STRATEGIC PERSPECTIVES—Top labor and employment developments for March 2020

By Kathleen Kapusta, J.D.

In case you missed the in-depth coverage of Labor & Employment Law Daily for March 2020, a month unlike any other in recent memory, here’s a recap of some key developments in the L&E community.

COVID-19 DOMINATES THE NEWS

Even before President Trump, on March 13, proclaimed that the COVID-19 outbreak was a national emergency, the nation was focused almost exclusively on the unrelenting spread of the coronavirus and its impact on the workplace and on all Americans. And soon, private employers and government agencies alike responded, many by shuttering offices. For example:

- **Supreme Court shuts doors.** On March 12, the U.S. Supreme Court closed its doors to the public due to the coronavirus and four days later, it postponed oral arguments scheduled for its March session and extended the deadline to file any petition for a writ of certiorari due on or after March 19, 2020, to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing.

- **Other federal courts.** As to other federal courts, the Administrative Offices of U.S. Courts said in a March 12 notice that courts are individually coordinating with state and local health officials to obtain local information about COVID-19, and so have issued orders relating to court business and public and employee safety. The Federal Court Finder can be used to link to a particular court's website for specific information.

- **DHS allows temporary remote inspection of Form I-9 documents.** Due to precautions being implemented by employers and employees related to physical proximity associated with COVID-19, the Department of Homeland Security announced March 20 that it would defer the physical presence requirements associated with Employment Eligibility Verification (Form I-9) under Section 274A of the Immigration and Nationality Act. The remote inspection provisions are valid for a period of 60 days from March 20, 2020, or within three business days after the termination of the National Emergency, whichever comes first.
• **NLRB suspends elections; DOL’s WHD announces COVID-19-related phone contact only.** In addition to closing a number of offices, the NLRB suspended elections through April 3 (and on April 1, the Board announced it will resume conducting elections beginning Monday, April 6) while the DOL said its Wage and Hour Division moved to telephone contact only.

• **Big Three automakers shut down to prevent coronavirus spread.** After mounting pressure from the UAW, General Motors, Ford, and Fiat Chrysler, on March 18, agreed to temporarily shut down production at factories in the United States, Canada, and Mexico to combat the spread of the novel coronavirus.

**Families First Coronavirus Response Act signed into law.** In one of the biggest developments of the month, the Families First Coronavirus Response Act (FFRCA), H.R. 6201, was signed into law by the President on March 18. Perhaps most notable are the FMLA amendments for public emergency leave, under which employers with 500 or fewer employees would be required to provide employees with up to 12 weeks of job-protected leave under the FMLA to be used to:

- adhere to a requirement or recommendation to quarantine due to exposure to or symptoms of coronavirus;
- care for an at-risk family member who is adhering to a requirement or recommendation to quarantine due to exposure to or symptoms of coronavirus; or
- care for a child of an employee if the child’s school or place of care has been closed, or the child-care provider is unavailable, due to a coronavirus.

**Paid emergency sick time.** Employers would be required to provide employees with emergency paid sick time of 80 hours for full-time employees and, for part-time employees, the average number of hours worked over a two-week period, to quarantine or seek a diagnosis or preventive care for coronavirus. These requirements would also apply to employers with fewer than 500 employees, as well as government employers.

The rate of pay for leave would be reduced to two-thirds of the employee’s regular rate when the leave is for the purpose of caring for a family member to quarantine, seek a diagnosis, or preventive care for coronavirus; or caring for a child whose school has closed, or whose child care provider is unavailable, due to the coronavirus.

**Employee paid leave rights.** The Department of Labor added new guidance documents to its COVID-19 resources, one of which maps out the new paid leave rights for employees:

- Two weeks (up to 80 hours) of paid sick time at the employee’s regular rate of pay where the employee is unable to work because the employee is quarantined (pursuant to federal, state, or local government order, or advice of a health care provider), and/or experiencing COVID-19 symptoms and seeking a medical diagnosis; or
• Two weeks (up to 80 hours) of paid sick time at two-thirds the employee’s regular rate of pay because the employee is unable to work because of a bona fide need to care for an individual subject to quarantine (pursuant to federal, state, or local government order or advice of a health care provider), or to care for a child (under 18 years of age) whose school or child care provider is closed or unavailable for reasons related to COVID-19, and/or the employee is experiencing a substantially similar condition as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of the Treasury and Labor; and

• Up to an additional 10 weeks of paid family leave at two-thirds the employee’s regular rate of pay where an employee, who has been employed for at least 30 calendar days, is unable to work due to a bona fide need for leave to care for a child whose school or child care provider is closed or unavailable for reasons related to COVID-19.

Notably, most federal employees are covered by Title II of the FMLA, which was not amended by the FFCRA, and are therefore not covered by these expanded family and medical leave provisions (which amend Title I of the FMLA). However, federal employees covered by Title II of the FMLA are covered by the paid sick leave provision.

Employer paid leave obligations. A second new DOL guidance document addresses employers’ paid leave obligations under the FFCRA. The paid sick leave and expanded family and medical leave provisions of the FFCRA apply to certain public employers, as well as private employers with fewer than 500 employees.

Paid sick leave credit. The employers’ obligation to provide paid sick leave is capped, and correspondingly, so is the amount of the dollar-for-dollar sick leave credit that is available:

• For an employee who is unable to work because of Coronavirus quarantine or self-quarantine or has Coronavirus symptoms and is seeking a medical diagnosis, eligible employers may receive a refundable sick leave credit for sick leave at the employee’s regular rate of pay, up to $511 per day and $5,110 in the aggregate, for a total of 10 days.

• For an employee who is caring for someone with Coronavirus, or is caring for a child because the child’s school or child care facility is closed, or the child care provider is unavailable due to the Coronavirus, eligible employers may claim a credit for two-thirds of the employee’s regular rate of pay, up to $200 per day and $2,000 in the aggregate, for up to 10 days.

• Eligible employers are entitled to an additional tax credit determined based on costs to maintain health insurance coverage for the eligible employee during the leave period.

Childcare leave credit. In addition to the sick leave credit, for an employee who is unable to work because of a need to care for a child whose school or child care facility is closed or whose childcare provider is unavailable due to the Coronavirus, eligible employers may receive a refundable childcare leave credit. This credit is equal to two-thirds of the employee’s regular
pay, capped at $200 per day or $10,000 in the aggregate. Up to 10 weeks of qualifying leave may be counted towards the child-care leave credit.

Eligible employers are entitled to an additional tax credit to be determined based on costs to maintain health insurance coverage for the eligible employee during the leave period.

Retaining payroll taxes to cover leave costs. Employers must deposit federal taxes withheld from employees’ paychecks, along with the employers’ share of Social Security and Medicare taxes, with the IRS and file quarterly payroll tax returns (Form 941 series). Under IRS guidance, eligible employers that pay qualifying sick or child-care leave will be able to retain an amount of the payroll taxes equal to the amount of qualifying sick and child-care leave that they paid, rather than deposit them with the IRS.

The payroll taxes that are available for retention include:

- Withheld federal income taxes;
- The employee share of Social Security and Medicare taxes; and
- The employer share of Social Security and Medicare taxes with respect to all employees.

If there are not enough payroll taxes to cover the cost of qualified sick and childcare leave paid, employers will be able file a request for an accelerated payment from the IRS. The IRS expects to process these requests beginning in April 2020.

Self-employed persons. Equivalent child-care leave and sick leave credit amounts are available to self-employed individuals under similar circumstances. These credits will be claimed on their income tax return and will reduce estimated tax payments.

WHD releases notices required by FFCRA. On March 25, DOL’s Wage and Hour Division released public sector and private sector notices that covered employers had to post by April 1, 2020, when the FFCRA took effect. The agency also has released and continues to update a list of Frequently Asked Questions to assist employers with the posting requirements.

CARES Act. And on March 27, the President signed into law a second COVID-19 emergency package, the $2 trillion bipartisan Coronavirus Aid, Relief, and Economic Security (CARES) Act. Among other things, the Act ensures that all workers are protected whether they work for small, medium, or large businesses, as well as the self-employed and workers in the gig economy. The $260 billion dollar plan would provide payments of $1,200 for individuals and $2,400 for couples. It also include a small business rescue plan that allocates more than $375 billion to forgivable loans and grants to small businesses and non-profits so they can maintain their existing workforce and help pay other expenses during this crisis, like rent, a mortgage, or utilities.

The self-employed, independent contractors, and sole proprietors would be eligible for assistance too. In addition, it extends and expands the unemployment insurance program by increasing the maximum unemployment benefit amount by $600 per week above one’s base unemployment
compensation benefit and ensures that workers who are laid-off or out of work, on average, will receive their full pay for four months.

**SCOTUS NEWS**

**Justices agree to hear ACA individual mandate case.** The U.S. Supreme court granted California and other states’ petition for certiorari in *The States of California v. The State of Texas*, after the Fifth Circuit’s decision upheld the finding that the individual mandate in the Patient Protection and Affordable Care Act (ACA) was unconstitutional. The Court’s grant of certiorari is limited to the question of whether reducing the amount specified in Section 5000A(c) of the ACA to zero rendered the minimum coverage provision unconstitutional and whether the minimum coverage provision is severable from the rest of the ACA. The Court did not announce when it will hear the case. If it follows usual procedures, the case will be heard in the fall of 2020, with a decision in 2021.

**IRCA did not preempt Kansas laws used to prosecute aliens who fraudulently used SSNs on tax-withholding forms.** In early March, a divided U.S. Supreme Court reversed a Kansas high court decision holding that the Immigration Reform and Control Act (IRCA) expressly prohibits a state from using "any information contained within [an] I–9 as the bas[i]s for a state law identity theft prosecution of an alien who uses another’s Social Security information in an I–9." Justice Alito, writing for the majority, found that IRCA did not expressly preempt the Kansas laws under which three aliens were convicted for fraudulently using another person’s Social Security numbers on the W-4s and K-4s they submitted upon obtaining employment. Nor, held the Court, was there any basis for finding field preemption or any ground for holding that the laws at issue conflicted with federal law. Justice Thomas, with whom Justice Gorsuch joined, wrote a separate concurring opinion while Justice Breyer, with whom Justices Ginsburg, Sotomayor, and Kagan joined, concurred in part and dissented in part (*Kansas v. Garcia*, March 3, 2020, Alito, S.).

**Section 1981 demands a but-for causation pleading standard.** Under Section 1981, a plaintiff has the burden of showing that the plaintiff’s race was a but-for cause of its injury, and that burden remains constant over the life of the lawsuit—including at the pleading stage. In a case arising outside the employment context but with big employment law implications, the High Court ruled that the African-American owner of Entertainment Studios Network (ESN) must plead (and has the ultimate burden of showing) that race was the but-for cause of Comcast’s decision not to carry channels produced by ESN and thus amounted to racial discrimination in violation of Section 1981(*Comcast Corp. v. National Association of African American Owned-Media*, March 23, 2020, Gorsuch, N.).

**FROM THE FEDERAL COURTS OF APPEAL**

**First Circuit:**
**Vision-impaired officer’s discriminatory discharge revived.** Reversing the grant of summary judgment in favor of a municipal employer that forced a station officer with monocular vision to retire, the First Circuit found he raised a triable issue with regard to his claims under the ADA,
Rehab Act, and Massachusetts law. There was evidence that would allow a jury to conclude the ability to see 20/100 in each eye was not a requirement for the job and the ability to engage in pursuit driving might not be essential for every officer. There was also evidence that the officer, in fact, could perform that function, including that he drove a motorcycle, consistently received passing marks in his firearm qualifications, and worked for years without incident (*Melo v. City of Somerville*, March 24, 2020, Kayatta, W.).

**Third Circuit:**

**Court overturns ruling that UberBLACK limousine drivers were not employees.** Addressing on appeal whether drivers for UberBLACK are employees or independent contractors within the meaning of the FLSA and similar Pennsylvania laws, the Third Circuit found summary judgment in favor of Uber inappropriate. The plaintiffs, three Pennsylvania drivers who utilize Uber Technologies’ ride-sharing mobile phone application, sued on behalf of a putative class of all persons who provide limousine services, now known as UberBLACK, through Uber’s Driver App in Philadelphia, Pennsylvania. Genuine disputes of material fact remained, said the court, noting that although Uber submitted a statement of undisputed material facts, the drivers responded with almost 100 pages of disputes, including whether the plaintiffs are operating within Uber’s system and under Uber’s rules, and whether they or their corporations contracted directly with Uber. The disputes go to the core of the DialAmerica factors, the appeals court noted, in remanding the matter to the court below (*Razak v. Uber Technologies, Inc.*, March 3, 2020, Greenaway, J., Jr.).

**“Objective” falsity standard in Medicare-based qui tam actions rejected.** Whether expert testimony was sufficient to establish the "falsity" element of a federal False Claims Act lawsuit was clarified by the Third Circuit in a case of first impression that also departed from the reasoning of the Eleventh Circuit. Under the plain language of the federal statute and its own precedent, legal falsity could form the basis of a claim, said the court, reversing the lower court’s grant of summary judgment to a hospice care provider that argued only a showing of factual falsity was necessary. The court also held that physician clinical judgment evidence could be reviewed by a jury to determine its credibility (*U.S. v. Care Alternatives*, March 4, 2020, Greenaway, J., Jr.).

**Sixth Circuit:**

**State employee can’t recoup ‘fair share’ fees paid before Janus.** An Ohio public employee was not entitled a refund of all the "fair share" fees he had paid to the union that represented Ohio Department of Taxation workers, ruled the Sixth Circuit, declining to overrule another recent circuit court decision. Although unions may have crossed the line into forbidden territory when they used state authority to extract fair-share fees from nonmembers, if they did so before *Janus*, they may invoke the good-faith defense because *Abood* and state law told them they were in the clear (*Ogle v. Ohio Civil Service Employees Association, AFSCME Local 11*, March 5, 2020, *per curiam*).

**Eighth Circuit:**

**Class certification of ADA claim based on railroad’s FFD policy reversed.** A federal court in Nebraska abused its discretion in ordering class certification of an ADA action brought by
former Union Pacific employees challenging the railroad’s fitness-for-duty program as an unlawful pattern or practice of discrimination used to systematically remove individuals with disabilities. Reversing the lower court’s decision, the Eighth Circuit held that individualized inquiries could not be addressed in a manner consistent with Rule 23 since the determination of whether the policy was unlawfully discriminatory under the ADA could not be made without consideration of whether it was job-related and consistent with business necessity as to each of the over 650 jobs at issue, as well as consideration of each employee’s individual circumstances, including their supervisor’s reactions to any functional job restrictions placed upon them (Harris v. Union Pacific Railroad Co., March 24, 2020, Gruender, R.).

Ninth Circuit:

**Staffing company liable for low-level employee’s failure to pay overtime.** Consistent with the law of agency, the Ninth Circuit, affirming the decision of the court below, found a staffing company that contracts with other companies to recruit employees and place them at jobsites for which it then handles administrative tasks was liable for the actions of its low-level employee who, while placed at another company to process payroll, paid all employee hours worked as "regular hours" instead of overtime. And because the employee, for more than a year, dismissed the payroll software’s repeated warnings that workers might not be receiving earned overtime, the violation was willful, said the court, affirming the award of liquidated damages. Finally, rejecting the company’s cross-claim for contribution or indemnification, the court, joining the Second Circuit, held that the FLSA does not imply a right to indemnification for liable employers (Scalia v Employer Solutions Staffing Group, LLC, March 2, 2020, Graber, S.).

**Retailer’s “call-in” scheduling practice triggered reporting time pay requirements.** It is not necessary for an employee to “report for work” in person in order to trigger the reporting time pay requirements in California’s Wage Order 7, ruled the Ninth Circuit. Rather, it was enough that a retail employer’s "call-in" policy required employees to call their manager 30 minutes to an hour before a scheduled shift. As a California appeals court had found in a recent decision, the employees were not compensated but were nevertheless burdened because they cannot take other jobs, go to school, or make social plans during the call-in shift. Thus, the employer’s call-in shift practice imposed significant restrictions on employees’ off-duty time. However, the appeals court reversed the district court’s denial of judgment on the pleadings as to the employee’s indemnification claim regarding the costs of making calls. Judge Berzon and Judge Nelson filed separate concurring opinions (Herrera v. Zumiez, Inc., March 19, 2020, Paez, R.).

**FCRA disclosure doc may contain ‘concise’ explanations.** Addressing an issue of first impression under the FCRA, the Ninth Circuit held that beyond a plain statement disclosing "that a consumer report may be obtained for employment purposes, some concise explanation of what that phrase means may be included as part of the ‘disclosure’ required by § 1681b(b)(2)(A)(i)." As an example, said the court, a company could briefly describe what a consumer report entails, how it will be obtained, and for which type of employment purposes it may be used. Further, the court held that the right provided by the FCRA to dispute inaccurate information in a consumer report does not require employers to provide applicants or employees with an opportunity to discuss their consumer reports directly with the employer. The court affirmed in part and reversed in part the decision of the court below (Walker v. Fred Meyer, Inc., March 20, 2020, Tashima, A.).
D.C. Cir.:

**Federal court can’t dismiss putative class members before class action is certified.** Addressing a question left unresolved by the U.S. Supreme Court in *Bristol-Myers Squibb Co. v. Superior Court of California*, a divided D.C. Circuit panel held that a federal district court cannot dismiss putative class members in a not-yet-certified class action because, absent class certification, those individuals are not parties before the court. Consequently, the court below properly denied a motion to narrow the putative class to D.C. residents in a wage suit against Whole Foods Market. Reflective of the significance of the procedural issue to class litigation, the U.S. Chamber of Commerce and Washington Legal Foundation filed briefs in support of Whole Foods; Public Citizen filed an amicus brief in support of the plaintiffs. Judge Silberman dissented (*Molock v. Whole Foods Market Group, Inc.*, March 10, 2020, Tatel, D.).

**NLRB NEWS**

**AFL-CIO mounts legal challenge to NLRB election rule.** In a complaint filed March 6, the AFL-CIO took aim at the NLRB’s latest representation election rule changes, saying that the Board violated the Administrative Procedures Act on numerous counts in issuing them. The labor federation is seeking a declaratory judgment to that effect, and injunctive relief barring the Board from implementing the rule changes as scheduled on April 16, 2020. On December 18, 2019, the NLRB issued a direct final rule amending its representation election procedures. The Board did not rescind the controversial 2014 "quickie election" rule changes enacted by the Obama administration, but revised a number of its specific provisions. The AFL-CIO contends, however, that the Trump NLRB "largely repealed" the labor-friendly Obama-era rule.

**Drivers who leased trucks from shipping company were employees, not independent contractors.** The NLRB found the drivers had little opportunity for economic gain because they had limited discretion to determine when they work, less discretion to decide what loads to haul, and no discretion to decide to work beyond the end of their shift. Nor did the drivers have their own routes. Rather, the record established that the drivers performed the work of hauling shipping containers for the company’s customers as assigned and not on routes in which they had a proprietary interest. However, the misclassification of the drivers as independent contractors was not a "per se" violation of the NLRA under the Board’s recent decision in *Velox Express, Inc.*, the Board determined (*Intermodal Bridge Transport*, March 3, 2020).
Volkswagen’s arbitration agreement unlawfully restricted access to Board processes. In consolidated cases, the NLRB ruled that an arbitration agreement VW Credit and its parent company, Volkswagen Group of America, required certain employees to sign unlawfully interfered with the employees’ access to the Board and its processes. Although the employer had sent notices to employees to clarify that the agreement did not restrict their right to file charges with the Board, the notices did not comply with requirements in the agreement that changes must be in writing and signed by the employee and a Volkswagen executive. Because the agreement did not contain "savings clause" language, when reasonably interpreted, it impermissibly interfered with the employees’ access to the Board and its processes (VW Credit, Inc., March 12, 2020).

“No participation in claims,” confidentiality provisions in severance agreements lawful. The mere offer of severance agreements containing a "no participation in claims" provision, a confidentiality provision, and a non-disparagement provision did not reasonably tend to interfere with or coerce employees in the exercise of their rights under the NLRA. Observing that the severance agreements were not mandatory, and pertained exclusively to post-employment activities, the NLRB found they differed from work rules so that the analysis outlined in Boeing Co. did not apply. Moreover, the complaint did not allege that any employee offered the separation agreement was unlawfully discharged for conduct protected by the NLRA (Baylor University Medical Center, March 16, 2020).

NLRB finalizes regs that revise, codify several representation policies, procedures. The NLRB announced on March 31 that it finalized several amendments to its representation rules that it says will "better protect employees’ statutory right of free choice on questions concerning representation." The final rule alters several Board policies, none of which were previously set forth as formal regulatory provisions. The Board first issued a notice of proposed rulemaking (NPRM) on August 12, 2019, to modify several provisions of Part 103 of the NLRB’s Rules and Regulations. The final version, which takes effect 60 days after its publication in the Federal Register on April 1, entails several substantive revisions to the provisions as first proposed, in response to comments received. The final rule revises the NLRB’s blocking charge policy, voluntary recognition bar, and Section 9(a) construction industry provisions, making some substantive changes to the rule as initially proposed.

The three representation changes reflect policies established through Board common law, policies subject to reversal whenever a new presidential administration upended the ideological makeup of the Board. The Trump NLRB has embraced rulemaking to effectuate more permanent changes in labor policy, saying that it can offer greater certainty and consistency by promulgating formal rules, rather than through reliance on case adjudication. By codifying these policies in the NLRB’s formal Rules and Regulations, the Board noted, "employers, unions, and employees will be able to plan their affairs free of the uncertainty that the legal regime may change on a moment’s notice through the adjudication process." The NLRB intends to post on its website a compliance guide to the final rule changes for small entities once the rule is formally published.

OTHER DEVELOPMENTS OF INTEREST
N.D. Cal.: Stay pending appeal denied in case ordering thousands of individual arbitrations over workers’ FLSA status. A food delivery company whose couriers had objected to their characterization as independent contractors was not entitled to stay a California federal court’s October 2019 decision that the parties must proceed to arbitration as specified in a mutual arbitration agreement the couriers were required to sign as a condition of employment, the federal court in California ruled. Rejecting the company’s contention that requiring it to proceed before its appeal of the decision could be heard by the Ninth Circuit would result in irreparable harm, the district court essentially held that the economic impact of the company’s arbitration mandate—some $10 million in filing fees—was a problem of the company’s own making (Adams v. Postmates, Inc., March 5, 2020, Armstrong, S.).

N.J. Sup. Ct.: Former funeral director advances bias claims stemming from medical marijuana use. Affirming an appellate court’s denial of an employer’s motion to dismiss, New Jersey’s highest court held that a former funeral director sufficiently pleaded that his termination due to his use of medically prescribed marijuana violated the New Jersey Law Against Discrimination (NJLAD). The court declined to adopt the appellate court’s holding that the Compassionate Use Act intended “to cause no impact on existing employment rights.” While the Compassionate Use Act states that it does not create new employment rights, the court acknowledged that the employee’s NJLAD claim is derived from the right to use medical marijuana. In the instant case, the court noted, in which the employee alleged that the Compassionate Use Act authorized his use of medical marijuana outside the workplace, that Act’s provisions may be harmonized with the law governing disability discrimination claims (Wild v. Carriage Funeral Holdings, Inc., March 10, 2020, per curiam).

Cal. Sup. Ct.: Settlement of individual claims doesn’t deprive employee of PAGA standing. On appeal of a decision dismissing an aggrieved employee’s PAGA claim after the parties had settled the employee’s individual claims, the California Supreme Court clarified that settlement of those claims did not affect the employee’s PAGA standing. The employer’s argument that the employee no longer had representative standing because his injury had been redressed failed, the court held, because it was “at odds with the language of the statute, the statutory purpose supporting PAGA claims, and the overall statutory scheme.” Accordingly, the judgment of the Court of Appeals was reversed and the case was remanded to the trial court (Kim v. Reins International California, Inc., March 12, 2020, Corrigan, C.).

C.D. Cal.: Freelance writers’ constitutional claims based on AB 5 fall flat. A federal court in California rejected a constitutional challenge to AB 5, the controversial state law enacted last year that codifies the stringent "ABC" test for determining whether workers are "independent contractors" or "employees" under the California Labor Code. Professional associations of freelance writers and photographers filed suit, contending that the statute’s 35-submission limit for defining independent contractor status violates Equal Protection and the First Amendment. Applying rational basis scrutiny, the court found that the statute permissibly distinguishes certain writing and photography professionals from others, and that those distinctions are content-neutral. Therefore, while noting that it does not weigh in "the desirability or wisdom of AB 5," the court denied the plaintiffs’ motion for a preliminary injunction and, in a separate ruling, dismissed the complaint on the merits. However, the court granted the plaintiffs leave to amend,

N.Y. Sup. Ct.: Postmates courier is “employee” for purposes of unemployment compensation. In a split decision that marks the end of a series of reversals by the state’s administrative decisionmakers and the appeals court, New York’s highest court ruled that an individual who had been prohibited from continuing work as a courier for Postmates, Inc., an e-company that uses drivers to pick up and deliver goods, was an "employee" entitled to receive unemployment benefits. The high court’s majority found that the company exercised more than "incidental control" over its couriers and dominates the significant aspects of its couriers’ work. One judge concurred in that conclusion but opined that the common-law test for employer control should be replaced by Restatement of Employment Law’s test for determining employee status, while two dissenters maintained that the current, common-law test is unsuitable for characterizing work in the ever-evolving gig economy (In the matter of Vega, March 26, 2020, DiFiore, J.).

S.D.N.Y.: In gender bias class action against Goldman Sachs, more than 1K class members sent to arbitration. In a decade-old class action accusing Goldman Sachs of systemic gender discrimination, over 1,000 putative class members who signed arbitration agreements as part of separation, promotion, or compensation agreements will have to arbitrate their individual claims. However, others who may have been misled into agreeing to arbitrate over six years after the litigation commenced as part of their equity award agreements will be given the chance to opt-out. In an 88-page opinion granting in part the parties’ cross-motions, a federal magistrate judge in New York rejected the plaintiffs’ contention that Goldman waived its right to compel arbitration and ruled that the arbitration clauses contained in all four categories of the arbitration agreements were enforceable. The plaintiffs also failed to convince the court that the arbitration provisions in all 1,220 agreements that were entered into by class members after this action was filed should be voided pursuant to the court’s duty to manage communications with putative class members under Rule 23(d) (Chen-Oster v Goldman, Sachs & Co., March 26, 2020, Lehrburger, R.).

D.D.C.: CFAA does not criminalize researchers’ plans to test employment websites for discriminatory algorithms. Researchers testing whether the algorithms of online job websites discriminate against job candidates on such bases as race, gender, and age will not violate the criminal provisions of the Consumer Fraud and Abuse Act (CFAA) by creating fake profiles and fake job postings as part of their research, a federal district court in Washington D.C. held. The researchers plan to create fictitious job candidate profiles and fictitious job opportunities, in violation of the websites’ terms of service, to test if the websites discriminate. The court dismissed as moot the researchers’ pre-enforcement First Amendment challenge to a provision of the CFAA that they feared the government would use to prosecute them, finding that the provision does not apply to their planned research activities (Sandvig v. Barr, March 27, 2020, Bates, J.).

Signet Jewelers settles sexual harassment-related securities fraud class action for $240M. The proposed settlement, if finally approved, would be among the top 75 securities class action settlements of all time out of thousands of settlements nationwide, according to the lead plaintiff.
In an unopposed motion, a preliminary settlement was submitted by the court-appointed lead plaintiff and class representative, the Public Employees’ Retirement System of Mississippi, on behalf of the class, resolving a pending consolidated securities class action in the court. A New York federal judge had earlier certified the class of investors who claimed that the defendant Signet Jewelers Ltd. had artificially inflated its stock price by making materially misleading statements and omissions about its culture of sexual harassment and the strength of its in-house customer financing credit portfolio (In re Signet Jewelers Limited Securities Litigation, March 26, 2020).

Uber, Lyft face coronavirus paid sick time suits. Law firm Litchten & Liss-Riordan has filed a pair of new class action lawsuits in California state court against Uber and Lyft on behalf of rideshare drivers who, if they are not considered statutory "employees" under California law, will be ineligible for state-mandated sick pay, which will in turn cause drivers "to continue working even if they are sick while they should be staying home because of the coronavirus," as attorney Shannon Liss-Riordan put it. Liss-Riordan told Labor and Employment Law Daily that she plans to file similar complaints in Massachusetts. Both the Uber and the Lyft complaints ask the court to issue injunctions ordering Uber and Lyft to classify their drivers as "employees" and offer paid sick leave as mandated by state law. The plaintiffs rely on California’s controversial AB 5, which codified the "ABC test" set forth in the California Supreme Court’s Dynamex decision. The ABC test essentially makes "employee" the default status unless certain factors proving "independent contractor" status are present.