want to deliver, the project they want to work on, or the rider they want to transport. Analyzing an individual's activity in these applications can help show that they are picking and choosing the jobs they want to take or that they are in multiple gig applications at a time, toggling between them to build out their own individualized and self-selected workday. This kind of evidence tends to undermine claims that the individual is in fact an employee of any particular organization.

Even single-plaintiff sexual harassment cases can benefit from this type of analysis. For instance, in a case where there are allegations of unwanted sexual or other physical contact, analysis of location data from both parties' mobile devices can provide information that confirms or refutes allegations of physical proximity during the period of time at issue. This kind of information might bolster or undermine the underlying claims, and avoid some of the "he said she said" that is typically present in competing narratives of what occurred.

Finally, it is important to remember that the use of this type of analysis is not limited to litigation. It can also be a critical lever in an organization's compliance arsenal. Many large organizations struggle to respond quickly to allegations of employee misconduct, trade secret theft, or violations of restrictive covenants. The creative application of data analysis can help.

B. Balancing Litigation Use with Cost and Risk

To a litigator, each of the systems described above represents a new source of evidence and strategic discovery. To in-house counsel and other business stakeholders, these also represent new drivers of cost and risk. Proper balancing of these conflicting dynamics is guided by three considerations.

First, consider whether there is any operational need to warehouse the data being created by these new systems. In some instances (*e.g.*, document repositories, collaboration tools, workforce planning products), data storage is precisely the point; however, in many instances (*e.g.*, chat and instant-messaging transcripts, virtual-meeting recordings, computer activity logs) the need to save transactional data is unclear, and data accumulation occurs reflexively. Determining the record-retention impact and objectives of a new tool before it is widely deployed will cut down on unnecessary data proliferation and the associated burden (both labor hours and expenditure). Assessing the positive evidentiary value of new data will similarly enhance litigation outcomes, allowing for the intentional build-up of evidence to support the company's employment workflows and business decisions. And the resulting deeper knowledge of the new systems will lead to tactically superior litigation by educated outside counsel.

Thus, for instance, a "gig economy" company that deploys independent contractors via one or more software applications may consider whether to build a repository of app data to analyze activity levels, transactional flows and throughput, and on that basis make necessary adjustments to enhance productivity. Given the enormous volume of these data points, the company will need to set retention time periods and related parameters carefully, but in so doing will likely generate a set of business records that will support downstream arguments relating to their business model.

Second, consider whether expanded in-house technical capabilities are needed to effectively manage new data sources. Leveraging the new data may require the hiring and training of dedicated data analysts and forensic technicians who can swiftly analyze, reduce and extract evidence (or business intelligence) cohesively from across multiple systems. New tools and toolkits such as data aggregators, forensic-imaging applications, and remote-collection software may be required to counter the decentralization of data and ensure defensible handling of evidence throughout. New tools may even need to be created to properly collect and prepare this evidence in litigation. While one-off or infrequent data-analysis needs can of course be met through the vendor marketplace, familiarizing a vendor with the company's customized configuration and use of a system creates its own cost, delay and data-access risks, all of which can be mitigated by developing the requisite internal skill-set. In-house experts thus not only serve as effective partners to outside counsel in implementing litigation strategy, they are critical to the efficient mining of the same data for business intelligence and operational improvement.

Thus, for instance, a company with a significant population of hourly, non-exempt employees may choose to aggregate the various work-activity data points described above (email, chat messages, call records, log-ins, and CRM interactions) to analyze work hours and measure employee performance. This will likely require the company to invest in data-aggregation software and data-mining expertise to glean the intended insights from the multi-stream data being accreted. Making this analysis a routine part of the business's operations and building that expertise in-house means that operational benefits aside, if a wage-and-hour lawsuit arises, the company stands ready to produce an enriched "day in the life" data picture for each employee at issue, thereby controlling the discovery narrative by substituting credible data for unreliable anecdotes.

Third, consider the impact of existing regulatory frameworks on data-access decisions. For instance, a threshold question is the extent to which the company has possession, custody or control (P/C/C) over the newly created data for purposes of litigation. P/C/C varies by jurisdiction, and ranges from requiring that the company have a strict contractual or other "legal right" to access the data to the other extreme of expecting that a company exercise all "practical ability" at its disposal to access and produce the data. In the BYOD setting for most digital workplaces, where employees are reimbursed for the use of their own cell-phones, computers, and other devices, the company's choice of terms in its technology-use policy may determine the extent of its right or *burden* to access and produce data for litigation.

Similarly, a threshold trial question is the authentication and admissibility of data evidence. Here, the newly enacted Federal Rules of Evidence 902(13) & (14) reduce the cost and burden of introducing data into the record, by permitting the use of a declaration from a qualified person (such as the in-house data expert proposed above) to self-authenticate records "generated by an electronic process or system" (902(13)), or using "digital identification" to self-authenticate data "copied from an electronic device, storage medium, or file" (902(14)). Doing so preempts the need to produce a testifying witness, and when used in conjunction with Rule 902(11), provides two-for-one coverage of authenticity *and* hearsay challenges to entry of the data.

Thus, for instance, if a single-plaintiff harassment claim implicates text messages and social-media content exchanged between employees, the employer has to analyze its jurisdictional rights and expectations before seeking to access the involved 'employees' cell phones and online accounts. And if the employer collects the relevant content in a forensically reliable manner that can be supported by a technical affidavit, it will eliminate any concerns regarding the authenticity, completeness and reliability of the evidence.

Finally, for data subject to regulation by non-U.S. jurisdictions, such as EU data that may be subject to GDPR requirements, the additional impact of cross-border discovery tasks, from preservation to access to notification, must be accounted for. Depending on the nature of the data, U.S.-specific privacy laws, such as the CCPA and the forthcoming Proposition 24 amendments to that law, may also need to be addressed when setting up data-warehousing and litigation-usage strategies.

VI. Global Overlay

A. Corporate Social Responsibility

1. Environmental Social Governance

"Doing well while doing good" is no longer a catchphrase companies can use without consequences. Now, companies that believe sustainable entrepreneurship and corporate social responsibility (CSR) are important corporate values must consider additional factors. Stakeholders, including employees, consumers, business partners, possible investors, financial institutions, employee representative bodies and political stakeholders have slowly but steadily started to judge or evaluate companies not only on their revenue, profit margin or other financial indicators, but also on the ways in which corporations consider the dimensions of environmental social governance (ESG) in their operations. The ESG factors are based on elements of both good corporate citizenship and financial relevance.

The differences between the various responsible management and investing concepts (ESG, CSR and to a certain extent SRI, socially responsible investing) may not be obvious. While all of the concepts are related, each has its own definitive goals and characteristics. It is often stated, however, that while CSR aims to make a business accountable, ESG makes its efforts measurable. Although CSR activities fluctuate drastically between businesses and sectors, there is a lack of comparable metrics. ESG efforts, on the other hand, are generally easier to quantify.

ESG refers to the ways in which corporations consider these three dimensions in their operations. As businesses emerge post-COVID-19 with some long-lasting adjustments, ESG becomes more and more important to a company's long-term sustainability. For example, the tight labor market, the COVID-19 pandemic and the recent racial equality crises illustrated the importance for companies to be resilient, organized and managed in a way that is more than focused on bottom-line results.

When analyzing the ESG acronym, the "E" takes into account a company's use of natural resources for business operations and whether this affects a company's impact on the environment. The carbon-neutral economy and energy transition are among the issues that are being measured. For the "G" governance factors, Board structure, business ethics, executive compensation, anti-corruption efforts, and accounting practices are all considered. But what does the S in ESG stand for?

"Social" looks at how a company manages its relationships with its workforce, consumers, the societies in which it operates and the political environment. Examples are the ways employees are treated regarding mental health, pay equity, health and safety, diversity, and inclusion. Social factors can also apply to the corporate image of a company. Geopolitical events also fall under the social category in ESG.

The most recognized social factors that companies take into account are:

Workforce, Engagement and Training
This factor examines whether employees, through either their union representatives, a works council or otherwise, have a seat at the table. Other factors that play a role are the presence of a collective bargaining agreement (CBA) and a healthy employer-employee relationship. Such factors involve an examination of staff turnover rate, talent attraction and retention, learning and education, productivity levels and the existence of long-term incentives.

Community and Society

A company's community engagement is measurable by a range of existing social criteria. Community involvement, its place in the society, and sponsorship programs are a few examples.

Data and IT Security and Integrity

Many companies have made data and IT security a priority, although these companies are usually unaware of their role in the social part of ESG. Data and IT security are, however, an issue that potentially affects every business in the world. Concerns around GDPR are also likely to intensify and these may be more difficult for companies to address where key people have been furloughed or must work remotely. This signals again why companies need to ensure that this is not overlooked.

Human Rights

While the "S" grows in prominence due to increasing evidence of its potential to significantly impact business performance and reputation, human rights is an area that has traditionally been a material focus especially for ESG investors. In an increasingly globalized world, companies often operate in jurisdictions with varying degrees of protection for employees, communities and consumers. Companies in all sectors with all types of operations should have clear policies on respecting human rights, particularly for those with complex supply chains.

Taking all this into account, it is understandable that there is an increasing pressure for ESG disclosure. To mention one example, in his annual letter to CEOs in January 2020, BlackRock CEO Larry Fink expressed that the firm expects disclosures according to guidelines set by the Sustainability Accounting Standards Board and the Task Force on Climate-Related Financial Disclosures.[126] Concurrently, there are efforts to streamline the reporting demands placed on companies, as illustrated by the World Economic Forum's International Business Council (IBC). The IBC is developing a methodology for ESG principles.

Another external influence that will speed up the adoption of ESG practices and policies is the evolving perimeters of a Board's fiduciary duties. For example, Canada, Sweden, and the United Kingdom have taken steps to expand what the Board's fiduciary duties encompass. And finally, millennials and Gen Z have illustrated a growing interest in companies' ESG practices, and whether these practices align with their own beliefs and morals. These populations are eager to support those businesses with good external messaging around their ESG practices and policies.[127] Business that cater to these populations have an increasing interest in developing strong and transparent ESG-minded policies and practices.

Against that backdrop, factors relating to "S" are now among the most pressing issues for companies globally. As we look forward, we believe that now, more than ever, a company's reputation—its "license to operate"—will be a function of how it engages and manages its E, S and G.

VII. Workplace Training

As the transformation of work and lifestyle has shifted dramatically during the past year, the absence of personal connection is taking a greater toll on many individuals than anyone had ever imagined. Yet in searching for solutions, we tend to look past the vital role that our workplaces can play in providing a meaningful sense of community. Whether we are essential workers putting our lives on the line, or those who struggle to show them appreciation by forcing a smile through a mask, it's not the same. Whether we were in the streets demanding justice or quietly discussing inequity around our kitchen tables, it's not the same. Whether we pine for someone to talk to from an empty apartment or dream of a moment's silence after a prolonged period of remote learning, it's not the same. Amongst all of this uncertainty, it can be helpful to look to our workplaces as sources of purpose and community that are so sorely needed.

Within the continued unfolding of these many challenges, now is the time to double down on employee engagement. While it may be easy to surrender to the forces that may be gradually shaping a terrain of departmental silos, our organizations are well placed to help rally us to a common purpose. Training can, and should, provide a platform for that purpose. When we come together and take an active role in establishing our workplace culture under the "new normal," we feel that we have a voice, we feel valued, and we feel more connected to our organization – and its success. Yes, this moves well beyond the sometimes tedious, box-checking approach to workplace compliance training and elevates us into a new space that appreciates who we are, respects our differences, and highlights fairness on the bottom line.

Today's challenges are tomorrow's opportunities, and organizations can begin to develop both compliance and non-compliance training opportunities that will assist employees in enduring and excelling in the workforce transformation. For example, organizations can look to increase the quality level of compliance anti-harassment training via live in-person or webinar form, or eLearning modules that will accommodate varied schedules and workforces. Additionally, organizations can look toward implementing trainings that will assist employees in maintaining engagement and cultivating a respect-based workplace through diversity, equity, and inclusion training, as well as performance management training that addresses the issues facing the workforce in our post-pandemic world.[128]

No matter the training solution that fits an employer's needs, training is an opportunity to demonstrate the organization's commitment to its people and its culture by focusing on quality. Engaging learners where they are with video vignettes, case studies, role-playing and gamification, results in meaningful takeaways that can prove sustainable well into the future. Training strategies that simultaneously provide a uniform message across levels and locations, while focusing on accessibility for those with impairments, bring everyone to the same table, and to the same purpose.

For years, both legislation and headlines have driven a growing demand for training that emphasizes a positive workplace culture and reinforces the unity of purpose that our workplaces provide. The future only promises to continue this increased focus on workplace training. Although in many ways we may feel further apart than ever, engaging with each other in meaningful learning forums provides an opportunity to forge stronger connections—and establish a common purpose—between our workplaces and our workforces as we move ahead in the new tomorrow.

VIII. Diversity, Equity, and Inclusion

Diversity, equity, and inclusion are key to a holistic strategy meant to address the workforce transformation caused by technology, automation, and the COVID-19 pandemic. These considerations are by no means new. The slow progress made over recent decades is being threatened by the harmful consequences of COVID-19 and rapid technological advancement. If the significance of diversity, equity, and inclusion is not contemplated in navigating these changes, a diverse workforce—and the accompanying differentiators—will be compromised.

Although there has been a surge in visibility of and investment in diversity, equity, and inclusion, most companies experience challenges in executing related strategies. Through audits of workforce demographic information, improvements to systems and practices, and targeted initiatives to offset the challenges disproportionately faced by women and individuals from underrepresented groups, companies can position themselves to survive rapid changes and succeed in the long term.

A. The Focus on Workforce Demographic Data

An increasing emphasis is being placed on corporate responsibility and social considerations. As a result, workforce demographic information is being disclosed both voluntarily and in response to legal requirements. In order to leverage demographic information, an understanding of its relationship with diversity, equity, and inclusion is key.

Workforce demographics measure diversity.[129] Diversity is a measure of equity and inclusion.[130],[131] The focus on workforce demographics and the public pressure to improve diversity, however, has obscured this relationship. Relying on demographic information as an indicator of equity and inclusion, and not just a measure of diversity, can help companies address imbalances across communities and achieve meaningful change.

B. The Power of Audits and Assessments

Because equity and inclusion are so difficult to quantify, demographic information is the key metric for measuring diversity, equity, and inclusion. With an understanding that overemphasis on the metrics can give rise to claims of discriminatory practices, companies can gain valuable insight from auditing and assessing workforce demographic data.

An audit of current demographic information informs a company's understanding of its diversity, equity, and inclusion. It provides an objective depiction that cannot be achieved through anecdotal information alone. An audit of historical demographic information reveals trends and helps forecast the potential impact of operational changes and diversity initiatives. This is especially important for public disclosures of company commitment to diversity and related objectives in order to avoid claims of misrepresentation or breaches of fiduciary duties.

In order to mitigate the disproportionate impact of TIDE and VIDE on underrepresented groups, organizations can collect and study aggregated demographic information to establish a basis for internal benchmarking and historical analyses. Regular collection and analysis of this information, enables companies to understand the impact of operational changes on the workforce.

C. Diversity initiatives

Companies that value their diverse workforces will need to develop initiatives to offset the disproportionate impact of COVID-19 and rapid technological advancement by equipping employees from underrepresented groups to transition into new, higher-value roles. Potential initiatives include:

- **Consultation with internal task forces**. As a preliminary step to making operational changes, decision-makers can rely on task forces comprised of employees from varied backgrounds to understand the implications of contemplated changes before undertaking them. Unintended consequences that adversely impact certain groups can be avoided or mitigated through diversity initiatives. For example, the unequal implications of remote work can be addressed through proactive initiatives and increased resources.
- **Upskilling and reskilling the existing workforce**. Instead of laying employees off when their positions are eliminated, employers can invest in upskilling and reskilling their existing workforce. Employers can also adopt programs to invest continually in employee training and education. For example, employers can implement lifelong learning accounts—employer-matched, portable individual accounts used to finance employee education and training.
- **Reimagining talent recruitment**. Acknowledging the disproportionate impact of COVID-19 on women and underrepresented minority groups, companies can adapt the talent recruitment process. For example, employers can reimagine job qualifications so that they do not automatically reject applicants with gaps in employment, fewer years of experience, degrees from lower-ranked schools, or lower grade point averages before an interview and/or skills assessment.

Through equitable systems and inclusive practices, companies can cultivate diverse workforces that will position them for long-term survival and success, even in the face of automation, technology, and other rapid changes.

IX. EMMA Coalition

While many predict that in the long-term, automation is likely to increase prosperity,[132] there is also general consensus that these changes will, in the near-term, produce significant anxiety and insecurity for many as to the sustainability of their employment. Younger workers may be particularly vulnerable, as they have not yet had the years of experience to hone and specialize their skills.[133] Moreover, as noted at the outset of this Report, the recent McKinsey study found that a quarter of the workforce may need to change occupations entirely as a result of the workforce shifts brought about by the pandemic.[134]

Littler has been a thought leader in this area, primarily through its partnership with the Emma Coalition, a non-profit 501(c)(3) corporation dedicated to ensuring that workers are provided with the skills, training, and resources necessary to adapt to the displacement of employment by technology and automation. The Emma Coalition seeks to bring together small and large American businesses; the organizations that represent them; representatives of organized labor; nonprofit, research and academic institutions; and federal, state, and local policymakers to address the challenges—and opportunities—presented by the dramatic changes presented by automation, robotics, and artificial intelligence that our workforce is already facing. It is the Emma Coalition's view that with proper preparation, employers and their workers can ride and thrive in TIDE. Conversely, without proper preparation, TIDE will overwhelm them.

Shortly before the pandemic fundamentally changed the shape of our economy and workplaces, the Emma Coalition was honored to present testimony to Congress on the challenges automation and AI will bring to the workforce, as well as potential solutions.[135] Both the challenges and the need for creative and nimble solutions are now more than ever critical to our health and economic recovery.

X. Conclusion

2020 was a wakeup call. The pandemic required nearly every employer around the globe to take stock of its workforce, policies and practices, and adapt to a rapidly changing and unpredictable environment. COVID-19 highlighted changes already underway in the workplace. How we work will continue to evolve, likely at an accelerated pace, even after the pandemic is behind us. Remote work for many is here to stay. Certain jobs hit hard by the lagging economy will never return, and others will eventually be performed by machines. To that end, workers will need to gain new skillsets to work in an environment where AI and automation are on the rise, or switch industries entirely. Employers, in turn, will need to reevaluate how, where, and when employees work, and take affirmative steps to facilitate necessary changes. This workplace transformation will require careful planning and deliberation. A primary goal of this Report is to highlight the myriad and overlapping labor and employment issues that arise as the workplace transforms, and the imperative that successful solutions will require significant cross-disciplinary collaboration. Careful planning and deliberation in the adoption of technology that will transform the workplace necessarily begins by identifying the key stakeholders who must be at the planning table, and working with qualified, agile counsel who can evaluate legal risk in a rapidly evolving and often ambiguous environment.

Endnotes

1 Valentina Romei, *Pandemic boosts automation and robotics* (Oct. 20, 2020).

2 McKinsey Global Institute, *A Future That Works: Automation, Employment, and Productivity* (Jan. 2017).

3 Mark Muro et al., *Automation and Artificial Intelligence: How Machines are Affecting People and Places*, Metropolitan Policy Program at Brookings Institute (Jan. 2019).

4 *Id.* p. 5.

5 Microsoft Corp., *The New Future of Work* (2021).

6 Susan Lund et al., McKinsey Global Institute, *The future of work after COVID-19* (Feb. 18, 2021).

7 Lori Ioannou, *1 in 4 Americans will be working remotely in 2021, Upwork survey reveals*, CNBC.com (Dec. 15, 2020). According to the latest BLS Employment Situation Report, in February 2021, 22.7% of employment persons were teleworking due to the pandemic. U.S. Bureau of Labor Statistics, *The Employment Situation—February 2021*, p. 3 (Mar. 5, 2021).

8 *https://www.ibm.com/cloud/learn/machine-learning*

9 Scherer, Matthew U. and King, Allan and Mrkonich, Marko, *Applying Old Rules to New Tools: Employment Discrimination Law in the Age of Algorithms* (October 21, 2019). South Carolina Law Review, Vol. 71, 449-522, 491–92 (2019), Available at SSRN: *https://ssrn.com/abstract=3472805*.

10 Annie Brown, *Biased Algorithms Learn from Biased Data: 3 Kinds of Biases Found In AI Data Sets*, Forbes (Feb. 7, 2020).

11 The Future of Work: Protecting Workers' Civil Rights in the Digital Age, 116th Congress, p. 11 (2020) (testimony of Jenny R. Yang, Esq.), available at *https://www.congress.gov/116/meeting/house/110438/witnesses/HHRG-116-ED07-Wstate-YangJDJ-20200205.pdf*.

12 *Id.* at pp. 11–12.

13 *Why the Onboarding Experience Is Key for Retention*, Gallup Blog, *https://www.gallup.com/workplace/235121/why-onboarding-experience-key-retention.aspx*.

14 *Id.*

15 Heidi Lynne Kurter, *5 Creative Ways to Keep Remote Workers Engaged and Excited*, Forbes (Spt. 22, 2020).

16 *Does working from home make employees more productive?* The Economist (Dec. 27, 2020).

17 Matthew Finnegan, *The New Normal: When work-from-home means the boss is watching*, Computerworld (Oct. 29, 2020).

18 374 S.W.2d 535, 539 (Mo. Ct. App. 1964).

19 Maine Rule 808.03.A.

20 138 S. Ct. 2080 (2018).

21 504 U.S. 298 (1992).

22 138 S. Ct. at 2095.

23 13-C MRSA § 1501.1.

24 *Id.* at § 1501.2.

25 The form can be obtained online at *https://www.maine.gov/sos/cec/forms/mbca12.pdf*.

26 13-C MRSA § 1502.

27 *See Barone v. Commissioner*, 85 T.C. 462, 466 (1985), *aff'd without published opinion*, 807 F.2d 177 (9th Cir. 1986).

28 *See Horton v. Commissioner*, 86 T.C. 589, 593 (1986).

29 *See Mitchell v. Commissioner*, 74 T.C. 578, 581 (1980); *Jordan v. United States*, 2006 U.S. Dist. LEXIS 17107 (D. Minn. March 23, 2006).

30 Rev. Rul. 99-7, 1999-1 C.B. 361.

31 *Johnson v. Commissioner*, 115 T.C. 210 (2000); *Sapson v. Commissioner*, 49 T.C. 636, 640 (1968).

32 326 U.S. 465 (1946).

33 Rev. Rul. 75-432, 1975-2 C.B. 60.

34 *See* IRS Pub. 463, "Travel, Entertainment, Gifts, and Car Expenses," pp. 3-4.

35 Littler Mendelson, P.C. is actively monitoring states that are working to enact paid sick leave, paid family leave, and other state leave laws. The primary focus of this section is on states that have enacted legislation.

36 Benefits do not begin until 2023.

37 State legislation is often amended to include wage schedules. For example, in New Jersey, for 2021, employees contribute 0.28% on the first $138,200 in covered wages earned during this calendar year. The maximum worker contribution for 2021 is $386.96. In New York, the 2021 deduction is 0.511% of an employee's gross wages each pay period and the maximum annual contribution is $385.34. In Massachusetts, the law only states that a tax of no greater than 0.75% of an employee's eligible wages is applied, and the maximum amount that could be deducted from a paycheck is $0.38 per every $100,000.

38 If the U.S. Government passes legislation raising the minimum wage to $15.00, it is expected that this amount would account for this change and still remain very high for those whose average weekly wage is equal to or less than 65% of the average weekly wage. Littler continues to monitor legislative efforts in this realm.

39 To qualify for the maximum of $1,357.00, you must earn at least $29,380.01 in a calendar quarter during your base period.

40 *See generally* David C. Gartenberg & Stephanie L. Mills-Gallan, *Colorado Confirms COVID-19 Triggers Public Health Emergency Leave Under the Healthy Families and Workplaces Act*, Littler ASAP (Dec. 24, 2020).

41 The District of Columbia has the District of Columbia Family and Medical Leave Act and the Universal Paid Leave Act.

42 Maryland has the Maryland Flexible Leave Act and the Maryland Parental Leave Act.

43 Minnesota has the Minnesota Parental Leave Act and the Care of Relatives Act.

44 *See* N.J. Stat. Ann. § 34:11B-4(h); N.J. Admin. Code § 13:14-1.9.

45 As discussed in part B of this Report, there are also tax implications with business expense reimbursement.

46 29 C.F.R. § 531.35.

47 18 U.S.C. § 2511(a); see *e.g.* Cal. Penal Code §§ 632, 637.2; Conn. Gen. Stat. Ann. § 52-570d; La. Rev. Stat. §§ 15:1303, 15:1312.

48 *United States v. Szymuszkiewicz*, 622 F.3d 701 (7th Cir. 2010) (auto-forwarding emails); *Shefts v. Petrakis*, 758 F. Supp.2d 620 (C.D. Ill., 2010) (text message capture); *Luis v. Zang*, 2013 U.S. Dist. LEXIS 29288 (S.D. Ohio, Mar. 5, 2013) (keystroke logging).

49 18 U.S.C. § 1030(a)(2)(c).

50 *See United States v. Kramer*, 631 F.3d 900, 902-03 (8th Cir. 2011) (interpreting "computer" to apply to "flip phones" that only make calls and send and receive text messages without Internet access or app functionality).

51 *See*, *e.g.*, Cal. Penal Code § 502; N.Y. Penal Law § 156.10; Va. Code Ann. § 18.2-152.4.

52 *See* 18 U.S.C. § 2701(a).

53 *See e.g.*, *Pure Power Boot Camp, Inc. v. Warrior Fitness Boot Camp, LLC*, 587 F. Supp. 2d 548, 562 (S.D.N.Y. 2008).

54 42 U.S.C. § 12112(d)(4)(a).

55 42 U.S.C. §§ 2000ff(4)(A)(iii), 2000ff–1(b).

56 29 C.F.R. § 1635.8(b)(1); 42 U.S.C. §§ 12101-12213.

57 42 U.S.C. §§ 12112(a), 2000ff-1(a).

58 42 U.S.C. § 2000e-2(a).

59 *See* 138 S. Ct. 2206, 2223 (2018).

60 *See*, *e.g.*, *Cunningham v. New York State Dep't of Labor*, 21 N.Y.3d 515, 523 (2013).

61 *See*, *e.g.*, Wis. Stat. Ann. § 940.315.

62 Cal. Civ. Code § 1798.100(b).

63 Cal. Civ. Code § 1798.100 et seq. (Prop. 24, § 4, approved Nov. 3, 2020, effective Jan. 1, 2023).

64 *SuperShuttle DFW, Inc*., 367 NLRB No. 75 (2019).

65 29 U.S.C. § 152(3).

66 Restatement (Second) of Agency §220.

67 *FedEx Home Delivery*, 361 NLRB 610 (2014).

68 *Id.*

69 *Id.*

70 *Id.*

71 367 NLRB No. 75 (Jan. 25, 2019).

72 *Id.*

73 *Id.*

74 *Id.*

75 *Union Authorization Card*, IBEW, http://ibew2320.org/autho-card/.

76 *Union Authorization Card*, SEIU, https://act.seiu.org/onlineactions/4kg1aq0rekaJyOOwNMOb6w2.

77 Andrew Perrin & Monica Anderson, *Share of U.S. adults using social media, including Facebook, is mostly unchanged since 2018*, Pew Research Center (Apr. 10, 2019).

78 *Id.*

79 *Unions and the Power of Social Media*, The Economist, (2019), *available at* http://tafthartley.prudentialretirement.com/_assets/documents_pdfs/taft_article6_socialmedia.pdf.

80 *Id.*

81 IATSE, *Communications Guides*, https://www.iatse.net/member-resources/communications-guides.

82 CWA, *Social Media Guidelines*, https://cwa-union.org/for-members/social-media-guidelines.

83 UAW, *Social Media*, https://uaw.org/members/labor-lab/local-unions-using-facebook-to-communicate/.

84 IBT, *The Teamsters Communications Manual*, https://teamster.org/wp-content/uploads/2018/12/8117ibtcommmanualrevise_july2017.pdf.

85 SEIU, *2020 Game Changers: Social Media Tips*, https://seiu2020.org/gamechangers/social-media-tip-sheet.

86 Union Track, *IAFF Smart*, https://uniontrack.com/clients/iaff/promo/index.htm.

87 *Id.*

88 Eli Rosenberg, *The Latest Frontier in Worker Activism: Zoom Union Campaigns*, The Washington Post (Sept. 11, 2020).

89 *See id*.

90 *Id.*

91 Eleanor Mueller, *The Pandemic is replacing people with tech – threatening the jobs rebound*, Politico (Feb. 5, 2021).

92 *Id.*

93 *The Future of Jobs Report 2020*, World Economic Forum (Oct. 20, 2020), available at https://www.weforum.org/reports/the-future-of-jobs-report-2020/digest.

94 *See* Melissa Hellman, *As Seattle's new hotels roll out automation to serve guests, workers worry*, Seattle Times (May 18, 2019).

95 *Id.*

96 *Id.*

97 EEOC, *Work at Home/Telework as a Reasonable Accommodation*, EEOC-NVTA-2003-1 (Feb. 3, 2003).

98 EEOC, Select Task Force on the Study of Harassment in the Workplace, *Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic* (June 2016).

99 Susan Lund, Anu Madgavkar, James Manyika, and Sven Smit, *What's Next For Remote Work: An Analysis of 2,000 Tasks, 800 jobs, and Nine Countries*, McKinsey Global Institute (Nov. 23, 2020).

100 *Id.*

101 Nicholas Bloom, *How Working From Home Works Out*, Stanford Institute for Economic Policy Research (June 2020).

102 *Dynamex Operations West, Inc. v. Superior Court*, 4 Cal.5th 903 (2018) codified in the California Labor Code by the passage of California A.B. 5. 2019-20 Leg., Reg. Sess. (Cal. 2019) (effective Jan. 1, 2020).

103 *S.G. Borello & Sons, Inc. v. Dept. of Industrial Relations*, 48 Cal.3d 341 (1989).

104 *See* California Assembly Bill 2275.

105 "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. The ABC test will mean many more workers will get the legal protections and benefits they rightfully should receive. As president, Biden will work with Congress to establish a federal standard modeled on the ABC test for all labor, employment, and tax laws." *The Biden Plan for Strengthening Worker Organizing, Collective Bargaining, and Unions*.

106 California Proposition 22; *see also* *Transportation Network Company (TNC) Legislation*, Texas A&M Transportation Institute (mapping 42 states that have enacted legislation regulating transportation network companies, including those that have made it possible to classify transportation network company workers as independent contractors).

107 *See* Larry English, *Supporting Digital Nomads In Your Business Is Good For The Bottom Line*, Forbes (Oct. 28, 2020).

108 OSHA, The Control of Hazardous Energy (Lockout/Tagout), 84 Fed. Reg. 22756 (May 20, 2019).

109 *Id.* at 22756.

110 *See, e.g.*, 29 U.S.C. § 1191b(a)(2) (defining "medical care" broadly).

111 *See* 45 C.F.R. pt. 160.103 (definition of "group health plan").

112 740 Ill. Comp. Stat. 14/15(b); Tex. Bus. & Com. Code § 503.001(b).

113 740 Ill. Comp. Stat. 14/15(e); Tex. Bus. & Com. Code § 503.001(c).

114 Sapana Agrawal et al., *To Emerge Stronger From the COVID-19 Crisis, Companies Should Start Reskilling Their Workforces Now*, McKinsey & Company (May 7, 2020).

115 *Id.*

116 *Id.*

117 *Id.*

118 Jocelyn Chao *et al.*, *Talent Retention and Selection in M&A*, McKinsey & Company (Oct. 12, 2020).

119 Dropbox Team, *Dropbox is Acquiring HelloSign to Improve Document Workflows for Hundreds of Millions of Users*, Dropbox (Jan. 28, 2019).

120 *Dropbox to Acquire HelloSign*, BusinessWire (Jan. 28, 2019).

121 Khalid Kark *et al.*, *The Kinetic Leader: Boldly Reinventing the Enterprise*, Deloitte (May 18, 2020).

122 Chris Hudgins & Oyin Falana, *Experts: Retailers' Desire for Digital Innovation is Driving M&A in 2019*, S&P Global (May 9, 2019).

123 N.J. Stat. Ann. § 10:5-13.

124 N.Y. Lab. Law § 198.

125 20 C.F.R. Sec 639.3(i)(6).

126 Larry Fink's 2021 letter to CEOs, at https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter.

127 NASDAQ, *How to Operationalize ESG* (Jan. 8, 2021).

128 If your tomorrow requires self-paced, on-demand solutions, Littler's partnership with an innovative eLearning provider, Kantola Training Solutions, has resulted in a suite of co-branded, engaging e-learning training solutions.

129 Diversity is the mixture of varying characteristics, identities, abilities, and experiences.

130 Equity relates to systems that ensure fair treatment and equal access to opportunity and resources.

131 Inclusion is the culture of valuing and encouraging contribution and participation by all people.

132 Dr. Lara C. Roll, *How the pandemic has given a boost to workplace automation*, Worktech Academy (2020).

133 Adi Gaskell, *Automation, COVID, and the Future of Work*, Forbes (Oct. 16, 2020).

134 *The Future of work after COVID-19*, *supra* note 6.

135 U.S. House of Representatives Committee on Education & Labor Subcommittee on Higher Education & Workforce Investment, *The Future Of Work: Ensuring Workers Are Competitive In A Rapidly Changing Economy*, Testimony on behalf of the EMMA Coalition (Dec. 18, 2019).