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

	**DOL Delays Portions of the 2020 Employee Tip Final Rule** On December 30, 2020, the US Department of Labor (DOL) had published a final rule to amend the employee tip regulations under the Fair Labor Standards Act (FLSA). On February 26, 2021, a delay rule extended the rule's effective date from March 1, 2021, to April 30, 2021. On April 29, 2021, the DOL published another file rule delaying the effective date of three provisions of the 2020 employee tip rule to December 31, 2021. 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.

The provisions affected by this delay relate to the assessment of civil money penalties against employers violating federal wage and hour laws, as well as regulations that dictate the application of tip credits to employees who perform both tipped and nontipped duties.

This delay will provide additional time to conduct another rulemaking to potentially revise that portion of the rule and address the application of tip credit provisions to tipped employees who perform both tipped and non-tipped duties.

The remainder of the rule became effective April 30, 2021, including those portions that address the keeping of tips and tip pooling, recordkeeping and other minor changes. The DOL is requesting public comments on how to improve the rule's recordkeeping requirements and provision that bans managers and supervisors from keeping employees' tips.

Wage and Hour Developments During the First 100 Days of the Biden Administration

As President Biden recently surpassed 100 days in office, below are the more important developments affecting wage and hour law that took place during his first 100 days:

- **Fight for $15** – This remains a top priority to increase the minimum wage to $15. Effective January 22, 2022, Biden issued an executive order requiring federal contractors and subcontractors to pay a minimum hourly wage of $15 for workers employed in the performance of federal contracts or subcontracts.
- **Senate Confirmations** – The Senate had confirmed 28 nominations but only one US DOL Secretary of Labor. In more recent presidencies, Obama and Bush had already filled three DOL-confirmed positions by their 100th day in office.
- **Wage and Hour (WHD) Personnel** – Biden intends to nominate Dr. David Weil as the next Wage and Hour Administrator. Weil served during the Obama administration and was the author of the Administrator Interpretations on Independent Contractors and Joint Employment.

- **Pre-Litigation Liquidated Damages** – On April 9, 2021, the WHD rescinded the Field Assistance Bulletin (FAB) 2020-2 with new guidance 2021-2. The new guidance reinstated a prior policy of pursuing pre-litigation liquidated damages but still required solicitor's office approval.
- **Independent Contractor and Joint Employment Rule** – The US Department of Labor (DOL) has announced it has officially withdrawn the Independent Contractor rule. For a full summary, see our e-Alert: DOL Withdraws Independent Contractor Final Rule
- **Tip Rule** – Parts of the rule went into effect, while the remainder of the rule was delayed.
- **Helping Employees Understand their Rights** – The DOL has launched new initiatives to help education and inform essential employees of their Wage and Hour rights and protections for all employees.
- **Withdrawing Opinion Letters** – The Biden administration has withdrawn the following opinion letters:
    1. FLSA2021-4 – addressing restaurant tip pools.
    2. FLSA2021-8 – addressing independent contractor status of distributors.
    3. FLSA2021-9 – addressing independent contractor status of motor carriers.
    4. FLSA2019-6 – addressing independent contractor status of service providers in the "gig economy."
    5. FLSA2019-10 – addressing whether time spent in a truck's sleeper berth during the multiday long-haul trips is compensable.

  The WHD is anticipated to continue withdrawing opinion letters, especially any issued during the prior administration.
- **End of the PAID Program** – On January 29, 2021, the DOL ended the Payroll Audit Independent Determination (PAID) program.

CDC New Safety Guidance for Fully Vaccinated Individuals

On April 27, 2021, the Centers for Disease Control and Prevention (CDC) released updated guidance concerning facial coverings and social distancing for fully vaccinated individuals.

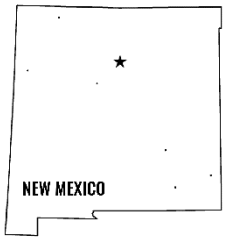
Based on the latest guidance, vaccinated people can:

- Visit with other fully vaccinated people indoors without wearing masks or physical distancing

	• Visit with unvaccinated people (including children) from a single household who are at low risk for severe COVID-19 disease indoors without wearing masks or physical distancing • Participate in outdoor actives and recreation without a mask, except in certain crowded settings and venues • Resume domestic travel and refrain from testing before or after travel or self-quarantine after travel • Refrain from testing before leaving the US for international travel (unless required by the destination) and refrain from self-quarantine after arriving back in the US • Refrain from testing following a known exposure, if asymptomatic, with some exceptions for specific settings including (1) residents and employees of non-health care congregate settings, such as homeless shelters and correctional and detention facilities; (2) high-density workplaces — processing plants, for example (3) residents of dorms or other high-density housing settings at educational institutions • Refrain from quarantine following a known exposure if asymptomatic • Refrain from routine testing if asymptomatic and feasible However, the CDC has communicated that fully vaccinated individuals must continue to wear masks in the following situations: • Indoor public settings • Gathering indoors with unvaccinated people (including children) from more than one other household • Visiting indoors with an unvaccinated person who is at an increased risk of severe illness or death from COVID-19 or who lives with a person at an increased risk. Recommendations for fully vaccinated individuals: • Avoid indoor large gatherings • Take steps to protect themselves when traveling • Required to wear masks on planes and public transportation • Watch for symptoms of COVID-19, especially if they have been around someone who is sick, in which they should get tested and stay home and away from others even if they are vaccinated. • Fully vaccinated international travelers arriving in the US are required to get tested within three days of their flight or show

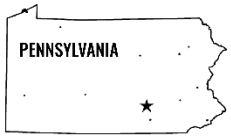
	documentation of recovery from COVID-19 in the past three months, and get tested again 3 – 5 days after their trip.
	**New Law Providing Immunity from Certain COVID-19 Claims** Effective April 5, 2021, Arizona has passed a law to provide businesses and health care providers with immunity from liability in connection to claims stemming from the COVID-19 pandemic. Businesses: A business that acts in good faith to protect customers, students, tenants, volunteers, patients, guests, neighbors, or the public from injury related to the public health pandemic is immune from liability for pandemic-related injury, death, or loss to person or property. A good faith effort is deemed as adopting and implementing reasonable policies related to the pandemic. Health Care Providers: A health care provider that acts in good faith is deemed immune from liability for injury or death caused by the health care provider's act or omission while providing health care services in support of the state's response to the pandemic. A good faith effort is deemed if they relied on the applicable federal or state published guidance related to the pandemic. The law applies to any act or omission occurring during a patient's pandemic-related screening, assessment, diagnosis, or treatment. This also includes providing a person with health care services unrelated to the pandemic if the health care provider's action or omission was in good faith support of the state's response to the pandemic. This includes: • Delaying or canceling nonurgent or elective procedures • Providing nursing care or procedures • Altering a diagnosis or treatment according to a government order, directive, or guideline • Due to a lack of staffing, facilities, equipment, supplies, or other resources that are attributable to the state of emergency and that render the health care provider unable to provide the level of care required. **New Law on Mask Mandates** Effective August 27, 2021, Arizona has enacted a law to address mask mandates due to the COVID-19 pandemic. The law confirms that any business in Arizona is not required to enforce (on its premises) a mask

	mandate. **Protections for Employers Hiring Employees with Certificate of Second Chance** Effective August 27, 2021, Arizona has passed updates to their Second Chance law that allows a person convicted of certain criminal offenses to apply to have the court set aside the judgment of guilt once the person has completed the conditions of their probation or sentence. That person can then apply to the court to be issued a Certificate of Second Chance. This certificate is not a sponsorship or recommendation when applying for employment. However, the employee cannot be barred from a position based on their certificate if they are otherwise deemed qualified for the role. This amendment extends the state's limited liability protections provided to employers that hire a person who has been issued a certificate. Certain occupations and criminal offenses are exempt from this law.
	**Preferential System for Rehiring Hospitality Workers** Effective April 16, 2021, certain hospitality employers in California are required to give preference during the hiring process to rehiring and retaining employees displaced by COVID-19. This new law is in effect until December 31, 2024. To read our full summary, see our e-Alert: California Adopts New Preferential System for Rehiring Certain Hospitality Workers Displaced by COVID-19.
	**Amendments to Discrimination Law** Effective April 13, 2021, Delaware has amended their discrimination law to prohibit discrimination based on race, marital status, genetic information, color, age, religion, sex, sexual orientation, gender identity, national origin, disability, reproductive health decisions, and family responsibilities. The amendment has now clarified that "race" includes traits historically associated with race, including hair texture and protective hairstyles such as braids, locs, and twists.

	**Essential Workers Protection Act (EWPA)** Maryland has passed Public Health Emergency Leave and made amendments to its bereavement leave law, both anticipated to be signed into law shortly and scheduled to take effect on October 1, 2021. To read our full summary, see our e-Alert: Maryland Passes Public Health Emergency and Bereavement Leave Laws.
	**Amendments to Discrimination Ordinance** Effective May 16, 2021, St. Louis, Missouri has amended their employment discrimination ordinance. These amendments prohibit discrimination based on hairstyle, protective hair, natural and cultural hair texture, or style unless based upon demonstrable workplace safety concerns directly related to the duties and responsibilities of the employment position. Protective hair, natural and cultural hair textures, and styles: most often associated with race including braids, cornrows, locs, Bantu knots, Afros, and twists, whether or not hair extensions or treatments are used to create or maintain any such hairstyle, and whether or not the hairstyle is adorned by hair ornaments, beads, or headwraps.
	**New Mexico Legalizes Recreational Marijuana** Effective June 29, 2021, Governor Michelle Lujan Grisham passed a law legalizing the use and possession of recreational cannabis. The use of cannabis for medicinal purposes was previously authorized in New Mexico back in 2007. General Provisions: • An adult can possess more than two ounces of cannabis, 16 grams of cannabis extract, and 800 milligrams of edible cannabis if it is stored at home or out of public view. • While in public, an adult may possess up to two ounces of cannabis, and it must be smoked, vaporized, or ingested in a designated "cannabis consumption area." ○ Violations of public use can be fined up to $50 per violation. • Individuals may keep up to six mature cannabis plants at home, but no more than 12 total mature plants per household. • The sale of recreational cannabis may only begin in April 2022, although provisions of this law will become effective June 29, 2021. The law permits employers to implement, continue, and maintain certain fundamental drug-free workplace rules and policies to ensure employee safety.

	• The law does not restrict the employer's ability to prohibit or take an adverse employment action against an employee for impairment or possession of "intoxicating substances" while at work or during work hours. • The law does not limit an employer's ability to maintain rules and policies in compliance with federal law and regulations or require an employer to take any actions that will potentially result in the loss of federal contracts and/or funding. • Employers may continue to adopt and implement a "zero tolerance" policy regarding cannabis products. This policy allows employers to discipline or terminate current employees based on positive drug tests; however, the "zero tolerance" policies do not specifically include applicants. • The law is not intended to be construed to invalidate, diminish, or interfere with any collective bargaining agreement or the ability of any party to collectively bargain over a drug-free workplace policy or related issued. **New Mexico Allowing Expungement of Certain Cannabis-Related Criminal Records** Effective June 29, 2021, hand in hand with passing recreational marijuana, New Mexico has passed an additional law allowing expungement of certain cannabis-related criminal records. Upon successful application, the records will be treated as if they never occurred, and the person who received the order to expunge may reply to an inquiry that no record exists. The law decriminalizes the possession and use of cannabis for persons 21 years or older. Regardless of whether the person has been convicted, if the person was charged with an offense involving cannabis that is no longer deemed a crime based on the new law, all public records held by a court, state, or local agency that relate to the person's arrest or conviction are automatically expunged two years after the date of the person's conviction, or the date of the person's arrest if there was no conviction. In cases where the arrest or conviction included multiple charges, only the portions related to the cannabis will be expunged. If a person is or was 18 years of age at the time of the arrest or conviction, the public records will be retained for two years or until the person is 18 years of age (whichever comes first) and then will automatically be expunged.

	New Mexico Prohibits Discrimination on Hairstyles and Head Coverings Associated with a Protected Class The current New Mexico Human Rights Act prohibits discrimination in employment based on race, color, national origin, ancestry, religion, sex, age, physical, or mental handicap and serious medical condition, spousal affiliation, sexual orientation, gender identity, pregnancy, childbirth, and conditions related to pregnancy and childbirth. Effective July 1, 2021, New Mexico has amended this act to prohibit discrimination based on hairstyles and head coverings associated with a protected class. This amendment clarifies that "race" includes traits historically associated with race, including hair texture, length, protective hairstyles, and cultural or religious headdresses. Cultural or religious headdresses include hijabs, head wraps, and other headdresses used as part of an individual's personal cultural or religious beliefs. Protective hairstyles include braids, locs, twists, tight coils or curls, cornrows, bantu knots, afros, waves, wigs, and head wraps. **Healthy Workplaces Act (HWA)** Effective July 1, 2022, New Mexico has enacted the Healthy Workplaces Act (HWA), requiring employers to provide paid leave to employees. To read our full summary, see our e-Alert: New Mexico Enacts Statewide Paid Sick and Safe Time.
	**New York City Imposes Sexual Harassment Reporting Requirements** Previously effective on March 3, 2021, New York City imposed a new sexual harassment reporting requirement for organizations that contract with New York City agencies for "human services." The order covers any organization that provides services to city agencies related to day care, foster care, home care, homeless assistance, housing and shelter assistance, preventive services, youth services, senior centers, and health, or medical services including those provided by health maintenance organizations, legal services, employment assistance services, vocational and educational programs, and recreation programs. Under the order, covered organizations are now required to make the following information available to NYC's Department of Investigation

	(DOI): • Copy of the organization's sexual harassment policies, including complaint procedure • Copy of any complaint or allegation of sexual harassment or retaliation brought by an employee, client, or any other person against the chief executive officer or equivalent principal of the organization • Copy of the final determination or judgment regarding a complaint or allegation • Any additional information the DOI requests to impact their review of any investigation and determination The information should be made available by uploading through PASSPort, which is the city's digital Procurement and Sourcing Solutions Portal. This information must be provided to the DOI via PASSPort within 30 days of receiving the complaint or allegation. Any names or identifying factors of individuals other than the accused must be redacted from the information; however, the DOI does reserve the right to request the redacted information. Annually, employers will be required to provide their harassment policy and complete all required reports even if they have no information to report on.
	**Philadelphia Bans Marijuana Tests for Many Prospective Employees** Effective January 1, 2022, Philadelphia will become the third jurisdiction in the US (following Nevada and New York City) to limit the ability of private employers to conduct marijuana testing of prospective employees. This ordinance will make it an unlawful employment practice to require prospective employees to undergo prehire marijuana screening as a condition of employment in most jobs. The ordinance focuses on prospective employees and does not limit an employer's ability to conduct marijuana screenings on current employees. Employers **can** conduct prehire marijuana drug tests if the applicant is seeking: • Any position in law enforcement • Any position requiring a commercial driver's license • Any position requiring supervision or care of children, medical patients, disabled, or other vulnerable individuals • Any position in which the employee could significantly impact the health or safety of other employees or members of the public The ordinance does not determine which positions could impact the

	health or safety of other employees or members of the public. According to the ordinance, there will be additional guidance on which positions fall into that category. This ordinance does not apply if drug testing is required due to (1) a federal or state statute, regulation, or order; (2) a federal government contract or grant; or (3) if an employer is a party to a collective bargaining agreement that covers preemployment drug testing.
	**DeSoto, Texas Bans the Box** Effective January 1, 2022, DeSoto, Texas has passed a law that will prohibit covered employers from inquiring about an applicant's criminal history on an initial job application. Covered employers are deemed those with 15 or more employees.
	**Vermont Amends Military Leave Law** Effective July 1, 2021, Vermont has amended their military leave of absence law to remove the 15-day limitation on leave available to members of the National Guard, Vermont's State Guard, or a reserve unit of the US Armed Forces when ordered for military drills, training, or other temporary duties.
	**Law Prohibits PPE Provisions from Factoring into Independent Contractor Analysis** Effective July 1, 2021, Virginia has made amendments to their employment misclassification statute as well as the definition of "employment" for the purposes of the state's workers' compensation, unemployment insurance, and wage and hour laws. Due to the COVID-19 pandemic, state workplace health and safety regulations required employers to provide personal protective equipment (PPE) to their employees and ensure their employees were properly using PPE. This amendment has clarified that if an employer provided PPE to workers in response to the COVID-19 pandemic, the fact that the employer provided the PPE cannot be used in the determination of whether an individual is an employee or an independent contractor. **Virginia Legalizes Recreational Marijuana** Effective July 1, 2021, Virginia has passed the Cannabis Control law,

	legalizing the recreational use of cannabis within the state by adults 21 years or over. The new regulation allows individuals 21 or older to possess or cultivate a specified amount of marijuana for personal use. Effective January 1, 2024, the act will set forth requirements for retail, licensure, and taxation for the sale of marijuana. An employer may continue to maintain a policy against possession or use of marijuana in the workplace.
	**Amendments to Washington's Paid Family and Medical Leave** Washington has made amendments to their Paid Family and Medical Leave (PFML) to now allow additional workers to use the benefits in response to the COVID-19 pandemic. Under PFML, employees are eligible for paid leave to care for their own or family member's serious health condition. An employee becomes eligible to use paid leave benefits after working at least 820 hours during a qualifying period. Amendments to Eligibility for Paid Leave: • If an employee meets all other eligibility requirements for leave, but does not meet the 820-hour requirement, they will be paid for leave if they worked 820 hours during the first through fourth quarters of 2019 **or** during the second through fourth quarters of 2019 and the first quarter of 2020. • Employees that did not meet the 820-hour requirement due to misconduct or voluntary separation unrelated to COVID-19, would not be eligible for paid leave. • Employees are not eligible for paid leave during weeks in which they received unemployment compensation, workers' compensation, industrial insurance, or disability compensation. These updates are effective for claims from January 1, 2021, through March 31, 2022. Small Employer Grants: The amended PFML also provides pandemic leave assistance grants to qualifying employers to assist with the additional costs of employees that are on leave. • Employers with 150 or fewer employees, or those with 50 or fewer that elect to pay the employer portion of premiums associated with the paid leave, are eligible to apply for a grant of $3,000 if they hire a temporary worker to replace one of the employees eligible for PFML. • An eligible employer may receive up to $1,000 to cover wage-related costs due to employees' PFML.

	• If an employer receives only $1,000 to cover wage-related costs, they may apply for an additional grant if they later hire a temporary worker to replace an employee that extended their leave beyond the planned time. • The grants are not available to employers with an approved voluntary paid family and medical leave program rather than the state-run program. **Washington No Longer Allowing Subminimum Wages for Individuals with Disabilities** Effective July 24, 2021, Washington has repealed the provision permitting employers to pay subminimum wages to individuals with disabilities. Previously, the state allowed employers to receive special certificates from the DOL allowing them to pay less than minimum wage to individuals with disabilities. Under this amendment, the DOL cannot issue any new special certificates after July 31, 2023. For certificates that are valid on the effective date of this amendment, the DOL may grant an employer's request to extend the duration of the certificate for up to one year for individuals determined to be eligible for services. Employers will receive written notice from the DOL 90 days prior to the expiration of the special certifications, with the following information: • Certificate expiration date • The option to extend if specified conditions are met • Upon request, the contact information for the Department of Social and Health Services along with a statement that provides the supportive services available to the individual with disabilities
	**New West Virginia Law Passed Clarifying Worker Classification** Effective June 9, 2021, Governor Jim Justice has passed the West Virginia Employment Law Workers Classification Act. This law provides standards for determining who is an employee and who is an independent contractor based upon certain West Virginia statutes. The act allows clarification for businesses to comply with applicable laws, provides workers with certainty as to their benefits and obligations, and minimizes unnecessary mistakes, litigation, risk, and legal exposure laws regarding workers' compensation, unemployment compensation, Human Rights Act rights, and wage payment and collection provision of the West Virginia code. A person should be classified as an independent contractor if there is a written contract between the company and the individual that states the

	company's intent to engage the services of the person as an independent contractor. This written contract should contain acknowledgments that the person understands: 1. They are providing services as an independent contractor. 2. They will not be treated as an employee. 3. They will not be provided either workers' compensation or unemployment benefits. 4. They are obligated to pay all applicable federal and state income taxes and that no tax withholdings from payments will be made by the company. 5. They are responsible for most of the supplies and other variable expenses incurred in connection with the contracted services unless the expenses are for nonlocal travel, the contract specifically provides for reimbursement, or they are commonly reimbursed under industry practice. To be classified as an independent contractor, the person must file or be contractually obligated to file an income tax return regarding the fees earned from the work; or the person provides their services through a business entity and directly controls the manner and means by which the work is to be accomplished and satisfies three or more of the following criteria: 1. The person has control over the amount of time personally spent providing services/dictating their own schedule. 2. The person has control over where the services are performed. 3. The person is not required to work exclusively for one company. 4. The person is free to exercise independent initiative in soliciting others to purchase their services. 5. The person is free to hire employees or to contract with assistants to perform all or some of the work. 6. The person cannot be required to perform additional services without a new or modified contract. 7. The person obtains a license or other permission from the company to use any workplace of the company to perform the work. 8. The company has been subject to an employment audit by the IRS and the IRS has not reclassified the person to truly be an employee. 9. The person is responsible for maintaining and bearing all costs of any required business licenses, insurance, certification, or permits required to perform the work.

	The act notates that a company is always free to hire a worker as an employee even if the person meets the criteria for an independent contractor. **New Law on Taxation of Remote Workers** Effective June 28, 2021, West Virginia has passed a new law designed to make the state's tax laws more favorable for remote workers. Generally, West Virginia taxes individuals on compensation received for work they performed within the state. The new law will allow nonresidents to work within the state for 30 days before being subject to personal income tax. Employers are not required to withhold state taxes from compensation paid to the nonresident for work performed in West Virginia for 30 or fewer days within the calendar year. When the number of days the employee spends working in West Virginia exceeds the 30-day threshold within a calendar year, the employer must then withhold tax for each day (including the first 30 days) in which the employee worked in the state. Individuals that qualify for this 30-day exemption, must perform employment duties in more than one state during the calendar year and the individual's resident state must be a state without income tax or one that provides a substantially similar exclusion. Best practice is for employers to maintain a time and attendance system that tracks where employees perform services daily for every day worked outside of the state where the employment duties are primarily performed. If the employer does not have a system that captures this information, then the employer must obtain a written statement from the employee of the number of days the employee reasonably expects to work in West Virginia during the taxable year. An employee is considered to be working within West Virginia for any day that they perform more of their employment duties there than in any other state during that day. Time that is spent in transit is not considered when determining the location of an employee's employment duties.

The People Simplifying HR

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