HR, Benefits, and Payroll Compliance Monthly Roundup: March 2021

DOL Delays Effective Date for 2020 Employee Tip Rule

On February 26, 2021, the US Department of Labor (DOL) delayed the 2020 employee tip rule's effective date from March 1, 2021, to April 30, 2021. The delay allows the Biden administration sufficient time to review the rule before it becomes effective. The tip rule:

- Prevents employers from keeping their employees' tips.
- Prohibits managers and supervisors from keeping any portion of the employees' tips, including any from a tip pool.
- Limits an employer's ability to implement mandatory tip pools that include nontipped employees.
- Incorporates a new recordkeeping requirement for employers that do not take a tip credit but collect employees' tips to operate a mandatory tip pool.
- Incorporates new civil monetary penalties.
- Codifies recent DOL guidance on how to compensate a tipped employee who performs nontipped duties at work.
- Harmonizes FLSA requirements with an executive order that establishes a minimum wage for certain contractors.

	Employers should continue their preparations to comply with this rule, as the rule is still scheduled to become effective April 30, 2021. They should also continue monitoring DOL communications for possible updates. **DOL Proposes to Rescind the Independent Contractor Rule** On March 11, 2021, the DOL announced a proposal to overturn the Independent Contractor final rule. The rule was originally published in January; however, the effective date has been pushed out allowing the Biden administration time to evaluate the rule before it becomes effective. The final rule reaffirms that employers must consider whether there is a financial dependency in the employment relationship with their workers based on the Economic Realities Test. This test is used to determine whether a worker is economically dependent on the employer — and is therefore an employee — or is really in business for him or herself — and is therefore an independent contractor. The DOL has stated that implementing this rule would "significantly weaken" worker protections under the Fair Labor Standards Act (FLSA). The DOL has found that using the Economic Realities Test would narrow or minimize the importance of factors not used by the test. Currently, the repeal of this rule has only been proposed and is not final. Employers should continue monitoring the DOL website for updates surrounding the final rule. **DOL Proposes to Rescind the FLSA Joint Employer Determination Rule** On March 11, 2021, the DOL announced a proposal to rescind the 2020 Joint Employer Determination Rule. Joint employment is when two or more organizations share the control and supervision of one or more employees. Joint employers are equally and individually responsible for compliance with labor and employment laws including the FLSA. The DOL proposed rescinding the rule as the rule was determined to go against long-standing agency interpretations and court rulings. According

	to the DOL, the rule requires using a test that is "unduly narrow," and rescinding the rule would "improve well-being and economic security" by providing stronger protections for workers. Currently, the repeal of this rule has only been proposed and is not final. Employers should continue monitoring the DOL website for updates surrounding the final rule. **OSHA Releases COVID-19 National Emphasis Program** On March 12, 2021, the Occupational Safety and Health Administration (OSHA) launched a National Emphasis Program (NEP) for COVID-19. Previous OSHA guidance addressed mitigating and limiting the spread of COVID-19. The NEP prioritizes eliminating and controlling workplace exposures to COVID-19. OSHA favors the use of on-site workplace inspections to enforce compliance with the NEP. OSHA will conduct remote inspections if on-site inspections cannot be performed safely. OSHA plans to focus enforcement efforts on employers that are not making good faith efforts to protect workers. They plan to use reports of work-related deaths and hospitalizations to allocate enforcement resources. OSHA has updated their interim enforcement response plan to reflect these new focus areas. NEP encourages employees to raise concerns when they perceive employers are failing to protect them from COVID-19. Employers should familiarize themselves with OSHA's COVID-19 NEP, to implement all policies, measures, and procedures necessary for compliance with OSHA regulations.
	**California Supreme Court Demands Strict Meal Period Compliance** On February 25, 2021, the California Supreme Court issued their ruling addressing legal standards for meal period violations in Donahue v. AMN Services, LLC. The court required strict compliance for providing meal periods and specifically condemned the practice of rounding to the nearest time increment for meal periods. Kennedy Donahue had filed a class action lawsuit against her employer for failing to pay premium wages for meal periods that did not strictly comply with California's requirement to provide a 30-minute meal period

	within the first five hours of work. In the lawsuit, it was found that the employer's time-capturing policy rounded time punches to the nearest 10-minute increment, resulting in meal periods that were as short as 22 minutes being rounded up to 30 minutes. Due to the hearing, the California Supreme Court found that employers cannot round time punches for meal periods. Under the Wage Orders, a meal period violation prompts premium pay obligations for the employer. The court noted that rounding potentially conflicts with the precise time requirement, infringing on an employee's right to a full 30-minute meal period. A "minor infringement" such as a meal period of 28 or 29 minutes, triggers an employer's premium pay obligations. In a previous case, See's Candy Shops Inc. v. Superior Court (2012) the court concluded that "employers may use rounded time punches to calculate regular and overtime wages if the rounding policy is neutral on its face and as applied," but ruled that the practice will not apply in the meal period context. The court held that a rounding practice is not accurate because it overlooks shortened meal periods, which were unreported due to rounding. Employers may present evidence that the employee failed or refused to take a compliant meal period provided by the employer, or that the employee was compensated for noncompliant meal periods. Employers need only to provide a mechanism for employees and ensure proper use: At a minimum, employers should consider the following: • Have policies and practices that notify employees of the availability of timely and complete meal periods. • Accurately track that employees are provided with a full 30-minute meal period that starts prior to completing the fifth hour of work (and the tenth hour for second meal periods), and do not use rounding. • Accurately determine whether an employee is entitled to a meal period premium and make that payment. Employers may want to consider providing meal periods of more than 30 minutes, which start well in advance of the five- and ten-hour mark, and having a method to determine whether a meal period violation occurred and must be paid automatically.

Sonoma County, California, Expands Emergency Paid Sick Leave

Effective February 9, 2021, Sonoma County, California's Board of Supervisors enacted an emergency ordinance that expands coverage under its emergency paid sick leave (EPSL) ordinance while clarifying and/or amending leave and notice requirements.

Employer Coverage:

- Previously, the ordinance applied to employers with 500 or more US employees. It now applies to all employers in the county's unincorporated areas.

No New Bank of Leave:

- EPSL is considered a one-time benefit, so employers do not need to provide a new bank of leave to employees.

Limited Exception for Health Care Providers & Emergency Responders:

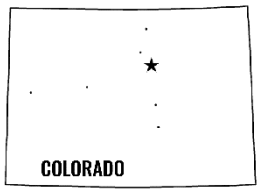
- Unlike the federal Families First Coronavirus Response Act (FFCRA), employers of health care providers and emergency responders covered by the ordinance could not elect to exempt those employees from being able to take EPSL. The ordinance now provides a limited exception for these employers. If they have employees who need to take leave due to COVID-19, these employers may deny leave if they make a good-faith determination that granting the leave would create a staffing shortfall and that their operational needs require them to deny all or some of the requested leave.

Notice/Posting Requirement:

- The amendment requires employers to provide notice to employees of their rights under the ordinance in a manner that will reach all employees, within three days of publication of the ordinance. It is recommended to post a notice in English and in Spanish in the workplace, on any intranet or applications-based platform and/or via email. The notice is available here.

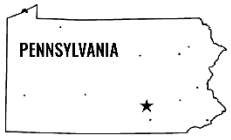
City of Los Angeles Amends Supplemental Paid Sick Leave Ordinance

Effective February 10, 2021, Los Angeles Mayor Eric Garcetti revised an order requiring employers to provide COVID-19 Supplemental Paid Sick Leave (SPSL) to broaden employee coverage and change how

	employers must calculate the amount of SPSL they provide employees. The LA Office of Wage Standards has now revised its regulations to align with these changes. Employee Coverage: • The revised order provides SPSL benefits to employees employed by the same employer for 60 days, expanding coverage to employees hired on or after March 5, 2020. SPSL Calculation: • The revised order requires employees to calculate the amount of SPSL due to employees based on their two-week average over the last 60 days of employment. The revised order does confirm whether this standard applies to only the employees who the order did not previously cover, or whether it also applies to previously covered employees. If it applies to previously covered employees, employers may need to recalculate the amount of SPSL these employees are eligible to receive. The revised order does not confirm when employers must perform this calculation. Until additional guidance is issued, employers might consider using the approach the federal FFCRA used: calculate the amount of leave when an employee first requests to use leave.
	**Colorado Clarifies the Obligation to Provide Public Health Emergency Leave** Effective April 14, 2021, the Colorado Department of Labor and Employment (CDLE) has issued revisions to the Wage Protection Rules, 7 CCR 1103-7, relating to Colorado employers' paid sick leave obligations under the Healthy Families and Workplaces Act (HFWA). These revisions: • Require Colorado employers to provide at least 48 hours of paid sick and safe leave (PSSL) each year on either an accrual basis based on hours worked or front-loaded annually. • Require all Colorado employers to provide employees access to up to 80 hours of public health emergency leave (PHEL) upon the declaration of a public health emergency by federal, state, or local authorities.

	Previously, the rule confirmed that full-time employees (those who work at least 40 hours per week) are entitled to 80 hours of PHEL under the law. The rule now clarifies that part-time employees receive PHEL in "the greater of the number of hours the employee a) is scheduled for work or paid leave in the 14-day period after the leave request, or b) actually worked in the 14-day period prior to the declaration of the public health emergency of the leave requests, whichever is later." Having the amount of PHEL that part-time employees receive tied to when they request PHEL makes compliance less challenging for employers as the calculation produces a result that represents the employee's current working situation. The second change clarifies those employers that are hired during a public health emergency and whether they are entitled to PHEL. The CDLE has simplified their language to indicate that all employees are entitled to PHEL regardless of their date of hire, because PHEL eligibility is linked to when the employee requests leave. Although the new rules do not take effect until April 14, 2021, employers can rely on them on a going-forward basis.
	**New Jersey Passes Law on Recreational Marijuana, Including Provisions on Discrimination and Drug Tests** Effective February 22, 2021, New Jersey has enacted the Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act implementing the constitutional amendment embracing recreational marijuana. Employment protections are as follows: • Employers cannot refuse to hire any person or discharge or take any adverse action against an employee with respect to compensation or any other terms and conditions of employment because the employee uses or does not use cannabis products. • The Act protects employees from being subject to any adverse employment action solely because they have tested positive for cannabinoid metabolites or admit to having engaged in the use of marijuana or marijuana products under the law. • The Act affirms the employers' right to maintain a drug and alcohol-free workplace, prohibiting employees from using, consuming, being under the influence of, or possessing marijuana or marijuana products in the workplace or during work hours. • The Act does not recognize any exception that would allow an

	employer to bar off-duty marijuana use by employees in safety-sensitive positions. • The act does provide that if compliance with the law results in a "provable adverse impact on an employer subject to the requirements of a federal contract," then the employer may enact policies to remain consistent with the federal law, rules, and regulations. Employers may require employees to submit to drug tests under the following circumstances: • Suspicion of cannabis use while the employee is engaged in the performance of their work responsibilities; • Finding any observable signs of intoxication related to usage of a cannabis item; or • Following a work-related accident (subject to an investigation by the employer). Employers may also utilize random drug testing, preemployment screening, or routing testing of current employees to determine cannabis use during an employee's working hours. However, an employer cannot act solely based on a positive drug test. The Act redefines conducting a "drug test" as meaning processing a) "scientifically reliable objective testing methods and procedures," such as blood, urine, or saliva tests; and b) conducting a physical evaluation by an individual certified as a Workplace Impairment Recognition Expert. The employer may take an adverse action only if both the Recognition Expert and drug test indicate that an employee is under the influence in the workplace or during work hours. The New Jersey Cannabis Regulatory Commission is still working on the regulations and further clarifying steps employers will have to take to comply with the new law. **New Jersey Prohibits Preemployment Inquiries Regarding Marijuana Convictions** Effective May 23, 2021, New Jersey has enacted a new law regarding preemployment inquiries into marijuana-related offenses. Employers are prohibited from inquiring about or basing any employment decision on the fact that an applicant or employee has been arrested for, charged

	with, convicted of certain offenses, or been involved in adjudication of delinquency for various marijuana or hashish-related offenses. Exceptions do apply for those positions in law enforcement, corrections, the judiciary, homeland security, and emergency management. The law provides a penalty of up to $1,000 for the first violation, $5,000 for the second violation, and $10,000 for each additional violation.
	**Pittsburgh Amends Provisions on Hairstyle-Related Discrimination** Effective February 24, 2021, Pittsburgh has amended their anti-discrimination provisions in their City Code to prohibit employment and other discrimination based on protective, cultural, or natural hairstyles. This amendment has removed the language "and other forms of hair presentation" from the definition of hairstyle. The update is intended to clarify that the protections do not extend to beards. **Pittsburgh Paid Sick Leave** The Pittsburgh Paid Sick Days Act (PDSA) took effect on March 15, 2021. Employers located in Pittsburgh or that conduct business in Pittsburgh, and that have at least one employee anywhere in the country, must comply with the PDSA. For the first year that the ordinance was in effect (March 15, 2020 through March 14, 2021), employers with 14 or fewer employees were required to provide accrual of up to 24 hours of unpaid sick time. Effective March 15, 2021, employers with 15 or more employees must permit accrual of up to 40 hours of paid sick time per year. Employers with fewer than 15 employees can accrue up to 24 hours of paid sick leave.

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