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The New Normal

Remote Work Programs and Potential Legal Risks

By Lukas Moffett and Amber M. Rogers

Technological advancements and shifting societal preferences have made remote work programs possible for a significant segment of the workforce, yet such programs have not been widely adopted. However, recent events related to COVID-19 forced the wide-spread acceptance of work-from-home arrangements. While many employers will likely return to some semblance of normalcy in the coming months, those that decide to implement permanent remote work programs, whether to reduce costs, provide employees greater flexibility, or further safety measures, should be cognizant of the associated potential legal risks. While the following considerations are not necessarily applicable to every remote work program, employers should remain mindful of the potential risks that can accompany these programs and the new ADA concerns associated with the "old normal."

Wage and Hour Concerns

The FLSA and state equivalents create a variety of obstacles for employers implementing remote work programs. Wage and hour laws typically mandate that covered employees receive overtime pay and are paid a minimum wage. Remote work programs can complicate an employer's ability to ensure compliance with these requirements:

- **Timekeeping.** Remote work programs can increase the difficulty of accurate timekeeping as employers may not be able to as easily supervise start/end times, breaks and overtime.
- **Reimbursements.** While reimbursable work-related expenses generally comprise expenses such as uniforms, travel expenses and other employer-directed purchases, if an employer requires employees to work remotely, certain home expenses, such as internet bills, may be considered work-related expenses. For example, in California, if an employer requires its employees to work remotely, it may be required to reimburse remote employees for expenses, or a portion of expenses, associated with phone lines, home internet and necessary hardware (such as computers).

Employers may be able to mitigate these risks by:

- Utilizing time tracking software to monitor and accurately track employees' hours.
- Clarifying and confining work hours to specified time periods.
- Implementing clear policies prohibiting employees from working unauthorized overtime hours.
- Implementing clear policies regarding employee expense reimbursements consistent with applicable law.
- Utilizing software to remind and require employees to take necessary breaks when appropriate.

Workplace Safety Concerns

Employers must provide employees with workplaces that are free from recognized hazards. Laws governing workplace safety, such

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THE SECTION

By Samantha C. Grant

I am honored to assume the role of Chair of the ABA Section of Labor and Employment Law. As the first woman of color to hold this role, I was cognizant of this historic achievement when I was became Chair-Elect in August 2019, and I'm committed to ensuring there are more women of color and other diverse attorneys who have the opportunity and privilege to lead the Section. While I have had to adjust some of my plans due to the pandemic, several noteworthy ones have already been more successful than I had even hoped they would be.

When I was Chair-Elect, in planning for the Section's 14th Annual Labor and Employment Law Conference, which will take place virtually from November 11–13, 2020, I wanted to ensure both that the panels were permeated with diversity and that the Section had a diversity, equity and inclusion track in addition to the other substantive tracks for the Conference. I am proud that, based on the focused and intentional efforts of our fabulous Conference Planning Committee, almost 60% of the expert panelists at the Conference are diverse, which is more than double the highest percentage of diverse panelists the Section has ever had at any of its prior Annual Conferences.

When I asked the Conference Planning Committee in the fall of 2019 to add a diversity, equity and inclusion track, I did not, at the time, imagine the 2020 global reckoning and thirst for knowledge on racial equity. The Conference Planning Committee embraced this new track and formed stellar panels with nationally recognized speakers on diversity, equity and inclusion. I also wanted the Section to enhance its efforts to collaborate with other ABA entities. To that end, I thank the ABA Commission on Racial and Ethnic Diversity in the Profession, ABA Commission on Hispanic Legal Rights and Responsibilities, ABA Commission on Women in the Profession and ABA Commission on Sexual Orientation and Gender Identity for agreeing to co-sponsor the Conference's diversity, equity and inclusion track and the ABA Forum on the Entertainment and Sports Industries for agreeing to co-sponsor the Conference's plenary session on diversity, equity and inclusion in the sports world!

In connection with the Conference, our tireless Section Secretary, The Honorable J. Michelle Childs (who is also Chair of the ABA Judicial Division this year), had the wonderful idea to present a program for new and young attorneys at a courthouse in connection with the Annual Section Conference. Although the pandemic prevented us from doing so, Judge Childs remained committed to presenting a panel for new and young lawyers. I then thought we should have an entire day of programming geared toward new and young lawyers. As such, the Conference will have its inaugural "Foundation and Essentials" program for new and young lawyers, which will be a full day of dual-track and plenary programs capped with a reception on November 5. I thank the ABA Young Lawyers Division for agreeing to co-sponsor this event and the Section's Outreach to New and Young Lawyers Committee for their creativity in planning the networking reception. I'm immensely grateful to the Conference Planning Committee for efficiently adjusting our plans to account for a virtual format and planning what promises to be a phenomenal four-day conference with 45 sessions!

I was pleased that the Section Council enthusiastically adopted my recommendation to establish an annual diversity, equity and inclusion in the legal profession award named after Judge Bernice B. Donald, which will be presented at the Section Conference. For the few who may not know her, Judge Donald is a highly respected jurist, a nationally recognized expert on and champion of diversity, equity and inclusion, an ABA leader, and a tireless contributor to countless Section initiatives and conferences. I thank Judge Donald for graciously permitting the Section to name the award after her.

Lastly, being a citizen of the United States, Canada and the UK and representing global clients caused me to want to form the Section's Outreach to International Lawyers Committee to bring together attorneys from around the world so we could learn from each other with respect to our common goal of creating workplace solutions that will benefit our members and those whom we represent. The Committee, whose dynamic leadership includes members from several countries, has drawn speakers and attendees to several Section events. Moreover, the Committee organized and hosted a meeting with 12 chairs of labor and employment law bar associations from around the world who are interested in collaborating with the Section.

Serving on the Executive Committee alongside Doug Dexter, with

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Employment Losses without WARNing

By Roxana M. (Crasovan) Underwood

The COVID-19 pandemic has forced many businesses around the country to abruptly close their doors. As employers ramp up efforts to address the short- and long-term business implications of the pandemic, they should carefully consider the deceptively straightforward federal Worker Adjustment and Retraining Notification (WARN) Act and its state law counterparts.

Under the federal WARN Act, businesses that employ 100 or more employees (excluding part-time employees) must generally provide all employees with 60 days' advance notice of any plant closing or mass layoff. A "plant closing" means a permanent or temporary shutdown of an employment site where 50 or more non-part-time employees experience a job loss during any 30-day period. A "mass layoff" is defined as a reduction in force during any 30-day period of at least one-third of the company's employees and of at least 50 employees, excluding part-time employees. However, if 500 or more employees (excluding part-time employees) are impacted, the one-third requirement does not apply. Before employers begin counting their workforce, they should bear in mind that part-time employees who have worked less than 6 months in the last 12-month period as well as part-time employees who work an average of less than 20 hours per week are not considered "employees" for purposes of determining employer coverage by WARN or triggering its notice obligations.

Some employers erroneously believe they can avoid the WARN Act's notice constraints by reducing their workforce in phases. However, the law specifically provides that an employment loss during any 90-day period for two or more groups at a single employment site, each of which individually may not meet the minimum number to trigger notice obligations, but in the aggregate exceed the minimum number, will generally meet the definition of a mass layoff or plant closing.

To complicate matters further, several states have enacted their own "mini-WARN acts." For example, states with WARN-like obligations include California, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, New Hampshire, New Jersey, New York, Tennessee and Wisconsin. Some of these state statutes have terms that differ from the federal WARN Act, so employers are encouraged to carefully consider state-specific requirements.

Of note, just weeks after states across the country instituted mandatory stay-at-home orders, and despite sky rocketing unemployment, nation-wide layoffs and business closures propelled some workers to begin filing class actions accusing companies of violating the federal WARN Act. One of the reasons WARN Act litigation has not yet spiked may be because the notice requirements are not triggered until a true "employment loss" exists. For example, a temporary layoff or furlough that does not exceed 6 months is not considered an employment loss. However, a temporary layoff or furlough that may initially have been expected to last six months or less but extends beyond six months may violate the Act where no notice was given at the outset of the layoff. Exceptions to this 6-month rule apply when the extension was caused by "business circumstances" not "reasonably foreseeable as of the time that notice would have been required" if notice was given when it became reasonably foreseeable that an extension beyond 6 months is required.

A good deal of uncertainty remains in identifying when the business circumstances become "reasonably foreseeable." Various federal circuit courts of appeal have opined that to determine whether such an exception excuses WARN Act notice obligations, an objective "probability" standard must be applied. For example, in *In re AE Liquidation, Inc.*, 866 F.3d 515 (3d Cir. 2017), the court explained that a layoff "becomes reasonably foreseeable only when it becomes more likely than not that it will occur." Otherwise, the mere "possibility" that a layoff might occur may "accelerate a company's demise and necessitate layoffs that otherwise may have been avoided." *Id.* Determinations of whether a layoff was more likely than not to occur are evaluated on a case-by-case basis. Yet the burden remains with the employer to prove that that a layoff was not *probable* at the time the notice would have been required. Many covered employers have sought to avoid the uncertainty of the application of the business circumstances exception by opting to carefully craft WARN Act notices even when a layoff is not originally anticipated to exceed 6 months.

While the May 2020 jobs report identified a 1.4 percent decrease in the pandemic-induced heightened unemployment figures, the magnitude of job losses coupled with the uncertainty surrounding any semblance of a return to "normalcy" may pave the way for an uptick in WARN Act litigation. A handful of class actions, including against companies like Hooters, Enterprise Rent-A-Car and Hertz, have been filed in the Middle District of Florida, claiming the employers could have anticipated the impact that the pandemic would have on its employees prior to the layoffs, such that notices were required from the very beginning of the layoff. For example, in *Benson v. Enterprise Holdings Inc.*, No. 6:20-cv-00891 (M.D. Fla. May 27, 2020), the plaintiffs contend Enterprise violated the WARN Act when it furloughed employees in mid-March 2020 and then permanently separated them a month later. Presumably, Enterprise will attempt to take advantage of the unforeseeable business exception to the WARN Act's notice requirements. According to the U.S. Department of Labor's recently issued Frequently Asked Questions, an "unanticipated and dramatic major economic downturn," "government ordered closing of an employment site that occurs without prior notice," and "sudden, dramatic, and unexpected action outside the employer's control, announced and implemented swiftly" may trigger unforeseeable business circumstances. However, the DOL gave no indication that the COVID-19 pandemic would automatically qualify as an unforeseeable business circumstance.

Thus, employers who are implementing permanent mass layoffs, plant closures, or who may otherwise need to extend their temporary layoffs beyond 6 months, should seriously consider whether they qualify for the unforeseeable business circumstances exception. While some employers remain optimistic that any layoffs will be relatively short-lived, the potential liability associated with a WARN Act violation may lead many to err on the side of caution and issue notices even if they may be returning employees to work in short order. ■

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Mail Ballot Elections

The New "Preferred Method" for Holding Union Representation Elections?

By Amber M. Rogers and Michael Reed

Due to the outbreak of COVID-19 and the inherent risks in holding large gatherings of people, the prospect of mail ballot elections has recently received considerable national attention. Typically, this attention is focused on how mail ballot elections might affect voter turnout or election results in state and federal elections and whether it might benefit one party over the other. So far, state and federal elections have generally continued to be held with in-person voting occurring at polling places, albeit with new safety measures in place.

Unsurprisingly, the manual versus mail ballot election issue has also arisen in the context of labor union representation elections. However, unlike state and federal elections, representation elections have almost become uniformly mail ballot, with the National Labor Relations Board quickly adapting and adhering to a now standard analysis of the safety and logistical considerations imposed by COVID-19. From March 1 to October 22, 2020, the Board issued 152 election decisions regarding this issue. During this timeframe, only two manual elections have been directed to proceed.

The Board's Preference for Manual Elections

As can be said about many things in light of COVID-19, the increase in mail ballot elections is unprecedented, as the Board's "long-standing policy" and preferred method of conducting elections has always been to hold a manual vote supervised by Board personnel. The Board has recognized, however, "that there are instances where circumstances tend to make it difficult for eligible employees to vote in a manual election or where a manual election, though possible, is impractical or not easily done." The Case-handling Manual goes on to advise that the regional director "should use his/her discretion in deciding which type of election to conduct," and take into account "at least the following situations that normally suggest the propriety of using mail ballots: (a) where eligible voters are 'scattered' because of their job duties over a wide geographic area; (b) where eligible voters are 'scattered' in the sense that their work schedules vary significantly, so that they are not present at a common location at common times; and (c) where there is a strike, a lockout or picketing in progress." Case-handling Manual, § 11301.2 ("Manual or Mail Ballot Election: Determination") (January 2017). If any of these situations arise, the regional director is advised to consider "the desires of all the parties," the "ability of voters to read and understand mail ballots," the "availability of addresses for employees" and the "efficient use of the [NLRB's] financial resources."

Regional Directors' Trend Towards Mail Ballot Elections Due to COVID-19

In recent elections, usually, though not always, it is the employer that wants a manual election and the union that proposes a mail ballot election. *See Ultimate RD, Inc. d/b/a R-B Rubber Products*, No. 19-RD-259129 (June 2, 2020) (mail ballot election directed at employer's request). In arguing for a mail ballot election, employers have described in detail the measures they had taken or were willing to take to minimize person-to-person contact and keep employees and Board personnel safe. For example, employers have stated that they were able to provide a well-ventilated area for voting, including an outdoor opening that would allow room for social distancing, mandatory temperature checks and quarantine requirements for employees, a plexiglass partition to separate voters, election observers and Board personnel, disposable pens or pencils for single-use voting, and providing masks and gloves for the election observers, union representatives and Board agents. Employers have also argued that there have been no confirmed, reported or even suspected cases of COVID-19 at their premises where the election would occur. In other cases, the employer has argued that manual elections should proceed because the jurisdiction where the employer was located was "reopening" or, in the case of "essential businesses," the voting employees had been working their regular schedules throughout the pandemic, albeit with additional safety measures. Employers also argued that there were health risks (spreading the virus via mail) and logistical concerns (loss of Board supervision and voter turnout) associated with a mail ballot election.

In contrast, the party favoring a mail ballot election, usually the union, has argued that mail ballot elections are safer than manual elections, that employer safety measures cannot adequately mitigate the risk of COVID-19 exposure and transmission, and that mail ballot elections allow for the most efficient means of deciding the question or representation, given the circumstances. Unions have also argued that the employer's safety precautions (*e.g.* temperature checks and quarantine requirements) could result in voters being prohibited from entering the worksite on election day, thereby preventing them from voting in the election.

What's Next?

Regional directors have consistently, and almost uniformly, found COVID-19 to present the "extraordinary circumstances" under which mail ballot elections are deemed appropriate. On July 6, 2020, the Board's Office of the General Counsel released a memorandum on "Suggested Manual Election Protocols," which provides a laundry list of logistical and procedural recommendations for holding manual elections. *See* NLRB Office of the General Counsel, "Suggested Manual Election Protocols" Memorandum (July 6, 2020). Many of the Board's recommendations are similar to those

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Workers' Collective Actions During the COVID-19 Pandemic

By Margot Nikitas

A global pandemic is not the time one would expect to see an uptick in worker organizing and collective job actions. Government shutdowns of businesses deemed "non-essential" and orders for non-essential workers to shelter in place in attempt to slow the spread of the novel coronavirus have resulted in massive layoffs and the highest U.S. unemployment rate since the Great Depression. But for workers in "essential" businesses that continued to operate during the shutdowns—including healthcare, food processing, grocery stores and warehousing—jobs that may already have posed health and safety risks became a matter of life and death due to fear of contracting the virus at work.

Although many essential workplaces are non-union, workers across the United States are banding together to collectively demand health and safety protections against COVID-19 and solutions to complaints that existed prior to the pandemic, such as lack of paid sick leave. Section 7 of the National Labor Relations Act (NLRA) provides that covered private sector employees, regardless of whether they are represented by a union, "shall have the right to . . . engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."

While omitted from the NLRA's protections due to their classification—or misclassification, as some assert—as independent contractors, "gig" economy workers at the online grocery delivery platform Instacart struck in April 2020 after what they considered to be an inadequate response to demands for increased personal protective equipment (PPE), $5 per order hazard pay and a 10% automatic tip. Workers walked out after Instacart responded that it would provide hand sanitizer and use customers' last tip as a default on new orders. On May 1, 2020, Instacart workers joined with warehouse workers from Amazon, Amazon's grocery subsidiary Whole Foods, and gig workers at the Target-owned Shipt in coordinated walkouts. During the walkouts, workers called for more PPE, professional cleaning of worksites and hazard pay. The "gig" workers also asked customers to boycott by withholding orders.

After hearing of the first positive COVID-19 case in their warehouse, in mid-March 2020, Amazon workers in Queens, New York organized an impromptu picket outside the building's entrance and confronted supervisors, successfully demanding that workers be sent home with pay while the building was sanitized. The next day, the organizing group Amazonians United launched an international petition calling for PPE, hazard pay, childcare support and paid sick leave. Amazon granted a $2 wage increase and unlimited unpaid time off but has since sought to revoke these temporary gains.

Fast food workers with the Fight for $15 and a union campaign have organized and executed one-day strikes throughout the pandemic to demand adequate PPE and paid sick leave. In mid-April 2020, a worker at a Chicago McDonald's franchisee location filed a complaint with the Occupational Safety and Health Administration alleging that store managers knew an employee had contracted COVID-19 but failed to inform other employees who may have come into contact with their ill coworker and failed to take additional sanitization measures. Although OSHA's "general duty" clause protects workers who refuse to work in dangerous conditions that cannot be timely remedied by the employer, unions have strongly criticized OSHA for failing to issue an emergency

temporary standard (ETS) providing health and safety protections during the pandemic. On May 18, 2020, the AFL-CIO filed an emergency petition in the U.S. Court of Appeals for the D.C. Circuit seeking to compel OSHA to issue an ETS. The court denied the petition on June 11, 2020, holding that OSHA's decision not to issue an ETS was entitled to "considerable deference" and was reasonable "[i]n light of the unprecedented nature of the COVID-19 pandemic" and "the regulatory tools that the OSHA has at its disposal to ensure that employers are maintaining hazard-free work environments." *In re: AFL-CIO*, D.C. Cir., No. 19-1158, 06/11/20. According to Bloomberg Law News, as of May 28, 2020, OSHA had opened 403 virus-related inspections but had issued only one complaint.

Meat and poultry processing workers in plants owned by Tyson have participated in sick outs over lack of PPE and fears of contracting the virus after many workers have tested positive or died. Despite company efforts to install plexiglass dividers and institute other safety measures, meat and poultry processing facilities have seen a higher number of positive COVID-19 cases and deaths due to the practice of having workers stand in close proximity to one another on production lines. Notwithstanding the high rates of COVID-19 in the industry, on April 28, 2020, President Trump issued an executive order mandating that meat and poultry processing plants remain open during the pandemic because of a concern of creating a nationwide meat shortage.

Public sector workers also have undertaken collective actions during the pandemic. In mid-March 2020, rank and file union teachers in New York public schools threatened a mass sick out as schools remained open when schools in many other jurisdictions had closed due to the virus. Several days before the planned sickout, Mayor Bill de Blasio announced his decision to

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The UK's Post-Brexit Immigration System in a Pandemic

By Rose Carey and Marcia Longdon

On January 1, 2021, the UK's exit from the European Union (EU) will be complete with the end of the transitional period on December 31, 2020, thus bringing to an end the rights of EU nationals (including European Economic Area (EEA) and Swiss nationals) to work and reside in the UK without immigration control.

This article examines the likely impact on UK employers, including compliance and questions are raised in relation to the impact of coronavirus on the plans for the UK's post-Brexit immigration system.

The current position for EU workers

The UK left the EU on January 31, 2020. Pursuant to the Withdrawal Agreement, the UK and EU agreed a transition period until December 31, 2020. During that time, EU citizens maintain free movement rights, which means they can continue to arrive, reside and work in the UK.

In order for EU citizens residing in the UK before December 31, 2020, to continue to stay in the UK, they are required to apply under the EU Settlement Scheme (EUSS). The EUSS, was created through domestic legislation and is the vehicle through which European nationals and their family members must apply to remain in the UK. The application process has proven to be fairly straightforward for most applicants, with the key criteria being whether the applicant has been residing in the UK for a continuous 5-year period. If that is the case, settled status (indefinite leave to remain) will be granted. If not, pre-settled status (limited leave to remain) will be granted. Those residing in the UK before December 31, 2020, will have to apply under the EUSS by the deadline of June 30, 2021.

The Future Immigration System

For those EU citizens arriving for the first time after January 1, 2021, they will be subject to new UK Immigration Rules. EU citizens will not be able to rely on free movement rights and will need to apply for a visa before being able to work in the UK. On February 19, 2020, the Home Office released a policy statement on the intended rules for EU citizens arriving in the UK from the start of next year.

Within the policy statement, there are references, as expected, to a new Points Based System (PBS) for the UK. The UK has actually had a PBS since 2008 and the new intended rules from the start of next year will largely be based on the existing categories of applications.

Key changes include:

- Relaxing of the Tier 2 work visa requirements
- Tier 1 Post Study Work visa for UK graduates
- A possible return of the highly skilled migrant visa later in 2021

The main changes come in Tier 2 and most EU workers will be using this category of visa if they want to work in the UK from January 1, 2021.

The main changes in Tier 2 are around the salary level and skill threshold. Both are being lowered which means more roles will be eligible for this visa category. The requirement to also advertise the role to justify why a resident worker is not being employed will also be removed. These are welcome changes making it easier for employers to sponsor workers.

However, UK employers will find that they need to give much more resources, time and money towards visa applications for EU citizens. Many UK employers will not be familiar with engaging with the UK immigration system if they have not generally been required to employ non-EU citizens. Equally, many employers, which will generally be small and medium sized organisations, will this year be required to apply for a sponsor licence in order that they are able to recruit skilled sponsored EU workers from the start of next year. Whilst the processing times for such sponsor licence applications are generally quite quick—often completion is within 4 weeks—as more employers apply throughout this year, we expect those processing times to be delayed. An additional consideration will be cost. At present government fees for a non-EU to be sponsored to work in the UK for 5 years would be circa £7500.00 in government fees. That does not include the government sponsor licence fee, which is an additional £1,476 (or £536 for a small company), although employers are only required to pay this every four years.

There is also the issue of compliance as all sponsor licence holding employers are subject to an audit on a pre-arranged or unannounced basis. There is some degree of uncertainty in relation to the extent to which the Home Office will be able to visit all employers as even to date it

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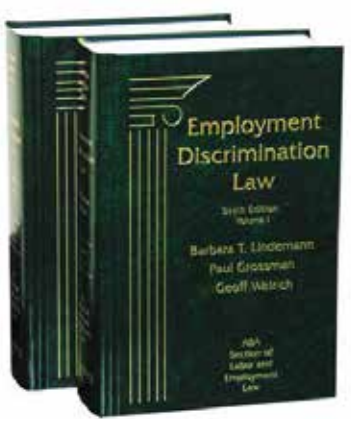

By **Barbara T. Lindemann**, **Paul Grossman**, and **Geoff Weirich**; **Laurie E. Leader**, **Nicole Buonocore Porter**, **Marianna Moss**, and **Geoffrey Weirich**, Executive Editors; **Equal Employment Opportunity Law Committee**

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COVID-19 Sheds Light on Legal Issues for Workers' Rights in the Gig Economy

By Sam Hensel

The COVID-19 pandemic has placed the spotlight on the legal rights of gig economy workers as compared to the protections afforded to more traditional workers. At the heart of this distinction is gig workers' classification as 1099 "independent contractors" who, employers argue, are afforded the benefits of flexibility by choosing their own hours and which jobs or tasks they prefer to undertake. Such a classification under the tax code stands in contrast to traditional employees who submit a W-2. Those employees are more likely to enjoy the protections of the constellation of federal and state labor laws, including rights under the National Labor Relations Act, the right to collect unemployment insurance, dispute and make claims for unpaid wages and hours, use sick leave, enjoy OSHA protections, and more. According to the World Economic Forum, since the pandemic spread across the United States, 68% of gig workers currently have no income, while just 23% have some money saved. 89% of gig workers are now looking for a new source of income. Josephine Moulds, *Gig Workers Among the Hardest Hit by Coronavirus Pandemic*, World Economic Forum (April 21, 2020). (https://www.weforum.org/agenda/2020/04/gig-workers-hardest-hit-coronavirus-pandemic/)

While unions and employees at non-union shops alike have advocated for better working conditions over the past few months, gig workers do so at a disadvantage. As independent contractors, they are not considered "employees" under Section 2 of the National Labor Relations Act. 29 U.S.C. § 152(3). Without NLRA protection, they do not have a right to unionize, and their employers may terminate them for almost any reason, including engaging in what would be considered "concerted activity" under Section 7 of the NLRA. In fact, collective action by independent contractors runs afoul of antitrust law. 15 U.S.C. § 17. Some jurisdictions have taken action to ensure that gig workers receive at least some of the same legal protections as more traditional employees. In California, the passage of AB-5 has received national attention. 2019-2020 Cal. Stat. AB-5. This statute codified a state supreme court decision holding that gig workers are "employees" entitled to benefits provided to traditional employees under state law, including sick leave and unemployment insurance. *See Dynamex Operations W. v. Superior Court*, 416 P.3d 1 (Cal. 2018).

COVID-19 has exacerbated the consequences of the legal framework governing the rights of gig workers against the companies for whom they perform work.

Seattle's recent, pre-COVID-19 attempt to permit ride-sharing drivers to unionize was enjoined following an appeal to the Ninth Circuit. *Chamber of Commerce v. City of Seattle*, 890 F.3d 769 (9th Cir. 2018). Though the court held the ordinance was not preempted by the NLRA under either *Garmon* or *Machinists*, it nonetheless held that the absence of the State of Washington supervising the ordinance's implementation failed to grant immunity from federal antitrust law under the state action immunity doctrine. *Id.* at 789-90. The court thus left open a window of opportunity for states (and municipalities with sufficient state supervision) to enact statutes or ordinances permitting gig workers to have union representation and collective bargaining rights in a manner that is not preempted by federal antitrust law.

One step that Congress has taken during the pandemic was to expand unemployment insurance to gig economy workers. Under the Pandemic Unemployment Assistance (PUA) program, passed as part of the CARES Act, gig workers are eligible for up to 39 weeks of unemployment benefits. However, the PUA requires the states to create the distribution system for the insurance, and progress has been slow. Most states have started distributing the insurance benefits to gig workers, but like many filing for unemployment, gig workers are frequently reporting long wait times, among other technical difficulties, due to the overall high volume of claims.

Another major point of contention for gig workers during the pandemic is paid sick leave. Companies who use gig workers assert that they may stay home if they are feeling symptomatic. Gig workers argue that the lack of paid sick leave means there is not sufficient income to pay their bills while caring for themselves. In Massachusetts, a federal court on May 23, 2020, denied a group of Lyft drivers' motion for an emergency preliminary injunction to prohibit Lyft from classifying them as independent contractors during the pandemic. *Cunningham v. Lyft, Inc.*, 1:19-cv-11974-IT, Dkt. #174 (D. Mass. 2020). The drivers were seeking to be reclassified so they could be covered by their state's paid sick leave law. Arizona, California, Connecticut, Maryland, Massachusetts, New Jersey, New York, Oregon, Rhode Island, Vermont, Washington and a group of municipalities including Los Angeles, San Francisco, San Diego, Oakland, Santa Monica, Chicago, Minneapolis, Duluth, New York, Philadelphia, Pittsburgh, Austin, Dallas, Seattle and Tacoma have passed paid sick leave laws and ordinances with an expanded definition of "employee" to cover gig workers. However, some companies have argued gig workers who perform work for them are still not covered. On the federal level, legislation is pending in Congress that

would provide two weeks of federally funded paid sick leave whenever a public health emergency is declared. S. 3415 – 116th Cong. (2020).

The pandemic has also compelled the Occupational Safety and Health Administration to, for the first time, issue an alert for workplace safety for gig workers who work for ride sharing app companies. (https://www.osha.gov/Publications/OSHA4021.pdf) This alert, which applies broadly to include all who work in the "car service" industry, includes encouraging drivers to stay home if experiencing symptoms, sanitize frequently-touched areas (like car door handles), ask customers to wear masks, limit the amount of passengers per ride, and install Plexiglass between drivers and backseat passengers. *Id.*

COVID-19 has exacerbated the consequences of the legal framework governing the rights of gig workers against the companies for whom they perform work. Though state and local governments have made efforts to alleviate the economic problems faced by gig workers as a result of the pandemic, it is unclear whether the federal government and states will be willing to extend benefits, such as unemployment insurance through the PUA, once the pandemic ends. ■

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The New Normal

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as OSHA, apply to some extent even when the workplace is one's home, and, if more employers implement permanent remote work programs, such laws may be more liberally applied.

According to OSHA guidance, now more than twenty years old, OSHA will not hold employers accountable for ensuring safety in employees' home offices. While OSHA's current position appears to remain unchanged, employers are nevertheless required to document and maintain records of work-related injuries that occur in home offices. The Administration has provided examples to help determine whether an injury that occurs in a home office is work-related:

- An injury resulting from dropping a box of work documents on one's foot is work-related.
- An injury resulting from a puncture wound by a sewing machine used to perform garment work, which becomes infected and requires medical treatment, is work-related.
- An injury resulting from tripping on the family dog while rushing to answer a work phone call is not work-related.
- An injury resulting from an electrocution by faulty in-home wiring is not work-related.

Employers can face significant fines for violating workplace safety laws. For example, OSHA violations bring a range of fines including, in 2020, $13,494 for each non-serious violation, $134,937 for each willful or repeat violation, and $13,494 per day for failing to timely remedy unsafe conditions (which will likely be exceedingly difficult when an unsafe condition resides within an employee's home). OSHA fines are typically subject to reduction; however, a violation remains on an employer's record for five years, subjecting the employer to the risk of a repeat violation and potentially jeopardizing the employer's business opportunities by making it difficult to procure certain contracts, such as government contracts.

Employers may be able to mitigate these risks by:

- Performing inspections of employees' home offices to ensure each location is free from recognized hazards.
- Liberally documenting and recording remote employees' injuries suffered at home, even if the connection between the injury and the work is slight.
- Frequently checking in with employees to create a record of consistent monitoring of employee safety.

The Old Normal and the ADA

Regular attendance and presence on-site has generally been considered an essential function of many jobs, but not all, and the determination is very fact intensive. For example, in *Vitti v. Macy's. Inc.*, the Second Circuit held that attendance is an essential function of a department store's cosmetic sales position, given the interactive nature of the job. *Vitti v. Macy's Inc.*, 758 F. App'x 153, 157 (2d Cir. 2018). In *Vitti*, the Second Circuit further noted that regular attendance is an essential function of essentially every job. *Id.* However, the Second Circuit has indicated that essential functions of certain jobs, such as customer service representatives, may not include attendance when the job can be performed satisfactorily from home. *DeRosa v. Nat'l Envelope Corp.*, 595 F.3d 99, 104 (2d Cir. 2010). Likewise, in *EEOC v. Ford Motor Co.*, the Sixth Circuit held that attendance is an essential function of a resale buyer position, as the position requires frequent face-to-face interactions with teammates and suppliers. *E.E.O.C. v. Ford Motor Co.*, 782 F.3d 753, 761-63 (6th Cir. 2015). Yet, the Sixth Circuit has also held that attendance may not be an essential function of positions in human resources if employees can perform work tasks in a timely and effective manner from home. *Hostettler v. Coll. of Wooster*, 895 F.3d 844, 856-57 (6th Cir. 2018).

Other circuits have held that regular attendance is an essential function of positions in management, manual labor, employee and vendor training, teaching, emergency dispatch, and warehouse supply. *See, e.g.*, *Hannah P. v. Coats*, 916 F.3d 327, 339 (4th Cir. 2019) (management); *Lipp v. Cargill Meat Sols. Corp.*, 911 F.3d 537, 544-45 (8th Cir. 2018) (manual labor); *Garrison v. City of Tallahassee*, 664 F. App'x 823, 824, 826 (11th Cir. 2016) (employee and vendor training); *Preddie v. Bartholomew Consol. Sch. Corp.*, 799 F.3d 806, 813–14 (7th Cir. 2015) (teaching); *Crowell v. Denver Health & Hosp. Auth.*, 572 F. App'x 650, 659 (10th Cir. 2014) (emergency dispatch); *Murry v. Gen. Servs. Admin.*, 519 F. App'x 866, 869 (5th Cir. 2013) (warehouse supply); *see also Mobley v. Allstate Ins. Co.*, 531 F.3d 539, 547-48 (7th Cir. 2008) ("as a general matter, working at home is not a reasonable accommodation."). In each instance, courts focused on a variety of factors, such as the employer's judgment and the availability of other employees to perform certain tasks. While the determination of whether attendance is an essential function of a position can be easy when a job requires in-person interactions, immediate access to documents or other information unavailable remotely, or manual labor components, things get complicated when a position solely or largely involves telephonic or online communications or document interactions.

Typically, an employer's judgment is given deference in determining whether attendance is an essential function of a position. However, mandatory work-from-home programs because of COVID-19 may test this deference. While it is too early to know, the reality exposed by mandatory work-from-home programs may be a consideration for courts in determining whether on-site attendance is an essential function of a job. ■

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The Section

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whom I joined the Section Council at the same time nine years ago, continues to be a richly rewarding experience in countless ways. I look forward to continuing to lead the Section with him as well as with Chair-Elect Kelly Dermody, Vice Chair Steve Moldof, and Immediate Past Chair Chris Hexter. I also greatly appreciate the wisdom and immeasurable contributions of my de facto special advisor George Washington. Thanks also to the Section Council and all of the Committee leaders for their commitment and service to the Section and our members. The Section could not even begin to function were it not for the Section's phenomenal staff led by the incomparable Section Director Brad Hoffman. I'm beyond grateful for his and the rest of his team's efforts; they take going above and beyond up quite a few notches. Working together, I know we will all provide Section members with a meaningful and impactful year.

As we move through the coming months, please remember how isolating and challenging it can be for many of our friends and colleagues in the Section as a result of the pandemic. I encourage you to be intentional about connecting and staying in touch with friends and colleagues and offering support or just lending an ear. I will be doing the same.

I hope that if you have questions about or suggestions for the Section, you will contact me. The Section of Labor and Employment Law is *your* section, and I want to make sure that we focus on topics and initiatives that are important to you. ■

Mail Ballot Elections

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offered by parties petitioning for manual elections in previous months. The Board also set forth required "certifications" relating to, for example, when the polling place was last cleaned and whether any visitors to the polling place had tested positive for COVID-19 exposure. In addition, the Board set out specific issues that must be covered in any manual election agreement. The Board's memorandum, however, does not seem designed to reopen the gates to manual elections. It concludes by stating that "[i]n the end, the decisions on election procedures and the safety of all participating in an election remain in the sound discretion of the Regional Director."

With the constantly shifting circumstances surrounding COVID-19, it seems unlikely that the current trend toward mail ballot elections will change anytime soon. For the time being, it seems that employers and unions should plan on navigating mail ballot representation elections. What remains to be seen is whether mail ballot elections will dissipate as the pandemic flattens. ■

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Workers' Collective Actions

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close schools. And in late May 2020, public sanitation workers in Tuskegee, Alabama protested the lack of proper PPE including gloves and masks.

This is but a small snapshot of the many COVID-19-related collective actions taken by private and public sector workers across the United States. Whether these will lead to increased union organizing drives and election petitions filed with the National Labor Relations Board remains to be seen. The Emergency Workers Organizing Committee, a joint project of the Democratic Socialists of America and the United Electrical Workers, was formed to respond to non-union workers' requests for organizing support during the pandemic and has so far helped efforts in over 30 states, some of which could lead to more formal campaigns. But what is clear is that when faced with contracting the coronavirus on the job or passing it to loved ones, workers are banding together to demand adequate PPE and safe workplace conditions. ■

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Brexit

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has struggled with the caseload. The indications are that the Home Office fully intends to continue with an environment of full compliance.

On any view, the UK government's timeline to deliver on these new immigration rules was always going to be tight. They have suggested recently that the new immigration rules will be available for employers to see from October 2020 ready to use for EU citizens and everyone else from January 1, 2021.

The COVID-19 Pandemic

Like all aspects of life at the moment, the COVID-19 pandemic is inevitably having a huge impact on the UK immigration system and around the world. It is almost inevitable that the Home Office will be required to apply its resources to working on new COVID-19-related guidance and the repercussions and not the new rules to be applicable from the start of next year. It therefore calls into question the ability of the government to deliver on its promise that EU free movement will cease at the end of 2020. However, the UK government has stated that it does not intend to seek an extension. If there is a change of mind, it must be made by the June 30, 2020, otherwise it will be too late to seek an extension.

The pandemic also calls into question the ability of EU citizens to register their status before the deadline under the EUSS. Whilst many EU citizens are able to apply online, some are required to attend in person and would be unable to do so in the current situation as application processing centres are only now starting to reopen and appointments are currently only available for applicants who applied before the lockdown and had their appointments cancelled.

As UK employers await the new immigration rules for next year, a sigh of relief would certainly be heard if the plans were delayed due to the coronavirus outbreak. ■

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Calendar of Events

2020

November 5
14th Annual Section of Labor & Employment Law Conference: Foundations and Essentials
Co-Sponsored by the ABA Young Lawyers Division
Virtual

November 11–13
14th Annual Section of Labor & Employment Law Conference
Virtual

2021

January 28–30
State & Local Government Bargaining & Employment Law Committee Midwinter Meeting
Westin Resort
Puerto Vallarta, Mexico

February 3–6
Employee Benefits Committee Midwinter Meeting
Fairmont El San Juan Hotel
San Juan, Puerto Rico

February 10–12
ADR in Labor & Employment Law Committee Midwinter Meeting
Marriott Marquis
Washington, D.C.

February 17–19
Federal Labor Standards Legislation Committee Midwinter Meeting
Grand Hyatt
Playa del Carmen, Mexico

February 23–26
Occupational Safety & Health Law Committee
Westin Sarasota
Sarasota, Florida

February 28–March 3
Committee on Development of the Law under the NLRA
Loews Coronado Beach Resort
Coronado, CA

March 2–5
Committee on Practice and Procedure under the NLRA
Loews Coronado Beach Resort
Coronado, CA

March 8–9
Federal Sector Labor & Employment Law Committee Midwinter Meeting
Washington, D.C.

March 10–12
Railway & Airline Labor Law Committee
JW Marriott Savannah Plant Riverside District
Savannah, Georgia

March 17–20
Employment Rights & Responsibilities Committee Midwinter Meeting
Fairmont El San Juan Hotel
San Juan, Puerto Rico

April 7–10
National Conference on Equal Employment Opportunity Law
The Peabody Hotel
Memphis, Tennessee

April 14–16
National Symposium on Technology in Labor & Employment Law
Marriott Marquis
Washington, D.C.

May 2–6
International Labor & Employment Law Committee
Ritz-Carlton Berlin
Berlin, Germany

November 10–13
15th Annual Section of Labor & Employment Law Conference
Beverly Hilton
Los Angeles, California

For more event information, contact the Section office at 312/988-5813 or visit *www.americanbar.org/laborlaw*.