

WPI Labor Day Report 2019

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Introduction

Labor Day became an official federal holiday in 1894. Although the world of employment has obviously changed significantly over the last 125 years, the pace of workplace transformation seems to have accelerated in the past decade.

The rise of automation and artificial intelligence in the workplace is forcing employers to reevaluate how they hire and do business. In some offices, biometric scanners have replaced time clocks, and cobots are the new coworkers. Meanwhile, the applicant pool of skilled U.S. workers is struggling to meet its demand, while U.S. immigration policy has made it more challenging for employers to hire qualified labor from abroad. At the same time, multi-state employers must contend with a patchwork of state and local employment law obligations, while keeping up with ever-changing federal regulations.

On the employee side of the equation, members of tech-savvy Generation Z are starting to enter the workforce, bringing with them an increased desire for workplace flexibility, diversity, and training opportunities. Yet a large portion of the labor force is working past retirement age; many in this cohort consider more traditional benefits—health care in particular—a priority.

This Labor Day Report is designed to update employers on notable employment trends, highlight key labor and employment developments over the past year, and provide some insight on what to expect in the year ahead.

Part I of this Report provides an overview of the state of work in the United States. An understanding of who is working/not working, where the jobs are, which industries are seeing job growth, and the changing nature of work, sets the stage for the discussion in Part II, which focuses on federal and state developments affecting the workplace.

Part II discusses key labor and employment developments at the federal and state levels. This section includes overviews of the top five policy changes involving labor, wage and hour, equal employment opportunity and discrimination, federal contracting, benefits, health and safety, and immigration law. This section also touches on the growing number of state and local regulations.

We hope employers find this Report useful as they look ahead to 2020 and beyond.

Part I: Workforce Snapshot

Any substantive discussion of labor and employment law trends requires a closer look at the workforce in general. Examining who is employed, who is unemployed, where the jobs are, and what types of jobs are available provides context to how new laws and regulations impact employment. The following section analyzes five general workforce developments.

1. With Rising Employment and Falling Unemployment, Employers Face the Challenge of Labor Supply Constraints

Employment

In June 2019, total employment as estimated from the Current Population (household) Survey¹ totaled 157.8 million, including 148.1 million² wage and salary employees and 9.7 million unincorporated self-employed workers.² Between June 2018 and June 2019, total employment increased by almost 1.4 million workers (1,363,000).

Those employed include 5.9 million teenagers (age 16-19), and 36.7 million workers age 55 or older, of whom about 4.3 million were age 70 or older. The 27.6 million foreign-born workers (including naturalized citizens, temporary workers and others) comprised 17.5% of total employment in June 2019, essentially unchanged from the 17.3% in June 2018, and comparable to 15.6% in 2008, when the Bureau of Labor Statistics (BLS) first began reporting such numbers.

One takeaway is that nearly a quarter of the workforce (23%) is approaching or working past retirement age. Another is that foreign-born workers remain a significant component of the labor force.

Meanwhile, full-time employment continues to increase as expanding labor demand enabled some workers to move from part-time to full-time jobs schedules. Workers on full-time schedules (35 hours per week or more) increased by 1.6 million in June 2019 compared to a year earlier, and the June 2018 full-time employment level was 2.5 million more than in June 2017. At 26.3 million in June 2019, the number of part-time workers was 240,000 less than that in 2018.

Unemployment

The active-job-seekers unemployment rate continued to fall this past year: 3.8% in June 2019, compared to 4.2% in June 2018. Unemployment is significantly below the post-recession peak of 10% in October 2009. The monthly unemployment rate over the past year (July 2018 through June 2019) has averaged 3.8%, the lowest 12-month average since 1969.

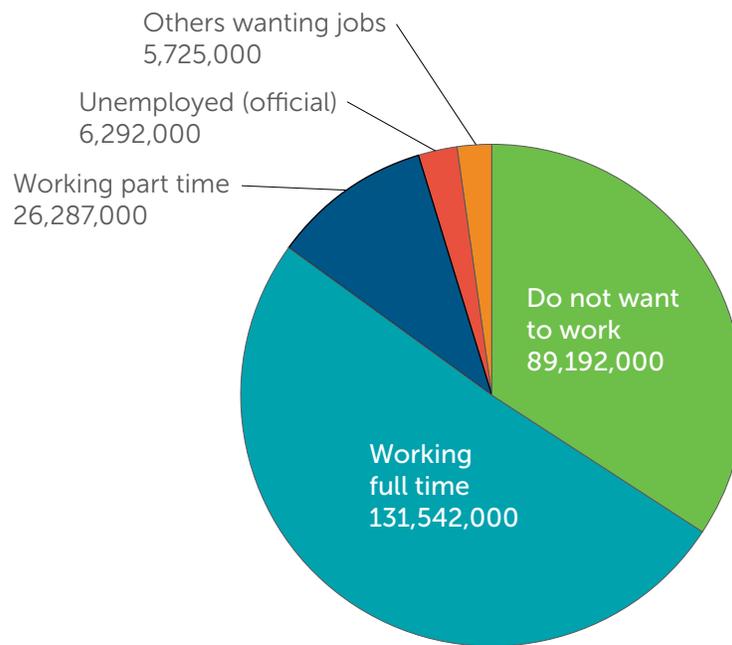
In June 2019, the official count of unemployed was 6.3 million active job seekers, down a half million compared to June 2018. During this same period, there were also 4.6 million part-time workers who wanted full-time work. Over the past two years, the shift from part-time to full-time work has been a significant source of overall labor supply expansion.

Notably, in June 2019, there were almost 8 million workers who held more than one job. This number increased by over 500,000 compared to June 2018. Of these multiple jobholders, 4.3 million held full-time primary jobs and part-time second jobs. For 2.1 million workers, both their primary and secondary jobs were part-time.

1 Bureau of Labor Statistics, *June 2019 Employment Situation Report*. Note: in addition to facilitating 12-month comparisons, the not-seasonally-adjusted data basis is used here because some of the data elements discussed are reported only on the not-seasonally-adjusted basis. In addition, the age-70-or-older employment data is from BLS annual average monthly employment data for 2018. Employment growth was compared to the 2.5 million increase of 2017/2018, reflecting declining numbers of available workers from the shrinking pools of unemployed workers and of persons not in the labor force (not actively looking for work) who want a job and are available.

2 The 6.1 million self-employed owners of incorporated businesses are counted among the wage and salary employee group.

Labor market status of 257.6 million civilian population age 16 and older, June 2019



Source: Bureau of Labor Statistics, June 2019 Employment Situation Report. All data on not seasonally adjusted basis.

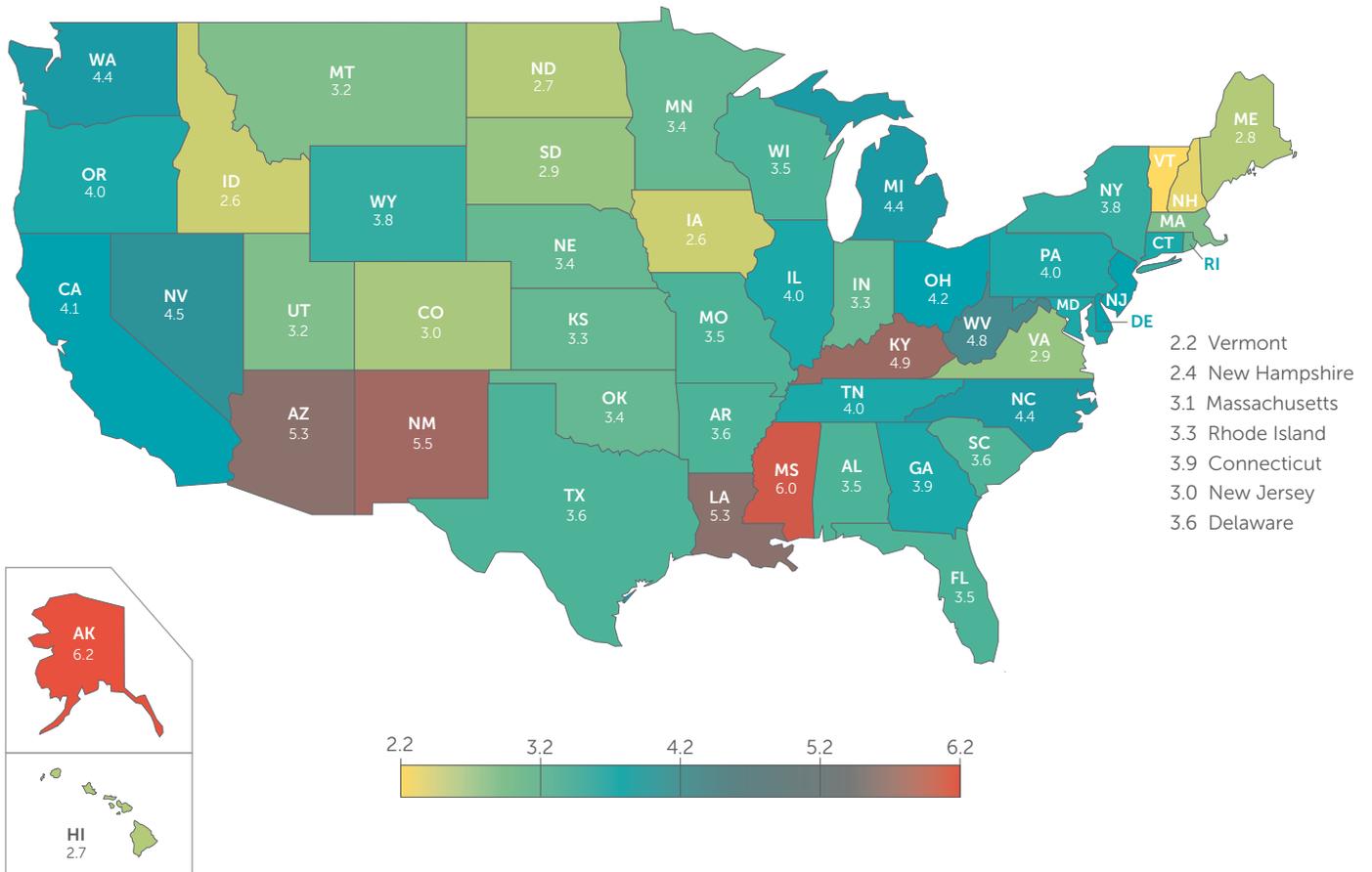
The unemployment rate varies significantly by state and locality.³ In June 2019, Vermont's 2.2% unemployment rate was the lowest, while Alaska's 6.2% unemployment rate was the highest. Other states with unemployment rates notably below the national average of 3.8% were New Hampshire (2.4%), Idaho (2.6%), Iowa (2.6%), and North Dakota (2.7%).

Jurisdictions with unemployment rates notably higher than the national average were Mississippi (6.0%), New Mexico (5.5%), the District of Columbia (5.5%), Arizona (5.3%), and Louisiana (5.3%).

Many of the states with low unemployment rates and the states with high unemployment rates are on the smaller side of the distribution in terms of total labor force. The five states with the lowest unemployment rates accounted for a total of 106,082 unemployed individuals—1.7% of the national total. The five states plus the District of Columbia with the highest unemployment rates accounted for 480,000 unemployed—7.0% of the total. The remaining 40 states with unemployment rates between 2.8% and 4.9% accounted for 89.3% of unemployed persons.

³ Bureau of Labor Statistics, State Employment and Unemployment – June 2010, News Release USDL-19-1303 (July 19, 2018). Note that not-seasonally-adjusted data is reported to facilitate 12-month comparisons.

Unemployment Rate by State



Source: Bureau of Labor Statistics, State Employment and Unemployment – June 2019, News Release USDL-19-1303 (July 19, 2019).

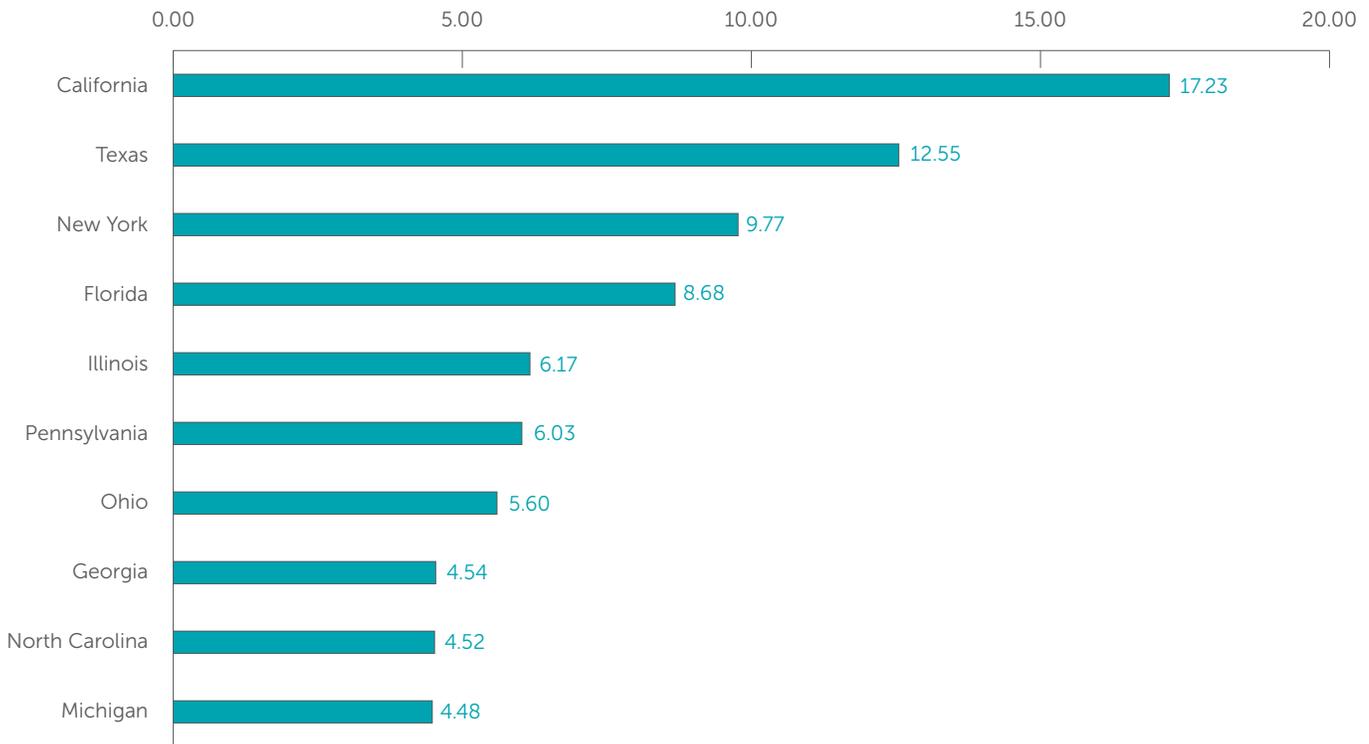
2. The Majority of Jobs are in 10 States

Nationwide, non-farm payroll jobs grew by 1.5% (2.2 million) over the past year to 152.3 million. This was slightly slower job growth than the 2.4 million increase from June 2017 to June 2018. Private-sector jobs grew by 2.1 million to 128.8 million.

California, the largest state in terms of jobs (17.2 million), posted 300,100 new jobs, a 1.7% increase. Texas, the second largest state in terms of jobs (12.9 million), posted 315,600 new jobs—the largest state increase, equivalent to 2.5% growth.

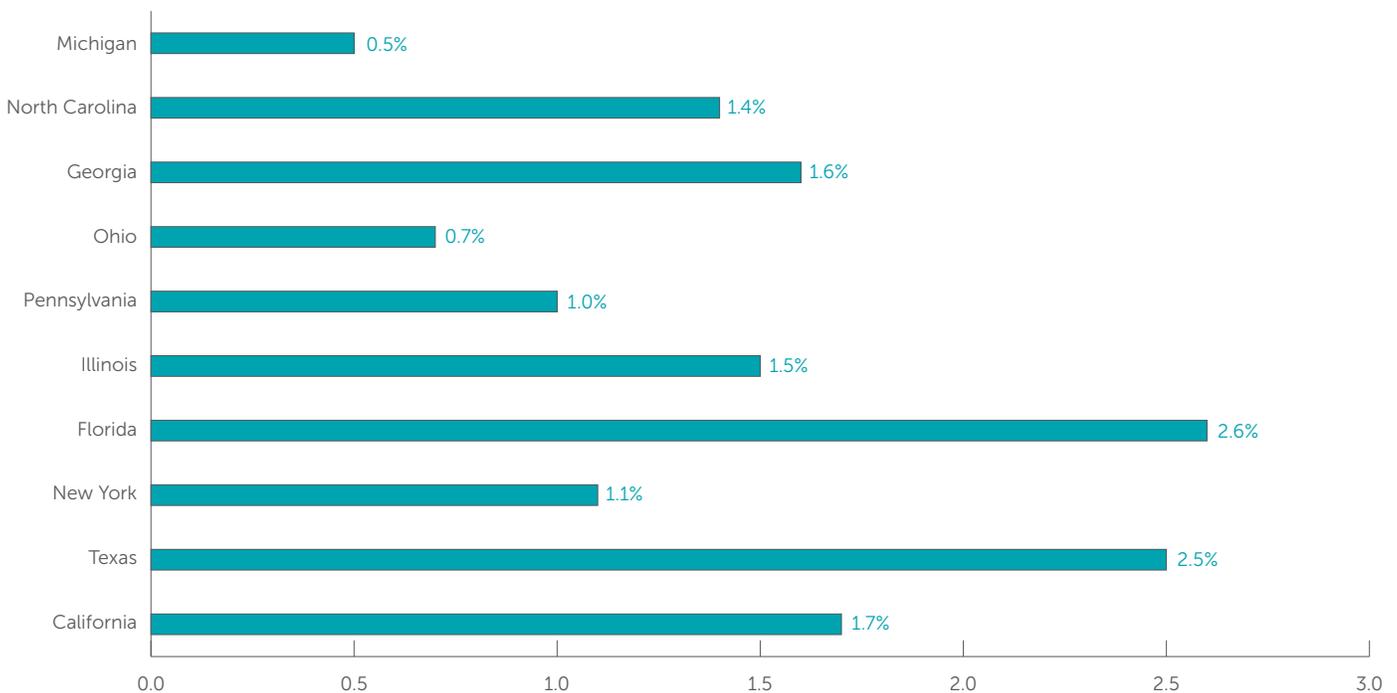
Majority of Jobs Are in Ten States

Ten states account for 56 percent (8.2 million) of 152.3 million jobs



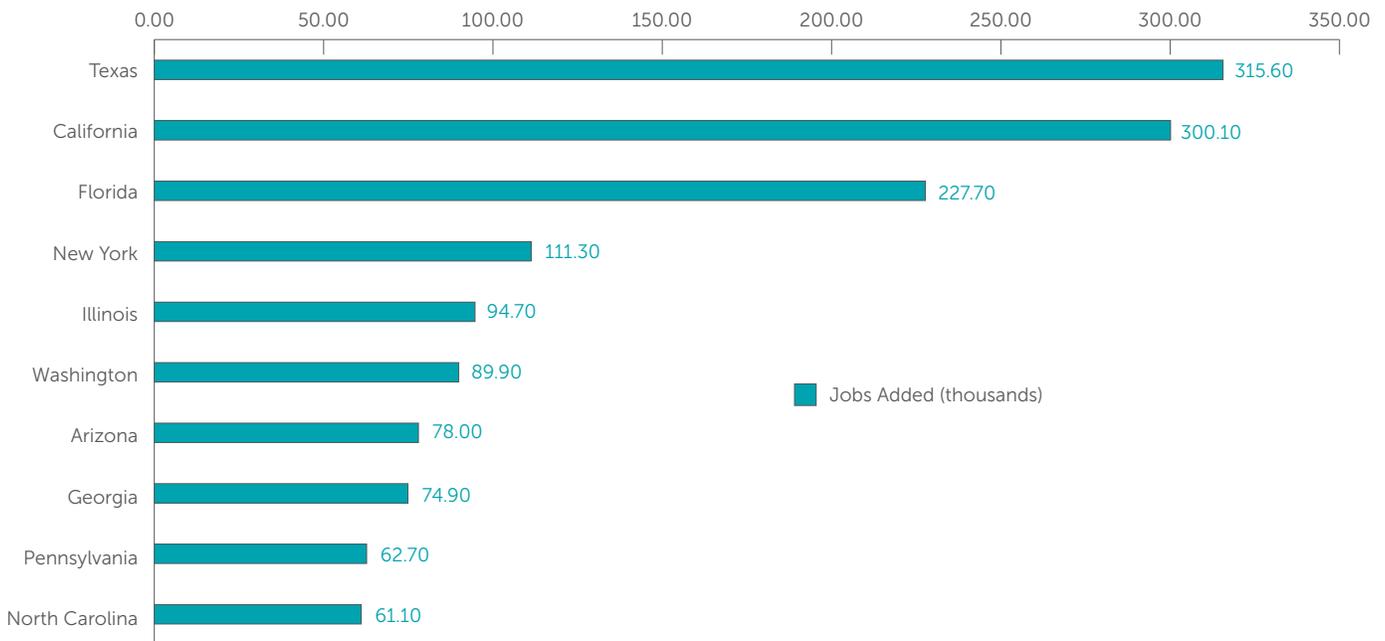
Source: Bureau of Labor Statistics. Total refers to non-farm payroll job growth over one-year period based on the BLS establishment survey

Job growth varied widely among the largest states. Six of largest jobs states had below 1.5% average job growth; Florida, Texas, California and Georgia exceeded the national average.



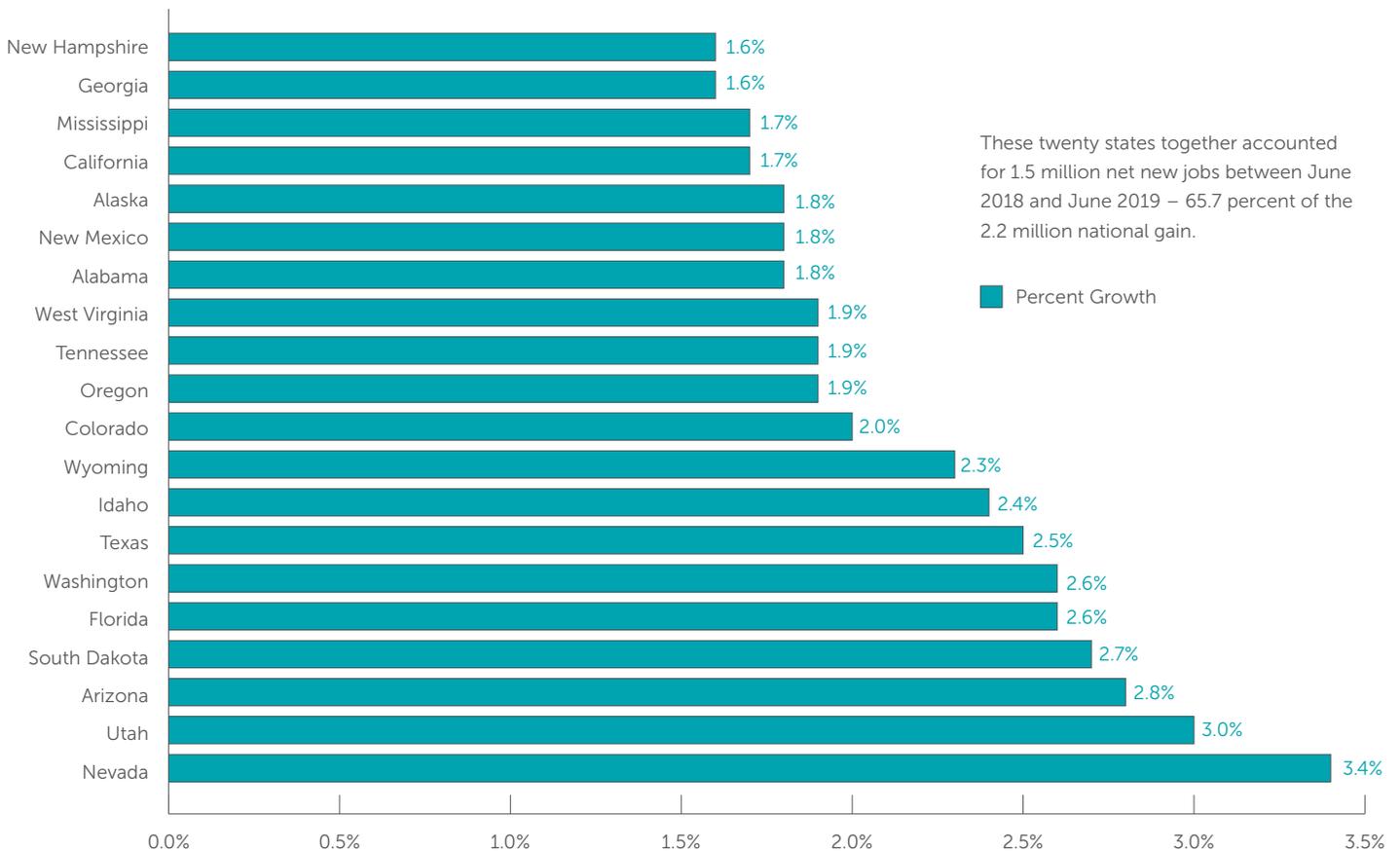
Source: Bureau of Labor Statistics. Total refers to non-farm payroll job growth over the a one-year period based on the BLS establishment survey

The following states posted the largest job growth numbers over the past year:



Source: Bureau of Labor Statistics

Twenty states' jobs numbers grew faster than the national average:



These twenty states together accounted for 1.5 million net new jobs between June 2018 and June 2019 – 65.7 percent of the 2.2 million national gain.

Source: Bureau of Labor Statistics

It is important for lawmakers in those states with high job growth numbers to ensure such growth continues. The California legislature, for example, is considering legislation, Assembly Bill 5, that could have a significant impact on job growth.⁴ If enacted, it will be interesting to see whether next year's job growth can be maintained in the Golden State.

3. Educational Attainment is an Important Determinant of Labor Market Outcomes

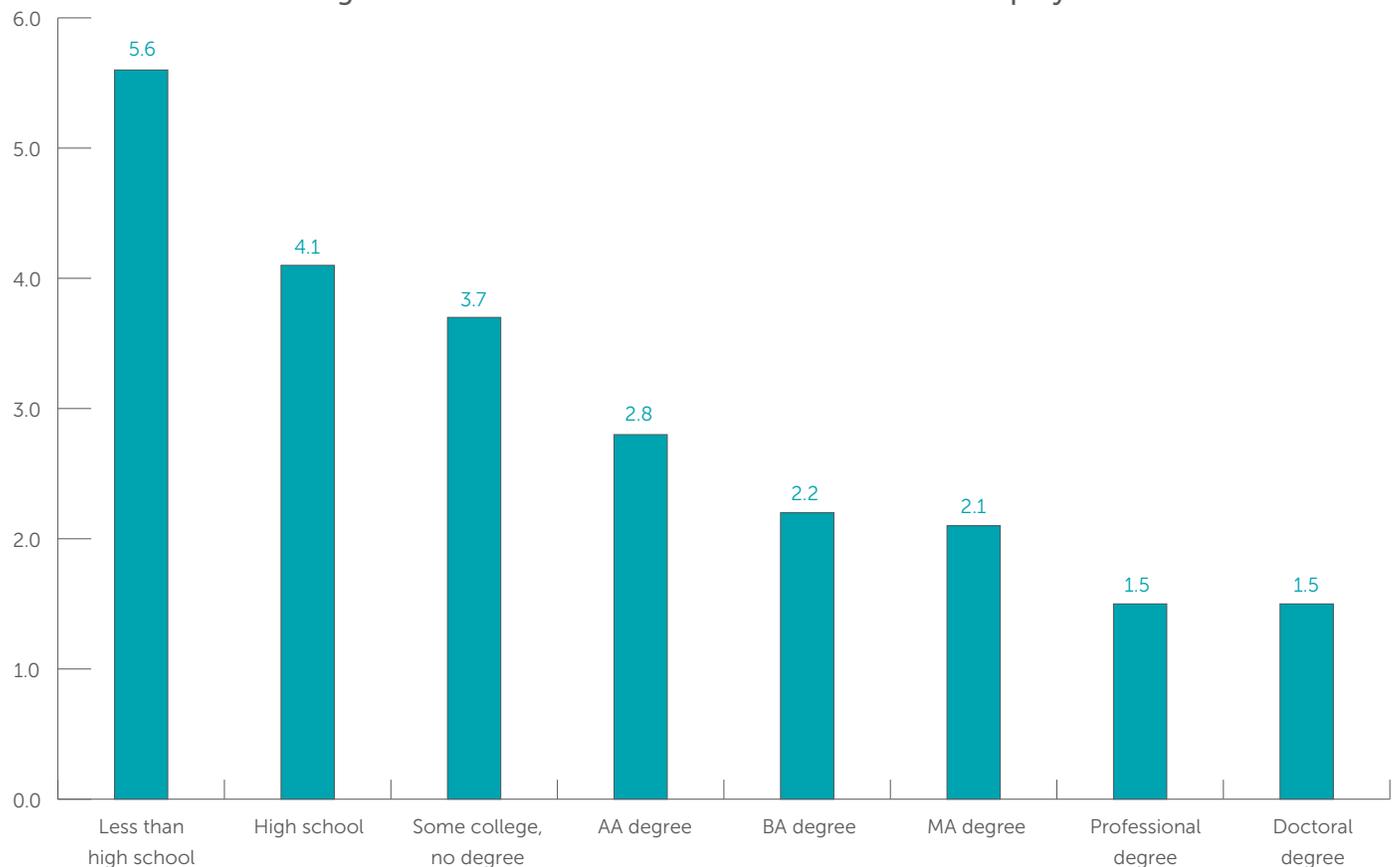
It is not surprising that workers with less education experience higher rates of unemployment. In 2018, the annual average unemployment rate for workers age 25 or older with less than a high school diploma was 5.6%. For workers with a four-year college degree, the unemployment rate was 2.2%, and for workers with a doctorate or comparable professional degree, the unemployment rate was 1.5%.

In June 2019, the unemployment rate for adults with less than a high school diploma had fallen to 5.3% (seasonally adjusted), but the comparable rate for workers with a bachelor's degree or higher was 2.1%.

Between June 2018 and June 2019, employment of workers age 25 or older who graduated with a bachelor's degree or higher increased by 1.9 million; employment of workers with only a high school diploma increased by only 120,000; employment of workers with less than a high school diploma fell by 421,000; and employment of workers with some college but less than a bachelor's degree fell by 495,000.

Second-quarter 2019 data from the Current Population Survey showed that full-time wage and salary workers age 25 and older who held advanced degrees (masters or higher) had median earnings of \$1,561 per week, 2.7 times greater than the \$588 per week earnings of full-time workers who had not completed a high school diploma, and 2.1 times greater than those with only a high school diploma.

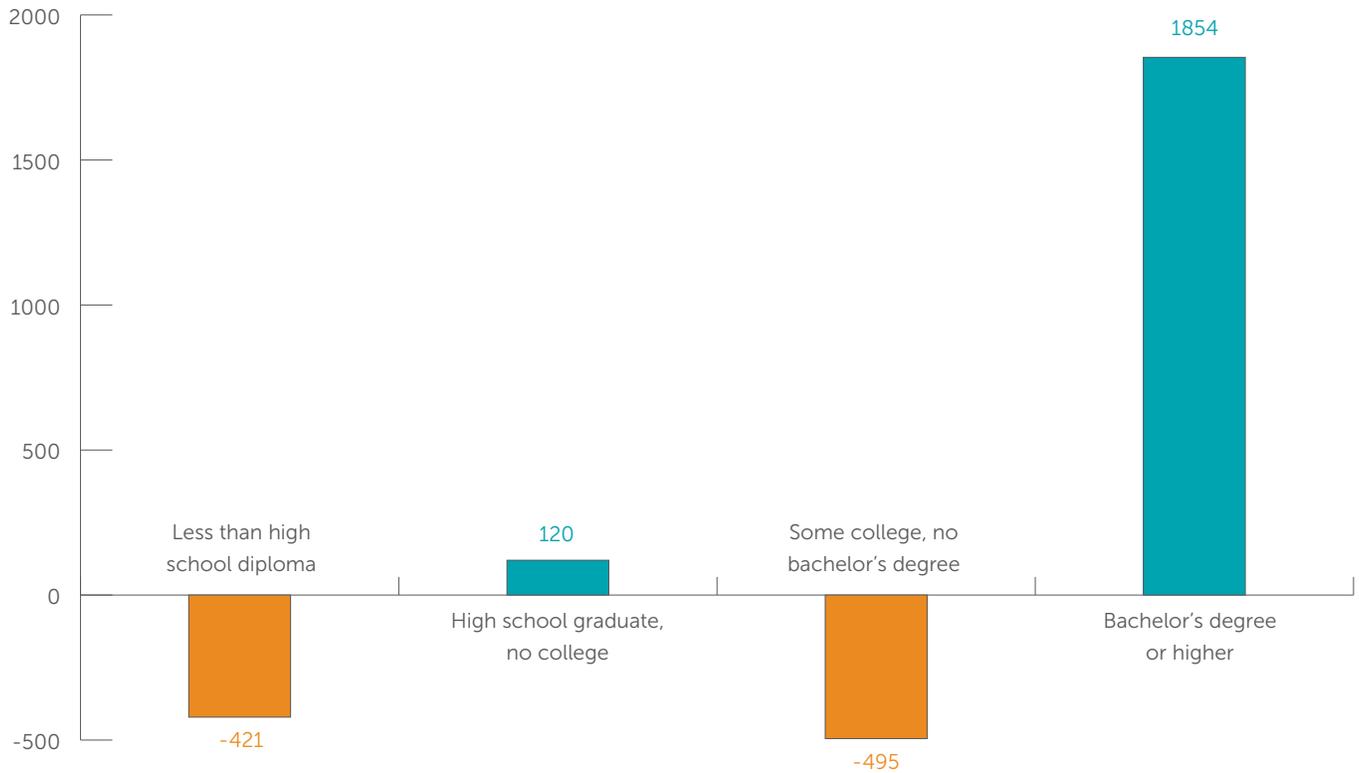
Higher educational attainment reduces risk of unemployment



4 See Bruce Sarchet et al., [AB 5: The Great California Employment Experiment—A Littler Workplace Policy Institute Report](#), WPI Report (Aug. 8, 2019).

Between June 2018 and June 2019, employment growth for works age 25 or older was overwhelmingly among workers with a bachelor’s degree or higher.

Employment Change 2018-2019 (thousands)



Median weekly earnings of full time wage and salary workers by educational attainment



With increasing automation of lower-skilled jobs, it will be crucial for policymakers to find employment solutions for those more vulnerable to job loss. The Department of Labor, for example, is currently finalizing rules designed “to address America’s skills gap and expand the apprenticeship model to new industries.”⁵ Specifically, this rule would establish a process for developing Industry-Recognized Apprenticeship Programs (IRAPs). Simultaneously, the DOL announced that it was awarding over \$183 million in grants for developing and expanding apprenticeship programs to educational institutions that partner with businesses that match funding. The announcement also states that the DOL will make an additional \$100 million in grants available to expand apprenticeships and help close the skills gap.⁶

At the state level, Washington and New Jersey announced the creation of “Future of Work” task forces last year, and Washington’s task force⁷ has begun its public engagement. California’s Little Hoover Commission published a report at the end of 2018 specifically addressing, among other things, the projected impact of artificial intelligence on California’s workforce.⁸ Scaling up these state-level efforts will be crucial to managing the effects of what Littler calls the TIDE™ (an acronym for *technology-induced displacement of employees*).

Policymakers still have an opportunity to positively influence the future of employment—but only if they take appropriate action and soon. The same is true of America’s employers in both the public and private sectors, which remain best positioned to identify the skills that employers will require in the future and establish training programs to provide workers with the necessary skills.

4. In the Past Year, Employment Growth was Focused in Managerial Occupations; Food Service and Health Care Industries Saw Increased Growth

In June 2019, 61% of U.S. workers were employed in so-called “white collar” occupations: managerial, administrative, professional, technical, or sales occupations; 21% were employed in so-called “blue collar” occupations: production, installation, repair, craft, construction, transportation, operators or farmers; and 18% were employed in service occupations. Twenty-five years ago in June 1994, these proportions were 57% “white collar,” 29% “blue collar,” and 14% service occupations. The shift in occupational employment proportions over time provides context for interpreting the change in educational attainment of the labor force. Both of these shifts reflect fundamental changes in technology and in global economic integration.

In June 2019, 17% of workers were in managerial or management support occupations, 23% were in professional and related technical occupations, 11% were in administrative support occupations, and 10% were in sales occupations.

The most focused growth, however, was in managerial occupations. The 1.6 million-increase in managerial occupations employment was a 6.4% gain over the June 2018 employment for this occupation group.

5 DOL, Notice of Proposed Rulemaking, [Apprenticeship Programs, Labor Standards for Registration, Amendment of Regulations](#), 84 Fed. Reg. 29970 (June 25, 2019). See also James A. Paretti, Jr. and Michael J. Lotito, [Department of Labor Releases Proposed Rule for Industry-Recognized Apprenticeship Programs](#), Littler ASAP (June 24, 2019).

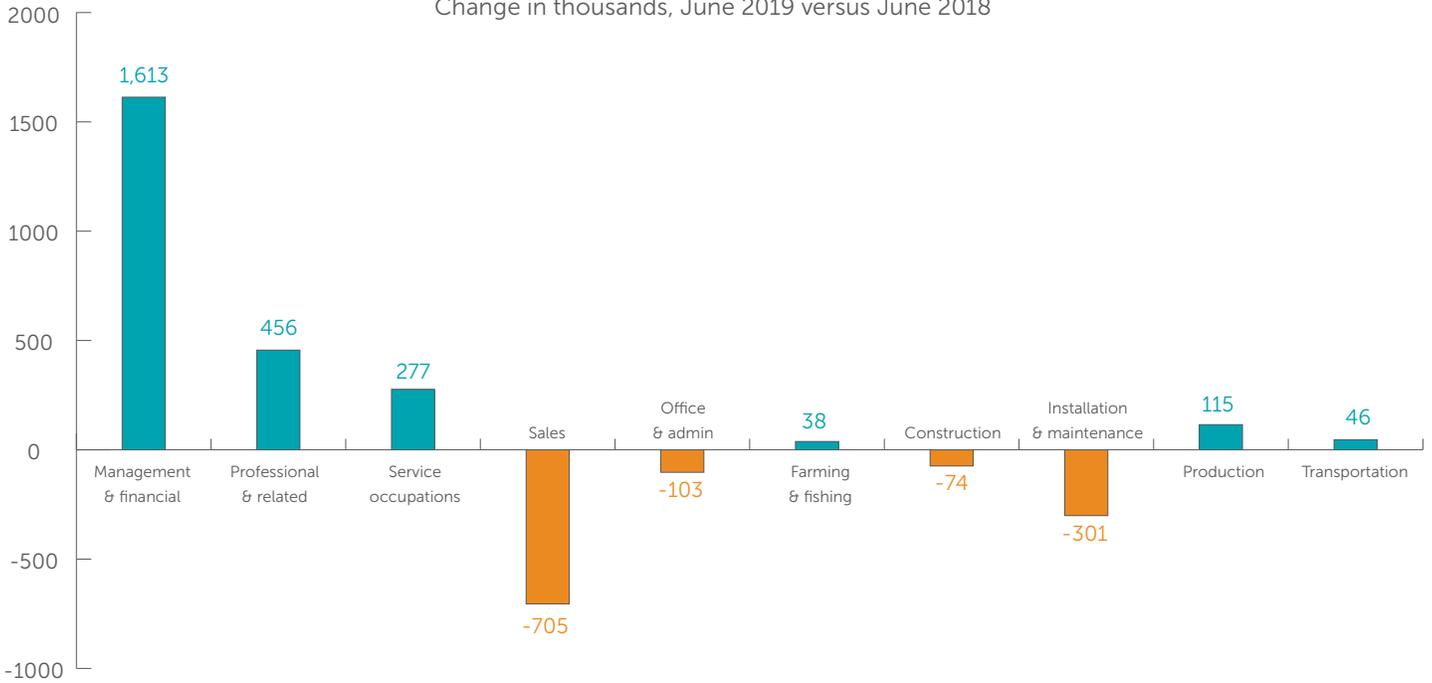
6 Press Release, DOL, [U.S. Department of Labor Makes Major Announcements on Apprenticeship Expansion](#), June 24, 2019.

7 Washington State, Workforce Training & Education Coordinating Board, [Future of Work: What lies ahead?](#) (last visited Aug. 11, 2019).

8 See Michael J. Lotito and Matthew U. Scherer, [A Roadmap for the Future of Work: California’s Little Hoover Commission Issues Report Highlighting the Importance of Building a “Human Infrastructure” to Ride Out the TIDE](#), Littler Insight (Jan. 14, 2019).

Changes in Employment by Occupation

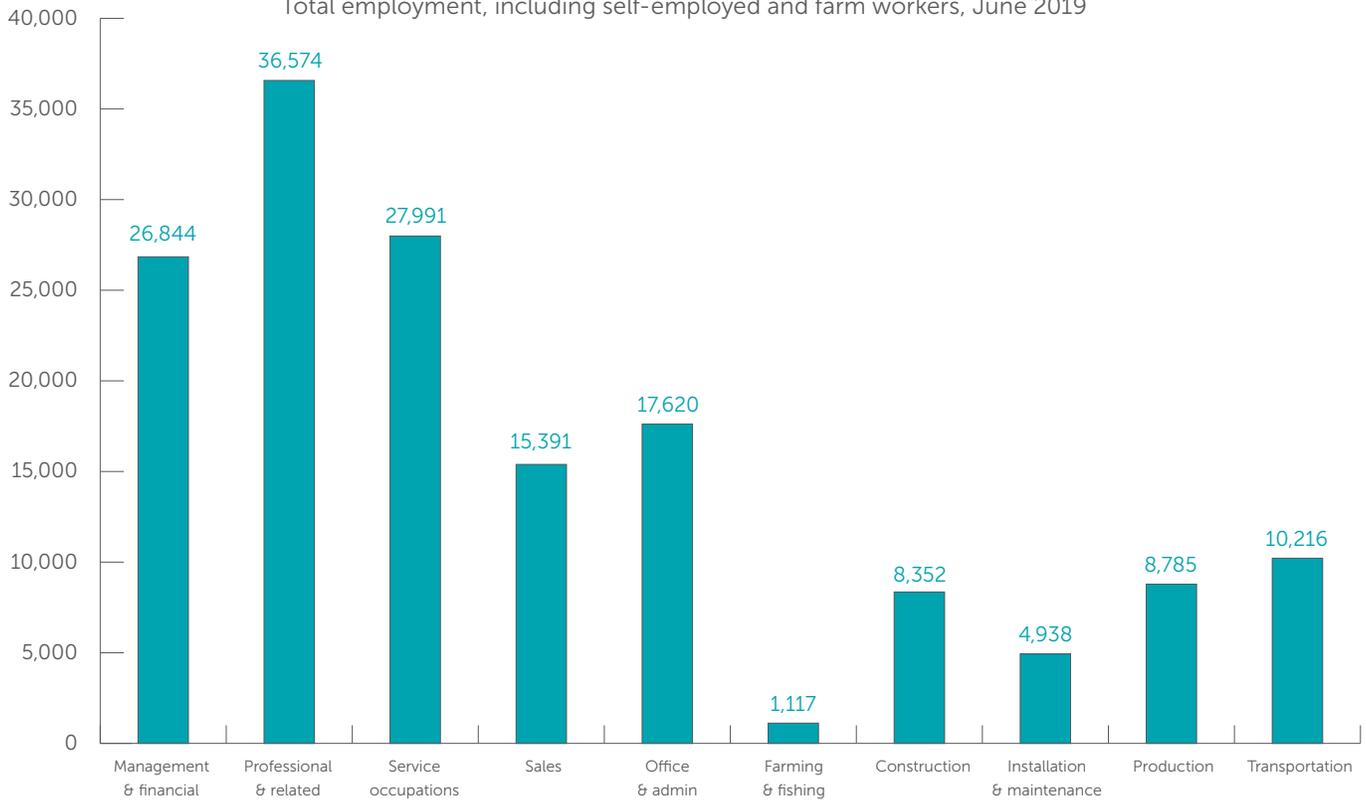
Change in thousands, June 2019 versus June 2018



Source: Bureau of Labor Statistics, June 2019 Employment Situation Report. Current Population Survey (households) data not seasonally adjusted. See BLS definitions of major occupational groups at <https://www.bls.gov/ncs/ocs/ocsm/comMOGADEF.htm#mogaanchor>.

Employment by Occupation

Total employment, including self-employed and farm workers, June 2019



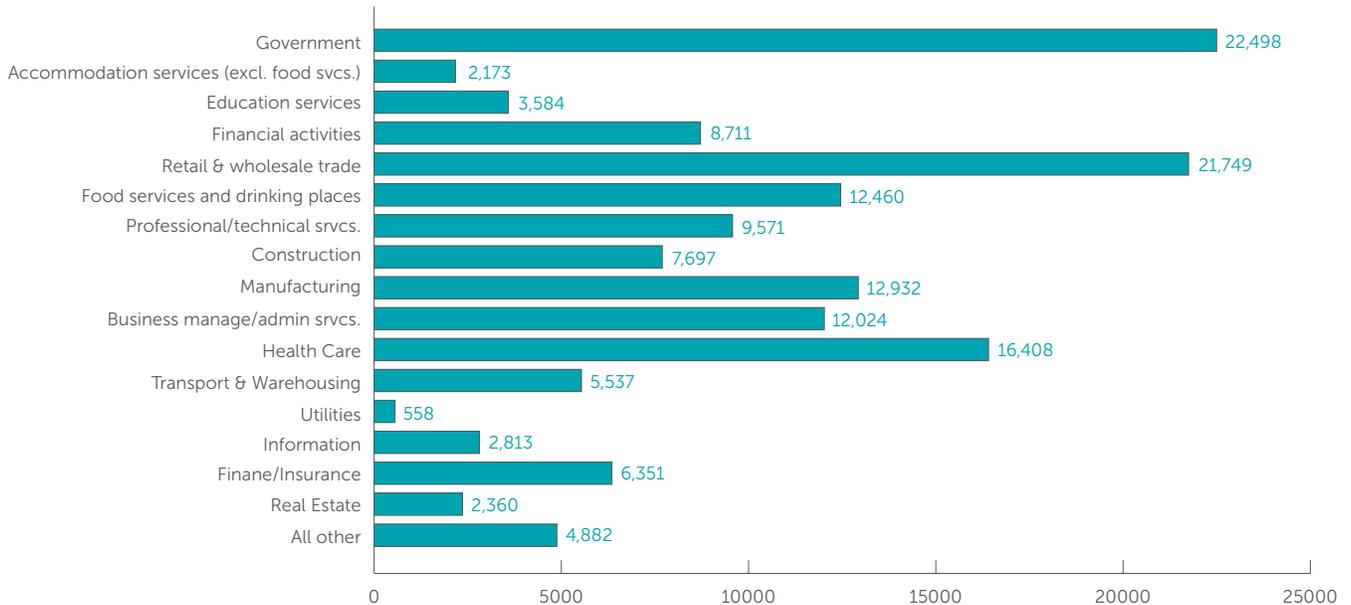
Source: Bureau of Labor Statistics, June 2019 Employment Situation Report. Current Population Survey (households) data not seasonally adjusted. See BLS definitions of major occupational groups at <https://www.bls.gov/ncs/ocs/ocsm/comMOGADEF.htm#mogaanchor>.

In June 2019, there were 129.8 million private-sector jobs, an increase of 2.1 million versus June 2018. After government, retail and wholesale trade comprised the second largest industry group with 21.7 million jobs, 14.3% of the total. Health care was the third largest industry group in June 2019 with 16.4 million payroll jobs, 10.8% of the total.

In terms of job growth between June 2018 and June 2019, health care experienced the largest job increase (+408,000 jobs), professional and technical services industry sector increased by 294,000 jobs, and food/drinking service establishments increased by 246,000 jobs.

Payroll jobs by major industry groups

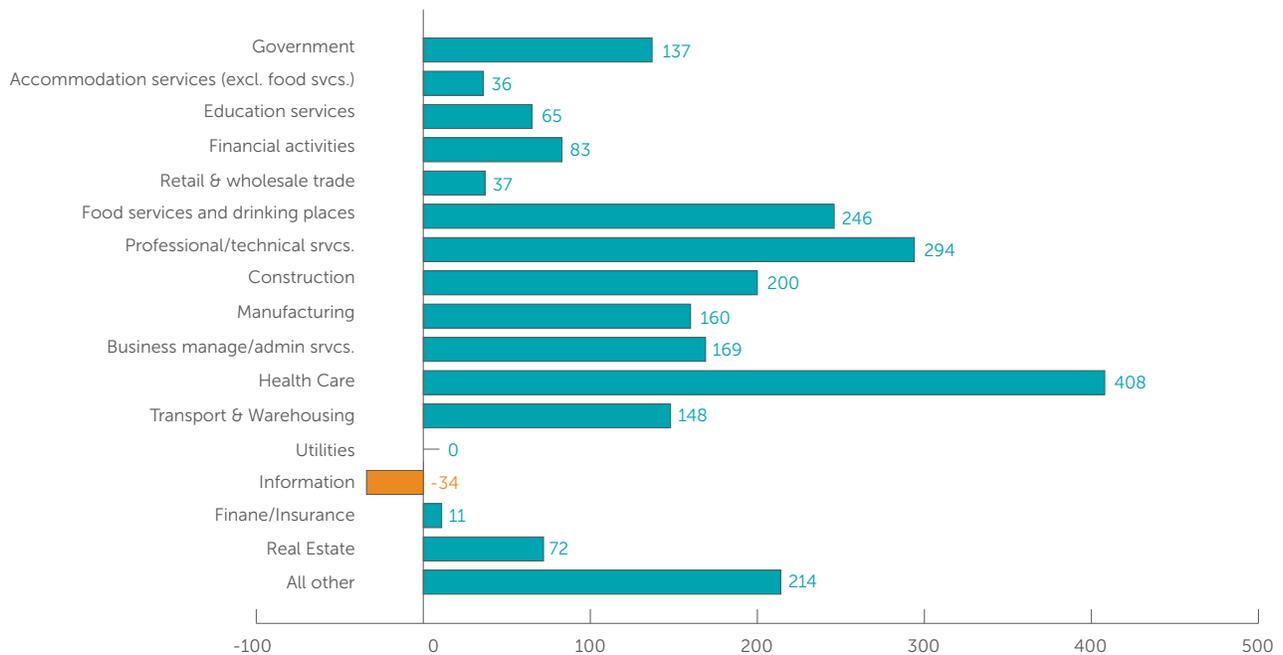
Non-farm wage and salary workers, selected industry sectors, June 2019



Source: BLS June 2019 Employment Situation Report, establishment survey data, not seasonally adjusted.

Change in payroll jobs by major industry groups

Non-farm wage and salary workers, selected industry sectors, June 2019 (change in thousands)



Source: BLS June 2019 Employment Situation Report, establishment survey data, not seasonally adjusted.

It is worth highlighting that high-growth industries such as health care and food services are job sectors that are particularly vulnerable to conflicting state and local employment laws governing wage and hour, scheduling, and paid leave.

5. The Increased Visibility of the Contingent Workforce Sparks Misclassification Questions

The contingent workforce, broadly defined, includes independent contractors, self-employed individuals, freelancers, temporary agency workers, and individuals working full-time or when they want via online platforms—in essence, all participants in the labor market who are not in a traditional ongoing employment relationship.

The standards for determining whether contingent workers are properly classified as employees or independent contractors is a moving target. For example, on April 29, 2019, the U.S. Department of Labor released an opinion letter⁹ telling an unidentified “virtual marketplace” employer that its service providers are properly classified as independent contractors, based on the DOL’s long-standing six-factor economic realities test. While advisory and non-binding, the letter continues the current administration’s departure from DOL guidance under the Obama administration that assumed most workers are employees and not independent contractors.

The past year has seen increased activity at the state level on employee status as well. In April and May 2019, respectively, Arkansas¹⁰ and Tennessee¹¹ passed laws formally adopting the IRS’s 20-factor test for determining whether a worker is an employee or an independent contractor. Nevada also enacted legislation clarifying the definitions of employee and contractor in certain situations and establishing an Employee Misclassification task force to make further recommendations regarding how the state should address worker misclassification.¹²

This spurt of state-level legislative activity regarding worker classification shows no signs of abating. As previously discussed, Assembly Bill 5 is rapidly working its way through the California legislature. If enacted, it would codify a 2018 California Supreme Court decision¹³ that adopted the strict “ABC” test for determining employment status under California law.

In addition to increased activity concerning classification, policymakers have increasingly called for better protection of contingent workers’ rights. Maryland, for example, enacted a statute in April clarifying that the state’s laws against discrimination and harassment apply to independent contractors.¹⁴ Meanwhile, New Jersey’s Task Force on Employee Misclassification has released a report that includes a host of recommendations, including stronger legislative action and interstate cooperation.¹⁵

The state and federal focus on independent contractor classification is expected to intensify.

9 Nina Markey and William Hays Weissman, *DOL Weighs in on Whether Gig Economy Workers are Employees or Independent Contractors*, Littler ASAP (May 6, 2019).

10 H.B. 1850, 92nd Leg., Reg. Sess. (Ark. 2019); See also Eva C. Madison, *What New Employment Laws Were Enacted in Arkansas?*, Littler ASAP (Apr. 29, 2019).

11 H.B. 539, 111th Leg. (Tenn. 2019).

12 S.B. 493, 80th Leg. (Nev. 2019); see also Roger Grandgenett and Kelsey Stegall, *Nothing Ventured, Nothing Gained: New Employment Laws in Nevada*, Littler Insight (July 24, 2019).

13 *Dynamex Operations West, Inc. v. Superior Court*, 4 Cal.5th 903 (2018).

14 H.B. 679, 441st Leg. (Md. 2019); see also Steven Kaplan and Alex MacDonald, *Key Legislation Emerging from Maryland and Local Ordinances to Remember*, Littler Insight (May 28, 2019).

15 Report of Gov. Murphy’s Task Force on Employee Misclassification (July 2019), <https://www.nj.gov/labor/assets/PDFs/Misclassification%20Report%202019.pdf>.

Part II: Federal and State Labor and Employment Developments

This past year several federal agencies operated under provisional leadership while political appointees awaited Senate confirmation. While the flurry of agency rulemaking has slowed, a few significant regulations are being finalized before the year's end. Meanwhile, legislative gridlock on Capitol Hill has pushed workplace policy reform to the state and local levels.

This section will address the five key developments in various areas of workplace law.

A. Labor-Management Relations

The National Labor Relations Board (NLRB or Board) is currently operating with four of five members: Chairman John F. Ring (R) and Members William J. Emanuel (R), Marvin E. Kaplan (R), and Lauren McFerran (D). Peter B. Robb (R) serves as the Board's General Counsel.

This year, the Board has decided relatively few cases, leaving the prior administration's impact on labor law relatively unaffected. The Board under the Obama administration had actively overturned years of precedent.¹⁶ At the same time, the number of filings of election petitions and unfair labor practice (ULP) charges are at historic lows.¹⁷

1. The Board Addresses Independent Contractor Test

On January 25, 2019, the Board issued its decision in *SuperShuttle DFW, Inc.*,¹⁸ which clarified the independent contractor standard and reaffirmed the applicability of the traditional common-law agency test as the appropriate "prism" through which to assess employment status, and thus, coverage under the Act.¹⁹ The Board applied the common-law agency test for decades before altering its approach its 2014 *FedEx Home Delivery*²⁰ decision. *SuperShuttle* overruled *FedEx Home Delivery*, and impacts all businesses that engage service providers outside of the typical employer-employee model.

Prior to *FedEx Home Delivery*, the Board employed the traditional 10-factor common-law agency test found in the Restatement (Second) of Agency, §220, to assess whether an individual was an independent contractor or employee. These factors are:

1. The extent of control that, by the agreement, the master may exercise over the details of the work.
2. Whether or not the one employed is engaged in a distinct occupation or business.
3. 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.
4. The skill required in the particular occupation.
5. Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work.
6. The length of time for which the person is employed.
7. The method of payment, whether by the time or by the job.
8. Whether or not the work is part of the regular business of the employer.
9. Whether or not the parties believe they are creating the relation of master and servant.
10. Whether the principal is or is not in business.

16 See Michael J. Lotito, Maurice Baskin, and Missy Perry, *Was the Obama NLRB the Most Partisan Board in History?*, Littler Article (Dec. 6, 2016).

17 See NLRB, Charges and Complaints, at <https://www.nlr.gov/news-outreach/graphs-data/charges-and-complaints/charges-and-complaints>; Representation Petitions – RC, at <https://www.nlr.gov/news-outreach/graphs-data/petitions-and-elections/representation-petitions-rc>.

18 367 NLRB No. 75 (2019).

19 See Alan I. Model and Kurt B. Rose, *Independent Contractor vs. Employee Mis/Classification Issue Continues To Evolve: The NLRB Weighs In (Again)*, Littler Insight (Jan. 29, 2019).

20 361 NLRB 610 (2014), *enf. denied* 849 F.3d 1123 (D.C. Cir. 2017).

In 2009, the U.S. Court of Appeals for the District of Columbia Circuit observed that the Board's application of the common-law test shifted in focus from the extent of control, to whether the purported independent contractor had "significant entrepreneurial opportunity for gain or loss."²¹ In its 2014 *FedEx Home Delivery* decision, the Board declined to adopt the D.C. Circuit's interpretation, and instead, held that entrepreneurial opportunity is "one aspect of a relevant factor that asks whether the evidence tends to show that the putative contractor is, in fact, *rendering services as part of an independent business.*"²²

SuperShuttle concerned the viability of a representation petition, seeking to organize franchisees who operated shared-ride vans at Dallas/Fort Worth International Airport. The Board held that *FedEx Home Delivery* "impermissibly altered the common-law test" for assessing purported independent contractors. Applying the common-law test, the Board concluded that the drivers were independent contractors due to the entrepreneurial opportunity available to them, including that the drivers owned or leased the vans they drove, were not required to drive any particular routes or to drive for any particular amount of time but rather, chose when and where to work, and paid the company a flat fee regardless of how much they worked.

In the wake of *SuperShuttle*, the NLRB's general counsel has dismissed unfair labor practice charges against several "gig economy" companies that were based upon claims of employee status but involved significant independent contractor defenses relating to entrepreneurial activity.²³ Most recently, the D.C. Circuit denied enforcement of an NLRB ruling against an interscholastic athletic association that had relied on the 2014 *FedEx Delivery* standard to find athletic officials were independent contractors.²⁴ The court applied all the common-law factors, particularly the association's lack of control over payments and the very brief periods of work by the officials to find independent contractor status.

In other independent contractor-related news, on August 29, 2019, the Board in *Velox Express, Inc.*, 368 NLRB No. 61 (2019), affirmed that employers that merely tell workers they are independent contractors do not violate Section 8(a)(1) of the NLRA. The Board held, "[e]rroneously communicating to workers that they are independent contractors does not, in and of itself, contain any 'threat of reprisal or force or promise of benefit.'"

2. Joint Employer Limbo (Redux): Joint-Employer Rulemaking Update, and *Browning-Ferris* is Back Before the Board

In the 2018 edition of Littler's WPI Labor Day Report, we noted that the Board's joint-employer standard changed three times from August 2015 to February 2018, and that two avenues exist by which the Board's August 27, 2015, *Browning-Ferris Industries of California*,²⁵ decision might be overturned: Board rulemaking or decisional invalidation.²⁶ *Browning-Ferris* established a new two-part test to identify joint-employment relationships, commonly regarded as the "indirect control" test, which dramatically expanded the definition of joint employer. Prior Board precedent required that an entity exercise actual control that is "direct and immediate" over essential employment terms to meet the definition of joint employer. Confusion as to joint-employer status is untenable for businesses, which may be required to bargain with a union representing jointly employed workers, subjected to liability for unfair labor practices committed by the joint employer, or subjected to labor picketing that would otherwise be illegal.

21 *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 497 (D.C. Cir. 2009).

22 361 NLRB at 620 (emphasis in original).

23 See, e.g., *Uber Technologies*, Case No. 13-CA-163062 (Advice Memo dismissal Apr. 16, 2019); *Handy Technologies*, Case No. 1-CA-158125 (charges withdrawn) (June 20, 2019).

24 *Pennsylvania Interscholastic Athletic Association v. NLRB*, 926 F.3d 837 (D.C. Cir. 2019).

25 362 NLRB 1599 (2015).

26 See Michael Lotito, et al., [Littler's WPI Labor Day Report 2018](#), Littler WPI Report (Aug. 30, 2018).

On September 14, 2018, the Board issued a notice of proposed rulemaking to establish a joint-employer standard. The Board received almost 29,000 comments in response to the proposed rule, and the comment period ended on January 28, 2019. Review of the comments is underway as the Board continues its work toward a final joint-employer rule, although a date for expected publication of a final rule was not announced in the federal government's Spring 2019 regulatory agenda.²⁷

Meanwhile, in a December 28, 2018, 2-1 decision,²⁸ the D.C. Circuit upheld portions of the *Browning-Ferris* standard, finding that an employer's right to control another company's employees, or its indirect control over those employees, are appropriate factors to assess potential joint-employment status. The D.C. Circuit ultimately determined, however, that the Board misapplied the concept of "indirect control" as to *Browning-Ferris*, and remanded to the Board for further consideration. The D.C. Circuit's decision means continued legal purgatory with regard to joint-employment standards, at least until the Board issues a final rule, and/or issues another decision in *Browning-Ferris*.

3. The Board Issues Proposed Rule Governing Union Representation, With Several Others in the Works

On August 12, 2019, the Board published in the *Federal Register* a proposed rule designed to "better protect employees' statutory right of free choice on questions concerning representation."²⁹ The proposed rule would create three amendments to Part 103 of the Board's Rules and Regulations:³⁰

- **Blocking Charge Policy:** The rule would replace the current blocking charge policy with a vote-and-impound procedure. An election could no longer be stayed by pending unfair labor practice charges, but the ballots would be impounded until the charges are resolved. Specifically, regional directors would continue to process a representation petition and would conduct an election even when an unfair labor practice charge and blocking request have been filed. If the charge has not been resolved prior to the election, the ballots would remain impounded until the Board makes a final determination regarding the charge.
- **Voluntary Recognition Bar:** Voluntary recognition occurs where an employer opts to recognize a union based on the union's showing of majority support, but without requiring a secret-ballot election. Under the proposed rule, the Board would return to the standard established in *Dana Corp.*, 351 NLRB 434 (2007). In that case, the Board held that no election bar could be imposed unless employees in the bargaining unit received notice of the voluntary recognition and their right to file a decertification petition or support the filing of a petition by a rival union within 45 days of receiving notice, and 45 days have passed from the date of notice without the filing of a valid petition.
- **Section 9(a) Recognition in the Construction Industry:** Section 9(a) of the NLRA provides that employee representatives that have been "designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining." Section 8(f) of the NLRA allows parties in the construction industry to establish a collective bargaining relationship absent majority support, unlike a Section 9(a) relationship in other industries. In *Staunton Fuel*, 335 NLRB 717 (2001), the Board held that a construction industry union could prove 9(a) recognition based on contract language alone without any other "positive evidence" of a contemporaneous showing of majority support. The proposed rule would overrule this decision, and establish that a union would have to show "positive evidence, apart from contract language," that the union unequivocally demanded recognition and the employer accepted it, "based on a contemporaneous showing of support from a majority of employees in an appropriate unit."

The comment period for this proposed rule ends October 11, 2019.

²⁷ See [Michael Lotito, et al., *Agencies Update Regulatory Agenda for 2019 and Beyond*](#), Littler ASAP (May 24, 2019).

²⁸ 911 F.3d 1195 (2018).

²⁹ NLRB, Press Release, [NLRB Proposes Rulemaking to Protect Employee Free Choice](#), Aug. 9, 2019.

³⁰ See Jason R. Stanevich, Ryan Freeman, and Michelle Devlin, [National Labor Relations Board Proposes Rulemaking Concerning Certain Union Representation Processes](#), Littler Insight (Aug. 12, 2019).

Meanwhile, a number of other rules are under development. The federal government's Spring 2019 Unified Agenda of Regulatory and Deregulatory Actions ("regulatory agenda"), which provides insight into federal agencies' priorities for the near and long term, was released on May 22, 2019. The latest regulatory agenda provides revised rulemaking timelines, and includes some new areas of focus. In addition to the joint-employer rulemaking discussed above, the NLRB has prioritized the following areas:

- **Access Rule.** The NLRB expects to publish a proposed rule regarding the "standards under the NLRA for access to an employer's private property." The proposal is slated for September 2019 and may reflect an attempt by the Board to revisit its prior decision in *Roundy's Inc. and Milwaukee Building and Construction Trades Council, AFL-CIO*, 356 NLRB No. 27 (2010) in which the NLRB ordered a business to allow a union access to the premises.³¹
- **Student/Employee Status.** The NLRB also plans to issue a proposed rule to establish standards regarding whether student aides at a university can be considered employees under the NLRB. This proposal is also scheduled for publication in September 2019.
- **Revision of Representation Case Rules.** The NLRB has issued plans to revise its representation election regulations, specifically to focus on amending the Board's representation case procedures from the rule published on December 15, 2015, otherwise known as the "quickie election" rule. The public comment period for this rule closed in early 2018, but the timeframe for issuing the proposed rule has yet to be determined.

Time will tell whether these rules will move forward as scheduled.

4. Key Board Decisions Are Pending

Employers are eagerly awaiting decisions in a number of key cases before the Board. For example, in *Caesars Entertainment Corporation d/b/a Rio All-Suites Hotel and Casino*, 28-CA-060841, the Board will consider whether it should adhere to, modify, or reject the legal standard set forth in *Purple Communications*, 361 NLRB 1050 (2014), regarding rules or policies governing the permissible uses of employer email systems. In *Purple Communications*, the Board held that Section 7 of the NLRA requires employers, except in very limited circumstances, to open their corporate email systems to union organizing by employees and to group discussions among employees about the terms and conditions of employment during non-work time.

In *Apogee Retail LLC d/b/a Unique Thrift Store*, No. 27-CA-191574, the Board's General Counsel has asked the Board to overrule *Banner Estrella Medical Center*, 362 NLRB No. 137 (2015). In that case, the Board ruled that to justify a prohibition on employee discussions during ongoing investigations, an employer must demonstrate the need for confidentiality, such as protecting witnesses and evidence, preventing testimony from being altered or fabricated, or preventing a cover-up. The Board, in essence, prohibited blanket rules and required a balance of employer justifications for requiring confidentiality on a case-by-case basis.

Finally, there are various pending cases that would apply the Board's decision in *The Boeing Co.*, 365 NLRB No. 154 (2017), which established a new standard that significantly broadens the scope of rules, policies, and handbook provisions that lawfully may be maintained under the NLRA. The Board in this decision established a balancing test to apply to rules that reasonably may be construed to interfere with Section 7 rights. In addition, in *PCC Structurals, Inc.*, 365 NLRB No. 160 (2017), the Board overturned *Specialty Healthcare*, 357 NLRB No. 83 (2011), reinstating the Board's prior standard for determining the appropriateness of a petitioned-for bargaining unit. The Board explicitly rejected *Specialty Healthcare's* "overwhelming community of interest" standard, effectively rebalancing the scales and removing the heightened burden placed on employers attempting to demonstrate that other excluded employees belong in a petitioned-for bargaining unit. Currently before the Board are cases that would apply *PCC Structurals* in determining the appropriateness of various election units.

³¹ On August 23, 2019, the NLRB also issued a decision in *Bexar County Performing Arts Center Foundation*, 368 NLRB No. 46 (Aug. 23, 2019), overruling the Obama Board's ruling in *New York New York*, 356 NLRB No. 119 (Mar. 25, 2011), by allowing employers to restrict access to private property by employees of a subcontractor seeking to engage in a work-related protest.

In *Alstate Maintenance, LLC and Greenidge*, 367 NLRB No. 68 (2019), the Board departed from the Obama Board's previous *WorldMark* decision by holding that an individual employee's refusal to perform work for a customer who did not tip well was not protected by the Act, even though the action occurred in front of other employees (but did not induce other employees to group action).

The Board's pending cases and rulemaking show that this administration's Board continues to make progress toward leveling the labor-management playing field.

5. States React to Right-to-Work Laws

Approximately half the states in the United States have right-to-work laws prohibiting employers and labor organizations from entering into collective bargaining agreements that require workers to join unions or pay dues. Earlier this year, however, certain states that currently do not have right-to-work laws in place took efforts one step further to limit right-to-work laws and ensure that employers and labor organizations *can* enter into such agreements.

In April 2019, Illinois Governor J.B. Pritzker (D) signed legislation banning local governments from passing right-to-work ordinances. In so doing, Governor Pritzker stated that the legislation "makes it abundantly clear that we have turned the page [to a more progressive agenda] here in Illinois."

Similarly, New Mexico Governor Lujan Grisham (D) signed a bill earlier this year that vests passage of right-to-work ordinances solely in the state. In so doing, Governor Grisham upended right-to-work ordinances passed by eight New Mexico counties.

These new laws are consistent with a 2018 ruling by the U.S. Court of Appeals for the Seventh Circuit in *International Union of Operating Engineers Local 399 v. Village of Lincolnshire*, 905 F.3d 995 (7th Cir. 2018), which held that while the NLRA permits individual states to pass right-to-work laws, it does not permit states to pass that responsibility on to local governments. The Village of Lincolnshire has appealed the decision to the United States Supreme Court, taking the position that local governments have the right to restrict dues collection and union security agreements between unions and employers. The Supreme Court has yet to decide if it will hear the case.

The scope and reach of right-to-work laws continue to be points of contention in other states as well. For example, the Seventh Circuit held in *International Association of Machinists District Ten and Local Lodge 873 v. Allen*, 904 F.3d 490 (7th Cir. 2018), that Wisconsin's right-to-work law overreached, by providing for a 30-day revocation period for dues-checkoff authorizations. The court held that this topic—the length of dues-checkoff revocation periods—is preempted by federal law and must be decided by the parties to a collective bargaining agreement. On the other hand, the Board reached a contradictory conclusion in its recent decision in *Metalcraft of Mayville Inc. and District Lodge No. 10*, 367 NLRB No. 116 (Apr. 17, 2019). There, the Board ruled that the employer did *not* violate the NLRA by ceasing dues collection in accordance with the 30-day revocation timeframe permitted by the Wisconsin law, rather than the revocation period set forth in the parties' collective bargaining agreement. The NLRB found that Wisconsin's right-to-work law voided the union security language in the parties' collective bargaining agreement, and thus also voided the dues-checkoff provisions.

These cases, along with the recent laws, are part of a broader ideological conflict that is playing out in statehouses, city councils, courts, and administrative agencies around the country regarding the extent to which states and local governments may restrict collective bargaining.

B. Wage and Hour

The U.S. Department of Labor (DOL) has been hard at work this year, issuing three proposed rules, which have been published for public comment, and submitting a fourth of which publication is expected shortly. The DOL has also continued in its recent push of issuing opinion letters, signaling its reinstatement of a process abandoned in the prior administration. Summaries of these rules and key opinion letters are discussed below.

1. The DOL Revisits the Overtime Rule

On March 22, 2019, the Wage and Hour Division of the DOL published the long-awaited Notice of Proposed Rulemaking (NPRM) to revise the “white collar” overtime exemption regulations.³² The DOL proposes to increase the minimum salary for exemption from \$455 per week (\$23,660 annualized) to \$679 per week (\$35,308 annualized). Employees with total annual compensation of \$147,414 (including at least \$679 per week paid on a salary basis)—up from the current \$100,000 total annual compensation—would qualify for exemption under the test for highly compensated employees (HCE).

If adopted, the proposed rule would replace the final rule issued by the DOL on May 19, 2016, which was enjoined by the Eastern District of Texas just weeks before its December 1, 2016 effective date. The 2016 final rule would have increased the minimum salary for exemption to \$913 per week (\$47,476 annualized) and the HCE total compensated requirement to \$134,004.

As in the 2016 final rule, the DOL’s new proposal would allow employers to satisfy up to 10% of the \$35,308 minimum salary requirement by the payment of nondiscretionary bonuses, incentives and commissions. However, the 2016 rule required that the bonuses be paid at least quarterly. Under the new proposal, the bonuses can be paid annually or more frequently.

Departing from the 2016 final rule, the DOL’s new proposal does not include automatic increases to the minimum salary level or the highly compensated test. Rather, the DOL “believes that the standard salary level and the HCE total annual compensation threshold should be proposed to be updated on a quadrennial basis (*i.e.*, once every four years) through an NPRM published in the *Federal Register*, followed by notice-and-comment rulemaking.” Public comments on the NPRM closed on May 21, 2019.

In mid-August, the DOL sent the final version to the White House Office of Management and Budget (OMB) for approval, the last step before publication in the *Federal Register*. A final rule is therefore imminent.

2. The DOL Looks to Clarify and Update Guidance Regarding the “Regular Rate”

On March 29, 2019, the DOL published a proposed rule to amend the regulations at 29 CFR Part 778 to clarify and update the “regular rate” requirements under section 7(e) of the Fair Labor Standards Act (FLSA), 29 USC §207(e), focusing on the types of compensation and benefits that employers must include in the overtime calculation.³³

The FLSA generally requires that employers pay non-exempt employees overtime at 1.5 times their regular rate for all hours worked over 40 in a workweek. The regular rate is not just an employee’s hourly rate of pay, but rather includes “all remuneration for employment”—unless specifically excluded by section 7(e) of the FLSA.

Examples of types of pay that must be included in the regular rate in addition to base hourly wages include non-discretionary bonuses, commissions and shift differentials. The FLSA also *excludes* some types of compensation from the regular rate, such as vacation or holiday pay, the cost of health insurance, employer contributions to retirement accounts, and reimbursements for business expenses. These regulations, which have seen only minor updates since 1968, provide additional guidance on the types of compensation included and excluded from the regular rate and overtime calculation.

32 DOL, Notice of Proposed Rulemaking, *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 84 Fed. Reg. 10,900 (Mar. 22, 2019).

33 DOL, Notice of Proposed Rulemaking, *Regular Rate Under the Fair Labor Standards Act*, 84 Fed. Reg. 11,888 (Mar. 29, 2019).

In the proposed rule, the DOL seeks to confirm that the following types of employer-provided benefits may be excluded from the regular rate of pay:

- Wellness benefits, including gym memberships, fitness classes and on-site specialist treatment;
- Discounts on retail goods and services;
- Payouts to employees of unused vacation and sick leave;
- Accident, unemployment and legal services benefits; and
- Tuition reimbursement and repayment of student loans.

The DOL also proposes to clarify that payment for hours not worked, including payment for *bona fide* meal periods and certain types of “call-back” pay are excludable, and that business expense reimbursements may be excludable even if not “solely” for the benefit of the employer.

Finally, the DOL has proposed some new examples of discretionary bonuses that are excludable, such as bonuses paid to employees who make unique or extraordinary efforts that are not awarded according to pre-established criteria; severance bonuses; bonuses for overcoming challenging or stressful situations; and employee-of-the-month bonuses. Public comment on the proposed rule closed on June 12, 2019. The DOL is currently reviewing all comments in preparation for issuing its final rule.

3. The DOL Proposes Revisions to the Joint-Employer Test

On April 9, 2019, the DOL published its proposed rule on joint employment under the Fair Labor Standards Act—the third proposed rule published by the agency in a two-week period.³⁴ The rule seeks to revise the regulations at 29 C.F.R. Part 791, which defines when two companies are considered joint employers of the same employee. The regulations were last revised nearly 60 years ago. The proposed rule would replace the January 2016 Administrator’s Interpretation on joint employment, which did not go through the notice-and-comment rulemaking process and was withdrawn in June 2017.

Under the FLSA, companies found to be joint employers are jointly liable for all minimum wage and overtime violations. The statute does not include a definition of joint employment and has left this determination to the courts.

The joint employment issue has become increasingly important since the National Labor Relations Board dramatically expanded the definition during the Obama administration in the *Browning Ferris* decision, recently partially affirmed but remanded to the NLRB by the D.C. Circuit. As previously discussed, the Trump NLRB has undertaken a rulemaking of its own, proposing to narrow the joint-employer definition under the National Labor Relations Act, so as to restore the law, essentially, to where it stood prior to *Browning Ferris*.

In its April NPRM, the DOL proposes a four-factor test for determining joint employment under the FLSA. The DOL will consider whether the potential joint employer actually exercises the power to:

- Hire or fire the employee;
- Supervise and control the employee’s work schedules or conditions of employment;
- Determine the employee’s rate and method of payment; and
- Maintain the employee’s employment records.

³⁴ DOL, Notice of Proposed Rulemaking, [Joint Employer Status Under the Fair Labor Standards Act](#), 84 Fed. Reg. 14,043 (Apr. 9, 2019).

This four-part test originates from the 1983 Ninth Circuit decision in *Bonnette v. California Health and Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983). The proposed regulations would also consider additional factors to determine joint-employer status, but only if they are indicative of whether a potential joint employer is exercising significant control over the terms and conditions of the employee's work or otherwise acting directly or indirectly in the interest of the employer in relation to the employee.

The proposed rule would also clarify factors that are not relevant to the joint-employer analysis, most notably explaining that "economic dependence" on the potential joint employer does not determine the potential joint employer's liability. Other irrelevant factors include, but are not limited to, whether the employee is in a specialty job or a job otherwise requiring special skill, initiative, judgment, or foresight; has the opportunity for profit or loss based on managerial skill; and invests in equipment or materials required for work or the employment of helpers—factors often used to determine whether a worker is an employee or an independent contractor.

Thus, the proposed rule clarifies that the question of whether a worker is an employee at all—the independent contractor inquiry—is separate from the question of who is or are the employers of an employee. This is further clarified by language in the proposal that only the definition of an "employer" in section 3(d) of the FLSA, 29 USC § 203(d), determines joint-employer status, not the definition of "employee" in section 3(e)(1) or the definition of "employ" as "to suffer or permit work" in section 3(g) of the Act. 29 USC §§ 203(e)(1), (g).

The FLSA defines "employer" as including "any person acting directly or indirectly in the interest of an employer in relation to an employee." Thus, the proposed rule does state that indirect action in relation to an employee may establish joint-employer status, which may not be welcome news to some employers but is tied to the language of the statute.

Finally, and perhaps most importantly, the DOL's proposal would add language on the impact of contractual obligations and business models. For example, operating as a franchisor would not make joint-employer status more or less likely; nor would requiring a business partner to institute workplace safety measures, wage floors, or sexual harassment policies. Also, providing a sample employee handbook to a franchisee, allowing an employer to operate a facility on one's premises, jointly participating with an employer in an apprenticeship program, or offering an association health or retirement plan to the employer or participating in such a plan with the employer, would not create joint-employer status.

The deadline for public comments on the joint employment proposed rule was June 25, 2019; the final rule is expected by the end of the year.

4. A Tip-Pooling Rule Is on the Horizon

On July 26, 2019, the DOL sent an NPRM regarding tip-pooling to the OMB, the required step before publication and the notice-and-comment period commences. Although the NPRM has not yet been made public, it is anticipated that it will address many of the issues addressed by last year's DOL-issued Field Assistance Bulletin No. 2018-3.³⁵ The expected areas to be covered by the NPRM include permitting the option of tip-sharing with non-tipped employees when an employer does not take a tip credit; clarifying the use of the tip credit for those working in dual positions and expressly rescinding the so-called 80/20 rule; establishing a definition of a "supervisor" or "manager" for purposes of exclusion of individuals from the tip pool; and addressing the permissible practice of deducting credit card fees from credit card tips for tipped employees.

35 See David Jordan and Eli Freedberg, [DOL Clarifies Amendment to the FLSA's Tip Pool Rules](#), Littler ASAP (Apr. 12, 2018).

5. The DOL Continues to Issue Opinion Letters

The Wage and Hour Division of the DOL has continued its recent process of issuing opinion letters in 2019—issuing 12 related to the Fair Labor Standards Act and two related to the Family and Medical Leave Act. Key opinions are discussed below:

FMLA2019-1-A: The DOL opined that an employer may not delay designating leave as FMLA leave, even where the delay is to permit the employee to exhaust available paid sick or other leave prior to initiation of the FMLA-protected leave. Once an eligible employee communicates a need to take leave for an FMLA-qualifying reason, neither the employee nor the employer may decline FMLA protection for that leave. Once the employer has enough information to determine that leave is for a qualifying reason, the employer must provide notice of the determination to the employee within five business days and count the leave toward the employee's FMLA leave entitlement. The agency stated that an employer may not delay designating the absence as FMLA-qualifying, even if the employee would prefer that the employer delay the designation. In the opinion letter, the DOL noted its disagreement with *Escriba v. Foster Poultry Farms*, a 2013 appellate decision in which the Ninth Circuit (in upholding a jury verdict in favor of the defendant employer) held that "an employee may use non-FMLA leave for an FMLA-qualifying reason and decline to use FMLA leave in order to preserve FMLA leave for future use."

FLSA2019-2: The DOL was called upon to render an opinion whether an employee's time spent participating in an employer's optional volunteer community service program is "hours worked" under the Fair Labor Standards Act, particularly where the employer awards a bonus to certain employees who participate in the program. The DOL opined that the time employees spend volunteering in the above program would not be considered hours worked so long as all of the following criteria are met: (1) employee participation in the program is charitable and voluntary; (2) the employer does not require or "unduly pressure" employees to participate in the program; (3) the employer does not control or direct the volunteer work; (4) not volunteering will have no adverse effect on the employee's working conditions or employment prospects; and (5) the employee is not guaranteed a bonus for volunteering. Regarding the fifth point—whether the bonus is "guaranteed"—the DOL suggested this criteria would be met where, for example, the employees are organized in groups in the workplace, and the employer "only rewards the group with the most community impact and gives the winning group's supervisor discretion to determine what amount of the bonus, if any, to award to individual employees in the group."

FLSA2019-6: The DOL weighed in on whether gig economy workers are employees or independent contractors, opining that that an unidentified "virtual marketplace" company properly classified its service providers as independent contractors. The agency relied on the long-standing six-factor economic realities tests, which looks to see whether the workers are economically independent or dependent on the working relationship with the entity at issue. The six factors are:

1. The nature and degree of the potential employer's control.
2. The permanency of the worker's relationship with the potential employer.
3. The amount of the worker's investment in facilities, equipment or helpers.
4. The amount of skill, initiative, judgment or foresight required for the worker's services.
5. The worker's opportunities for profit or loss.
6. The extent of integration of the worker's services into the potential employer's business.

In this particular scenario, the DOL found all six factors pointed to "economic independence, rather than economic dependence, in the working relationship between [the Company's] client and its service providers." The DOL further reasoned that the company "empowers service providers to provide services to end-market consumers" and "as a matter of economic reality" the service providers are working for the consumer, not the company operating the platform.

To date, the DOL's Wage and Hour Administration has issued over 40 opinion letters on the FMLA and FLSA during the current administration, providing guidance and clarity over various nuances of these laws.

C. Equal Employment Opportunity and Discrimination

It has been an eventful year for the Equal Employment Opportunity Commission (EEOC) with respect to its membership. In January, the EEOC lost its quorum when the holdover term of Commissioner Chai R. Feldblum (D) expired, leaving the agency with only two sitting commissioners: Acting Chair Victoria A. Lipnic (R) and Commissioner Charlotte R. Burrows (D). Prior to losing its quorum, the Commission delegated a number of functions to program offices within the Agency. Given that much of the day-to-day operations of the Commission are conducted via EEOC staff in its field offices, the loss of a quorum did not dramatically impact the routine operations of the Commission. It did, however, prevent the Commission from moving forward on significant or new policy matters for almost half of the year.

1. EEOC Restores Quorum; Republican Majority for the First Time in the Administration

In May, the U.S. Senate confirmed Janet Dhillon (R) as Chair of the Commission, restoring the Commission's quorum, and creating, for the first time in the current administration, a Republican majority. Chair Dhillon's term is scheduled to expire on July 1, 2022 (although under Title VII her term may be extended in holdover status for a period of time thereafter). Former Acting Chair Lipnic returns to her role as Commissioner, with a term scheduled to expire on July 1, 2020 (again, subject to holdover). Most recently, on August 1, 2019, the U.S. Senate re-confirmed Commissioner Burrows (her term will now expire in 2023), and confirmed as General Counsel Sharon Fast Gustafson. General Counsel Gustafson—the first female general counsel in the agency's history—was sworn in in early August and will serve a four-year term.

There is presently one additional EEOC nominee pending in the Senate. In July, Keith Sonderling, currently the Deputy Administrator of the Wage and Hour Division at the U.S. Department of Labor, was nominated for the open Republican seat on the Commission. To date, no nominee for the open Democratic seat has been named, and it is unclear whether and when the U.S. Senate will act on nominations for one or both seats.

2. EEO-1 Pay Data Collection: Raised from the Dead

The EEOC was the subject of significant attention in March, when the agency was dealt an unexpected blow by the U.S. District Court for the District of Columbia, which ordered it to reinstate a previously suspended collection of detailed compensation data from thousands of employers nationwide.

By way of background, at the end of the prior administration, the EEOC finalized a rule that would have, for the first time, required employers to submit detailed data on employee compensation and hours worked on the agency's Form EEO-1. This new collection—the so-called "Component 2" of the EEO-1 form—was scheduled to begin in March 2018—roughly 18 months after the rule was finalized. This significant lead time was intended to give employers sufficient time to prepare their human resource information systems (HRIS) for this filing. The rule, adopted on a party-line vote, generated significant controversy when it was considered and ultimately finalized.

In February 2017, following the change in administration, several employer groups petitioned the Office of Management and Budget—the agency that must approve all federal data collections—to revoke its prior approval of the expanded EEO-1. In August 2017, OMB suspended and stayed its prior approval, effectively killing the new Component 2. Shortly thereafter, several employee advocate groups sued EEOC and OMB, alleging that the suspension of the prior approval was unlawful, and asking that the court order the data collection to go forward.

In a surprising decision, the court in March 2019 ruled that OMB's stay of its prior approval of Component 2 was unlawful, and ordered the EEOC to reinstate the planned collection of compensation data. After a series of hearings and motions, the agency was ordered to collect two calendar years of compensation data. The EEOC has opted to collect compensation data for calendar years 2017 and 2018, with a deadline of September 30, 2019.

This means that all employers subject to Title VII with 100 or more employees are now required to file Component 2 of the EEO-1. In this filing, employers are required to report employee compensation (grouped into one of 12 salary bands), sorted by race, ethnicity, gender, and EEO-1 job category. Employers must also report hours worked by these employees, along the same bases.³⁶

As of this writing, the EEO-1 Component 2 filing portal is open, and EEO-1 compensation data for calendar years 2017 and 2018 is due to be filed by September 30, 2019 (Component 1 filing was due at the end of May, a deadline that was extended from March 31 because of last winter's government shutdown). While the agency has appealed the court's decision, it seems unlikely that the appeals court will provide relief prior to the September 30 deadline.

3. LGBT Coverage Under Title VII: Supreme Court to Decide

Earlier this year, the U.S. Supreme Court granted review of a trio of cases squarely raising the question of whether discrimination on the basis of sexual orientation or gender identity is unlawful sex discrimination under Title VII. In April, the Court granted review of three cases: *Altitude Express, Inc. v. Zarda*, *Bostock v. Clayton County, Georgia*, and *R.G. & G.R. Harris Funeral Homes v. EEOC*. The first two directly ask whether sexual orientation discrimination is prohibited under federal civil rights law; the third raises the question of whether transgender employees are similarly protected. The Court's decision is expected to answer questions that have split federal courts around the country, and indeed, even agencies within the current administration.

By way of background, since 2015, the EEOC has held that discrimination based on sexual orientation is a form of sex discrimination and thus unlawful under Title VII.³⁷ In support of its position, the EEOC has offered three different arguments: (1) that "sexual orientation" is, by definition, inseparable from "sex" (*i.e.*, the sexual orientation of a female employee attracted to males is heterosexual, while the sexual orientation of a male employee likewise attracted to males is homosexual—the difference in sexual orientation is based solely on the sex of the subject employee); (2) that discrimination on the basis of sexual orientation is prohibited discrimination on the basis of association (much as discrimination on the basis of an employee's spouse's race would be prohibited racial discrimination); and (3) discrimination on the basis of sexual orientation is a form of "sex stereotyping" prohibited under prior Supreme Court case law.

In 2017, in *Hively v. Ivy Tech Community College*, the full U.S. Court of Appeals for the Seventh Circuit became the first federal appeals court to adopt the EEOC's reasoning and hold that Title VII prohibits discrimination on the basis of sexual orientation.³⁸ Less than a year later, the Second Circuit followed suit in *Zarda*, similarly holding that Title VII protects workers from sexual orientation discrimination.³⁹ In contrast, the Eleventh Circuit, citing binding precedent, held in 2017 that Title VII does not include discrimination on the basis of sexual orientation, thus making the question ripe for consideration by the Supreme Court.⁴⁰ At that time, the Supreme Court declined to review the Eleventh Circuit's holding.

With respect to gender identity discrimination, there has also been division within the courts. Some courts have allowed cases alleging gender identity discrimination to proceed (most commonly analyzing the case as a question of "sex stereotyping" as discussed above); others have held that transgender status is not protected under Title VII. The EEOC has held since 2012 that discrimination on the basis of gender identity is unlawful under Title VII.⁴¹ In 2018, the Sixth Circuit held in the *Harris Funeral Homes* case currently on appeal that discrimination on the basis of transgender status is prohibited under federal law.⁴²

³⁶ In July, Littler broadcast a webinar for employers detailing their obligations with respect to the EEO-1, which may be accessed [here](#).

³⁷ See *Baldwin v. Dep't of Transportation*, EEOC Appeal No. 0120133080, 2015 WL 4397641 (July 15, 2015).

³⁸ *Hively v. Ivy Tech Cmty. Coll of Ind.*, 194 F.3d 339 (7th Cir. 2017).

³⁹ *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d. Cir. 2018).

⁴⁰ See *Evans v. Georgia Reg'l Hosp.*, 830 F.3d 1248 (11th Cir. 2017), *cert denied*, 138 S. Ct. 557 (2017).

⁴¹ See *Macy v. Dep't of Justice*, EEOC Appeal No. 0120120821, 2012 WL 1435995 (Apr. 20, 2012).

⁴² *R.G.& G.R. Harris Funeral Homes v. Equal Employment Opportunity Commission*, 884 F.3d 560 (6th Cir. 2018).

As noted, there is currently conflict within the administration on these points. During consideration of the *Zarda* case in the appeals court, the U.S. Department of Justice (DOJ) filed an *amicus* brief arguing that sexual orientation is not discrimination on the basis of sex. Similarly, in *Harris Funeral Homes*, the DOJ in August filed an *amicus* brief in the Supreme court, arguing that “sex discrimination” under the law does not include discrimination on the basis of gender identity. The DOJ filed similar briefs with respect to sexual orientation.

The Court is scheduled to hear oral argument on these cases in October, and likely to issue its decision before the end of its term in June 2020. Given the divisiveness of the questions, it is likely that however the Court rules, Congress will introduce legislation to overturn its decision.

4. Harassment Remains Priority for EEOC, States

In the wake of the #MeToo movement, the EEOC continues to focus on workplace harassment broadly, and sexual harassment specifically. During the last fiscal year, the agency filed 66 lawsuits alleging workplace harassment (41 alleging sexual harassment), an increase of more than 50% over the prior year. In a report issued by the agency on October 4, 2018,⁴³ the EEOC indicated that the number of filed charges alleging sexual harassment increased by more than 12% over that same period, and that it found cause to believe unlawful harassment had occurred in nearly 1,200 charges filed, an almost 25% increase over the prior year. In that same time period, the agency recovered nearly \$70 million for victims of sexual harassment, up from \$47.5 million in FY 2017.

These facts underscore the EEOC’s continued focus on eliminating unlawful workplace harassment. In its current Strategic Enforcement Plan (SEP) for fiscal years 2017-2021, the EEOC identified the prevention of harassment as one of its key enforcement priorities (perhaps presaging increased focus, harassment was identified as a top priority in its prior SEP as well).

States and localities have also responded in various fashions to these challenges. Numerous states and localities have adopted or expanded laws to prevent sexual harassment, mandate anti-harassment training, or increase penalties for unlawful harassment. Most recently, Illinois governor J.D. Pritzker signed a law mandating harassment training, expanding the scope of anti-harassment coverage, and purporting to limit the use of arbitration to adjudicate harassment claims.⁴⁴ Illinois’s efforts follow on those taken earlier this year by New Jersey and Connecticut. Still dozens (if not hundreds) of proposals aimed at preventing and eliminating harassment (particularly sex-based harassment) are pending in legislatures and municipal bodies around the country.

Attempts to limit the use of arbitration have been a common response, but federal case law suggests these state-level efforts are likely to not pass muster under the Federal Arbitration Act (FAA). To date, in more than a dozen states, legislation to limit the use of arbitration in harassment cases has been introduced, and a handful of states have actually adopted such laws. In recent years, the U.S. Supreme Court has reliably construed the FAA broadly, and held that its preemptive reach is broad. In New York State, the U.S. District Court for the Southern District of New York ruled recently that a state law purporting to limit the use of arbitration was preempted by the FAA.⁴⁵ It is highly likely that other state laws will face similar challenges, with less-than-stellar prospects of being upheld.

5. Pay Equity Laws Continue to Proliferate

At the same time states are addressing workplace harassment, we have seen increased focus on issues of pay equity continue to resonate, particularly in states and localities, where efforts to purportedly strengthen equal pay laws showed no sign of abating in 2019.

43 EEOC, [What You Should Know: EEOC Leads the Way in Preventing Workplace Harassment](#).

44 See Shanthi Gaur, Jennifer Jones and Melissa Logan, [Illinois’ New #MeToo-Inspired Law Creates Sweeping Employer Obligations](#), Littler Insight (Aug. 13, 2019).

45 See *Latif v. Morgan Stanley & Co. LLC*, No. 18-cv-11528 (DLC), 2019 WL 2610985 (June 26, 2019).

State law approaches to have taken a variety of forms. Some states have opted to broaden the scope of positions to be considered in comparing pay, both functionally and geographically. Others purpose to limit employer defenses for equal pay claims (particularly state law analogues to the “factor other than sex” defense available under the federal Equal Pay Act). Finally, one recent trend has been for states to prohibit or restrict the ability of employers to consider the pay history of a job applicant, on the theory that eliminating that factor may minimize the effects of prior discrimination.

Overall, at least 13 states have enacted enhanced pay equity laws that go beyond simply prohibiting unequal pay for “equal” work; 24 states and municipalities—along with Puerto Rico—have enacted salary history inquiry bans; and at least 18 states and the District of Columbia have enacted wage transparency provisions.⁴⁶ This trend is expected to continue in earnest.

D. Federal Contracting

Federal contractors’ employment practices are regulated by a wide array of statutes and executive orders that do not apply to other employers. Among other things, federal contractors may be required to implement affirmative action programs to ensure equal employment opportunity for minorities, women, veterans, and the disabled; pay prevailing wages for certain types of work; provide paid sick leave; and adopt specific employment policies. Most of these obligations are implemented and enforced by the Office of Federal Contract Compliance Programs (OFCCP), but some are enforced by other agencies within the United States Department of Labor.

1. The OFCCP Remains Its Own Sub-Agency

Based on past experiences under Republican administrations, and understanding this administration’s commitment to reductions in regulation and oversight, many federal contractors expected to see substantial changes to regulations and enforcement during the Trump presidency. What has actually transpired is less dramatic.

The big story over the past three years is that OFCCP appears to be here to stay but will have to continue to contend with diminishing resources. An early Trump administration proposal would have ended OFCCP’s existence as a separate agency and assigned its responsibilities to the Equal Employment Opportunity Commission. However, the proposal received negative reviews from both the contractor and civil rights communities and generated no interest in Congress. Any changes in the basic structure of the DOL or OFCCP now seem unlikely.

On the other hand, OFCCP’s budget has remained flat since 2010, resulting in a decline in OFCCP’s headcount from nearly 800 full-time equivalents in 2010 to fewer than 500 in 2019. As a result, OFCCP went from auditing 4,000–5,000 contractor establishments each year to around 1,000 in 2018. Of course, while much of this decline is a result of OFCCP’s diminished resources, it also reflects an Obama-era policy of conducting very in-depth audits that consumed a great deal of the agency’s limited resources.

2. OFCCP Moves to More Focused Reviews

While OFCCP’s budgetary challenges continue, the agency began to conduct more limited audits in 2019, including resumption of focused reviews and compliance checks, allowing it to increase the number of contractors it is able to “touch” each year. In addition, OFCCP has also indicated an intention to be more effective in identifying for audit those contractors that are not in current compliance.⁴⁷

46 See Patricia J. Martin, Denise M. Visconti, and Corinn Jackson, *Minding the Pay Gap: What Employers Need to Know as Pay Equity Protections Widen*, Littler Report (Aug. 1, 2019).

47 See, Lance Gibbons & David Goldstein, *OFCCP Acting Director Promises Clear Guidance and Consistency While Laying out a Program of Carrots and Sticks*, Littler ASAP (August 6, 2018)

The decision to resume focused reviews in FY 2019 was announced in an August 14, 2018 Directive.⁴⁸ Unlike broad-based compliance reviews, focused reviews assess compliance against only some of a contractor's affirmative action obligations. A focused review may be limited to just the rules relating to women and minorities (under Executive Order 11246), disabilities (under Section 503 of the Rehabilitation Act), or protected veterans (under the Vietnam Era Veterans' Readjustment Assistance Act of 1974). Focused reviews are not new, but the Directive represents a clear statement of OFCCP's intention to operate efficiently while ensuring that entities doing business with the federal government meet their affirmative action and equal employment obligations. At the National Industry Liaison Group conference in 2019, OFCCP Director Craig Leen announced his continued emphasis on focused reviews as a means to ensure equal access to employment for individuals with disabilities and, beginning in Fiscal Year 2020, for veterans.

3. Status of Executive Orders

Over past decades there has been a consistent pattern when the presidency transitions from Democratic to Republican (or vice versa). Democratic presidents typically issue executive orders requiring federal contractors to notify employees of their rights under federal labor laws⁴⁹ and creating rights for employees working under federal service contracts. Republican presidents tend to issue executive orders requiring contractors to notify employees of their rights to opt out of union activities and expenses and making it easier to transition service contracts. In addition to these "partisan" executive orders, the Obama administration also issued an unprecedented number of executive orders regulating federal contractors, requiring them to pay a higher minimum wage,⁵⁰ provide paid sick leave,⁵¹ implement pay transparency policies,⁵² and bar discrimination based on sexual orientation and gender identity.⁵³ Many contractors speculated that some or all of these executive orders would be rescinded under the new administration. They all, however, remain in place.

4. Commitment to Increased Transparency

Even though the anticipated reduction in regulations has not transpired, federal contractors have seen a change in their interactions with the OFCCP at its highest levels. Since taking over as OFCCP Director in July 2018, Craig Leen has been committed to increasing transparency and consistency across the agency.

On March 14, 2018, OFCCP issued a directive providing that it will no longer issue final findings of discrimination without first issuing a Predetermination Notice and considering the contractor's response.⁵⁴ Predetermination Notices had been issued by OFCCP offices on a discretionary basis in the past. This directive removed regional discretion, standardizing practices across the agency's offices. It promises to provide contractors with a significant opportunity to better understand and address OFCCP's concerns toward the end of an audit, and potentially resolve those concerns at a time when the agency should still be relatively open to fairly considering additional evidence.

48 See Lance Gibbons & David Goldstein, [OFCCP Focused Reviews Coming in FY 2019](#), Littler ASAP (August 14, 2018).

49 Executive Order 13496 of Jan. 30, 2009, *Notification of Employee Rights Under Federal Labor Laws*, 74 Fed. Reg. 6107-6111 (Feb. 4, 2009).

50 Executive Order 13658 of Feb. 12, 2014, *Establishing a Minimum Wage for Contractors*, 79 Fed. Reg. 9849 (Feb. 20, 2014).

51 Executive Order 13706 of Sept. 7, 2015, *Establishing Paid Sick Leave for Federal Contractors*, 80 Fed. Reg. 54697-54700 (Sept. 10, 2015) and U.S. DOL, Wage and Hour Division, *Establishing Paid Sick Leave for Federal Contractors*, 81 Fed. Reg. 67598-67724 (Sept. 30, 2016).

52 Executive Order 13665 of Apr. 8, 2014, *Non-Retaliation for Disclosure of Compensation Information*, 79 Fed. Reg. 20749-20750 (Apr. 11, 2014).

53 Executive Order 13672 of July 21, 2014, *Further Amendments to Executive Order 11478, Equal Employment Opportunity in the Federal Government, and Executive Order 11246, Equal Employment Opportunity*, 79 Fed. Reg. 42,971 (July 23, 2014).

54 See David Goldstein, Meredith Shoop, & Brandon Haugrud, [New OFCCP Directive on Predetermination Notices Makes it Easier for Contractors to Understand and Address OFCCP Audit Concerns](#), Littler ASAP (Mar. 14, 2018).

A month later, in another signal of increased transparency, OFCCP issued a release describing in detail its methodology for selecting and scheduling federal contractors for audit in 2018.⁵⁵ This release brought clarity to an audit selection process that had long been a source of confusion and, sometimes, consternation for contractors. By making public its audit selection processes, OFCCP provided important insights and procedures for contractors to minimize their exposure and improve compliance.

OFCCP also released a contractor “Bill of Rights,” titled “What Contractors Can Expect.”⁵⁶ This document, conceived during OFCCP’s Town Hall Meetings earlier in 2018, covers many items Director Leen has highlighted and sets forth specific expectations for contractors’ interactions with OFCCP, including timely access to accurate compliance assistance, opportunities to provide meaningful feedback and to collaborate, professional conduct by OFCCP’s staff, neutral scheduling of compliance evaluations, reasonable opportunity to discuss compliance evaluation concerns, timely and efficient progress on compliance evaluations, and confidentiality.

5. Gender Pay Discrimination Remains in OFCCP’s Crosshairs; Health Care Entity Coverage Not So Much

Gender-based pay discrimination remains a primary focus for OFCCP. The agency’s procedures for reviewing contractor compensation systems and practices during compliance evaluations are now governed by a new OFCCP directive⁵⁷ that replaced the controversial Obama-era directive 307. Directive 307 was long-criticized by many as offering too little guidance to contractors and for inconsistencies with applicable legal standards.⁵⁸ Unfortunately, the new OFCCP directive gives little further clarification. All that can be said with clarity is that federal contractors must continue to expect to have their compensation systems and practices scrutinized during OFCCP audits. Periodic self-auditing of compensation in light of both federal and evolving state and local standards is critically important.

On the other hand, OFCCP appears to have backed away from its efforts to substantially expand jurisdiction over health care providers. Nevertheless, rather than officially abandoning its claim of jurisdiction over providers that participate in TRICARE, OFCCP merely extended its existing enforcement moratorium for an additional two years, until May 7, 2021.⁵⁹ As a result, some uncertainty continues regarding the status of health care employers that provide medical benefits to active duty and retired military personnel and their families through the TRICARE network, but that are otherwise not federal contractors. In another notable development in this area, President Trump signed the VA Mission Act into law on June 6, 2018. Among other things, this law allows community health care providers to enter into contracts with the Veterans Administration to provide hospital care, a medical service, or an extended care service without becoming subject to OFCCP jurisdiction.

55 See Meredith Shoop & David Goldstein, *OFCCP Clarifies Methodology for Contractor Audit Selection*, Littler Insight (Apr. 19, 2018).

56 U.S. DOL, Office of Federal Contract Compliance Programs, *What Federal Contractors Can Expect*, available at https://www.dol.gov/ofccp/regs/compliance/posters/FS_WhatFedContractorsCanExpect-v2ESQA508c.pdf.

57 See Meredith C. Shoop & David Goldstein, *OFCCP Reins in Compensation Analysis by Rescinding Directive 307 and Issuing New Guidance*, Littler ASAP (August 28, 2018).

58 Directive 2013-03, U.S. DOL, Office of Federal Contract Compliance Programs (Feb. 28, 2013), available at <https://www.dol.gov/ofccp/regs/compliance/directives/dir307.htm>.

59 See Meredith Shoop & David Goldstein, *OFCCP Extends Moratorium on TRICARE Enforcement for Two More Years*, Littler ASAP (May 21, 2018).

E. Status of Health Care Reform

Nearly a decade after the Affordable Care Act (ACA) was enacted, the fate of the law still remains up for debate. Federal agencies continue to issue regulations and enforce its penalties, Congress debates its future, and the courts review whether the act should have been passed at all.

The following discusses the current state of the ACA and other recent developments regarding the provision of health benefits.

1. Rules Relaxed for Health Reimbursement Arrangements

After years of debate and speculation, the Trump administration has formally blessed the “defined contribution” model of delivering employer-sponsored health care. In final regulations published on June 20, 2019,⁶⁰ the Departments of Labor, Treasury, and Health and Human Services walked back prior guidance that prohibited most employers from offering a standalone health reimbursement arrangement (HRA). Under the new regulations, employers can set aside a fixed amount of money in an HRA that covered employees can use to purchase individual health insurance coverage policies.

The new guidance allows employers to shift nearly all of their health insurance risk to the individual market. This approach was previously available only to small employers through the Qualified Small Employer Health Reimbursement Arrangement (QSEHRA) design. The regulations include specific rules to ensure that uniform contributions are available across certain defined “classes” of employees. Further, if the HRA model is offered to employees in a particular class, the employer cannot simultaneously offer traditional group medical coverage to that class. The approved classes are as follows:

- Full-time employees
- Part-time employees
- Salaried employees
- Hourly employees
- Employees working in the same geographic region (*i.e.*, the same insurance rating area, state, or multi-state region)
- Seasonal employees
- Employees covered by a particular CBA
- Employees who have not satisfied a waiting period
- Non-resident aliens with no U.S.-sourced income
- Temporary employees of staffing firms
- Any group of employees formed by combining one or more of the above classes (*e.g.*, salaried employees in Florida)

The regulations allow for limited variations in employer HSA contributions due to an employee’s age and/or the number of his/her dependents.

While employees will have the power to purchase the individual coverage of their choosing, they may find that their options on the individual market do not offer the same benefits as a typical employer-sponsored group health plan. For example, there may be reduced access to benefits such as in-vitro fertilization, applied behavioral analysis (ABA) therapy, and domestic partner coverage, depending on applicable state law.

Other than administering the HRA accounts, the employer would have no involvement in the administration of the core major medical benefits.

60 IRS, EBSA, HHS, Final Rule, [Health Reimbursement Arrangements and Other Account-Based Group Health Plans](#), 84 Fed. Reg. 28,888 (June 20, 2019).

Lastly, large employers subject to the Affordable Care Act's employer mandate are awaiting further guidance from the IRS to determine what level of employer contributions will be considered an offer of "affordable" health care.

2. ACA Employer Mandate Update

Though it has been the subject of constant debate, the employer mandate remains in effect. The Internal Revenue Service is actively assessing penalties against employers for recent plan years. Meanwhile, action in the court system threatened to send the entire ACA back to the drawing board.

On December 14, 2018, a Texas federal court declared the ACA unconstitutional—including the employer mandate. In *Texas v. United States of America*, the court held that the individual mandate (previously upheld as valid under Congress' power to tax) is no longer valid due to the reduction of the tax to \$0 last year under the Tax Cuts and Jobs Act. The court further ruled that the individual mandate was essential to the ACA, and if it fails, the entire statute fails. The court declined, however, to issue an injunction invalidating the law, and the appeals process is expected to take years. Moreover, now that Democrats control the House of Representatives, it is unlikely that any legislative action will be taken in the short term to change the current status of the employer mandate. Accordingly, employers should not expect to see any significant changes to the employer mandate in the near future.⁶¹

3. ACA Individual Mandate Update

As noted above, the Tax Cuts and Jobs Act repealed the "individual mandate" portion of the ACA. This means that individual taxpayers will not pay a penalty if they do not purchase qualifying health insurance. Importantly, the "employer mandate" portion of the IRS remains in effect.

Employers are unlikely to see significant impacts due to the repeal of the individual mandate. Some lower-paid employees may choose to waive coverage, which could potentially reduce the covered headcount under the medical plan. However, employers should be on guard to respond to employees who are diagnosed with a serious health condition during the plan year and want to enroll in the employer's plan on a mid-year basis. For coverage paid on a pre-tax basis, the employee cannot join the plan outside open enrollment unless he/she has experienced a Code-approved election change event (such as the birth of a new child).

4. Association Health Plan Regulations Update

On March 28, 2019, a federal court struck down key portions of the new association health plan (AHP) regulations, just days before the fledgling rules for self-insured medical plans were slated to go into effect regarding newly created AHPs.⁶²

The regulations were intended to promote the use of AHPs, which are a means for small employers to band together and obtain coverage in the large group insurance market, which generally imposes fewer coverage requirements. For example, unlike the small group insurance market, policies issued in the large group insurance market are not required to cover "essential health benefits."⁶³

The U.S. District Court for the District of Columbia ruled that the Department of Labor's final AHP regulations are based on an "unreasonable interpretation" of ERISA and that the DOL ignored the "language and purpose" of both ERISA and the ACA. The court vacated the regulations' definition of *bona fide* employer associations, the new "commonality of interest" standard, and the language equating working owners with employees. The regulations have been remanded to the DOL so that the Department can determine which remaining portions of the AHP regulations (if any) will remain in effect.

61 See Anne Sanchez LaWer and Finn Pressly, [ACA Still in Effect, Despite New Federal Court Ruling](#), Littler ASAP (Dec. 17, 2018).

62 *New York v. United States Dep't of Labor*, No. CV 18-1747 (JDB), 2019 WL 1410370 (D.D.C. Mar. 28, 2019).

63 See Anne Sanchez LaWer, Mark Grushkin and Finn Pressly, [Association Health Plans: How Do You Solve a Problem Like a MEWA?](#), Littler ASAP (June 21, 2018).

5. Proposed Regulations Remove ACA's Protections for Transgender Patients

In June, HHS published a proposal rule interpreting Section 1557 of the ACA, which contains the health reform law's anti-discrimination provisions.⁶⁴ These proposed regulations substantially change Obama-era HHS regulations interpreting Section 1557 to prohibit discrimination in certain health programs based on gender identity, gender expression, and transgender status.⁶⁵

In 2016, the Obama administration issued final regulations under Section 1557 stating that discrimination based on "sex" in federally funded health programs would be interpreted to prohibit discrimination based on gender identity, gender expression, and transgender status.⁶⁶

Following a legal challenge, the U.S. District Court for the Northern District of Texas found the regulations' interpretation of sex to include gender identity violated both the Administrative Procedures Act and the Religious Freedom Restoration Act; on December 31, 2016, the regulations were enjoined on a nationwide basis.⁶⁷

Instead of appealing the injunction, the government asked that the ruling be stayed and the final regulations be sent back to HHS to review. While the proposed regulations issued in June include general prohibitions against discrimination based on race, color, national origin, sex, age, and disability, the regulations abandoned the position taken in the 2016 regulations that Section 1557 would be interpreted to prohibit gender identity, gender expression, and transgender status as discrimination based on "sex." The notice-and-comment period on the proposed regulations closed on August 13, 2019.

Regardless of whether the proposed regulations become final in their current iteration, employers should continue to evaluate whether their employer-sponsored benefits plans and programs contain blanket, categorical exclusions from coverage for health services or care related to transgender- or transition-related procedures. If these plans and programs contain such exclusions, employers should consult with their benefits group, Plan Administrator and counsel to determine how best to ensure compliance with Section 1557 and Title VII, particularly since the HHS's interpretation of "sex" is in direct contrast to case law in some appellate courts interpreting "sex" under Title VII.

F. Health and Safety

Deputy Assistant Secretary Loren Sweatt continues to serve as the Acting Secretary of the Occupational Safety and Health Administration (OSHA), and likely will remain in that position throughout the remainder of this term of the Trump administration. Scott Mugno, former FedEx Ground Vice President of Safety, Vehicle Maintenance & Sustainability, was nominated for the position of permanent Assistant Secretary. His confirmation vote was delayed, however, and he subsequently withdrew his name from consideration. No other nominee has been named. Even without a permanent political head, the Agency has implemented a number of notable policy and enforcement initiatives over the last year.

1. OSHA Issues Final Rule Governing Injury and Illness Reporting

On January 25, 2019, OSHA published a final rule revising the "Improve Tracking of Workplace Injuries and Illnesses" regulation promulgated in 2016 under the Obama administration.⁶⁸ The original 2016 rule required employers with 250 or more employees to electronically file information from their OSHA Forms 300, 300A, and 301 with OSHA, and OSHA stated at the time that it would make the data publicly available.

64 HHS, Notice of Proposed Rulemaking, *Nondiscrimination in Health and Health Education Programs or Activities*, 84 Fed. Reg. 27,846 (June 14, 2019).

65 See Denise M. Visconti, with Finn Pressly and Anne Sanchez LaWer, *HHS Proposed Regulations Remove Protections from the Affordable Care Act for Transgender Patients*, Littler Insight (July 11, 2019).

66 See Denise Visconti, *HHS Final Rule Finds Categorical Exclusions for Health Services Related to Gender Transition Are Generally Unlawful*, Littler Insight (June 21, 2016).

67 *Franciscan Alliance, Inc. v. Burwell*, 227 F. Supp. 3d 660 (N.D. Tex. 2016).

68 OSHA, Final Rule, *Tracking of Workplace Injuries and Illnesses*, 84 Fed. Reg. 380 (Jan. 25, 2019).

The January 2019 final rule rolled back some of these requirements and employers are now only required to submit the general summary data regarding recordable injuries and illnesses from Form 300A and are no longer responsible for submitting information from their Forms 300 or 301. The new final rule reflects OSHA's desire to protect worker privacy, with the agency acknowledging that the collection of potentially sensitive personal health information, such as descriptions of employee injuries, birth dates of injured employees, and the location where such injuries took place, contained in the Forms 300 or 301 would create a privacy risk. OSHA determined that collection of such data would create an unacceptable risk that such information could be publicly disclosed through Freedom of Information Act requests and such risk was unjustified given the uncertain benefit of collecting such information. OSHA believed that the final rule would "maintain safety and health protections for workers while also reducing the burden to employers of complying with the current rule." Additionally, under the Trump administration, OSHA has stated that it will not make the 300A data available to the public for at least a certain number of years.

The final rule, however, did not change the regulation's original requirement that employers establish "reasonable" procedures for employees to report work-related injuries. Nor did the final rule change the original language giving the Agency additional authority to redress alleged discrimination and retaliation against employees for reporting a work-related injury or illness through the citation and notification of penalty process, instead of through the congressionally-authorized Section 11(c) anti-retaliation provision and process. Critics have voiced concerns regarding the vagueness of these provisions and their overall legality given Section 11(c) in the statute.

2. OSHA Issues New Guidance on Workplace Safety Incentive Programs and Post-Incident Drug-Testing Programs

While the revised workplace injury and illness tracking rule did not amend the "reasonable" reporting procedure and anti-retaliation requirements in the original Obama-era rule, in an October 11, 2018 memorandum to its regional administrators and state affiliates, OSHA clarified and rolled back some previous guidance that potentially penalized employers for certain safety-incentive and post-accident drug testing programs.⁶⁹ Certain of those programs had come under attack during the Obama administration as a result of the initial Improve Tracking of Workplace Injuries and Illnesses rule.

Safety Incentive Programs

OSHA's new guidance clarifies that incentive programs rewarding employees (and/or managers) with a prize or bonus for low injury rates are permissible as long as they "are not implemented in a manner that discourages reporting." Even if a prize or bonus is withheld because of a reported injury, the program would still be permissible under OSHA's new guidance so long as the employer has implemented adequate precautions to ensure that employees feel free to report injuries and illnesses. This represented a change in position from the prior administration, which appeared to outlaw many safety incentive programs based on lagging indicators. The new guidance also suggested that employers with incentive programs based on injury rates might also want to institute companion programs that, for example, reward employees for identifying unsafe conditions.

Post-Incident Drug-Testing Programs

OSHA also attempted to clarify in the memorandum that most types of workplace drug testing would be allowable. Some examples of permissible drug testing include: random drug testing; drug testing unrelated to the reporting of a work-related injury or illness; drug testing under a state workers' compensation law; drug testing under other federal law (*i.e.*, Department of Transportation regulations); and drug testing to evaluate the root cause of a workplace incident that harmed or could have harmed employees.

69 OSHA, Memorandum, [*Clarification of OSHA's Position on Workplace Safety Incentive Programs and Post-Incident Drug Testing Under 29 C.F.R. § 1904.35\(b\)\(1\)\(iv\)*](#) (Oct. 11, 2018).

3. OSHA's Standard Improvement Project IV Final Rule

On May 14, 2019, OSHA issued a final rule as part of its ongoing Standards Improvement Project (SIP).⁷⁰ Consistent with the project's rationale of reducing regulatory burdens while maintaining or enhancing worker safety and health, the updated regulations encompassed in the final rule generally simplified employer efforts both to comply with the Agency's requirements as well as to determine how compliance can be achieved. For example, the rule replaces 31 pages of regulatory text on how to manage hazardous chemicals in the construction industry with a cross reference to an identical standard for general industry. Even with OSHA's emphasis on regulatory simplification, however, there were several key requirements that employers should closely consider to ensure continued compliance with OSHA standards.

Hearing Loss Injury Reporting

The final rule modifies OSHA's requirement for reporting work-related injuries with regard to determining and reporting work-related hearing loss. Under section 1904.10(b)(6) of OSHA's regulations, employers have been excused from reporting an employee's hearing loss as a work-related injury when a physician or other licensed health care professional has determined the hearing loss neither is work-related nor was significantly aggravated by occupational noise exposure. Until the recent final rule, however, the reporting requirement did not expressly set out any standards for how such medical professionals could go about ruling out work-relatedness. With this final rule, OSHA has now made explicit in section 1904.10(b)(6) that medical professionals must use OSHA's rules in section 1904.5, general standards for determining the work-relatedness of an injury, in determining whether hearing loss is work-related.

911 Emergency Services

In the final rule, OSHA also updated requirements related to availability of 911 emergency services found in 29 C.F.R. 1926.50(f). When OSHA first promulgated the provision in 1979, it simply required the posting of phone numbers for physicians, hospitals, and ambulances in areas where 911 services were unavailable. But, with 911 services now available almost everywhere across the United States, OSHA in the SIP IV rulemaking identified a different problem. When a caller dials 911 on a landline phone, it is customary for the 911 dispatcher to automatically be provided the caller's location, which can greatly assist in pinpointing where medical services need to be sent. However, such location-services technology is not yet as ubiquitous on wireless phones. As a result, particularly in distant worksites that lack landline telephones, in the event a caller dials 911 on a wireless phone, neither the caller nor the phone being used might be able to tell the dispatcher where exactly the call is coming from.

Under OSHA's update to section 1926.50(f), employers in worksites that have 911 services available, but lack readily available landline telephones, must post in a conspicuous location either the worksite's latitude and longitude, or alternatively, other location-identification information that communicates effectively to employees the worksite's location. In light of this revision, employers that field employees in out-of-the-way worksites should ensure they provide those employees, whether on a bulletin board or another widely trafficked part of the worksite, information on precisely where their site is located.

Easing Regulatory Burdens

Finally, it is worth noting that several parts of the new rule increase employer flexibility or otherwise generally reduce regulatory burdens. One such instance concerns OSHA's standards involving employers' providing chest X-rays to employees. Not only has OSHA eliminated the requirements for periodic chest X-rays associated with employee exposure to certain chemicals (due to there being no discernable benefit in reducing either lung cancer risk or mortality), but it has also allowed employers the flexibility to choose digital rather than analog chest X-rays, as well as greater flexibility in the size of X-ray films, regarding exposure to a larger subset of chemicals.

70 OSHA, Final Rule, [Standards Improvement Project-Phase IV](#), 84 Fed. Reg. 21416 (May 14, 2019).

Another example concerns lifelines used standalone as well as with safety belts and lanyards, which previously had to supply a minimum of 5,400 pounds in breaking strength. With improvements in testing methodology, lifelines now only have to supply at least 5,000 pounds of breaking strength.

4. FAQs on Respirable Crystalline Silica

At the very beginning of 2019, OSHA published Frequently Asked Questions (FAQs) providing guidance to general industry employers on the application of OSHA's final rule regulating occupational exposure to respirable crystalline silica in general industry.⁷¹ OSHA developed the FAQs in consultation with the American Foundry Society and the National Association of Manufacturers. While the FAQs are voluminous, a few notable ones are discussed below.

- The standard applies to all occupational exposures to respirable crystalline silica, except the standard does not apply to: (1) construction work; (2) agricultural operations; and (3) exposure that results from the processing of sorptive clays. In addition, the standard does not apply where the employer has objective data demonstrating that employee exposure to silica will remain below the action level (AL) of 25 µg/m³ measured as an 8-hour TWA under any foreseeable conditions. In assessing whether certain activities are outside the scope of the standard, an employer does not necessarily need to assess exposures in the complete absence of controls.
- The standard requires employers to establish regulated areas wherever an employee's exposure to airborne concentrations of respirable crystalline silica is, or can reasonably be expected to be, in excess of the PEL. Employers must demarcate regulated areas from the rest of the workplace and post signs with a specified legend at all entrances to regulated areas. If an employer has, and adequately enforces, work rules precluding employees from entering a particular area, then the employer does not need to treat that location as a regulated area. An area also does not need to be designated as a regulated area if the employer has and enforces work rules limiting employees' time in the area so that there is no reasonable expectation that their 8-hour TWA exposures will exceed the PEL.
- The standard requires employers to use engineering and work practice controls to reduce and maintain employee exposure to silica to or below the PEL, unless they can demonstrate that such controls are not feasible. Administrative controls are an acceptable means of reducing employee exposures under the standard. An employer could reduce an employee's exposures by scheduling high-exposure tasks to be conducted when that employee will not be working in an adjacent area. The standard also does not prohibit the rotation of employees to limit employee exposures.
- The standard requires employers to implement a written exposure control plan that contains: (1) a description of the tasks in the workplace that involve exposure to silica; (2) a description of the engineering controls, work practices, and respiratory protection used to limit employee exposure; and (3) a description of the housekeeping measures used. The plan must be reviewed and evaluated for effectiveness at least annually and updated as necessary.
- Under the standard, employers must not allow dry sweeping or dry brushing "where such activity could contribute to employee exposure to respirable crystalline silica unless wet sweeping, HEPA-filtered vacuuming or other methods that minimize the likelihood of exposure are not feasible." However, if an employer has objective data demonstrating that employee exposure will remain below the AL under any foreseeable conditions, the prohibition on dry sweeping and dry brushing does not apply. Furthermore, the standard does not require employers to demonstrate that wet methods, a HEPA-filtered vacuum, or other methods are *impossible* to use in order to establish "infeasibility."

71 OSHA, *Frequently Asked Questions for General Industry*, available at https://www.osha.gov/dsg/topics/silicacrystalline/generalindustry_info_silica.html.

5. OSHA's Site-Specific Targeting Program

Finally, with respect to enforcement, OSHA recently launched a program aimed at combating high injury and illness rates—the “Site-Specific Targeting Program” or SST. It is now OSHA’s primary site-specific, programmed inspection initiative. Implemented across national, regional, and area OSHA offices, the SST program uses injury and illness Form 300A data electronically submitted by employers with 20 or more employees to identify workplaces for inspection. Previously, OSHA had used injury and illness information collected under the OSHA Data Initiative. The SST program applies to both manufacturing and non-manufacturing sectors, but excludes construction worksites. It is not intended to include office-only work environments. Employers that are approved participants in the Pre-Safety and Health Achievement Recognition Program may be granted a deferral from OSHA programmed inspections, including SST.

OSHA’s SST program directs enforcement resources to workplaces with the highest rates of injuries and illnesses, but inspections will not be *limited* to worksites with the highest rates of these issues. Under the SST program, OSHA will also randomly inspect worksites that did not provide the required Form 300A data—an effort to discourage employers from failing to report. Further, OSHA will inspect a random sample of “low-rate establishments” for quality control purposes. Therefore, employers with low rates reported on their Forms 300A are not necessarily excluded from possible SST inspection.

When a worksite is identified for inspection under the SST, the Office of Statistical Analysis provides OSHA Area Offices with access to the “Inspection List.” Only OSHA and State Plan States can access this data. Area Offices are required to inspect all establishments on the SST Inspection List unless the Regional Administrator specifically authorizes otherwise.

SST inspections are required by OSHA to be comprehensive in scope. An SST inspection can be opened as either a comprehensive safety or health inspection, based on the Area Office’s knowledge of the workplace characteristics. But, if the site has been inspected previously, an Area Director may expand the inspection to cover both health and safety hazards based on that prior inspection history. The Area Director is required to document the rationale for any expanded inspection.

In addition to the SST, OSHA continues to utilize inspection programs targeting hazards and industries identified as “high risk” such as lead, ship-breaking, trenching/excavations, process safety management, hazardous machinery, hexavalent chromium, primary metal industries, and combustible dust. OSHA also has approximately 100 regional or local programs addressing areas of emphasis identified by OSHA.

G. Immigration

This year the Trump administration has continued its focus on border security and immigration enforcement efforts. These policies have had a significant impact on employers seeking to hire foreign workers.

1. Visa Denials Increase

In April 2017, President Trump signed the Buy American, Hire American executive order, which called for the application of existing U.S. laws to visa recipients and the re-evaluation of the H-1B program. The order requests various agencies to promulgate new rules to “supersede or revise previous rules and guidance, if appropriate” under existing law, ostensibly to protect American workers. In the two years since the Buy American, Hire American order was announced, several changes have occurred with visa adjudications. Notably, the United States Citizenship and Immigration Services (USCIS) has begun implementing stricter guidelines, and employers have noticed an increase in more restrictive adjudication of visa petitions.

Specifically, denial rates have spiked exponentially, with the H-1B and L-1 visa classifications notably taking the hardest hits. Put in perspective, in FY 2015, H-1B denial rates hovered around 6%, increasing just slightly in FY 2016 to 10% and in FY 2017 to 13%. FY 2018 saw the first dramatic rise in H-1B denials, with rates increasing to 24%. In FY 2019, H-1B denial rates have hit an all-time high of 32%—a direct result of the Trump administration’s hardline stance on immigration.⁷²

⁷² USCIS H-1B Employer Data Hub, National Foundation for American Policy.

Likewise, L-1B denial rates increased between the first and fourth quarters of FY 2017 from 21.7% to 28.7%; an approximately one-third increase in the denial rate within the same fiscal year. Almost half (48%) of Indian nationals whose employers sought to transfer them into the U.S. via L-1B petitions had their applications denied in the 4th quarter of FY 2017, representing an increase from an already high 36% denial rate in the 1st quarter of FY 2017. Demonstrating the trend in adjudications is continuing. In the first quarter of FY 2018, the denial rate was 30.5% for all L-1B petitions and 29.2% in the 2nd quarter of FY 2018. Between the first and fourth quarter of FY 2017, the denial rate increased by 67% (from 12.8% to 21.4%) for L-1A petitions, which are used to transfer managers and executives into the U.S. By the last quarter of 2018, L-1B denials were up to almost one in every three petitions.⁷³

2. ICE Continues to Increase Raids and Audits

U.S. Immigration and Customs Enforcement (ICE) continued to increase its worksite enforcement. ICE worksite enforcement comes in two forms. The first type of enforcement is an I-9 audit. When ICE initiates an I-9 audit, an employer has only three days to provide the requested I-9s to ICE. ICE will then review the I-9s to determine if there are any errors, and will issue fines ranging from \$230 to \$2,292 per each form with a substantive error. ICE will also ensure employees are authorized to work and are not using fraudulent documents. The employment of any employees who lack work authorization must be terminated. In FY 2018, ICE initiated 5,981 I-9 audits compared to 1,360 in the previous years. We expect the FY 2019 numbers to be similar or surpass those for FY 2018. When ICE began increasing its I-9 audits, its former Acting Director indicated his goal was to conduct 15,000 audits per year.

The second form of worksite enforcement, the so-called “raid” in which ICE arrests employees who lack work authorization or who have otherwise put their lawful immigration status in jeopardy, has likewise increased. There have been several raids across the country involving the arrests of sometimes hundreds of employees at their place of work. On August 7, 2019, for example, ICE raided several employers in Mississippi. According to ICE, the raids resulted in the arrests of approximately 680 undocumented workers. We expect ICE will continue large worksite raids.

In the first part of the year, the Social Security Administration began reissuing no-match letters. While no-match letters are not issued due to an employee’s immigration status, if employees fail to respond to a no-match letter, the employee’s failure to respond may implicate immigration compliance issues. It is likely the return of the no-match letter is linked to the Trump administration’s increased focus on immigration enforcement.

3. DOL Issues Guidance on Complying Electronically with H-1B Posting Requirement

In March, the U.S. Department of Labor’s Wage and Hour Division issued a Field Assistance Bulletin (FAB) providing guidance on acceptable ways to notify employees electronically of plans to hire foreign workers.⁷⁴

The Immigration and Nationality Act and H-1B regulations require an employer to notify all affected employees of its intent to hire H-1B nonimmigrant workers. Affected employees are those at the same worksite, in the same occupational classification as the prospective H-1B worker, and also include individuals employed by a third-party employer. This posting requirement informs U.S. workers of the terms of the H-1B workers’ employment, as specified on the Labor Condition Application (LCA). It is intended to protect U.S. workers by informing them of their right to examine certain documents and to file complaints if they believe that violations have occurred.

The notification must occur in one of three ways: (1) by posting a hard-copy notice; (2) via electronic notification; or, when applicable, (3) by providing notification to a collective bargaining representative. The DOL’s new guidance makes clear that no matter which method employers use, they must ensure that the notification is readily available to all affected employees. This may

⁷³ *Id.*

⁷⁴ See Jorge Lopez and Michelle White, [DOL Issues Guidance on Complying with the H-1B LCA Posting Requirement Electronically](#), Littler ASAP (Mar. 26, 2019).

require employers to evaluate their current LCA posting practices at their worksites, including those of third-party employers that place H-1B workers at their worksites. Among other things, the guidance clarifies that if an employer has not taken steps to make affected employees aware of the existence or location of the electronic notification, then the employer has not complied with the posting requirement.

4. USCIS Issues Final Rule Prioritizing Advanced-Degree Petitions, Implementing Electronic Registration

The H-1B visa is used by businesses that want to employ foreign nationals to work in a specialty occupation requiring theoretical or technical expertise. There is an annual limit of 65,000 visas available for H-1B petitions, with an additional 20,000 reserved for individuals who have earned a U.S. master's degree or higher. On January 31, 2019, the United States Department of Homeland Security issued a new final rule⁷⁵ that is designed to give preference to advanced-degree petitions. The rule also introduced an electronic registration requirement.

If USCIS receives more than enough petitions to meet the standard and advanced-degree quotas during the first five business days of the filing season, it will conduct a computerized lottery to choose cases for processing. In past years, the lottery had first focused on selecting advanced-degree petitions to fill the cap exemption quota of 20,000. Then, remaining unselected advanced-degree cases were put into a second lottery to select enough petitions to meet the standard quota of 65,000. This year, USCIS has reversed the lottery selection process.

Under the new rule, which became effective April 1, 2019, all petitions (including those eligible for the advanced-degree exemption quota) are first subject to a computerized lottery to select a sufficient number of petitions to fill the standard quota of 65,000. Then, remaining unselected advanced-degree cases are entered into a second lottery, composed of advanced-degree petitions only, to fill the cap exemption quota of 20,000. USCIS estimated that this change would result in an increase of up to 16% (or 5,340 workers) in the number of selected petitions for H-1B beneficiaries with a master's degree or higher from a U.S. institution of higher education.

The rule also introduced an electronic registration requirement for petitioners seeking to file H-1B cap-subject petitions. DHS anticipates the registration requirement will be implemented next year, starting with the FY 2021 H-1B cap. Once the electronic registration system is implemented, U.S. employers will be required to electronically register each potential H-1B employee by providing USCIS with basic information about the person and the position. Employers will also be required to attest, among other things, that they intend to file an H-1B petition for the beneficiary in the position for which the registration is filed. Petitioners will need to file a separate registration for each beneficiary and will be limited to one registration per beneficiary for the same fiscal year. The agency will conduct the H-1B lottery from the pool of timely-filed electronic registrations, and only those who are selected will be eligible to file a full petition and receive an adjudication.

5. USCIS Plans to Issue Proposed Rule Revising H-1B Visa Program

According to the Department of Homeland Security's spring regulatory agenda, the USCIS is working on 21 separate rules in various stages of development. Among them is a proposed rule governing the H-1B visa program. The stated purpose of this proposed rule—*Strengthening the H-1B Nonimmigrant Visa Classification Program*—is:

to revise the definition of specialty occupation to increase focus on obtaining the best and the brightest foreign nationals via the H-1B program, and revise the definition of employment and employer-employee relationship to better protect U.S. workers and wages. In addition, DHS will propose additional requirements designed to ensure employers pay appropriate wages to H-1B visa holders.

75 USCIS, Final Rule, [Registration Requirement for Petitioners Seeking To File H-1B Petitions on Behalf of Cap-Subject Aliens](#), 84 Fed. Reg. 888 (Jan. 31, 2019).

The regulatory agenda had set an August 2019 date for issuing this proposal, although such dates are typically aspirational. As of the date of this Report's publication, the USCIS had not yet issued its Notice of Proposed Rulemaking on H-1B visas.

I. State of the States

Since last Labor Day, over 300 generally applicable labor and employment laws have been enacted at the state level.⁷⁶ This number does not reflect the paid sick leave, minimum wage, anti-discrimination, and other measures adopted at the municipal level. Without a federal consensus on many politically charged issues, states have picked up the slack. This is especially true in states operating with political "trifectas"—*i.e.*, both legislative chambers and the governorship are controlled by a single party. For example, Colorado, Illinois, Maine, Nevada, New Mexico, and New York all gained Democratic trifectas following the November 2018 midterm elections, and the results are clear.

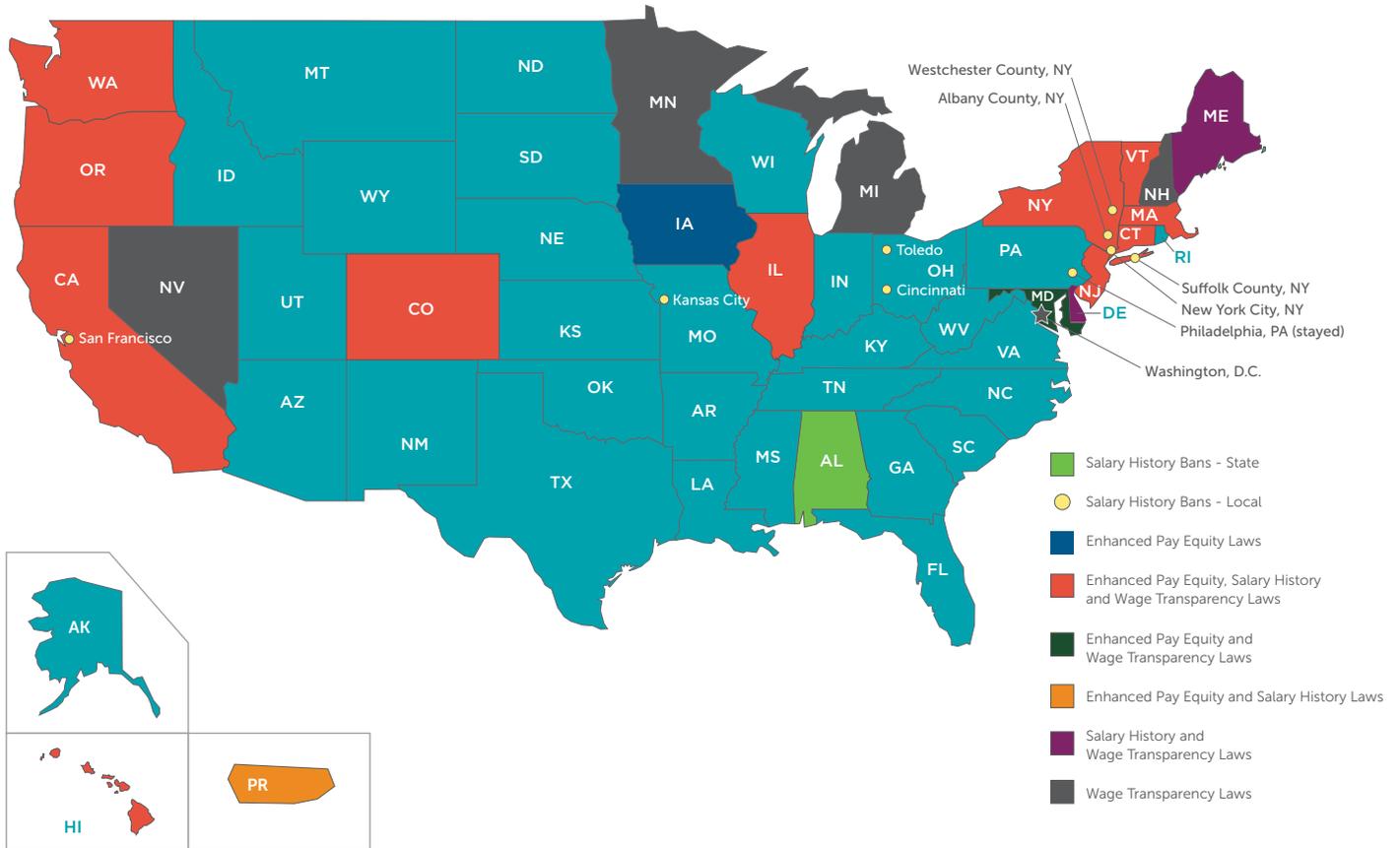
- **Colorado:** This past year, Colorado enacted new employment-related laws governing equal pay, salary history inquiries, criminal history inquiries, and wage theft penalties, and has repealed its law preventing localities from enacting higher minimum wages.
- **Illinois:** Illinois has been busy enacting bills the prior Republican governor vetoed, including those involving salary history restrictions, anti-right-to-work efforts, \$15 minimum wage, equal pay, and recreational marijuana use, to name a few. Illinois also recently enacted a sweeping anti-harassment law that contains mandatory training requirements and limits on arbitration agreements.
- **Maine:** The Vacation State enacted over 20 new labor and employment laws this year, including those addressing salary history restrictions, pregnancy accommodation, paid leave, and non-compete agreements.
- **Nevada:** Nevada similarly enacted over 20 new labor and employment laws this year, including those requiring paid leave, addressing worker misclassification, restricting criminal history inquiries, and prohibiting nondisclosure agreements for sex-based claims.
- **New Mexico:** New Mexico enacted laws allowing union membership to be required as a condition of employment, prohibiting employers from discriminating based on sexual orientation and gender identity, limiting criminal history inquiries, and allowing employees to use paid sick time for caregiving purposes.
- **New York:** Like a number of other states this year, New York enacted a law limiting salary history inquiries. The Empire State also enacted laws prohibiting race discrimination based on hairstyles and discrimination based on immigration status, and strengthened its pay equity law.

The above examples show that states will continue to lead the charge, and that elections matter. As a result, multi-state employers must contend with an ever-growing patchwork of workplace obligations.

⁷⁶ See, e.g., Bruce Sarchet, [July Is Always the "New January" for Employment Laws, But This Year Takes the Cake!](#), Littler Insight (June 13, 2019); James A. Paretti, Jr. and Michael J. Lotito, [Employers are Preparing Now to Tackle 2019's Newest Labor and Employment Laws](#), Littler Insight (Nov. 13, 2018).

2. Salary History, Wage Transparency, and Enhanced Equal Pay Laws

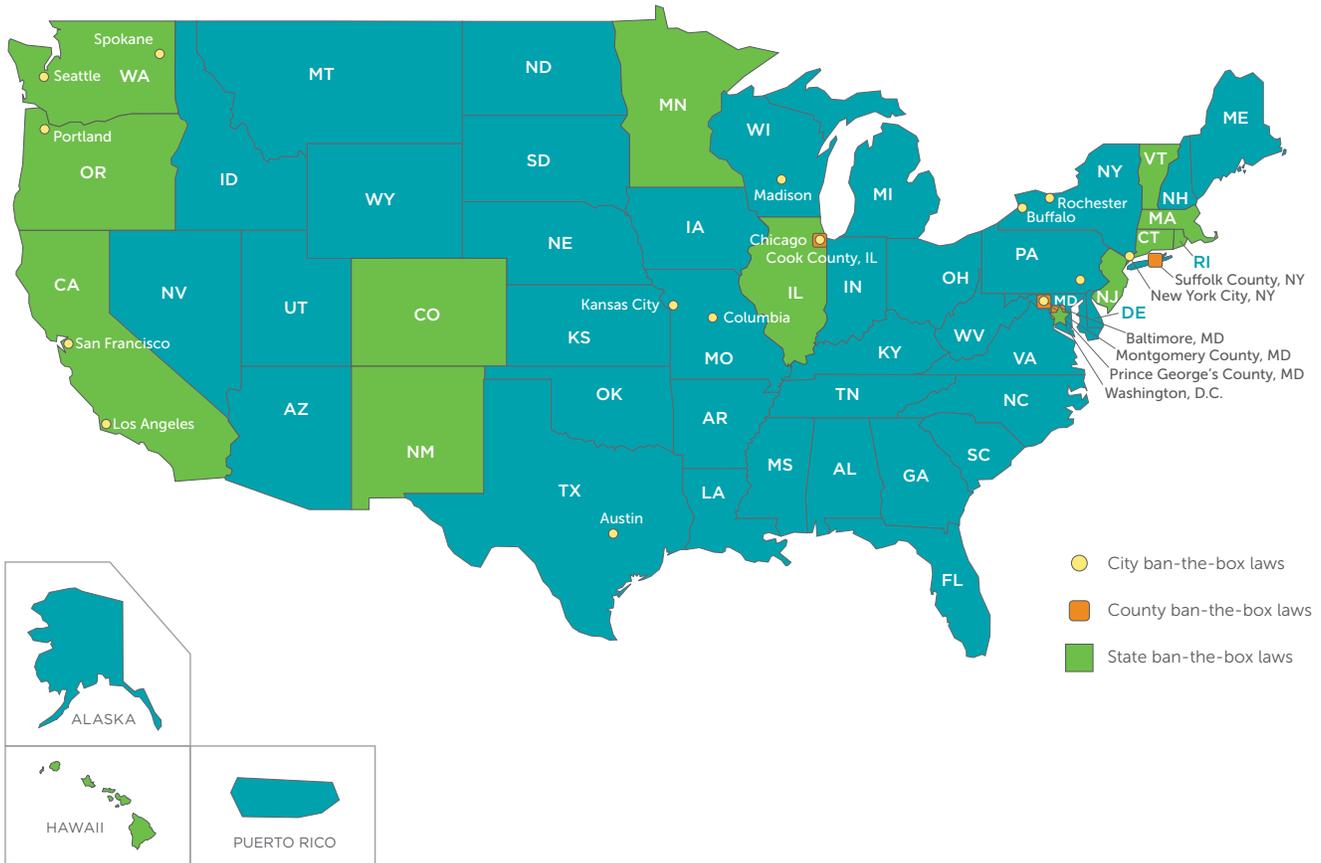
The number of state and local laws that restrict an employer’s ability to solicit an applicant’s salary history information is growing. The idea behind such laws is that a discriminatory wage decision should not have repercussions throughout an employee’s career. Along the same lines, some states have enacted laws preventing an employer from prohibiting wage discussion in the workplace. These laws are a separate, yet related, component of strengthened pay equity laws. Several other states have enacted jurisdiction-specific pay equity laws that are more stringent than the federal Equal Pay Act.⁷⁷



77 See Patricia J. Martin, Denise M. Visconti, and Corinn Jackson, *Minding the Pay Gap: What Employers Need to Know as Pay Equity Protections Widen*, Littler Report (Aug. 1, 2019).

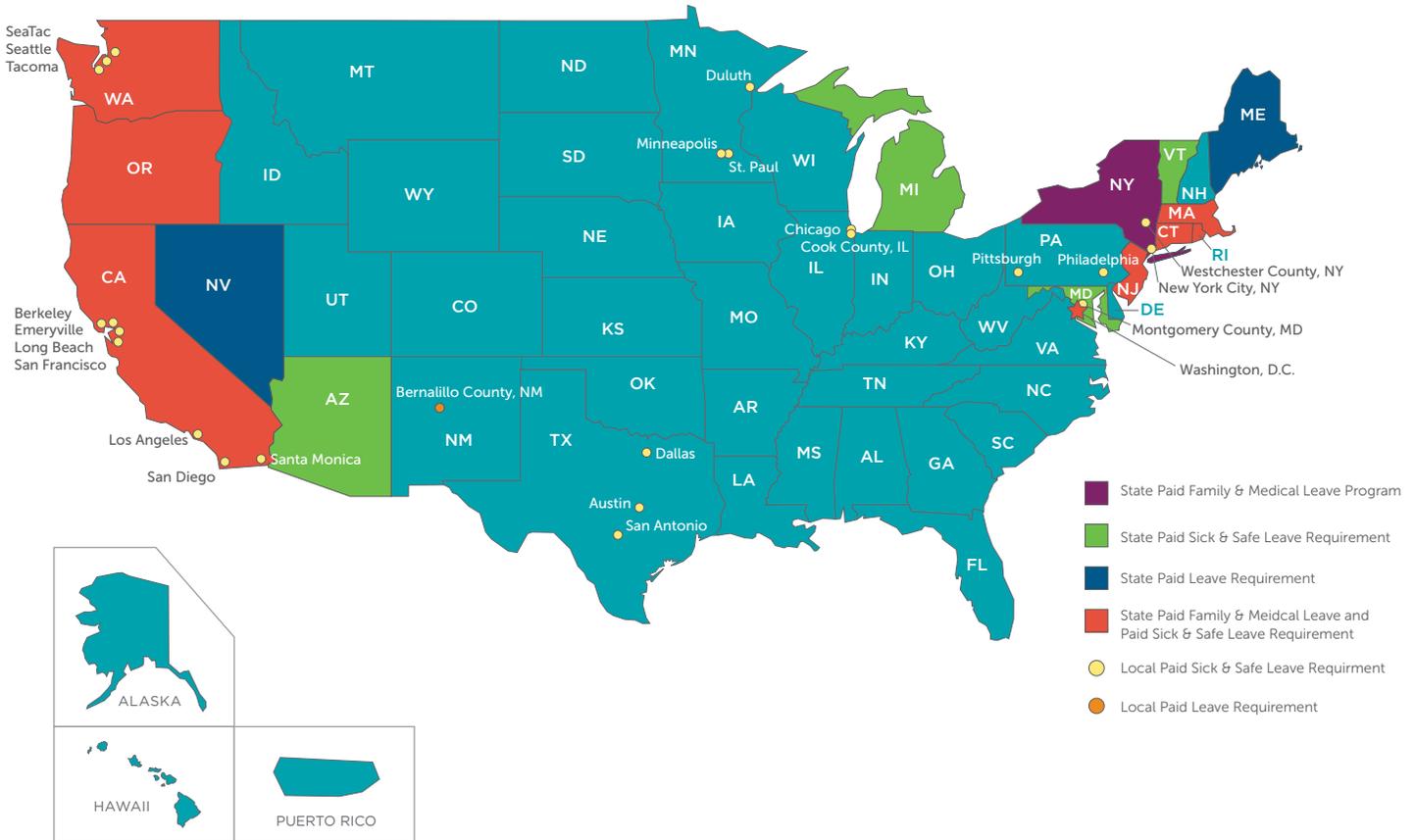
4. Ban-the-Box Laws

Colorado and New Mexico joined several other states this year in prohibiting private-sector employers from inquiring about a job applicant’s criminal record on an employment application. These state and local laws vary, as some prevent such inquiries at the application stage, while others prevent such inquiries until a job offer has been extended. In addition, some laws ban job advertisements that state applicants with criminal records need not apply.



5. Jurisdictions with Paid Sick & Safe or Paid Leave Laws

Many jurisdictions have enacted laws requiring employers to provide paid leave generally, or to provide paid leave for an employee's or the employee's family member's illness or need to take leave related to an incident of domestic violence, sexual assault, or stalking, often referred to as "safe" leave. As with other state laws governing the workplace, the coverage and scope of these laws vary substantially.⁷⁸ To complicate matters, these laws are distinct from states that have paid family and medical leave insurance-type programs in place.



Part III: Conclusion

The window for advancing national employment reform this administration—either legislatively or through rulemaking—is closing. Soon the 2020 election season will dominate the administration's attention. States, however, will continue to push the envelope when it comes to shaping workplace policy. The economy, meanwhile, appears to be heading toward a recession, which will no doubt affect employment.

Next Labor Day may bring a very different employment outlook for the coming year. In the meantime, Littler's WPI will continue to monitor these workplace developments and report on any significant changes.

78 See Michael Lotito, D. Mark Wilson, Sebastian Chilco, Corinn Jackson, and E.R. Anderson, *Paid Sick Leave: Deconstructing the Patchwork to Develop a Way Forward*, WPI Report (May 6, 2019).

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