



WPI Labor Day Report 2020

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Introduction

Prior Workplace Policy Institute (WPI) Labor Day Reports focused on key employment developments and trends to provide employers with insight on the state of work and what to expect in the coming year.¹ Employers need no reminder that 2020 is unlike any year they have ever experienced.

The COVID-19 pandemic has fundamentally changed employment. The unemployment rate hit historic levels in recent months. Those able to work are juggling family care obligations, new safety protocols, and work environments—whether remote or on-site—that bear little resemblance to their prior workspaces. Employers, meanwhile, are struggling to remain in business and/or resume operations amid varying shutdown orders, significant decreased demand for goods and services, new leave and accommodation requirements, stringent reopening guidelines, and potential liability stemming from coronavirus-related claims. Many businesses have shut their doors for good.

The challenges employees and employers continue to face this Labor Day are enormous and unprecedented. Even when the coronavirus is finally behind us, many of these challenges will remain. Accordingly, this year's Labor Day Report necessarily focuses on the state of employment in the context of the global pandemic.

Part I of this Report provides a snapshot of the current jobs market. This section includes data on unemployment and which jobs and worker demographics have been most impacted. Notably, from March to April 2020, total payroll jobs decreased by 20.8 million—the largest single-month change in the history of the U.S. payroll jobs survey. Initial unemployment insurance (UI) claims increased by record numbers during this time. From March 15 through July 18, workers filed 49.4 million initial claims. The total number of people receiving UI benefits under the regular state-administered program in June increased 1,000% over last year's numbers. The private sector was hit hardest, losing 21.2 million jobs between February and April. By July, private-sector jobs remained down by over 9%, and those who considered themselves “unavailable” for work reached 98.5 million, suggesting the coronavirus led some to stop seeking work altogether.

The hospitality and retail industries have suffered the most. In June 2020, the number of individuals receiving unemployment in the hotel and restaurant/food services sector increased more than 2,500% compared to June 2019. The number of those receiving unemployment in the retail trade industry increased over 1,350%. The franchise sector fared slightly better than non-franchise employers during the employment collapse. In terms of demographics, women, Black workers, and those ages 16-24, have been hardest hit by unemployment during the pandemic.

Part II discusses ways in which the nature of work has changed. Teleworking is the new normal. According to a Bureau of Labor Statistics survey, in July, approximately one in four employees teleworked or worked from home because of the coronavirus. Most employees able to telework want to continue to do so at least one day per week after the COVID-19 emergency has subsided. The move to telework, however, brings a new set of employment law challenges. Those employers that are able to or must continue on-site operations have their own issues with which to contend. Employers are juggling a host of legal and public health concerns while ensuring the safety and health of employees as they return to work. Meanwhile, during the pandemic, the demand for certain gig economy services, such as food service delivery, increased significantly. As more permanent jobs disappear, more workers are expected to pivot to work as independent contractors, although certain legislative efforts at the state and federal level might make this transition more difficult.

1 See Michael J. Lotito et al., *WPI Labor Day Report 2019*, WPI Report (Sept. 3, 2019); *WPI Labor Day Report 2018*, WPI Report (Aug. 30, 2018).

* Economist Ronald Bird, PhD, provided the charts and tables summarizing publicly available data describing the current status and recent trends in the U.S. labor market.

Part III provides an overview of the types of claims employers are facing in light of COVID-19. Plaintiffs have filed numerous lawsuits stemming from COVID-19 in federal and state courts since March 2020, ranging from customer and client claims related to COVID-19 exposure, to more focused claims from employees under various federal, state and local laws addressing workplace health and safety, non-discrimination, and employment termination. Over 600 pandemic-related lawsuits (including at least 72 class actions) allege labor and employment violations specifically. The greatest share of claims have been filed against healthcare employers.

Part IV addresses federal and state efforts to manage the employment-related aspects of the crisis. To date, Congress has adopted four significant pieces of legislation responding to COVID-19. The fate of future legislative relief, however, remains highly unclear, given the current legislative stalemate. As with other labor and employment issues, states are quick to jump in with new laws and regulations when Congress fails or is slow to act. Hundreds of employment-focused state and local bills, ordinances, executive orders, and regulations have been enacted or issued—many on a temporary basis—in response to COVID-19. These mandates address a range of workplace issues impacted by the pandemic.

Part V offers some factors that may provide clues about where the economy is headed. While it is impossible to predict with any certainty what employers can expect in the months ahead, this section discusses some benchmarks that may be instructive. Indices and surveys such as the Consumer Confidence Index (CCI), Bureau of Labor Statistics' monthly Employment Situation Report, and U.S. Census Small Business Pulse Survey, may be useful in gauging economic resurgence. Other factors, such as long-term unemployment indicators, can demonstrate how fast the economy is recovering. Finally, the results of the November elections—and therefore which federal and state lawmakers and regulators will be managing the coronavirus crisis—will certainly play a role in the country's economic health.

We hope this Report is informative, and that next year's Labor Day Report will look very different.²

² Please note that this Report analyzed data that was available as of August 28, 2020. As the economic situation is in a constant state of flux, WPI will provide periodic updates.

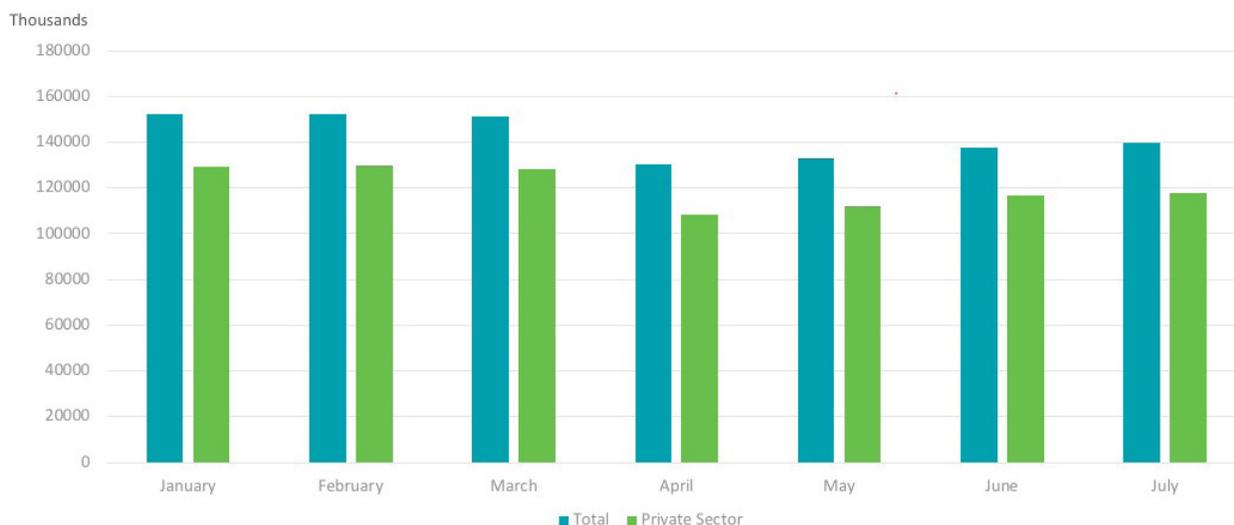
Part I – Current Jobs Market

The contraction of payroll employment in 2020 was remarkable for both its severity and its speed. Total payroll jobs decreased by 1.4 million in March and then by **20.8 million** in April. Never in the history of the U.S. payroll jobs survey,³ which began in 1939, has there been a single-month total change as large as the 14.5% drop in employment from March to April.⁴ This was greater than the 8.6 million jobs lost (6.2%) during the financial crisis recession of 2008-2009, which was spread over 23 months instead of two.

Private-sector employment was hit harder than the public sector. Private-sector jobs fell by 21.2 million—95.7% of the 22.2 million total contraction—from February to April. In April, private establishment payrolls were down 16.3% compared to February, and despite gains in following months, private jobs remained down by 9.1% in July 2020.

This jobs-lost data does not include workers who remained on payrolls but experienced wage losses because of reduced hours or pay, or lost sales commissions or tips. The payroll jobs losses also omit the lost work and earnings of self-employed small business owners, independent contractors, craft trades workers, professional services providers (lawyers, dentists, etc.) and independent service providers. Even those who were able to switch to remote operation platforms likely experienced a loss of productivity and income.

U.S. Nonfarm Payroll Employment in 2020



Source: U.S. Bureau of Labor Statistics, *Employment Situation Reports (monthly)* at www.bls.gov. <https://www.bls.gov/webapps/legacy/cesbtabs1.htm>

As employment fell in March and April, the number of unemployed workers increased from 5.8 million in February to 23.1 million in April—a four-fold increase. Individuals are counted as unemployed only if they are actively seeking work or have been furloughed with an expectation of being recalled.

³ The U.S. Bureau of Labor Statistics (BLS) conducts two monthly surveys that measure employment levels and trends. One is the payroll survey (CES), which is designed to measure employment, hours, and earnings in the nonfarm sector. A representative sample of businesses in the U.S. provides the data for the payroll survey. See BLS, *Labor Force Statistics from the Current Population Survey*.

⁴ Note: During 1944 and 1945, payroll employment declined by 5.4 million, a 12.6% decline from the November 1943 peak, but this was associated with transfer of over 3 million civilian workers to military duty in preparation for the D-Day invasion and the temporary layoff of 2 million workers in August and September 1945 as armament production was curtailed after the war ended.

The increase in the number of unemployed from February to April—17.3 million—was less than the 22.2 million reduction in jobs, in part because the changed reality of the labor market combined with the constraints of the public health crisis led many who were out of a job to retreat to the sidelines. These individuals were therefore classified as not in the labor force despite actually wanting a job and being available to work. These people are part of the “marginally attached” workforce—those not in the “official” labor force definition because they were not actively seeking work.

In February, there were 1.5 million available workers in the “marginally attached” category, the typical monthly level for the previous year. By April, the marginally attached available workers number had grown to 2.3 million and the number increased to 2.5 million in June, before slipping back to 2.0 million in July. Coronavirus fears or logistical challenges it created, such as lack of childcare, likely led some to stop seeking work. In February, there were 93.7 million Americans age 16 and older who were not in the labor force but not in the marginally attached group of interested and available to work. By April, that number had grown to 101.1 million—a record high. In July, that “unavailable” non-worker group remained at 98.5 million, which is 5.2% higher than in February. This suggests that the coronavirus may have changed the motivations of many potential workers.

U.S. Unemployment: From Low to High in Two Months

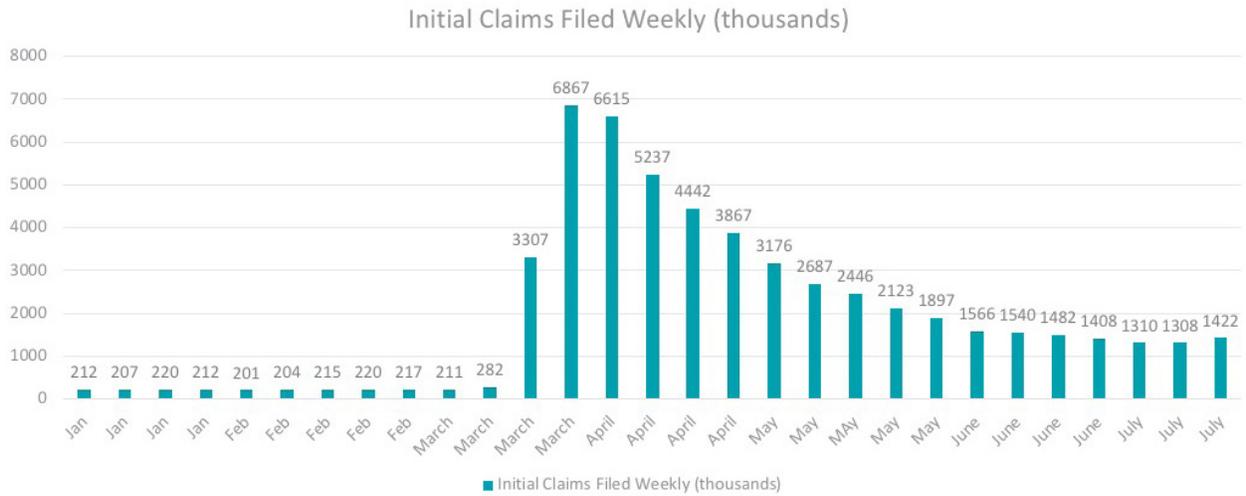


Source: U.S. Bureau of Labor Statistics, *Employment Situation Reports (monthly)* at www.bls.gov

The unemployment insurance system provides partial replacement of lost wages for workers in covered employment who are laid off because of economic conditions or individual workplace closures or changes. The system is administered by each state under general operating rules established under federal law and overseen by the U.S. Department of Labor. Reflecting the strong labor market and low overall unemployment, the February weekly initial claims numbers were near historic lows. During that month, about 200,000 new claims for unemployment insurance benefits were filed each week as workers experienced layoffs from workplace closures or reorganization in the normal course of business.

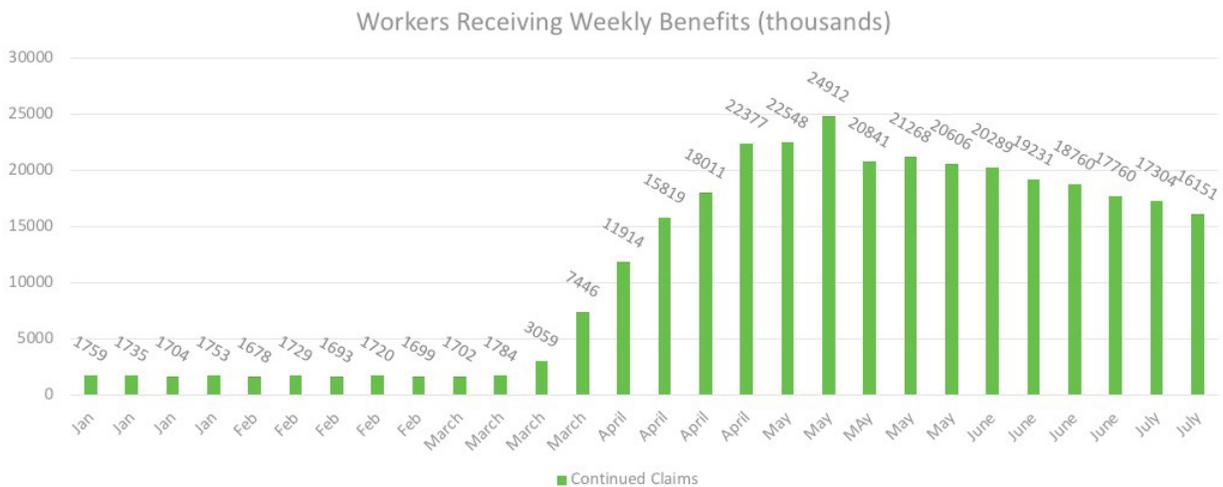
Initial claims increased by unprecedented numbers during the weeks ending March 21 (+3.3 million), March 28 (+6.9 million) and April 4 (+6.6 million). Initial claim filings declined over the ensuing weeks, but for the week ending July 18, initial claims were 1.4 million, still above the highest number ever recorded during any previous recession (665,000 the week ending March 28, 2009). In the four months from March 15 through July 18, 2020, American workers filed a total of 49.4 million initial claims for unemployment insurance benefits. This represents 33.1% of the 145.7 million workers covered by the unemployment insurance system. The unparalleled workload imposed on state unemployment offices makes it difficult to know the extent to which this sum includes duplicative individual claims.

Historic Number of Unemployment Insurance Claims Filed



In February 2020, the total number of persons receiving weekly benefits was about 1.7 million. Beginning in late March, the number of unemployed workers receiving benefits rose sharply to 3.1 million the week ending March 21 and to 24.9 million the week ending May 9. In the weeks since, the number of weekly beneficiaries has gradually declined to the 16 million level near the end of July.

Based on the latest available DOL data regarding state UI claimants (first quarter 2020 averages), the typical UI beneficiary received about \$374 per week, which replaced about 40% of lost covered prior earnings (\$932). The Coronavirus Aid, Relief and Economic Security (CARES) Act’s temporary expanded unemployment insurance benefits added \$600 per week to a recipient’s weekly benefit amount through July 31, 2020.⁵ This \$600 weekly supplement may have placed the average beneficiary at about 100% lost wage replacement. For claimants whose prior covered wages were less than average, the wage replacement result might have been greater than 100% after adding the \$600 flat amount.

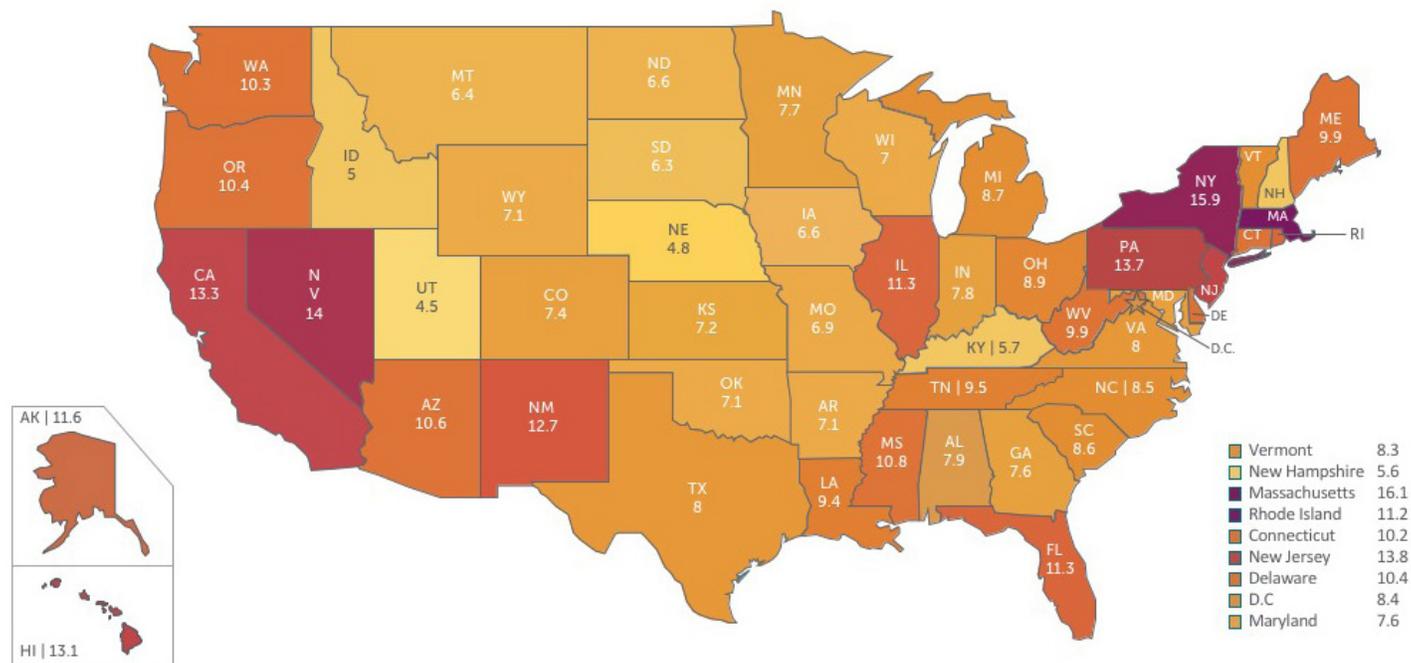


⁵ Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136 (2020). See also William Hays Weissman, [What Government Actions to Address COVID-19 Really Mean For Employers](#), Littler Insight (Mar. 30, 2020); William Hays Weissman, Jim Paretto and Michael Lotito, [New DOL Guidance Clarifies Eligibility for \\$600 Payments under CARES Act](#), Littler ASAP (Apr. 5, 2020).

The unemployment rate varied widely by state. In July 2020, Massachusetts registered the highest rate of unemployment (16.1%), while Utah reported the lowest rate (4.5%). As indicated in the below map, the states shown in red had the highest unemployment rates: Massachusetts (16.1%), New York (15.9%), Nevada (14.0%), New Jersey (13.8%), Hawaii (13.1%), Pennsylvania (13.7%), California (13.3%), and New Mexico (12.7%). States with lowest unemployment rates were Utah (4.5%), Nebraska (4.8%), Idaho (5.0%), and Kentucky (5.7%).

State Unemployment Rates

Massachusetts highest at 16.1%, Utah lowest at 4.5% (July 2020)



Source: Bureau of Labor Statistics, "State Employment and Unemployment Monthly" July 2020 (<https://www.bls.gov/news.release/laus.t01.htm>)

State variations seem to reflect a variety of factors, including the extent of virus infection cases in the early stages of the spread, the extent of public health measures adopted affecting economic activity, and the relative size of employment in the hard-hit leisure and hospitality industry sector. As the extent and severity of infection in the summer has spread to states that had relatively lower unemployment rates in July, it will be important to watch how the unemployment rates in those states change in the months that follow.

The surge in unemployment insurance claims varied by state as well. Compared to the same time last year, the total number of persons receiving UI benefits under the regular state-administered program was 17.1 million in June 2020, 15.6 million more than a year earlier—a 1,000% increase compared to the 1.5 million in June 2019. This 15.6 million increase was concentrated in seven states – California (+2.5 million), New York (+1.5 million), Texas (+1.1 million), Florida (+988 thousand), Pennsylvania (+649 thousand), Georgia (+645 thousand), and Illinois (+617 thousand). These seven states accounted for 51% of the 15.6 million national increase in the number of unemployment insurance beneficiaries.

State unemployment agencies are struggling financially and logistically to handle the steady influx of claims.⁶ Initial UI claims should be recorded for the week submitted, but data revisions weeks later suggest the failure to do so. Under normal circumstances, initial claims should be processed and approved or denied within a week; even if a claim is approved tardily, benefits should be due beginning the week following the initial claim filing. Anecdotal evidence, however, suggests some payments have been slow or nonexistent.

6 See, e.g., Courtenay Brown, *A quandary for state unemployment agencies*, Axios.com (last visited Aug. 11, 2020).

On August 8, 2020, the president issued a memorandum⁷ that allows states to extend enhanced unemployment insurance benefits through the end of the year, although at a lower rate than had previously been authorized. Expanded UI benefits of up to \$600 per week, authorized by the CARES Act,⁸ expired on July 31, 2020. Under the executive memorandum, the Federal Emergency Management Agency (FEMA) is directed to provide up to \$44 billion in previously approved disaster aid for states to make available for lost wages. States are allowed to determine the level of benefit increase (up to \$400/week), and are required to fund 25% of the increase (although some administration officials have indicated that states may be allowed to seek a waiver for their portion of funding).

On August 18, 2020, the U.S. Department of Labor announced that seven states (Iowa, Arizona, New Mexico, Louisiana, Utah, Colorado, and Missouri) were granted the first round of funding under the Lost Wages Assistance (LWA) Program.⁹ At least 19 states have applied for the aid expansion. The LWA program, however, is a temporary stopgap measure with limited funding. A more long-term and sustainable solution will have to come from Congress.

Impacted Demographics

Women have been hardest hit by unemployment during the pandemic's economic contraction, experiencing relatively greater increases in the level and rate of unemployment. In February, when the labor market was at its pre-recession best, the 2.7 million unemployed women comprised 46.6% of total unemployed and the 3.1 million unemployed men comprised 53.4% of the total. By April, the number of unemployed men had risen 8.1 million to 11.2 million total, but the number of unemployed women had risen by 9.2 million to a total of 11.9 million. Thus, by April, women comprised 51.4% of total unemployed. In May through July, the levels of unemployment for both women and men declined from the April peak, and in July, men comprised 50.9% and women 49.1% of unemployed.

Because the absolute size of the women's labor force is smaller than the men's labor force, however, the relatively larger increases in the numbers of women unemployed was reflected in a greater rise in women's unemployment rate. In February, the unemployment rate for women (3.4%) was slightly less than the rate for men (3.6%), but in April, the unemployment rate for women had risen to 16.2% compared to 13.5% for men. As the levels of unemployed have decline slowly from April to July, Women's unemployment rate has remained relatively high: 10.6% in July for women compared to 9.8% for men.

In addition to the industries affected, the lingering effect of traditional gender roles likely played a part in women's relatively high unemployment rates during this period.¹⁰ Research conducted by the U.S. Census Bureau and the Federal Reserve shows that women ages 25-44 with children are almost three times as likely as men to not be working due to childcare demands related to COVID-19.¹¹ According to Week 12 of the U.S. Census Bureau's Household Pulse Survey, approximately one in five, or 18.2%, of working-age adults claimed they were not working because they were caring for children not in school or daycare because of the pandemic.¹² Several studies have shown women often bear the brunt of caregiving responsibilities.¹³ This disparity has

7 Presidential Memoranda, [Memorandum on Authorizing the Other Needs Assistance Program for Major Disaster Declarations Related to Coronavirus Disease 2019](#) (Aug. 8, 2020).

8 Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116-136 (2020).

9 U.S. DOL, News Release, [Statement By Secretary Scalia On The Lost Wages Assistance Program](#) (Aug. 18, 2020).

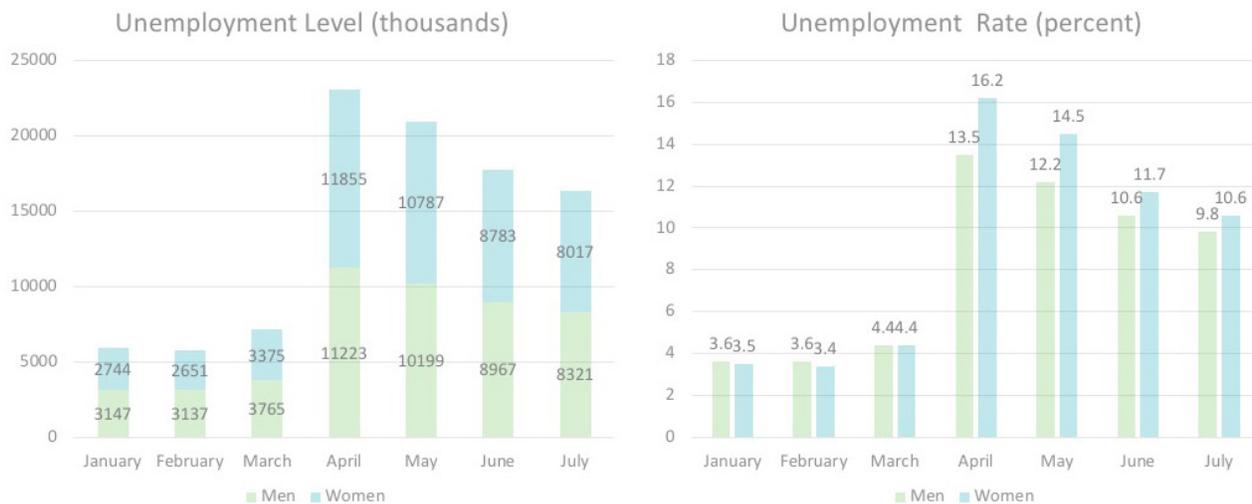
10 See, e.g., Lauren Weber, [Women's Careers Could Take Long-Term Hit From Coronavirus Pandemic](#), The Wall Street Journal, July 15, 2020.

11 Misty Heggeness, [Why Is Mommy So Stressed? Estimating the Immediate Impact of the COVID-19 Shock on Parental Attachment to the Labor Market and the Double Bind of Mothers](#), Institute Working Paper 33, revised June 19, 2020.

12 U.S. Census Bureau, [Week 12 Household Pulse Survey: July 16 - July 21](#), Employment Table 3.

13 See, e.g., News Release, U.S. Bureau of Labor Statistics, [American Time Use Survey – 2019 Results](#), June 25, 2020 (finding that on an average day, among adults living in households with children under age 6, women spent 1.1 hours providing physical care (such as bathing or feeding a child) to household children; by contrast, men spent 27 minutes providing physical care); Titan Alon, et al., [The impact of Covid-19 on gender equality](#), 4 Covid Economics 62-85, CEPR Press (Apr. 14, 2020) (finding married women provide close to 60% of child care even among couples who work full time, and an even higher share if they have young children, when childcare needs are the highest).

become more evident during the pandemic. According to an analysis of the Census data, as the pandemic wore on, “the percent of mothers age 25 to 44 not working due to COVID-19-related childcare issues grew by 4.7 percentage points, compared to no increase for similar men.”¹⁴

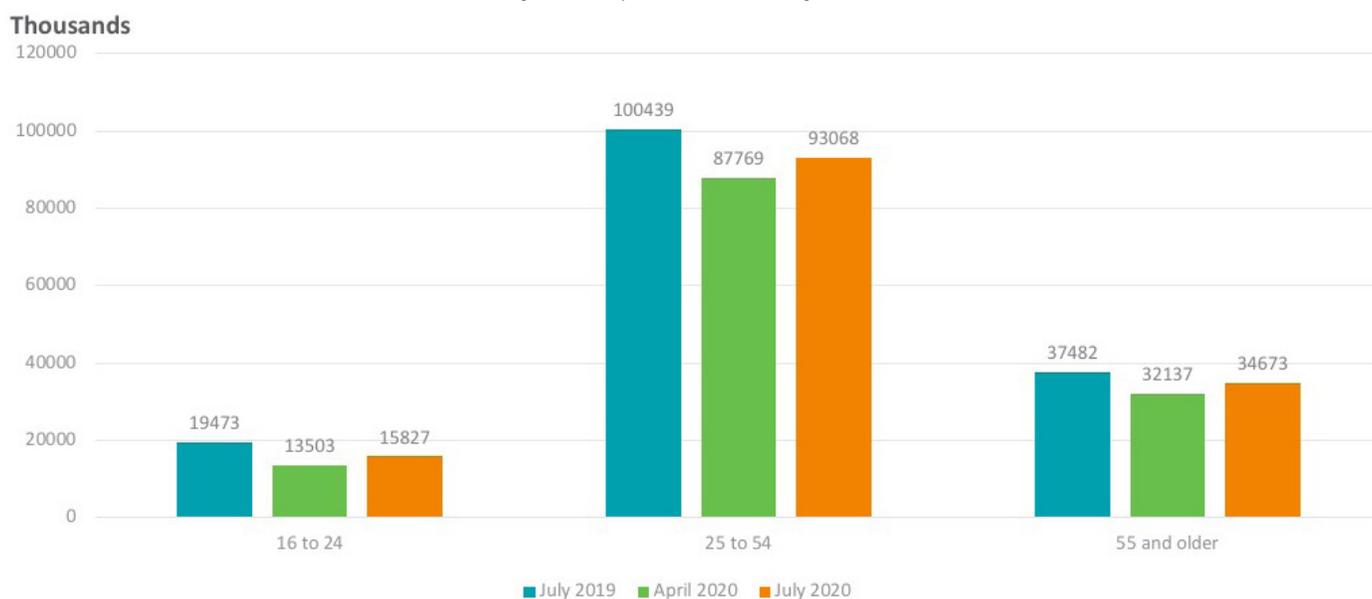


Source: U.S. Bureau of Labor Statistics, *Employment Situation Reports (monthly)* at www.bls.gov.

Employment by Age

Workers ages 16 to 24 comprise a relatively small proportion of the employed workforce (12.4% in 2019), but the pandemic recession affected the group relatively harder than other age groups. In April 2020, employment of those ages 16 to 24 was 30.7% below the July 2020 benchmark, compared to 12.6% lower for 25 to 54 year-old workers and 12.6% lower for workers age 55 or older. Recovery has also been slower for the youngest group: In July, employment was still 18.7% lower for the 16 to 24 age group, but only about 7% lower for each of the older groups (7.3% and 7.5%, respectively). In July 2019, 63.8% of all workers were in the 25-54 age group and 23.8% were in the 55 or older age group.

Employment by Age
July 2019, April 2020 and July 2020



Source: Bureau of Labor Statistics, *Labor Force Statistics (Current Population Survey)* at <https://www.bls.gov/data/#employment>

14 Misty L. Heggeness and Jason M. Fields, *Working Moms Bear Brunt of Home Schooling While Working During COVID-19*, U.S. Census Bureau (Aug. 18, 2020).

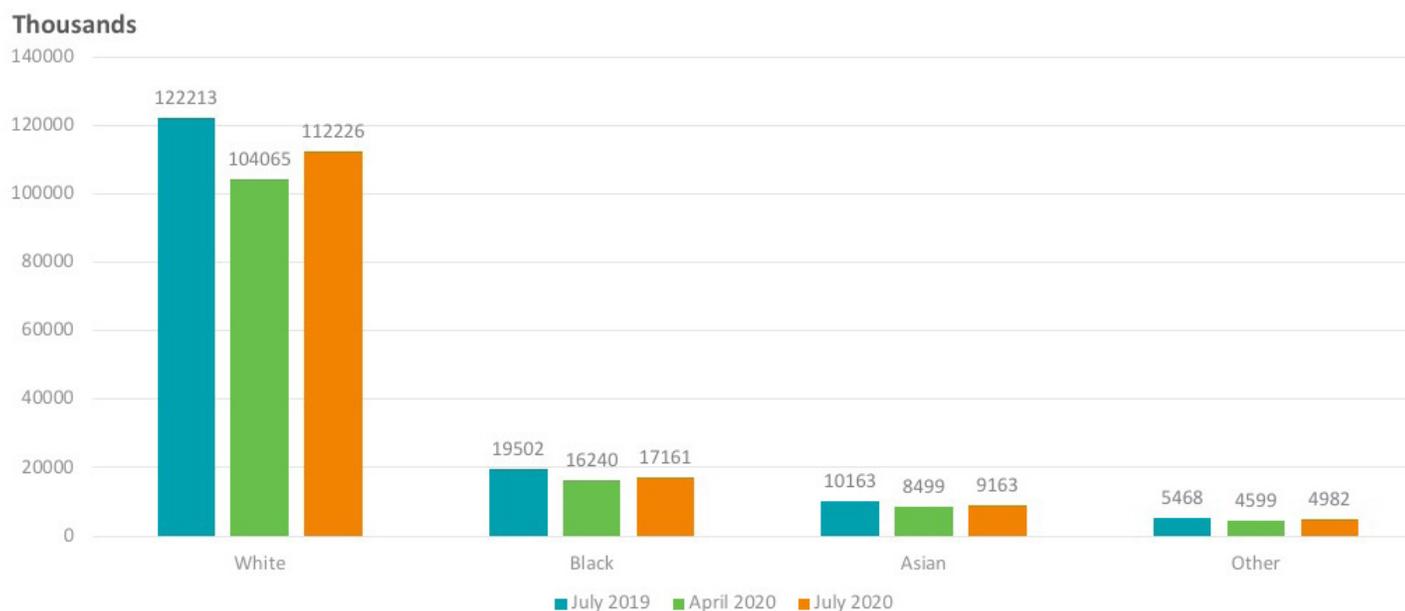
Employment by Race

In July 2019, 77.7% of workers identified racially as White, 12.4% as Black, 6.5% as Asian, and 3.5% as another race, mixed race, or none. The pandemic employment contraction of March and April 2020 resulted in declines across all groups, but the relative changes differed somewhat, with White employment decline being the least percentage. White employment declined by 18.1 million (14.8%) in April compared to July 2019, Black employment declined by 3.3 million (16.7%), Asian employment declined by 1.7 million (16.4%), and other race group employment declined by 869 thousand (15.9%).

The recovery since April through July has also been marked by differing relative changes. White employment recovered by 8.2 million (from 104 million in April to 112.2 million in July, recovering 42.7% of the prior 18.1 million loss); Black employment recovered by 921,000 (from 16.24 million in April to 17.16 million in July, recovering only 28.2% of the prior loss). For Asians, the July employment total of 9.2 million represented a 40% recovery of the April loss, and for others the recovery percentage was 44%.

Employment by Race

July 2019, April 2020 and July 2020

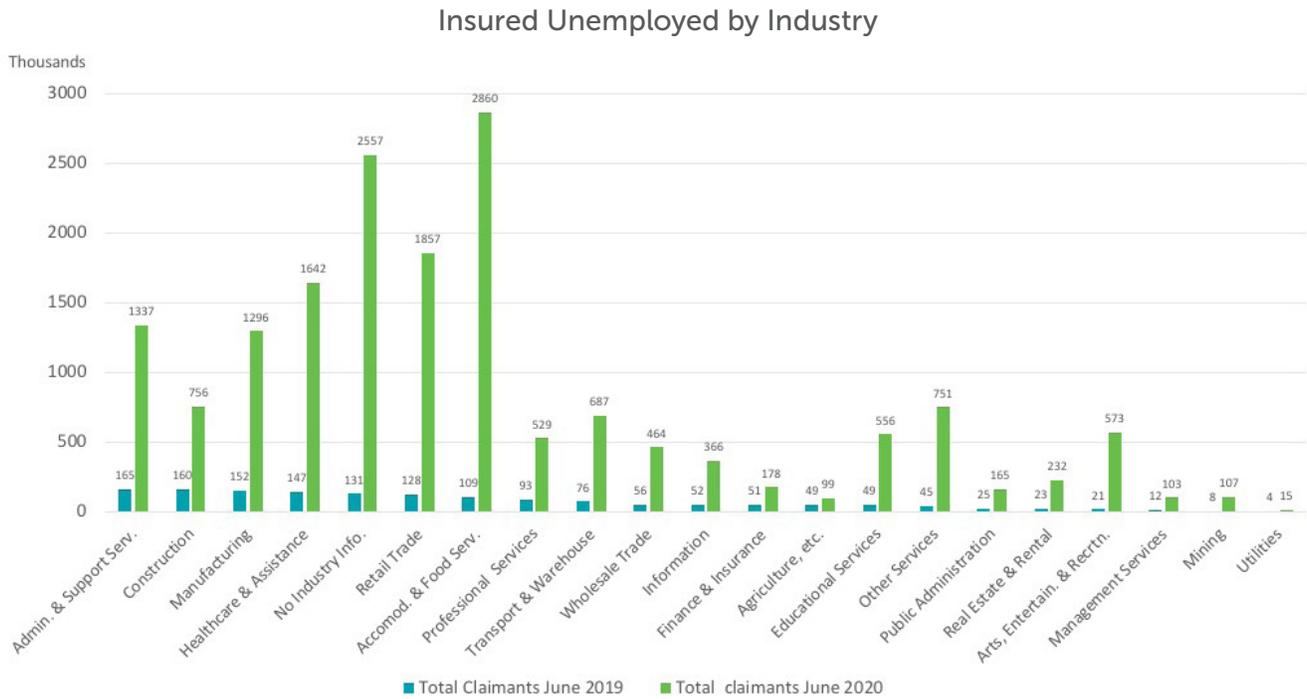


Industries Affected

The pandemic has had a devastating effect on the hospitality and retail industries. The vast majority of those receiving unemployment in June 2020 were in the hotel and restaurants/food services sector (over 2.8 million individuals)—a more than **2,500% increase** over the June 2019 numbers. Over 1.8 million individuals were receiving unemployment in the retail trade industry (over 1,350% increase from June 2019), 1.6 million in the healthcare industry (over 1,000% increase), 1.3 million from the administration support services (over 700% increase), and nearly 1.3 million in manufacturing (over 750% increase).

Insured unemployed workers are persons who have been laid off from a job that was covered by the UI system. In normal times, only about 30% of unemployed workers (persons who are not currently working for pay and who are actively looking for work) actually receive UI benefits. Those who do not receive benefits include new entrants or reentrants to the active labor force who were not working immediately prior to their job search, those who quit their previous job voluntarily or were terminated for cause, those whose prior work was not subject to the UI system payroll tax, those whose prior work in a covered job had not been of sufficiently long tenure, and those earnings were insufficient to qualify. Also, some workers who would qualify for UI benefits do not apply for various reasons. For some eligible workers, the process of claiming benefits is daunting.

The chart compares persons who claimed and were awarded UI benefits in June 2019 and June 2020 by the industry in which they previously worked. The industries are arranged by the highest number of insured unemployed recipients in those industries in June 2019.

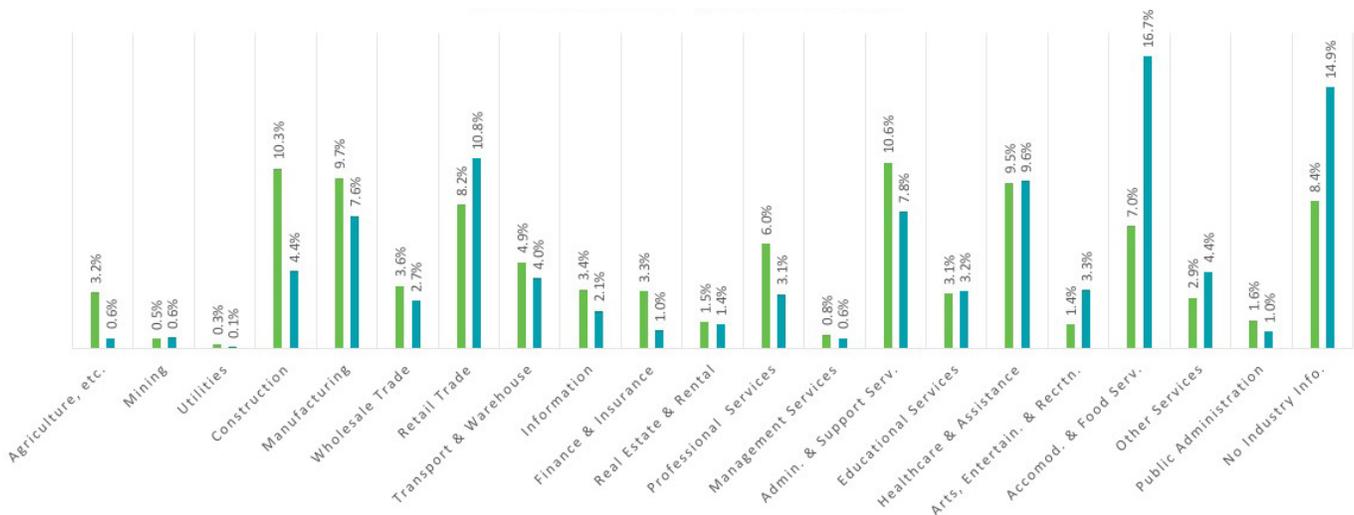


Comparing June 2020 UI claimants by industry to the number of those in the same industries who filed for unemployment in June 2019, further indicates how much of an impact the coronavirus has had in these sectors.

In June 2019, the largest percentage of UI benefit claimants came from the Administrative and Support Services (10.6%), Construction (10.3%), Manufacturing (9.7%), and Healthcare & Social Assistance Categories (9.5%). In June 2020, the first three of these accounted for significantly smaller shares of the much larger absolute numbers of claimants, and the Accommodation & Food Services (16.7%) had moved to the top rank of the distribution.

Change in Distribution of UI Claimants by Industry

June 2019 versus June 2020



Source: U.S. Department of Labor, "Characteristics of the Insured Unemployed" June 2020 at <https://oui.doleta.gov/unemploy/content/chariu2020/2020Jun.html>

Notably, since March 2020, labor unions have been inundated with calls for help from nonunion workers in these hardest-hit industries. Workers in the healthcare, fast-food, and meat-processing industries, for example, have staged strikes and walkouts as they demand protective equipment, hazard pay, more generous sick leave and other protections and benefits. Most of these workers have voiced concerns about contracting the coronavirus on the job, setting the stage for a wave of organizing following decades of declining union membership¹⁵

Impact on Service Occupations

All occupations lost some employment between the pre-recession peak in February 2020 and the trough of April, but the losses were proportionately different and the recoveries since have been different.

The Service Occupations Group accounted for the greatest absolute number and the largest proportion of employment declines from February to April: Employment declined by 8.2 million, or 31.4% of the February benchmark. By July, employment in service occupations had recovered by 3.9 million, reversing 48% of the initial loss.

The services group, which before the recession accounted for about 17% of all workers, is diverse in terms of skills and industries in which these workers are employed. Major subgroups of service occupations are healthcare support, protective services, food preparation and serving, building grounds cleaning/maintenance, and personal care services.

Reflecting increased demand for healthcare services during the pandemic, the healthcare support occupations subgroup recorded 8.2% more workers employed in July 2020 than in 2019. The food preparation and personal care subgroups, however, each had an employment deficit of over 2.3 million in July compared to a year earlier, about 33% combined deficit.

Employment in Service Occupation Subgroups

July 2019 and July 2020



Source: Bureau of Labor Statistics, Monthly Employment Situation Reports, at <https://www.bls.gov/webapps/legacy/cpsatab13.htm>. Data is not seasonally adjusted.

15 According to the latest union membership survey published by the Bureau of Labor Statistics (BLS), in 2019, roughly 14.6 million wage and salary workers (10.3%) were members of unions, down by 0.2 percentage point from 2018. This number is in sharp contrast to the 20.1% union membership rate (or 17.7 million workers who were union members) in 1983, when the BLS first began compiling this information. The union membership rate of public-sector workers (33.6%) was over five times higher than the rate of private-sector workers (6.2%). U.S. Bureau of Labor Statistics, Economic News Release, [Union Members Summary](#) (Jan. 22, 2020).

Impact on Franchise Industry

The franchise sector's 9.1 million employees comprised 7.1% of total private sector nonfarm wage and salary employment in July 2019, according to estimates by the ADP National Franchise Report¹⁶. The franchise sector has long been a leading source of jobs growth. From July 2019 to February 2020, for example, franchise sector employment grew 2.6% compared to overall private nonfarm sector growth of 0.84%. The franchise sector was somewhat more robust than non-franchise employers in the face of the pandemic employment collapse of March and April. Franchise employment decreased 12.6% compared to overall private sector employment decrease of 15.2%, compared to the February benchmark. Employment growth in the franchise sector, however, appears to have stalled since April.

The economic recovery promises to be slow and protracted, and many uncertainties remain. How well employers can adapt to sudden operational changes may be a key to their survival.

16 ADP Research Institute, [ADP National Franchise Report](#), July 2020.

Part II – The Changing Nature of Work

Fundamental changes in how work is performed had already begun prior to the pandemic. Non-manufacturing operations were already increasing their use of automation and artificial intelligence (AI) in the workplace. The on-demand economy expanded when and how services are performed. Virtual offices and online platforms replaced some brick-and-mortar operations. COVID-19 has merely highlighted this transformation, as well as created new disruptions.

Telework is the New Normal

Working from home took on new meaning in 2020. Some state stay-at-home orders and reopening guidelines stipulated that if work *could* be done from home, employers *had* to allow employees to work from home, at least until emergency orders were lifted. Many state reopening guidelines encourage employers to continue to allow employees to work remotely, particularly for those employees considered more vulnerable to the virus.¹⁷ As the virus shows no sign of abating, teleworking—at least to some degree—is here to stay.

In May 2020, the U.S. Bureau of Labor Statistics added five questions to the Current Population Survey (CPS) to help measure the coronavirus' impact on the labor market. One of those questions asked whether people teleworked or worked from home because of the pandemic. According to the BLS survey, 31% of workers in June 2020, and 26.4% in July, teleworked or worked from home for pay because of the coronavirus pandemic.¹⁸ This figure represents employed people who teleworked or worked at home for pay at some point in the previous four weeks specifically because of the pandemic. In other words, it did not take into account those already teleworking as part of their normal, pre-pandemic job activities. Other notable findings from this survey include:

- Education levels affected who was more likely to telework due to the virus. For workers age 25 and over, only 4% of those with less than a high school diploma teleworked in July, compared to 47% of those with a bachelor's degree or higher.
- Occupational type mattered. In July, employed people most likely to telework because of the pandemic worked in management, business, and financial operations occupations (46%) and professional and related occupations (44%). In contrast, relatively few people teleworked in service occupations (5%); natural resources, construction, and maintenance occupations (5%); and production, transportation, and material moving occupations (4%).¹⁹
- By industry, 58% in finance and insurance, and 57% in professional and technical services teleworked in July 2020 because of the pandemic. In contrast, only 7% of those working in accommodations and food services and 6% in agriculture teleworked.²⁰

The pivot to home offices will likely stick around in some sectors. According to one survey of executives and offices workers (essential workers were excluded), 85% of employees reported they want to continue working from home at least one day per week, and over half of employers (55%) anticipate that most of their workers will do so post-COVID.²¹ Nearly a third of executives (30%) reported they would require less office space in three years, mainly due to the switch to remote work.²²

17 According to CDC guidance, people at increased risk of the coronavirus include older adults and those with certain underlying medical conditions, among others. See Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), [People at Increased Risk](#), updated Aug. 10, 2020. Many state orders encourage or require employers to allow telework as an accommodation for those workers considered particularly vulnerable.

18 U.S. Bureau of Labor Statistics, Labor Force Statistics from the Current Population Survey, [Supplemental data measuring the effects of the coronavirus \(COVID-19\) pandemic on the labor market](#), Table 1: Employed persons who teleworked or worked at home for pay at any time in the last 4 weeks because of the coronavirus pandemic by selected characteristics, [June 2020 \(XLSX\)](#) & [July 2020 \(XLSX\)](#).

19 *Id.* at Table 2: Employed persons who teleworked or worked at home for pay at any time in the last 4 weeks because of the coronavirus pandemic by usual full- or part-time status, occupation, industry, and class of worker, [July 2020 \(XLSX\)](#).

20 *Id.*

21 PwC's [US Remote Work Survey – June 25, 2020](#).

22 *Id.*

The move to remote work, however, has brought with it a host of employment concerns some employers had never before encountered. For example, employers have had to consider how to capture and account for time non-exempt employees work, determine whether the time an employee spends traveling from the home office to other work locations is compensable, and enforce meal and rest breaks where applicable.

Employers must also contend with a patchwork of state laws governing expense reimbursement, which comes into play for things like home office equipment, supplies, and internet use. In addition, employees working from home in states other than the employer's home base raises payroll and income tax considerations, and may impact the enforceability of various common workplace agreements, which vary by state.

How workers' compensation laws apply and how employers can maintain data security for remote employees are other questions employers are addressing. These are just a handful of the issues employers have confronted with the switch to remote work.

Changes to On-Site Work

Those employers that are able to or must continue on-site operations have their own issues with which to contend. Employers are juggling a host of legal and public health issues while ensuring the safety and health of employees as they return to work. In addition to federal guidance and recommendations, employers are taking into account the ever-evolving orders and guidance from state and local authorities. State re-opening plans typically include specific guidelines and safety plans that vary by industry.²³ Thus, there is no one-size-fits-all set of instructions for any one employer.

A return-to-work plan necessarily includes a number of physical changes to the worksite as well as procedural changes. Most plans include new routine cleaning processes, enhanced protocols in case of contamination, as well as the implementation of new engineering and administrative controls. Notably, face coverings are required in most workplaces,²⁴ as are certain social distancing protocols. Many employers are implementing temperature checks and health screens as part of the daily return-to-work process.²⁵ Several workspaces include markers to encourage six-foot spacing, Plexiglas barriers, and staggered shifts and meal/rest breaks to limit congregating. The physical workplace looks much different than it did a year ago.

Allure of Automation

Employers are increasingly integrating robotics, AI, and automation into their operations.²⁶ Pre-pandemic, automated technologies had been supplanting or assisting human workers in warehouses, grocery stores, and fast food operations, among others.²⁷ This trend will likely get a boost from post-pandemic realities, as, among other things, robots do not get sick or need to practice social distancing.

As explained in one analysis, the industries most susceptible to automation are those involving predictable physical activities, which figure prominently in sectors such as manufacturing, food service and accommodations, and retailing.²⁸ As discussed in Part I of this Report, these are some of the sectors hit hardest by the pandemic. Although it is difficult to predict what will happen in a post-COVID economy, it seems likely that a significant portion of these jobs that have been automated will stay automated.

23 Littler maintains a list of return-to-work protocols, available at <https://www.littler.com/publication-press/publication/bouncing-back-list-statewide-return-work-protocols>.

24 Littler maintains a list of statewide face covering requirements, available at <https://www.littler.com/publication-press/publication/facing-your-face-mask-duties-list-statewide-orders>.

25 Littler maintains a list of statewide temperature and health screening requirements, available at <https://www.littler.com/publication-press/publication/wont-hurt-bit-employee-temperature-and-health-screenings-list>.

26 See, e.g., Oxford Economics, *How robots change the world*, July 23, 2019 (the use of robots worldwide has tripled over the last 20 years to 2.25 million machines); 2017 - 2018 Willis Towers Watson *Global Future of Work Survey*, Feb. 7, 2018 (workplace automation is projected to double in three years).

27 See Michael Corkery and David Gelles, *Robots Welcome to Take Over, as Pandemic Accelerates Automation*, N.Y. Times, Apr. 10, 2020.

28 Michael Chui, James Manyika, and Mehdi Miremadi, *Where machines could replace humans—and where they can't (yet)*, McKinsey Quarterly (July 8, 2016).

On-Demand Economy

Pre-COVID, non-traditional “gig” work had been on the rise. One study estimated that from 2002 to 2014, while total employment increased 7.5%, gig economy workers increased by between 9.4% and 15%, depending on how such workers were defined.²⁹ Between 2010 and 2014, growth in independent contractors alone accounted for 29.2% percent of all jobs added during that period.³⁰ Another study estimated that gig and freelance work has accounted for 85% of new work opportunities since the Great Recession.³¹ Still another study indicates those workers participating in the 1099 workforce grew by 1.9 percentage points from 2000 to 2016, and accounts for nearly 12% of the total workforce.³²

During the pandemic, the demand for certain gig economy services—for example, food service delivery—increased significantly.³³ Facing mass unemployment and a shift toward on-demand delivery services, many are turning to gig work for the first time. This move is not unexpected, as many jobs lost in 2020 will never return.

The IRS recently examined withholding documents for 2019 and made predictions on the number of filings expected through the year 2028.³⁴ While it is unclear how accurate such a projection eight years into the future is, especially given the unprecedented nature of the pandemic and its impact on the economy, the numbers are sobering. For example, Form W-2 filings,³⁵ which most employers file for each employee, are estimated to fall by nearly 14%, or 37.2 million fewer filings, in 2021.³⁶ More troubling, the projected W-2 filings are not expected to reach pre-pandemic levels though at least the year 2028.³⁷

At the same time, Form 1099-MISC, which are typically filed by independent contractors, are expected to rise steadily over the same period.³⁸ According to the report, the number of Form 1099-MISC filings for 2021 is projected to rise by 1.6 million over prior year estimates.³⁹ By the year 2028, the IRS predicts more than 20 million Form 1099-MISC will be filed compared to the number filed in 2019.⁴⁰ As more traditional jobs decline, the need for individuals to earn a living through independent contract work becomes more urgent.

Yet, certain legislative efforts could affect the viability of the sector. Prior to the pandemic, a state-led effort to address so-called worker “misclassification” had begun to take hold. California led the way with the enactment of AB 5, which codified the so-called “ABC test” to determine whether workers should be classified as employees or independent contractors under the state’s wage orders and other labor and employment laws. The practical impact of this law, which applies to virtually every business in the state, is that thousands of workers have been reclassified as employees, and many employers are still grappling with how the new law affects their business model and operations.⁴¹

29 Douglas Holtz-Eakin et al., *The Gig Economy—Research and Policy Implications of Regional, Economic, and Demographic Trends*, p. 2, Future of Work Initiative and American Action Forum (Jan. 2017).

30 *Id.*

31 Gerald Friedman, *Workers without employers: shadow corporations and the rise of the gig economy*, Review of Keynesian Economics, Vol. 2 No. 2, Summer 2014, pp. 171-188.

32 Brett Collins et al., *Is Gig Work Replacing Traditional Employment? Evidence from Two Decades of Tax Returns*, IRS SOI Joint Statistical Research Program, Mar. 25, 2019.

33 *Analysis on Impact of Covid-19- Online On-Demand Food Delivery Services Market 2019-2023*, Businesswire.com (Apr. 20, 2020).

34 IRS, [Publication 6961](#), Calendar Year Projections of Information and Withholding Documents for the United States and IRS Campuses, 2020 Update.

35 See IRS, [About Form W-2, Wage and Tax Statement](#).

36 IRS Publication 6961, *supra* note 34, at Table 1.

37 *Id.* at Table 2.

38 *Id.* at Table 1.

39 *Id.*

40 *Id.* at Table 2.

41 For a more in-depth discussion of AB 5’s impact, please see Bruce Sarchet, Jim Paretto and Michael Lotito, *Independent Contractor Issues In California: Summer 2020 Update*, WPI Report (Sept. 1, 2020).

One bill the governor signed into law on September 4, 2020, AB 2257, makes a number of significant changes to AB 5 by modifying and creating new exceptions to the law, and revising its enforcement provisions.⁴² AB 2257 is couched as an urgency statute, so it is effective immediately. In addition, California voters will have an opportunity to weigh in on this issue on Election Day. Proposition 22 would consider app-based drivers to be independent contractors and not employees or agents, unless the company sets drivers' hours, requires acceptance of specific ride and delivery requests, or restricts working for other companies.⁴³ Proposition 22 would also require the company to provide independent contractor drivers with certain benefits, like insurance and health care subsidies.

Although most state legislatures have been focusing on pandemic relief measures, when regular legislative sessions resume in early 2021, other states are expected to follow California's lead and introduce bills to address independent contractor classification.⁴⁴

It is unclear whether federal guidance on the issue will be forthcoming. In its spring regulatory agenda, the U.S. DOL indicated an intent to develop regulations for determining independent contractor status under the federal Fair Labor Standards Act.⁴⁵ To date, this proposal has yet to be published. Given the usual rulemaking timetable, if the DOL attempts to promulgate a regulation defining independent contractor under the FLSA, it will need to do so at high speed.

In Congress, one bill—the PRO Act (H.R. 2474)—cleared the U.S. House of Representatives on a mostly party-line vote.⁴⁶ This bill would dramatically amend the National Labor Relations Act by expressly adopting the ABC test. The Senate is not expected to take the bill up this session, but it could resurface post-election.

These fundamental changes to the workplace discussed in this section are being felt at all levels of the economy, creating great economic uncertainty for many employers and workers. Indeed, the only certainty is that the speed and pace of these disruptions will continue to increase as the economy attempts to recover.

42 See Bruce Sarchet, Jim Paretti, and Michal Lotito, [AB 5 Update: AB 2257 Would Amend California Independent Contractor Law](#), Littler ASAP (Aug. 26, 2020).

43 California Attorney General, "[Initiative 19-0026](#)," October 29, 2019.

44 In 2020 alone, Colorado, New Jersey, Vermont, and Virginia all enacted laws or regulations to strengthen enforcement against worker misclassification under various state laws. Legislation similar to AB 5 has been discussed in New York along with alternatives that would provide bargaining rights for independent contractors in the form of sectoral bargaining.

45 U.S. DOL, Independent Contractor Status Under the Fair Labor Standards Act, [RIN: 1235-AA34](#), Spring 2020.

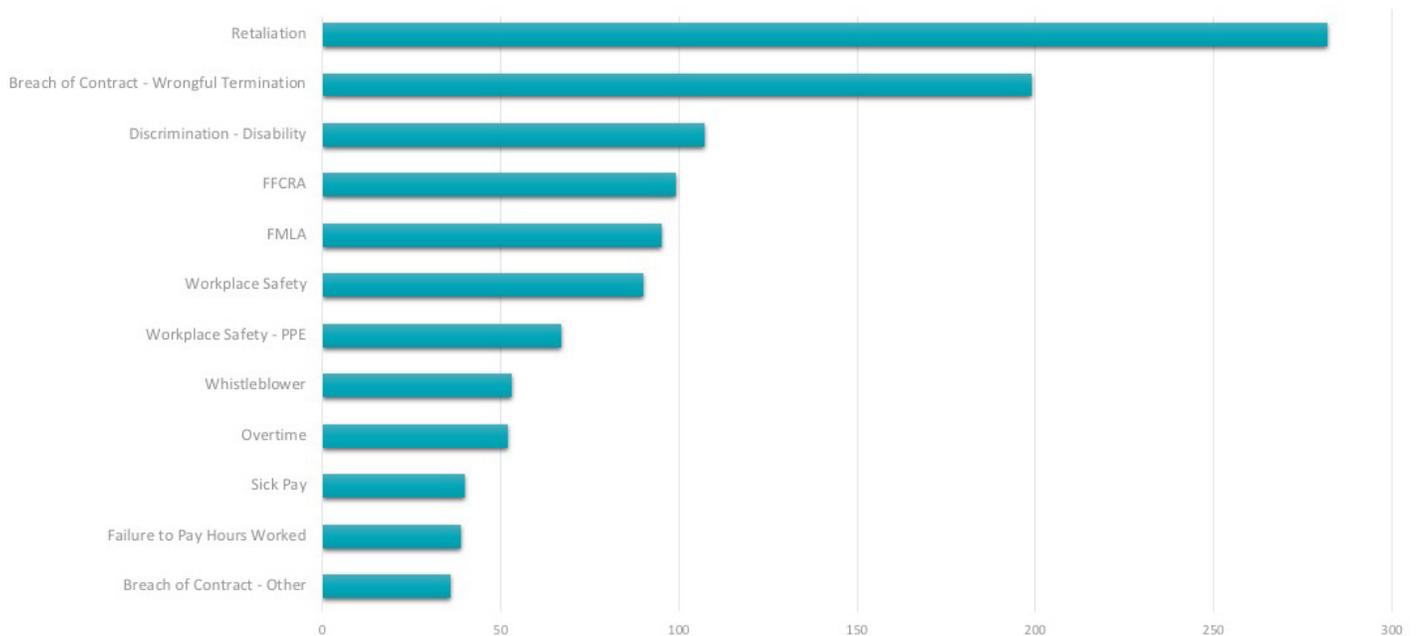
46 H.R. 2474, Protecting the Right to Organize Act of 2019, 116th Cong., 2d Sess.

Part III – COVID-19 Employment Lawsuits

Although defending against employment lawsuits has always been a part of doing business, the pandemic has brought with it a host of new claims. Numerous lawsuits stemming from COVID-19 have been filed in federal and state courts since March 2020, ranging from customer and client claims related to COVID-19 exposure, to more focused claims from employees under various federal, state and local laws addressing workplace health and safety, non-discrimination, and employment termination. By the end of August, at least 638 lawsuits directly related to labor and employment violations have been filed (including 72 class action suits). California leads the nation with 115 employment lawsuits already filed, with Florida, New York, and New Jersey close behind.

These claims raise a number of allegations, including retaliation, breach of contract, discrimination, leaves of absence, wage and hour, and workplace safety concerns, among others.

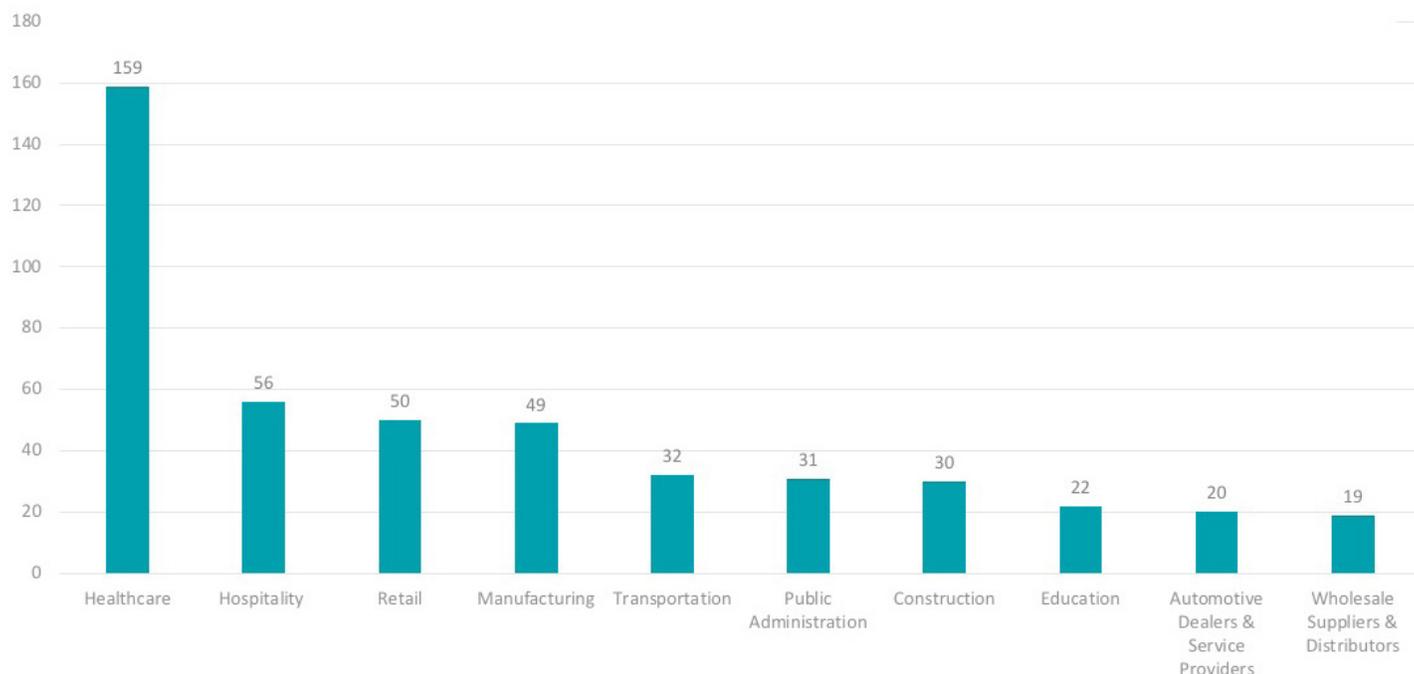
Most Common Claims



Where workplace liability is concerned, there is no shortage of laws or regulations under which employers may face claims. To date, while at least a dozen states have enacted laws to shield employers acting in good faith from liability for COVID-19 claims, they have largely been confined to claims of exposure to the virus—we have not seen significant legislation offering any type of protection for labor and employment claims in particular. Nor has the federal government yet acted on proposals to limit COVID-related liability for employers and businesses, although proposals to do so have been introduced, and are discussed below.

The largest number of claims have been filed against healthcare industry employers.

Number of Lawsuits in Hardest-Hit Industries



Given the rapid (and at times haphazard) pace at which the federal government, states, and localities have enacted laws responding to COVID-19 and employment, there are several types of claims of which employers should be mindful. The following is just a snapshot of some of these claims.

Wage & Hour

Timekeeping

If a non-exempt employee performs any work during a quarantine or similar period, the employer should ensure that the employee accurately tracks their working time and is paid for that time in accordance with all applicable federal, state, and local laws. Non-exempt employees working from home during quarantine should be directed to comply fully with any and all company policies related to timekeeping, overtime approval, and meal and rest breaks.

Employers may be struggling with how to accurately keep track of an employee's time when working from home or how to ensure that employees are appropriately taking meal and rest breaks. Approximately 20 states have some form of meal or rest break requirements. Importantly, recent court decisions in Oregon and Washington State have held that employers have an affirmative duty to "ensure" that non-exempt employees receive and take all required meal and rest breaks. To address this concern, employers can consider implementing a policy signed by employees requiring them to acknowledge they are expected to schedule and take meal and rest breaks and to accurately and thoroughly record time worked.

Business Expenses

As more and more employees are working from home due to the pandemic, many employees have incurred costs associated with working from home. Depending on the jurisdiction, an employer may be obligated to reimburse the employee for any costs associated with teleworking.

Federal law does not require specific “item-by-item” reimbursement of tools and services incidental to carrying on the employer’s business; however, the employer must reimburse the employee to the extent the incurrence of those expenses causes the employee’s wages to dip below minimum wage. In addition, some states have laws or guidance addressing reimbursements and allowable deductions from wages. Often, these laws will allow deductions only when authorized in writing by the employee or will restrict the employer’s right to take deductions that impact minimum wage. Over half of states and some local jurisdictions have laws or guidance impacting reimbursements and deductions. Some jurisdictions require employers to reimburse employees a reasonable percentage of the employee’s cell phone or internet use, even where working from home imposes no additional charge to the employee. Employers should closely review the applicable reimbursement statutes that apply to them to ensure compliance.

Reporting Time Pay

If an employee is sent home from work due to illness or because the employer is implementing a mandatory furlough, certain jurisdictions may require reporting time pay to compensate the employee for reporting to work even if no work was performed or if the employee was sent home prior to working a full shift. Jurisdictions that have some version of a reporting time pay law include, for example, California, Connecticut (for hospitality or retail only), District of Columbia, Hawaii, Massachusetts, New Hampshire, New Jersey, New York, Oregon, and Rhode Island. Employers with non-exempt employees in these jurisdictions should consult applicable law to assess when and how much reporting pay is owed.

Compensable Work Time

Employers can expect disputes and litigation over the compensability of new pandemic-related activities, such as temperature checks and other health screening activities. The question of compensability for pre-shift activities is a complex area of law, and the compensability of these particular activities has not been extensively considered previously. The result of these litigation tests will depend heavily on state law, in particular the manner in which the jurisdiction follows federal Portal-to-Portal Act.⁴⁷ Those states with wage and hour statutes that track federal law, and those without state wage and hour statutes, may be more likely to deem such pre-shift activities as non-compensable. Generally, employers should carefully consider state requirements before implementing home health checks or screenings, as there is a risk that such activity can begin the workday.

In addition, the DOL’s Wage and Hour Division in a recent Field Assistance Bulletin reaffirmed that employers are required to pay their non-exempt employees for all hours worked, “including work not requested but allowed and work performed at home. If the employer knows or has reason to believe that an employee is performing work, the time must be counted as hours worked.”⁴⁸ According to the DOL, employers still have an obligation to exercise “reasonable diligence” in tracking the hours their teleworking employees work.

Downsizing and Reductions in Force

Employers that have been forced to downsize their workforces in the wake of the pandemic should also be mindful of the federal Worker Adjustment and Retraining Notification (WARN) Act. The WARN Act generally requires that employers that are closing a plant or laying off a significant number of workers for an extended period, are required to provide 60 days’ notice to workers, as well as to the state. State law analogues of WARN (so-called “mini-WARNs”) often impose similar if not more burdensome requirements.

While WARN provides certain exceptions to these notice requirements (most notably, when a plant closure or mass layoff is the result of business circumstances that were not reasonably foreseeable at the time notice was required), the applicability of these exemptions with respect to COVID-19 remains unclear. Despite the unpredictability and uncertainty of the pandemic and its duration, and of the ever-changing governmental and societal responses to the pandemic (including, for example, renewed and

47 29 USC §§251-262 (1947).

48 U.S. DOL, [Field Assistance Bulletin No. 2020-05](#), Aug. 24, 2020.

extended restrictions on travel, business and social activities) all of which impact business in unforeseeable ways, plaintiffs may challenge businesses for invoking the “unforeseeable business circumstances” exception to give shortened WARN notice or to extend layoffs beyond six months. In addition, WARN includes certain “lookback” provisions that may trigger a notice requirement, even retroactively, where an employer is not letting everyone go at the same time. And while some states have modified their state WARN laws to be more forgiving of COVID-related job losses, others are proceeding apace with WARN expansions contemplated prior to the pandemic.

As employers prepare to reopen businesses, or return employees from furlough, they should be mindful of WARN Act obligations.⁴⁹ This is especially true where federal funding to maintain jobs (such as under the Paycheck Protection Program⁵⁰) may be running out, and employers are facing the unwelcome prospect of having to let workers go, potentially triggering WARN notice requirements. While legislation introduced in the U.S. Senate would exclude COVID-related closures and layoffs from notice requirements under WARN, the fate of this effort is not at all clear. Employers contemplating uncertainty as to whether and how they will maintain their employee numbers are advised to consult with counsel sooner, rather than later.

Employers should also consider whether they may be subject to a state or local ordinance creating a “right to recall” for employees subject to a reduction in force as the result of the pandemic. Currently, some localities in California, including San Francisco, Los Angeles, and Long Beach, are creating (or have already created) these types of laws with a private right of action for employees to sue if they are not reinstated to their position following a pandemic reduction-in-force.⁵¹

Discrimination Claims

Americans with Disabilities Act (ADA)

Historically, claims of discrimination have increased as unemployment has gone up. In the 15-year period prior to the pandemic, the highest level of unemployment in the United States occurred in 2009 and 2010.⁵² Notably, and perhaps unsurprisingly, the highest number of discrimination charges filed with the U.S. Equal Employment Opportunity Commission (EEOC) also occurred in fiscal years 2010 and 2011.⁵³ Given the unprecedented levels of COVID-related unemployment, we see no reason to think that this historical trend will not continue.

Employers should be aware of the ADA’s requirements governing what medical information employers can seek from employees and how and when to “reasonably accommodate” employees with disabilities. Based on the EEOC’s current view, it is unclear whether COVID-19 is or could be a disability under the ADA. Regardless, in relying on the findings of the CDC and others public health authorities, the EEOC has determined that “an employer may bar an employee with the disease from entering the workplace” because the COVID 19 pandemic meets the “direct threat” standard under the ADA, that is, “a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.”⁵⁴

49 See, e.g., Shawn Matthew Clark, Robert C. Long, Bruce R. Millman, Daniel L. Thieme, and Michael J. Lotito, [WARN Act Risks Loom for Employers Re-Hiring or Un-Furloughing Employees to Receive Paycheck Protection Program Funding](#), Littler ASAP (Apr. 19, 2020).

50 Generally, the Paycheck Protection Program, which was established by the 2020 Coronavirus Aid, Relief, and Economic Security (CARES) Act, provides low-interest, forgivable loans to small businesses affected by the COVID-19 pandemic. See U.S. Small Business Administration, [Paycheck Protection Program](#).

51 See Robert Wilger and Francesca Lanpher, [San Francisco Releases “Back to Work” Layoff Notice and Related Guidance](#), Littler ASAP (Aug. 11, 2020); Sebastian Chilco and Bruce Sarchet, [New San Francisco Emergency Ordinance Requires Layoff Notices, Reemployment Rights and Reasonable Accommodation for Eligible Workers](#), Littler Insight (July 7, 2020); Shiva Shirazi Davoudian and Alexandria Witte, [Long Beach, California Follows Los Angeles and Enacts its Own Mandatory Right of Recall and Worker Retention Ordinances](#), Littler Insight (May 26, 2020); Shiva Shirazi Davoudian and Alexandria Witte, [City of Los Angeles Enacts Mandatory Right to Recall and Worker Retention Ordinances](#), Littler Insight (May 7, 2020).

52 See U.S. Bureau of Labor Statistics, [Civilian unemployment rate](#) (last visited Aug. 27, 2020).

53 See EEOC, [All Statutes \(Charges filed with EEOC\) FY 1997 - FY 2019](#) (last visited Aug. 27, 2020).

54 See EEOC, [What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws](#), updated June 17, 2020.

An employer's obligation to make reasonable accommodations and engage in the interactive process remains in place based on EEOC guidance. The EEOC's guidance on this issue, however, has continued to evolve as the agency attempts to balance ADA reasonable accommodation obligations with an employer's concern about the "direct threat" to the employee's health and others by returning an employee to the workplace. Employers should remain mindful of this tension in their dealings with employees who may or may not have high risk factors, employees who may have been exposed to the virus, as well as what sort of accommodations employers may be able to reasonably provide to their employees.

Age Discrimination in Employment Act (ADEA), Pregnancy Discrimination Act (PDA), and Other Discrimination Laws

Particularly where employers are beginning to return their employees to the workforce, they should be mindful of potential pitfalls even where they believe they are acting in an employee's best interests. The EEOC has cautioned against possible infection control strategies and conduct that may conflict with the ADEA, PDA, Title VII, or state equal employment opportunity laws. Though employers may be particularly concerned for their more vulnerable employees, the EEOC has made clear its position that employers may not prevent older workers, or pregnant workers, from returning to work if they wish to do so, even if the employer believes it is acting to protect these workers from risk.⁵⁵ In these situations, EEOC guidance does encourage employers to be flexible, and nothing prohibits an employer from accommodating, for example, an older worker's request to continue to telework (although some state laws that prohibit "reverse age discrimination" might be implicated in this scenario).

Additionally, though certain communities, countries, or areas of the world may become "hotspots" for the virus, employers should be careful to refrain from relying on such information in making employment decisions so as not to run afoul of Title VII. Notably, mistreatment and harassment of Asian Americans and others of Asian descent also has received widespread coverage in the press in recent months.⁵⁶ Based on these types of concerns, EEOC Chair Janet Dhillon has cautioned against mistreatment or harassment of Asian Americans and others of Asian descent, which can result in unlawful discrimination on the basis of national origin or race.⁵⁷

Leaves of Absence

Both the federal government, by way of the Families First Coronavirus Response Act (FFCRA),⁵⁸ and numerous state and local governments, have adopted new laws, ordinances, or regulations relating to paid leave for employees during the COVID-19 pandemic. Already we are witnessing claims from employees alleging that they were denied leave to which they were entitled under these new laws, or retaliated against for seeking leave. Employers should monitor developments in this area closely, and make sure their leave programs are coordinated to meet varying federal, state, and local requirements.

Safety and Health

Duty to Provide a Safe Workplace

A host of legal and public health issues must be considered to ensure the safety and health of employees as they return to work. Employers are balancing federal guidance and recommendations with evolving local guidance and orders. Moreover, different sectors of the economy may have drastically different requirements and guidelines to follow upon their physical return to work,

55 *Id.* at Q. J.1.

56 See, e.g., Alexandra Kelley, [Report highlights emerging trends of Asian American discrimination amid coronavirus pandemic](#), The Hill.com (Apr. 2, 2020); Alex Ellerbeck, [Over 30 percent of Americans have witnessed COVID-19 bias against Asians, poll says](#), NBCnews.com (Apr. 28, 2020); and Yuhua Wang, [Asians are stereotyped as 'competent but cold.' Here's how that increases backlash from the coronavirus pandemic](#), The Washington Post (Apr. 6, 2020).

57 See EEOC, [Message From EEOC Chair Janet Dhillon on National Origin and Race Discrimination During the COVID-19 Outbreak](#) (last visited Aug. 23, 2020).

58 Pub. L. 116-127 (Mar. 18, 2020).

particularly for public-facing businesses and the healthcare sector. An employer that does not adopt measures to prevent the spread of the coronavirus at work adequately could face liability for failure to comply with its duty to provide a safe workplace under OSHA.

Now that certain worksites are reopening, employers are dealing with employees who develop symptoms of COVID-19, test positive for COVID-19, are clinically diagnosed with COVID-19 (“presumptive positive”), and/or have been in close contact with a presumed positive or confirmed COVID-19 individual. Employers are creating exposure control plans and dealing with how and when to record and/or report a confirmed case of COVID-19 in the workplace pursuant to OSHA standards.

In addition, the Commonwealth of Virginia became the first state to enact an Emergency Temporary Standard directly regulating COVID-19. This comprehensive standard applies to all employers in the Commonwealth and includes obligations to conduct a hazard assessment of job tasks, implement engineering and administrative controls to protect employees from COVID-19, and to conduct training. Employers should take note as other states may begin to follow Virginia’s lead.

Retaliation

Employees who have continued to work in essential businesses are increasingly filing complaints regarding personal protective equipment, social distancing, and other health and safety measures during the pandemic. At the same time, many employers are faced with the reality of changing or reducing hours, cutting pay, or terminating employees due to the widespread decline in business activity. The combination of increased health and safety complaints with a simultaneous escalation of employment actions that many employers must take due to business necessity has also led to an increase in retaliation claims being filed under state and federal law.

The risk for employers under certain federal anti-retaliation laws is also increased because a lower causation standard—the “contributing factor” standard—may be applicable in some instances. Specifically, under certain federal anti-retaliation laws, a complaining party may establish that they have a viable claim that should be heard by proving, among other things, that a retaliatory motive played a “contributing factor” in the adverse employment decision. In addition, under OSHA, complainants generally do not need to show the alleged violation they complained about actually took place. A viable retaliation claim requires only that they had, among other things, a “good faith” basis for making the allegation in the first instance, which is a low bar to clear.

Moreover, federal law is not the only source of protection for employees pursuing complaints related to health and safety practices. A majority of states recognize some form of a wrongful discharge claim under anti-retaliation statutes or under common law, which is based on court decisions rather than a statute or regulation. Employees may be entitled to significant damages if they prove that an employer took adverse action against them because they raised a health and safety concern, and the remedies vary from state to state.

Labor Relations

Whether an employer has a unionized or non-unionized workforce, employers should remain aware of their obligations under the National Labor Relations Act. One area where employers should be especially cautious is when employees engage in concerted activity.⁵⁹ Examples of concerted activity include discussions of concerns of the terms and conditions of employment in light of the current pandemic, protesting working conditions, or organizing walkouts over safety conditions. In all of these cases, employers should take care not to curtail employees’ protected right to collective action. Additionally, if workers successfully organize or are already unionized, employers should be aware they may have a duty to bargain over safety conditions. Given the highly fact-specific nature of these analyses, employers facing potential protected activity in their workplace should consult with counsel to determine how best to respond.

⁵⁹ Section 7 of the NLRA, in pertinent part, guarantees employees the right “. . . to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .” 29 U.S.C. § 157.

Part IV – Federal and State Efforts

Federal Legislative Response to COVID-19

To date, Congress has adopted four significant pieces of legislation responding to COVID-19. The fate of future legislative relief, however, remains highly unclear, and has resulted in a legislative stalemate throughout most of the summer.

In March of this year, Congress first passed the Coronavirus Preparedness and Response Supplemental Appropriations, an \$8.3 billion package of emergency funding for the Department of Health and Human Services, the Centers for Disease Control, and other agencies responding to the pandemic. Later that month, Congress enacted the Families First Coronavirus Response Act (FFCRA),⁶⁰ which most notably for employers provided emergency paid sick leave and emergency Family and Medical Leave entitlements for employees (paid for by the federal government). At the end of March, lawmakers adopted the CARES Act, which created the Paycheck Protection Program (PPP) for small businesses, and greatly expanded UI eligibility and benefits.⁶¹ Finally, in late April, Congress enacted the Paycheck Protection Program and Health Care Enhancement Act (PPHCEA), which provide an additional \$310 billion in funding for the PPP, and additional monies for disaster relief, health care, and coronavirus tracking and response.⁶²

Each of these four bills, while fiercely negotiated, was adopted with broad bipartisan support. However, since enactment of the PPHCEA, that spirit of cooperation has evaporated, and further legislative efforts to address the pandemic have stalled on party lines. The following legislative proposals are still pending.

House HEROES Act

On May 15, 2020, the U.S. House of Representatives passed H.R. 6800, the Health and Economic Recovery Omnibus Emergency Solutions or HEROES Act.⁶³ The 1800+-page, \$3.5 trillion bill includes a host of COVID-19 relief provisions, including \$1 trillion for state, local, and tribal governments; an additional round of direct stimulus payments for individuals; repeal of the 2017 tax bill limitation on the deduction of state and local taxes; a requirement that the Occupational Safety and Health Administration (OSHA) issue an emergency standard to protect health care workers and emergency responders from COVID-19; and a number of other provisions directly relating to employers regarding pay, benefits, and unemployment insurance. The bill was passed 208-199 largely along party lines, with 14 Democrats voting against it, and only one Republican voting for it. Key employment-related provisions of the HEROES Act include:

Expanded Unemployment Insurance. The bill would extend expanded UI provisions created by the CARES Act through January 31, 2021, including the CARES Act's provision of an additional 13 weeks of unemployment eligibility; extra \$600 per week enhanced unemployment benefits; and the Pandemic Unemployment Assistance program, which provides unemployment benefits to workers traditionally ineligible for UI such as independent contractors and self-employed workers.

Paid FMLA/Sick Leave. The bill would dramatically expand the Emergency Paid Sick Leave Act (EPSLA) and the Emergency Family and Medical Leave Expansion Act (EFMLEA) requirements created under the federal FFCRA. Most notably, the bill would eliminate the provisions of the FFCRA mandating that only smaller businesses (those with fewer than 500 employees) provide this leave, and would require all private-sector employers to provide 80 hours of paid sick leave and up to 12 weeks of EFMLEA leave (10 of them

60 Pub. L. 116-136 (Mar. 27, 2020); See also Jim Paretti, Michael J. Lotito, and Sebastian T. Chilco, [House Passes COVID-19 Response Legislation Including Numerous Paid Leave, Unemployment Provisions](#), Littler ASAP (Mar. 14, 2020).

61 See William Hays Weissman, Michael J. Lotito, and Jim Paretti, [Senate Passes CARES Act with Relief for Businesses and Additional Unemployment Benefits](#), Littler ASAP (Mar. 26, 2020).

62 Pub. L. 116-139 (Apr. 24, 2020); See also Michael Lotito, Jim Paretti, and Alex MacDonald, [Lawmakers Agree to New Funding for Paycheck Protection Act Program](#), Littler ASAP (Apr. 21, 2020).

63 H.R. 6800, The HEROES Act, 116th Cong. 2d Session (2019-2020); See Jim Paretti and Michael J. Lotito, [House Passes New \\$3 Trillion COVID-19 Relief Package with Significant Labor and Employment Provisions, but Future Unclear](#), Littler ASAP (May 18, 2020).

paid) to all private-sector employers. In addition, the bill would expand the reasons for which EFMLEA leave could be taken, and eliminate exemptions from FFCRA requirements for health care employers, emergency responders, and small businesses.

Hazard Pay. The HEROES Act would create a federally funded \$180 billion grant program under which employers of “essential” workers could obtain federal dollars to provide premium pay for their workers, retroactive to January 27, 2020. Premium pay for essential workers would be \$13/hour, capped at \$10,000 per worker (\$5,000 for those earning \$200,000 or more annually).

Paycheck Protection Program Amendments. The bill would extend the authority of the Small Business Administration to grant loans under the PPP until December 31, 2020 (or until the current \$659 billion in funding runs out). In addition, the HEROS Act would extend the covered period for use of the loan for up to 24 weeks after loan origination, or December 31, whichever is earlier; allow PPP borrowers additional time (to December 31, 2020) to bring employees back on the payroll for purposes of loan forgiveness; remove the current requirement that 75% of a PPP loan must be used for payroll to be forgivable; provide that employers would not be penalized in terms of PPP loan forgiveness where they are unable to rehire certain workers or cannot find similarly qualified employees; and extend maturity of PPP loans to a minimum of five years.

Senate HEALS Act

The Senate did not take up the HEROES Act, instead waiting to see how the pandemic played out over the course of the summer. By late July, as expanded unemployment benefits were nearing their expiration, Senate Republican leadership unveiled its latest legislative response to the COVID-19 pandemic, the Health, Economic Assistance, Liability Protection and Schools (HEALS) Act.⁶⁴ With an estimated cost of \$1 trillion, key provisions of the HEALS Act include:

Unemployment Insurance (UI). The bill would continue an expanded unemployment benefit for millions who have lost their jobs during the pandemic. The current expanded benefit of an additional \$600 per week expired on July 31, 2020. In its place, the Senate bill would continue extended UI benefits, but at the rate of \$200 per week in the short term. Longer term, the bill directs states to phase in a new system over the next two-to-four months, in which workers would receive up to 70% of their lost wages, whereupon the \$200 flat “plus-up” would end. To date, state UI offices have been overwhelmed with claims, with many reports that antiquated computer systems are unable to handle this onslaught; it is not clear how quickly states would be able to adapt their UI systems to this new proposal, were it to become law.

Liability Shields. The bill includes provisions limiting employers from liability from employees, customers, and vendors relating to COVID-19 exposure. The HEALS Act would create a federal cause of action for coronavirus exposure claims as the exclusive remedy for all claims against a defendant for personal injury caused by an actual, alleged, feared or potential exposure to the coronavirus. This cause of action would cover all alleged injuries that arise from conduct taking place between December 1, 2019 and the later of either the end of the coronavirus emergency declaration or October 1, 2024, and covers all claims, including those still pending on the date of enactment. State and common law would be preempted insofar as they provide for broader liability. Under the bill, a defendant would not be liable for coronavirus exposure so long as it undertook reasonable efforts in light of all the circumstances to comply with applicable mandatory coronavirus standards and regulations in effect at the time of the alleged exposure. If plaintiffs were able to show that the business did not take these reasonable steps, they would also need to show by clear and convincing evidence that the defendant’s gross negligence or willful misconduct caused the plaintiffs’ coronavirus injuries.

Employer Liability. Employers are already facing a spiraling number of lawsuits relating to COVID-19 under labor and employment laws, with almost 550 suits filed to date.⁶⁵ Recognizing this, the HEALS Act would protect employers from liability under federal labor and employment laws, including the Occupational Safety and Health (OSH) Act, the Fair Labor Standards Act (FLSA), the Age Discrimination in Employment Act (ADEA), the Worker Adjustment and Retraining Notification (WARN) Act, Title VII of the Civil Rights Act of 1964, Title II of the Genetic Information Nondiscrimination Act (GINA), and Title I of the Americans with Disabilities

64 See Jim Paretti and Michael J. Lotito, [Senate Republicans Unveil Latest COVID-19 Response Legislation](#), Littler ASAP (July 28, 2020).

65 See [COVID-19 Labor & Employment Litigation Tracker](#), Littler Insight (updated weekly).

Act (ADA), for actions taken to comply with coronavirus-related public health guidance and regulations. It would further protect from liability under the ADA and Civil Rights Act of 1964 businesses and employers that cannot offer requested accommodations because doing so would pose a serious risk to public health, and would foreclose lawsuits for injuries caused by workplace coronavirus testing unless the injuries were caused by gross negligence or intentional misconduct.

Other Employment Provisions. The bill would clarify that providing coronavirus-related assistance to an independent contractor or to the employee of another employer does not create an employment relationship between the person or entity providing the assistance and the person who received it. With respect to required WARN Act notices, the bill would provide an exception to employer notification laws that normally require a notice period for employment decisions made due to the coronavirus emergency.

Paycheck Protection Program. The bill would make a number of changes to the Small Business Administration PPP. It would provide for additional allowable expenses for PPP to include operations costs, certain supplier costs, personal protective equipment (PPE), and certain property damage. The bill would provide additional flexibility for borrowers to determine what their eight-week "covered period" is (through December 31, 2020), provide simplified application processes for loans of less than \$2 million, and allow certain small businesses with 300 or fewer employees and a 50% reduction in gross revenues to access a second PPP loan, up to \$2 million.

Late July and early August saw a series of attempted negotiations between the Democratic-led House, the Republican-led Senate, and the White House. Unfortunately, no substantive agreement was reached, and both chambers adjourned for their August recess, with the expectation that if a new "deal" on additional legislation is reached, it is likely to come after Labor Day. While both sides have backed off their initial proposals (offering up "lite" versions of their respective packages), it does still appear that there is significant distance and that quick compromise is unlikely. As lawmakers enter the last serious legislative stretch before the November elections, it is increasingly likely that additional COVID-19 relief will be tied into necessary legislation to fund the federal government when the current fiscal year expires on September 30, 2020.

New Paid Leave Mandates

Perhaps the most significant piece of legislation directly affecting employers and employees was the enactment in March 2020 of the Families First Coronavirus Response Act. Effective April 1, 2020, the FFCRA requires covered employers (generally those with fewer than 500 employees) to provide up to 80 hours of emergency paid sick leave under the Emergency Paid Sick Leave Act (EPSLA) and up to 12 weeks of leave under the Emergency Family and Medical Leave Expansion Act (EFMLEA) to certain employees impacted by COVID. Under the law, up to 80 hours of leave under EPSLA is available to employees for a variety of specified reasons, specifically, where an employee: (1) is subject to a federal, state, or local quarantine or isolation order related to COVID-19; (2) has been advised by a health care provider to self-quarantine related to COVID-19; (3) is experiencing COVID-19 symptoms and is seeking a medical diagnosis; (4) is caring for an individual subject to an order described in (1) or self-quarantine as described in (2); (5) is caring for a child whose school or place of care is closed (or child care provider is unavailable) for reasons related to COVID-19; or (6) is experiencing any other substantially-similar condition specified by the Secretary of Health and Human Services (HHS), in consultation with the Secretaries of Labor and Treasury (to date, no such "substantially similar condition" has been identified by HHS).

Under FFCRA, an employee is also entitled to up to 12 weeks of leave under the EFMLEA, the first two of which are unpaid, the remainder paid at the rate described below. Importantly, this leave is only available for reason (5) (that is, where an employee is caring for a child whose school or place of care has been closed or whose child care provider is unavailable due to COVID). This last provision has taken on even greater importance as the COVID-19 pandemic has continued to wreak havoc throughout the summer, and as schools reopen for the fall in various fashions (online education, in person, or a hybrid of both, sometimes at a parent's discretion).⁶⁶

66 See Jeff Nowak, Lauren Marcus and Sebastian Chilco, [Dear Littler: How Do We Manage Time Off, Scheduling & Accommodation Requests from Employees with Children Whose Education is Affected by COVID-19?](#) (Aug. 26, 2020).

Rates of Pay. Employees taking leave under the EPSLA for reasons (1), (2), or (3) are entitled to be paid at either their regular rate or the applicable minimum wage, whichever is higher, up to \$511 per day and \$5,110 in the aggregate (over a 2-week period). Employees taking EPSLA leave for reasons (4) or (6) are required to be paid at 2/3 their regular rate or 2/3 the applicable minimum wage, whichever is higher, up to \$200 per day and \$2,000 in the aggregate (over a 2-week period). Finally, employees taking FFCRA leave for reason (5) must be paid at 2/3 their regular rate or 2/3 the applicable minimum wage, whichever is higher, up to \$200 per day and \$12,000 in the aggregate (over a 12-week period—two weeks of paid sick leave followed by up to 10 weeks of paid expanded family and medical leave).⁶⁷ While employers are required to pay for this leave, the cost is 100% covered by the federal government by way of refundable payroll tax credits.

Exemptions. The FFCRA included a series of exemptions for certain employers, including small businesses (those with fewer than 50 employees), as well as exemptions for employers of health care providers and emergency first responders. The Department of Labor quickly issued a series of frequently asked questions⁶⁸ for employers, and shortly thereafter issued a temporary rule specifically setting out, among other things, its interpretation of these exceptions.⁶⁹

Legal Challenge. In April 2020, the state of New York filed a complaint for declaratory and injunctive relief against the DOL and the Secretary of Labor in the U.S. District Court for the Southern District of New York, alleging that portions of the DOL's rule were unlawful under the Administrative Procedure Act (APA). Specifically, the lawsuit challenged the DOL's regulatory definition of the "health care provider" exemption, which it alleged was over-broad. It also challenged the DOL's interpretation that leave was available for employees only where the employer had work available for the employee to perform (put more simply, DOL's regulation took the position that where an employer's business was closed, say due to a shut-down order, or where employees were furloughed due to lack of work, these employees were not entitled to leave because there was no work available for them to perform). In August, the district court ruled in favor of the plaintiffs, striking down the challenged portions of the regulations (including the health care provider definition, the "availability of work" requirement, and other provisions relating to the use of intermittent leave and documentation requirements).⁷⁰

As of this writing, it is unclear whether the DOL will appeal the district court's ruling. Relatedly, the Office of Management and Budget is reviewing a new FFCRA regulation the DOL is expected to promulgate shortly (the scope and substance of which is not yet known). The scope of the district court's ruling is also not clear. Many assume that the decision equates to a nationwide injunction on the challenged portions of the final rule. The state of New York did not, however, specifically seek the APA remedy of "vacatur without remand," the remedy that would result in such a nationwide injunction. In the absence of such a specific request by the state, the district court's order itself could be instructive on the scope of the decision. However, the district court's decision does not make clear whether its decision to vacate portions of the final rule applies only to the Southern District of New York, New York State or on a broader, nationwide basis. Given the significant uncertainty surrounding key portions of FFCRA's rules, employers should consult legal counsel before making any decision as to whether or not to provide paid FFCRA leave.

67 The \$12,000 aggregate amount reflects the up to 80 hours (2 weeks) of EPSLA and then 10 weeks of EFMLEA.

68 U.S. DOL, Wage and Hour Division, Families First Coronavirus Response Act: Questions and Answers, available at <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>.

69 U.S. DOL, *Paid Leave Under the Families First Coronavirus Response Act*, 85 Fed. Reg. 19326-19357 (Apr. 6, 2020); *Paid Leave Under the Families First Coronavirus Response Act: Correction*, 85 Fed. Reg. 20156-20158 (Apr. 10, 2020); See also Alexis Knapp, Jeff Nowak, Sebastian Chilco, Jim Paretto, and Michael Lotito, *DOL Releases Regulations Implementing the Families First Coronavirus Response Act*, Littler Insight (Apr. 2, 2020).

70 *State of New York v. U.S. Dept. of Labor*, Case 1:20-cv-03020 (S.D.N.Y. Aug. 3, 2020); See also Bill Allen, Emilie Hammerstein, Alexis Knapp, and Jeff Nowak, *NY Federal Court Strikes Down Key Provisions of DOL Rule Regarding FFCRA Paid Sick and Expanded FMLA Leave*, Littler Insight (Aug. 4, 2020).

State Response to COVID-19

As with other labor and employment issues, states are quick to jump in with new laws and regulations when Congress fails or is slow to act.

Over 200 employment-related state and local bills, ordinances, and regulations have been enacted—many on a temporary basis—in response to COVID-19. These laws and regulations address a range of workplace issues impacted by the pandemic, and are in addition to the countless governor-issued executive orders governing workplace closures, health screenings, face coverings, and return-to-work protocols.

A number of California localities enacted laws requiring supplemental paid sick leave for COVID-19 purposes.⁷¹ In part, these laws aim to fill gaps left by the federal FFCRA, which applies to employers with 499 or fewer employees only and allows certain employers to exempt their employees wholly or partly from coverage.

While California leads the charge with these emergency supplemental leave laws, a number of other jurisdictions have enacted their own laws that (a) prohibit employers from taking adverse action against employees for obeying a public health order or emergency or healthcare provider's advice to self-isolate; (b) expand the amount of leave allowed during the pandemic; (c) allow an employee to take leave to care for a family member for COVID-19-related reasons; or (d) relax the requirements for requesting verification to support an employee's request to use paid sick leave. Some of these laws simply expand existing state leave laws to cover leave for COVID-19-related reasons, while others create new obligations.

At the local level, a new ordinance in Seattle (Seattle Council Bill 119793) requires covered employers to provide gig workers with paid sick leave for use related to the COVID-19 pandemic.⁷² Employers operating in multiple states should therefore review the laws in every jurisdiction in which they operate.

The most common COVID-19-related laws focus on state unemployment insurance programs. Over half of U.S. states have enacted some type of emergency measure that eases restrictions on accessing unemployment benefits. Many of these state laws or regulations waive applicable waiting periods or expand the permissible reasons for declining employment during the pandemic, although some states are starting to resume enforcement of the work-search requirements. Another set of UI-related laws eases the impact of UI claims on an employer's experience rating. Toward a similar end, another spate of new local laws encourages participation in state workshare programs.

On the workers' compensation front, some laws provide a rebuttable presumption that first responders and other essential workers who are injured or die from COVID-19 contracted the illness while on the job, and are therefore entitled to benefits. Still other laws provide for hazard pay, while some localities in California give employees a right of recall if they were laid off for COVID-related reasons.

Although many jurisdictions issued safety and health-related orders, as noted, Virginia recently became the first state to enact an Emergency Temporary Standard related to COVID-19.⁷³ This emergency standard, which took effect on July 27, 2020, applies generally to every employer with operations in the Commonwealth, and imposes several health and safety obligations on employers. These requirements include conducting hazard assessments, implementing feasible engineering and administrative controls, carrying out an infectious disease preparedness and response plan, and conducting training. Depending on the level of risk employees face, additional requirements may also apply.

71 To date, emergency supplemental paid sick leave laws have been enacted in Long Beach, Los Angeles (city and county), Oakland, Sacramento, San Francisco, San Jose, San Mateo, Santa Rosa, and Sonoma County, California. The state also extended emergency paid leave to food-sector workers.

72 See Pam Salgado and Goldie Davidoff, [Seattle Passes Ordinance Providing COVID-19 Paid Sick and Safe Time for Gig Workers](#), Littler Insight (June 8, 2020).

73 The new law is codified at Title 16, §§ 25-220-10 through 25-220-90 of the Virginia Administrative Code. See Brad Hammock, Lauren M. Bridenbaugh, and Melissa Harclerode, [Virginia is the First State to Implement COVID-19 Emergency Standard](#), Littler ASAP (July 16, 2020).

Finally, another growing trend at the state level is the granting of limited immunity from liability for claims based on virus transmission. To date, at least 12 states have enacted such liability shield laws.⁷⁴

Many of these state and local laws are geared toward this specific emergency, and will therefore sunset when conditions improve. It will be interesting to see, however, which of these new laws will have staying power. The 2020 elections and the political makeup of the state legislatures in 2021 will likely affect this calculus.

74 Georgia, Idaho, Iowa, Kansas, Louisiana, Mississippi, Nevada, North Carolina, Oklahoma, Tennessee, Utah, and Wyoming.

Part V: Predictions

Making predictions under normal circumstances is more art than science. Making predictions during a pandemic—and two months before a national election—is largely a fool’s errand. Yet, there are certain factors and variables we can highlight that could influence how the economy might recover and what the new year will bring.

- Independent contractor work will help fill the void left by jobs that are no longer available. As noted, the IRS projected an upward trend of 1099 filings traditionally used by independent contractors.⁷⁵ Because the economic recovery will be long and protracted, individuals will need to look to other avenues find work.
- Indices such as the Consumer Confidence Index (CCI) are worth monitoring. The CCI is a survey administered by The Conference Board⁷⁶ to measure how optimistic individuals are about their financial situation. The monthly reports examine current business conditions and expected developments. According to the Conference Board, the CCI decreased in August for the second month in a row, dropping to its lowest level in six years.⁷⁷
- While not a panacea, a safe and effective COVID-19 vaccine will go a long way to revitalizing jobs that require close personal contact, and boosting consumer confidence. Of course, encouraging everyone who can be vaccinated to receive a vaccination will factor into how successful it ultimately is. Along the same lines, the number of COVID-19 cases, hospitalizations, deaths, and extent/ease of testing will clearly influence consumer confidence and therefore recovery.
- Many businesses that considered their furloughs temporary are coming to the realization some closures will be permanent. According to the BLS, of the 16.9 million people unemployed in July, 9.6 million (57%) reported they were unable to work because their employer closed or lost business due to the pandemic.⁷⁸ As of August 28, 2020, there were at least 15 lawsuits filed across the country alleging an employer did not properly comply with its obligations under the federal WARN Act and/or a state mini-WARN statute. Whether these lawsuits increase or decrease may indicate how many businesses are able to stay afloat. Similarly, the number of business and personal bankruptcy filings compared to those filed in past recessions could serve as another indicator of where the economy is headed.
- Another metric to monitor is the Bureau of Labor Statistics’ monthly Employment Situation Report, which measures aggregate hours worked by production and non-production supervisory workers, excluding farm workers.⁷⁹ This index shows the combined effect of both layoffs and reductions in hours for workers who remain on a company’s payroll. The aggregate hours index peaked at 119.8 in February 2020, marking the culmination of a prolonged period of growing economic activity, to a low of 97.4 in April 2020, wiping out the entire previous 10 years of economic expansion represented by the index. Hopes for a sharp but short recession have been raised by the recovery of the index to 108.5 in July 2020, a level 11.4% higher than April, but still almost 10% short of the February benchmark. If this number continues to steadily increase, as it has since the April 2020 low, this could be a positive recovery sign.
- Small businesses are crucial to long-term economic success. The health of the small business sector will be a bellwether for the economy as a whole. According to the latest results from the Census Small Business Pulse Survey, 5.5% of respondents claimed that during the week of August 23, 2020, they had rehired employees who had been furloughed or laid off after March 13, 2020, while 39.6% responded they did not.⁸⁰ The same week, 6.6% of responding small businesses

75 Monitoring the self-employment data, which is found in the Household Survey tables in the Bureau of Labor Statistics monthly Employment Situation Reports, will also indicate any growth in independent contractor activity.

76 The Conference Board, [About Us](#).

77 The Conference Board, Press Release, [Consumer Confidence Survey](#), Aug. 25, 2020.

78 U.S. Bureau of Labor Statistics, Labor Force Statistics from the Current Population Survey, [Supplemental data measuring the effects of the coronavirus \(COVID-19\) pandemic on the labor market](#), Table 5. Persons unable to work at some point in the last 4 weeks because their employer closed or lost business due to the coronavirus pandemic by receipt of pay from their employer for hours not worked and employment status, [July 2020 \(XLSX\)](#).

79 See U.S. Bureau of Labor Statistics, [Technical Notes for the Current Employment Statistics Survey](#).

80 U.S. Census Bureau, [Small Business Pulse Survey](#), updated September 3, 2020. The week in question was from August 23 through August 29, 2020.

indicated they had increased their number of paid employees, while 10.7% of respondents claimed they had downsized.⁸¹ The survey asks 20 key questions worth monitoring, including whether small businesses permanently or temporarily closed a location, are operating at the same capacity relative to one year ago, are receiving federal financial assistance, or have changed their operations in other ways. How these responses trend over the coming weeks could be informative.

- Long-term unemployment claims continue to be instructive. Claims under the CARES Act Pandemic Emergency Unemployment Compensation (PEUC) program rose significantly from April to August. Those individuals who have exhausted their eligibility for regular UI benefits can receive up to an additional 13 weeks of benefits under the PEUC. According to DOL data, approximately 27,000 people filed claims under the PEUC on April 11; during the week ending August 15, nearly 1.4 million individuals claimed PEUC benefits.⁸² Another recent analysis predicts that approximately 1.6 million workers laid off in April 2020 will still be out of work in October, and over 500,000 from this group will still be unemployed by February 2021.⁸³ The same study estimates that the long-term unemployment numbers (those out of work for more than 26 weeks) could therefore exceed 4.5 million.⁸⁴
- Tracking the employment numbers in states with liability shields could be useful. If employers are more apt to resume operations and bring their employees back from furlough without the fear of additional liability, more states legislatures might follow suit.
- Whether consumer habits have been permanently changed and how businesses can adapt to such changes will be revealing. For example, the prevalence of online shopping had already caused many brick-and-mortar stores to close. The pandemic might have influenced even more individuals to switch to online shopping—or services, such as healthcare visits—exclusively. Facilities that already had an online presence—or could quickly and efficiently create one—will outlast those that do not. Similarly, crowd avoidance may influence the number of people who plan to attend concerts and theaters, take public transportation, or travel when the pandemic subsides.
- The November elections will bring its own level of uncertainty. As we learned in 2016, we need to expect the unexpected. The election results could be a referendum on the current economic and social conditions. If voters usher in a completely new political regime, how will the economy react? Businesses typically prefer a politically divided government to ensure a system of checks and balances. Regardless of the outcome, businesses will be looking to their elected officials to be more proactive than they have been over the past six months.

Conclusion

The challenges of the past six months have tested the resolve and resiliency of the U.S. population and economy. How businesses fare in the next six months may indicate how long these current struggles will last.

In the meantime, WPI will continue to monitor federal and state legislative and regulatory efforts to address unemployment and encourage job growth. Our next publication, the WPI Post-Election Report, will include an update on notable employment trends.

81 *Id.*

82 U.S. DOL, News Release, [Unemployment Insurance Weekly Claims](#), Sept. 3, 2020.

83 Chodorow-Reich, Gabriel, and John Coglianesi. Working Paper. "[Projecting Unemployment Durations: A Factor-Flows Simulation Approach With Application to the COVID-19 Recession.](#)" (July 2020).

84 *Id.*, pp. 2-3.

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