EMPLOYMENT LAWSCENE ALERT: WISCONSIN TO PUT IN PLACE SAFER AT HOME ORDER

Today, March 23, 2020, Wisconsin Governor Tony Evers announced via Twitter that he is issuing a Safer at Home Order tomorrow, Tuesday, March 24, 2020. The Order will likely go into effect shortly thereafter. This Order will follow similar orders in states such as New York, California, and Illinois. The Order will cease all non-essential business statewide. This does not prevent businesses from continuing to have employees work from home. Additionally, essential businesses, such as healthcare, grocery stores, and pharmacies, will continue to remain open. It is currently believed that restaurants will be allowed to continue curbside takeout and manufacturers will be allowed to continue business operations. The Order is also likely to further limit personal interactions, as Gov. Evers's tweets this morning stated that it "means no sleepovers, no playdates, and no dinner parties with friends and neighbors." Employees who work at essential businesses and individuals who need to use the services of essential businesses will continue to be allowed to travel for such purposes. The goal of this order is to be proactive in stopping the spread of COVID-19.

We will provide additional information as soon as it becomes available from the Governor's office.

EMPLOYMENT LAWSCENE ALERT: IRS SAYS REDUCED-COST OR FREE COVID-19 TESTING OR TREATMENT WON'T PREVENT INDIVIDUALS FROM MAKING OR RECEIVING HSA CONTRIBUTIONS

In recent guidance, the IRS noted the "unprecedented public health emergency posed by COVID-19" (the disease that results from the 2019 Novel Coronavirus), and the need to remove potential administrative and financial barriers to COVID-19 testing and treatment under the health savings account (HSA) rules.

Issued on March 11, 2020, IRS Notice 2020-15 responds to employer uncertainty as to whether a health plan providing for reduced-cost COVID-19 testing—for individuals who have not yet met their annual deductibles—remains an HSA-compatible high-deductible health plan (HDHP).

That uncertainty arose from the recent wave of insurer and state announcements of the waiver of out-of-pocket costs for COVID-19 testing (and, in some cases, for treatment). Cost-sharing waivers apply, as of this writing, in at least 32 states, including for most, but not all, insurers in Wisconsin. Insurers have agreed to waive cost sharing due, variously, to voluntary agreements by major insurers, state mandates, or state-insurer agreements.

No-cost COVID-19 testing will be required by all private health plans now that President Trump has signed the Families First Coronavirus Response Act.

HSA-Compatible Coverage, Generally

As we described in a prior post, an HSA is a tax-favored account established to receive contributions from an employee, an employer, or both.

To be eligible to make (or receive) HSA contributions, an individual must be covered only under the HDHP and my not have any other coverage (including reduced-cost services), unless such other coverage is expressly permitted by the IRS.

Certain "preventive care" services are specifically permitted and are not considered to constitute "other" health coverage that would disqualify an individual from HSA eligibility. In July of 2019, the IRS expanded the list of "preventive care" to include fourteen additional items and services intended to prevent the worsening of certain chronic medical conditions.

HSA-Compatible Coverage Now Includes Coronavirus-related Services

The result of the newly-issued IRS Notice 2020-15 is that an individual who is covered by an HDHP will not lose eligibility to make (or receive) tax-favored HSA contributions merely because the HDHP permits pre-deductible COVID-19 testing and treatment with reduced (or no) employee cost-sharing. HSA-eligible individuals may continue to contribute to an HSA regardless of whether the HDHP offers, or the individual receives, a reduced-cost or no-cost COVID-19 test or treatment.

Be Aware That:

- As in the past, any vaccination costs continue to count as preventive care and can paid for by the plan at any time during the year, without regard to whether the deductible has been met.
- As recently confirmed by the Centers for Medicare and Medicaid, the costs of certain COVID-19 treatments and services, including testing, isolation, quarantine, and vaccination, are generally covered as essential healthcare benefits under Affordable Care Act rules for individual and small group health plans.
- Self-funded group health plans are not required to waive COVID-19 cost-sharing under the state mandates or insurer agreements (but are impacted under the federal Families First Coronavirus Response Act).

The text of the IRS Notice is available here.

The attorneys of the Labor and Employment Group of O'Neil, Cannon, Hollman, DeJong and Laing are actively monitoring COVID-19 developments and are available to assist employers with related employment law and employee benefit plan compliance matters.

EMPLOYMENT LAWSCENE ALERT: PRESIDENT SIGNS FAMILIES FIRST CORONAVIRUS RESPONSE ACT EXPANDING EMPLOYEES' FMLA RIGHTS AND MANDATING PAID SICK LEAVE

The President signed the COVID-19 bill, H.R. 6201, into law late Wednesday night, not wasting any time during this national health emergency, after the Senate approved the bill by a vote of 90-8. Before the Senate took its vote, the House of Representatives made technical corrections to the bill from the version of the bill that the House passed early Saturday morning. The House's technical corrections actually made substantial limitations to the scope of who qualifies for expanded Family and Medical Leave Act (FMLA) rights and made clarifying changes to the portion of the bill that provides employees with two weeks of emergency paid sick leave.

On Monday, we provided our readers with a summary of the House of Representatives' version of H.R. 6201, which can be found here. The Senate's version of H.R. 6201 limits the expanded FMLA leave entitlement to only those employees who are unable to work due to a need to care for their child under 18 years of age because the child's school is closed or the child's child care provider is unavailable due to the public health emergency caused by the coronavirus pandemic. The Senate's version also capped the amount of paid sick time at $200 per day and $2,000 in the aggregate per employee for an employee who is: (i) taking care of an individual subject to a quarantine order or who has been advised by a health care provider to self-quarantine; (ii) caring for the employee's child if the child's school or place of care has been closed due to the coronavirus or if the child care provider for the child is unavailable; or (iii) experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

The Senate's version also made significant changes to the emergency paid sick leave portion of the bill. Most noteworthy being that there is now a cap on the amount of paid sick time in the amount of $511 per day and $5,110 in the aggregate for employees who are quarantined or isolated due to coronavirus or are experiencing symptoms of COVID-19 and seeking a

medical diagnosis.

This article will describe what employers need to know about the Emergency Family and Medical Leave Expansion Act and the Emergency Paid Sick Leave Act which are now part of the Families First Coronavirus Response Act (the Act) which is now law. A copy of the Act can be found here.

Emergency Family and Medical Leave Expansion Act

Effective April 1, 2020, employers with 500 or fewer employees will be required to provide employees, who have worked for their employer at least 30 calendar days (forget about the 1,250 hours service requirement during the preceding 12-month period for other types of FMLA leave), with up to 12 weeks of FMLA leave. These expanded FMLA leave rights extend through December 31, 2020.

Employees entitled to these expanded FMLA leave rights are limited only to those employees who are unable to work (or telework) due to a need for leave to care for their son or daughter under 18 years of age if the school or place of care has been closed, or if the child care provider of such child is unavailable because of the public health emergency caused by the coronavirus. The first 10 days for this FMLA leave will be unpaid. If the FMLA leave extends beyond 10 days for this purpose, then the employer will be required to provide up to 10 weeks of paid leave for this expanded leave.

The paid leave amount for eligible employees for the available 10-week period is based on an amount equal to not less than two-thirds of the employee's regular rate of pay multiplied by the number of hours the employee would otherwise be scheduled to work. As mentioned above, the paid portion of the leave is now capped at $200 per day and $10,000 in the aggregate for each employee. This portion of the Act represents one of the corrections made to the House's first version of the bill so that the amount of the employer's liability for paid leave now matches the amount of tax credit available to the employer for providing such paid FMLA leave.

Currently, the Act covers all employers with 500 or fewer employees, including small employers who employ fewer than 50 employees. However, the Department of Labor is authorized to issue regulations that would exempt small employers with fewer than 50 employees from the paid leave requirements of the bill if such payment obligation would jeopardize the viability of the employer's business as a going concern. This means that if a small employer chooses not to provide the paid leave benefit for expanded FMLA leave, it does so at its own peril subject to its ability to defend itself on the basis that any such paid leave jeopardizes the employer's existence as a going concern. That burden could be high for small employers to meet.

Qualifying Need Related to a Public Health Emergency

Obviously, employees who have been diagnosed with the coronavirus and otherwise meet the definition of having a serious health condition will qualify for regular unpaid FMLA leave like any other employee with a serious health condition. Now, however, employees who have worked for an employer for a period of at least 30 days and have a "qualifying need related to a public health emergency" will qualify for expanded FMLA leave with the opportunity to have 10 out of their 12 week FMLA leave allotment to be paid. The Act defines a "qualifying need related to a public health emergency" as an employee who is unable to work (or telework) due to a need for leave to care for their child under 18 years of age if the school or place of care for such child has been closed, or if the child care provider of such child is unavailable, due the public health emergency cause by the coronavirus pandemic.

Expanded FMLA Provides for Both Unpaid and Paid Leave

The first 10 days of leave under the expanded FMLA would be unpaid. However, employees may elect, but employers cannot require employees, to substitute any accrued vacation leave, personal leave, or medical or sick leave for the unpaid portion of the leave.

After expiration of the 10 days of leave for a qualifying need related to a public health emergency, employers will be required to provide employees with paid leave. The paid leave provision of the Act will require employers to pay employees an amount equal to at least two-thirds of each employee's regular rate of pay multiplied by the number of hours the employee would otherwise be normally scheduled to work. If the employee works a varying number of hours each workweek, then the employer must base the amount of paid leave on the average number of hours that the employee was scheduled to work per day over the previous 6-month period preceding the need for the leave. The amount of paid leave is capped at $200 per day or $10,000 in the aggregate.

Restoration Rights

Like with other types of leave provided under the FMLA, employers will be required to restore employees to their position after expiration of their leave. However, employers with fewer than 25 employees are relieved of the obligation to restore an employee to his or her position if all the following four conditions are met:

- The employee took leave for a "qualifying need related to a public emergency";
- The position that the employee held no longer exists due to economic conditions or other changes of the employer caused by the public health emergency;
- The employer makes reasonable efforts to restore the employee to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment; and
- If the employer is unable to restore the employee's employment to an equivalent

position, then the employer must contact the employee within a 1-year period beginning on the date the FMLA leave concludes if an equivalent position eventually becomes available within that 1-year time period.

Emergency Paid Sick Leave Act

Effective April 1, 2020, employers with 500 or fewer employees, through December 31, 2020, will be required to provide up to 80 hours of paid sick leave to an employee, regardless of how long the employee has been employed by the employer, if the employee is:

- Subject to a federal, state, or local quarantine or isolation order related to COVID-19;
- Has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- Experiencing symptoms of COVID-19 and is seeking a medical diagnosis;
- Caring for an individual who is subject to an order to quarantine or isolate by a public order or self-quarantine as advised by a health care provider;
- Caring for the employee's son or daughter if the school or place of care for such child has been closed, or if the child care provider of such child is unavailable due to COVID-19 precautions; or
- Experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

Employers will be required to post and keep posted, in conspicuous places on the employer's premises, a notice to employees describing the requirements of the paid sick leave portion of the Act. The Department of Labor will make a model notice available no later than 7 days after enactment of the Act.

Full-time employees will be entitled to up to 80 hours of paid leave based on their normal wage. Part-time employees will be entitled to paid leave equal to the number of hours worked, on average, over a two-week period. Paid sick leave is capped at $511 per day and $5,110 in the aggregate for employees who are quarantined or isolated due to coronavirus or are experiencing symptoms of COVID-19 and seeking a medical diagnosis. The amount of paid sick time is also capped at $200 per day and $2,000 in the aggregate per employee for an employee who is: (i) taking care of an individual subject to a quarantine order or who has been advised by a health care provider to self-quarantine; (ii) caring for the employee's child if the child's school or place of care has been closed due to the coronavirus or if the child care provider for the child is unavailable; or (iii) experiencing any other substantially similar condition specified by the Secretary of Health and Human Services. However, both full-time and part-time employees will be entitled only to two-thirds of their wages, as calculated under the Act, when the paid sick leave is used for those reasons where the amount of paid leave is capped at $200 per day. Small employers employing fewer than 50 employees may be able to claim an exemption to the requirements of the paid sick leave portion of the Act if the employer can show that compliance would jeopardize the viability of its business as a

going concern.

The paid sick time provided under the Act would be in addition to any other paid leave made available to the employee by the employer. Employers also cannot require an employee to use other paid time, like vacation or PTO, before using paid sick time provided under the Act. In addition, the paid sick leave can't be carried over from year to year, and the employer is not required to pay any unused paid sick leave to the employee at the time of the employee's separation of employment if the employee has not used such sick leave prior to separation.

Tax Credits for Paid Sick Leave and Paid Family and Medical Leave

To assist employers in paying employees either paid FMLA leave or paid sick leave, employers will be entitled to tax credits on their employer's portion of payroll taxes for wages paid to employees.

For paid FMLA leave, an employer will be entitled to a tax credit for qualified family leave wages in an amount up to $200 per day or $10,000 in the aggregate (5 days x 10 weeks x $200/day cap). If any tax `credit exceeds the amount of payroll taxes due by the employer, then such excess would be treated as an overpayment entitling the employer to a refund.

For paid sick leave, the available tax credit for each employee would be for wages capped at $511 per day while the employee is receiving paid sick leave because: (i) the employee is subject to a quarantine or isolation order by a public official; (ii) the employee has been advised by a health care provider to self-quarantine; or (iii) the employee is seeking a medical diagnosis because the employee is experiencing symptoms of coronavirus. The available tax credit to an employer who pays paid sick leave to an employee is $200 per day if the leave: (i) is taken to care for an individual subject to a quarantine order or who has been advised by a health care provider to self-quarantine; (ii) is taken to care for the employee's child if the child's school or place of care has been closed due to the coronavirus or if the child care provider for the child is unavailable; or (iii) is taken by the employee who is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

If you have questions regarding compliance with these new legal requirements for either expanded FMLA rights or paid sick leave, please contact one of our employment lawyers, Joseph Gumina or Erica Reib, at (414) 276-5000.

EMPLOYMENT LAWSCENE ALERT: WISCONSIN ISSUES NEW BAN ON MASS GATHERINGS OF 10 OR MORE PEOPLE–WHAT DOES THAT MEAN FOR MY BUSINESS?

Under the direction of Wisconsin Governor Tony Evers, the Wisconsin Department of Health Services has ordered a ban on mass gathering of 10 or more people. Pursuant to Emergency Order #5 Prohibiting Mass Gatherings of 10 People or More, a "mass gathering" is "any planned or spontaneous, public or private event or convening that will bring together or is likely to bring together 10 or more people in a single room or single confined or enclosed space at the same time." All gatherings that bring together fewer than 10 people in a single room or confined or enclosed space at the same time must preserve social distancing of six feet between people and follow all other public health recommendations issued by the Wisconsin Department of Health Services and Centers for Disease Control. Additionally, all bars and restaurants in the State of Wisconsin shall be closed, except that restaurants may remain open for take-out or delivery service only. No seating may be provided, and no food may be consumed at the restaurant. Restaurants are to preserve social distancing of six feet between customers during pick up. Under the order, all public and private schools and institutions of higher learning shall be closed for instructional and extracurricular activities.

This does not affect critical infrastructure and services such as grocery stores, food pantries, childcare centers, pharmacies, and hospitals. Retail food establishments, such as grocery stores, convenience stores, and farmer's markets, are required to close all seating intended for consuming food, cease self-service operations of salad bars, beverage stations, and buffets, and prohibit customers from self-dispending all unpackaged food. Office spaces are also exempt from the Order, although they are required to implement social distancing, including teleworking, as much as practicable. Additionally, manufacturing, processing, distribution, and production facilities are exempt from this Order. This is intended to encourage social distancing and limit the spread of coronavirus. This Order goes into effect at 5:00 p.m. on Tuesday, March 17, 2020, and will remain in effect for the duration of the public health emergency declared in Governor Evers's Executive Order #72 or until a superseding order is issued. At this time, there is no specific end date to Executive Order #72 or the Order Prohibiting Mass Gatherings of 50 People or More. Failure to comply with this directive could result in fines and imprisonment.

The full Order can be found here.

EMPLOYMENT LAWSCENE ALERT: WISCONSIN BANS MASS GATHERINGS OF 50 OR MORE PEOPLE–WHAT DOES THAT MEAN FOR MY BUSINESS?

Earlier this afternoon, Wisconsin Governor Tony Evers directed Wisconsin Department of Health Services Secretary-designee, Andrea Palm, to order a ban on mass gathering of 50 or more people. Pursuant to the Order Prohibiting Mass Gatherings of 50 People or More, a "mass gathering" is "any planned or spontaneous, public or private event or convening that will bring together or is likely to bring together 50 or more people in a single room or single confined or enclosed space at the same time." This does not affect critical infrastructure and services such as grocery stores, food pantries, childcare centers, pharmacies, and hospitals. Office spaces as well as manufacturing, processing, distribution, and production facilities are also exempt from the Order. Some affected Wisconsin businesses, including bars and restaurants, will be permitted to remain open provided that they operate at 50% of seating capacity or 50 total people, whichever is less; preserve social distancing of six feet between tables, booths, bar stools, and ordering counters; cease self-service operations of salad bars, beverage stations, and buffets; and prohibit customers from self-dispensing all unpackaged food and beverage. This is intended to encourage social distancing and limit the spread of coronavirus. This Order goes into effect at 12:01 a.m. on Tuesday, March 17, 2020, and will remain in effect for the duration of the public health emergency declared in Governor Evers's Executive Order #72 or until a superseding order is issued. At this time, there is no specific end date to Executive Order #72 or the Order Prohibiting Mass Gatherings of 50 People or More. Failure to comply with this directive could result in fines and imprisonment.

The full Order can be found here.

EMPLOYMENT LAWSCENE ALERT: ECONOMIC RELIEF IS COMING FOR EMPLOYEES IMPACTED BY THE CORONAVIRUS–EMERGENCY FMLA EXPANSION ACT–EMERGENCY PAID SICK LEAVE ACT

On the heels of President Trump declaring a National Health Emergency, the U.S. House of

Representatives passed a 110-page relief bill (HR 6201) during the early morning hours of Saturday, March 14th, to address the economic effects upon individuals negatively impacted by the coronavirus pandemic. H.R. 6201 is designed to provide affected workers expanded Family and Medical Leave Act (FMLA) protections, expansion of food assistance and unemployment insurance benefits, and up to 80 hours of paid sick leave, as well as other relief.

H.R. 6201 will be presented to the U.S. Senate this week for debate for a high-profile vote. President Trump has already indicated that he would sign the legislation in its current form. Employers should expect the U.S. Senate to act quickly so that a bill can be presented to President Trump for signature as soon as possible.

This article will describe what employers need to know about two significant provisions of H.R. 6201 as it moves forward to the Senate: The Emergency FMLA Expansion Act and the Emergency Paid Sick Leave Act.

Emergency FMLA Expansion Act – Small Employers Beware

Targeting that segment of the economy that will be hit the hardest by the impact of the coronavirus pandemic, employers with 500 or fewer employees will be required to provide employees, who have worked for their employer at least 30 calendar days (forget about the 1,250 hour service requirement during the preceding 12-month period for other FMLA leave), with up to 12-weeks of FMLA leave. The expanded FMLA leave rights extends through December 31, 2020. Employers may be required to provide up to 10 weeks of paid leave for their employees who qualify for this expanded leave.

Currently, the proposed legislation would cover all employers with 500 or fewer employees, including small employers who employ less than 50 employees. However, the Department of Labor would be authorized to issue regulations that would exempt small employers with fewer than 50 employees from the paid leave requirements of the bill if such payment obligation would jeopardize the viability of the employer's business as a going concern. This means that if a small employer chooses not to provide the paid leave benefit for expanded FMLA leave, it does so at its own peril subject to its ability to defend itself on the basis that any such paid leave jeopardizes the employer's existence as a going concern. That burden could be high for small employers to meet.

Qualifying Need Related to a Public Health Emergency

Forget about the concept of an employee having a "serious health condition" in order to be entitled to this expanded FMLA leave. Now, because of the public health emergency caused by the coronavirus, employees will be entitled to expanded FMLA rights if they have a "qualifying need related to a public health emergency." Under this standard, employees who

have been employed by the same employer for at least 30 calendar days, regardless of the number of hours previously worked, will be entitled up to 12 weeks of leave if the employees are:

- Complying with the recommendation of a public health official or a health care provider who recommends that the employee be quarantined because of their exposure to coronavirus or because they exhibit the symptoms of coronavirus;
- Providing care for a family member who has been quarantined because of their exposure to coronavirus or because the family member exhibits the symptoms of coronavirus;
- Providing care for their son or daughter under the 18 years of age if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to the public health emergency.

Expanded FMLA Provides for Both Unpaid and Paid Leave

The first 14 days of leave under the expanded FMLA would be unpaid. However, employees may elect, but employers cannot require employees, to substitute any accrued vacation leave, personal leave, or medical or sick leave for the unpaid portion of the leave.

After expiration of the 14 days of leave for a qualifying need related to a public health emergency, employers will be required to provide employees with paid leave. The paid leave provision of the bill would require employers to pay employees an amount equal to at least two-thirds of each employee's regular rate of pay multiplied by the number of hours the employee would otherwise be normally scheduled to work. If the employee works a varying number of hours each workweek, then the employer must base the amount of paid leave on the average number of hours that the employee was scheduled to work per day over the previous 6-month period preceding the need for the leave.

Restoration Rights

Like with other types of leave provided under the FMLA, employers will be required to restore employees to their position after expiration of their leave. However, employers with fewer than 25 employees are relieved of the obligation to restore an employee to his or her position if all the following four conditions are met:

- The employee took leave for a qualifying need related to a public emergency;
- The position that the employee held no longer exist due to economic conditions or other changes of the employer caused by the public health emergency;
- The employer makes reasonable efforts to restore the employee to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment; and
- If the employer is not able to restore the employee's employment to an equivalent position, then the employer must contact the employee within a 1-year period beginning on the date the FMLA leave concludes if an equivalent position does

eventually become available within that 1-year time period.

Emergency Paid Sick Leave Act

H.R. 6201 will require employers with 500 or fewer employees, through December 31, 2020, to provide up to 80 hours paid sick leave to employees who:

- Are required to self-isolate because they are diagnosed with coronavirus;
- Seek medical diagnosis or care if they are experiencing the symptoms of coronavirus;
- Are required to comply with the recommendations or orders by a public health official or a health care provider because their physical presence on the job would jeopardize the health of others because of the employee's exposure to coronavirus;
- Are required to care for or assist a family member who is either self-isolating because the family member has been diagnosed with coronavirus or is experiencing symptoms of coronavirus; or
- Are required to care for their child because the child's school or place of care has been closed, or the child's care provider is unavailable due to coronavirus.

Full-time employees will be entitled up to 80 hours of paid leave based on their normal wage. Part-time employees will be entitled to paid leave equal to the number of hours worked, on average, over a two-week period. However, both full-time and part-time employees will be entitled only to two-thirds of their wages when the sick leave is used to either provide care for a family member with coronavirus or to take care of a child whose school is closed or the child care provider is unavailable because of the coronavirus.

The paid sick leave provided under H.R. 6201 would be in addition to any other paid leave made available to the employee by the employer. Employers cannot require an employee to use other paid time, like vacation or PTO, before using paid sick time provided under H.R. 6201. In addition, the paid sick leave can't be carried over from year to year, and the employer is not required to pay any unused paid sick leave to the employee at time of the employee's separation of employment if the employee has not used such sick leave prior to separation.

Tax Credits for Paid Sick Leave and Paid Family and Medical Leave

Employers would be entitled to tax credits for their employer's portion of payroll taxes for wages paid to employees taking either paid sick leave or paid FMLA leave. The sick leave credit for each employee would be for wages as much as $511 per day while the employee is receiving paid sick leave to care for themselves, or $200 if the sick leave is to care for a family member or child if the child's school is closed. The amount of tax credit for qualified family leave wages for each employee is $200 per day or $10,000 in the aggregate. If any credit exceeds the amount of payroll taxes due by the employer, then such excess would be treated as an overpayment entitling the employer to a refund.

We will keep you posted on the developments of H.R. 6201 as it moves to the Senate for consideration. Stay tuned!

EMPLOYMENT LAWSCENE ALERT: CAN I SEND MY SICK EMPLOYEE HOME?

Many companies are currently wondering what to do if they know an employee or their family member is sick with coronavirus or the flu or if someone seems to be sick with the coronavirus or the flu. The CDC has issued Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 (COVID-19). The CDC has issued the following recommendations, along with other tips and guidance:

- **Actively encourage sick employees to stay at home.** This means that employees who have symptoms of respiratory illness (e.g., cough, fever over 100.4˚) should not come to work until they are free of all such symptoms for at least 24 hours, without the use of medicine. Employees who are caring for someone who is sick may also refer to CDC guidance on how to conduct a risk assessment of their potential exposure and should also stay home if they are at risk of contracting a contagious illness. This may require employers to be more flexible with their sick leave policies and use of time off. If sick employees are encouraged or required to come to work for fear of losing their jobs, it could have a larger impact on your company by making more employees sick and further limiting the company's ability to conduct normal operations.
- **Separate sick employees.** Employees who show signs of respiratory illness while at work should be separated from other employees and sent home immediately.
- **Emphasize staying home when sick, respiratory etiquette, and hand hygiene.** Companies should emphasize that sick employees should stay home. Additionally, while at work, employees need to cover their noses and mouths while coughing and sneezing, use tissue, wash their hands, and use hand sanitizer frequently. Companies may consider putting up posters with reminders of these actions and providing tissues and hand sanitizer. The CDC has sample posters (here) that employers can post at their workplace that encourage employees who are sick to stay at home.
- **Perform routine cleaning.** Companies need to ensure that frequently touched surfaces – workstations, countertops, doorknobs – are cleaned and disinfected regularly. Companies may also consider providing disposable wipes for employees to use.

There are certain legal obligations regarding how companies treat sick employees. All Wisconsin companies with one or more employees are subject to the Wisconsin Fair Employment Act ("WFEA"), and all companies with fifteen or more employees are subject to the Americans with Disabilities Act ("ADA"). Both of these laws protect employees with disabilities and perceived disabilities, as well as employees who are associated with people

with disabilities, from discrimination. However, these laws still allow companies to send an employee who has or appears to have a contagious disease such as coronavirus or the flu home because that employee poses a direct threat of making other employees sick.

In conclusion, yes, sick employees who pose a risk of spreading a contagious illness to your other employees can be sent home from work and should be encouraged to stay home from work until they no longer pose such risk. In this instance, businesses may need to consider one-time, situation-based modifications to their sick leave and absenteeism policies that would allow employees to miss work and not be penalized for it. Employers should not make their decisions about sending an ill employee home based on fear but, rather, on rational, objective, and observable facts designed to protect the interests of all employees and to ensure that your company's continued operations are not placed at risk.

EMPLOYMENT LAWSCENE ALERT: WORRIED THAT YOUR EMPLOYEE HAS THE FLU? OR IS IT CORONAVIRUS?! HERE ARE SOME THINGS TO CONSIDER

The recent world-wide coronavirus outbreak has, thus far, had a fairly limited impact in the U.S. However, health officials believe that it's not a matter of "if" the U.S. has an outbreak of the virus, but "when." The CDC has stated that the "[d]isruption to everyday life may be severe," which could include schools being closed, mass public gatherings being suspended, and businesses having their employees work remotely. Additionally, we're still well within the grasp of cold and flu season, so employers are going to have to deal with the impact of employees needing leave illnesses of some severity. This raises a number of potential employment law concerns, and employers must consider the following:

- Wage and Hour.
    - Under the FLSA, an employee is considered exempt if they meet certain duties tests and receive compensation on a "salary basis." The FLSA regulations provide that, for an exempt employee to be paid on a "salary basis," the employee must receive his or her full salary for any week in which the employee performs any work without regard to the number of days or hours worked. However, a deduction may be made when an exempt employee is absent from work for one or more full days for sickness or disability if the deduction is made pursuant to a "bona fide" plan, policy, or practice of providing compensation for loss of salary occasioned by sickness or disability. The employer is not required to pay any portion of the employee's salary for a full-day absence for which they receive

compensation under such plan or if they do not receive compensation under such plan because the employee has not yet qualified for the plan or has exhausted their leave allowance under the plan. Therefore, an exempt employee may be forced to take leave for such illness under the employer's bona fide plan. If they are not yet eligible or have exhausted their leave, an employer may deduct a full day's wages from an exempt employee's salary if that person does not report for work for the day due to sickness or disability. Such a deduction will not violate the "salary basis" rule or otherwise affect the employee's exempt status. If, however, the employee works only a partial day because of sickness or disability, the employer may not make deductions from the employee's salary for the lost time because an exempt employee must receive a full day's pay for the partial day worked in order for the employer to meet the "salary basis" rule. Time worked includes time worked from home.

- Additionally, if the employer chooses to close due to concerns regarding the spread of disease, it cannot deduct the day's wage from an exempt employee's salary. It is the U.S. Department of Labor's ("DOL") position that an employer must pay an exempt employee his or her full salary for any week in which work was performed if the employer closes its operations due to a weather-related emergency or other emergency. The DOL's position is based, in part, on the FLSA's regulation that provides that deductions may not be made for time when work is not available. When it is the employer's decision to close its business because of an emergency, the DOL presumes that employees remain ready, willing, and able to work. Under such circumstances, deductions may not be made from an exempt employee's salary when work is not available. If deductions are made under such circumstances, the employer risks losing the exemption, thus subjecting it to potential overtime liability. If the employer's operation are closed for a full workweek, no salary must be paid. Employers are permitted to require that employees utilize their available paid time off during an employer-mandated office closure, whether for a full day or a partial day. However, if the employer does not provide paid time off or if the employee does not have available paid time off, the employer may not deduct from the employee's salary for the closure. The employer may not require that the employee have a negative leave balance or make an already negative leave balance more negative as the result of requiring the employee to take paid time off for an office closure.

- Non-exempt employees do not have to be paid for time not worked.

- FMLA.
  - The FMLA is clear that, ordinarily, the common cold and flu are not serious health conditions. However, more severe cases that require inpatient care or continuing treatment by a healthcare provider, and therefore meet the definition of serious health condition, do qualify. Therefore, employers need to be carefully tracking who is eligible for FMLA leave and why the employee needs time off and providing timely eligibility notices to employees. When in doubt, employers should err on the side of caution and provide a eligible employee taking time off for illnesses with an eligibility notice and certification of healthcare provider. Then, with the

information provided by the employee's healthcare provider, the employer (potentially assisted by counsel) can determine whether the employee's particular illness meets the definition of a "serious health condition" under the FMLA. Additionally, eligible employees are entitled to FMLA for the care of a family member who has a serious health condition, so employees with spouses, children, or parents who are suffering from a severe flu or coronavirus may also be entitled to FMLA leave.

- Disability Discrimination.
    - Employees with certain health conditions may be more susceptible to other diseases, such as colds, flus, or the coronavirus. Therefore, employers may have to consider reasonable accommodations such as working from home or avoiding travel in order to help those employees avoid the risk of further infection. However, employers should use caution about requiring health screenings or otherwise inquiring about potential medical conditions, as this could also be a violation of the ADA and state disability discrimination laws.
    - If the employee is displaying symptoms of a contagious illness at work the employer can (and probably should) send them home, and that will not violate the ADA. If it turns out that the condition was a minor illness, it will not be considered a disability; and if the condition is severe enough to be considered a disability, then the employer was justified in protecting other employees from the direct threat that the contagious illness posed.

- OSHA.
    - Although OSHA has not issued any guidance specific to the coronavirus, under OSHA, employer have a general duty to furnish a place of employment that is free from recognized hazards that are causing or likely to cause the death of or serious physical harm to employees. To that end, employers should consider making hand sanitizer available, particularly in environments with public contact; making sure that surfaces and eating areas are cleaned and disinfected; and encouraging employees who are sick to stay home. Additionally, while the standard cold and flu are not reportable illnesses, OSHA has deemed the 2019 Novel Coronavirus a recordable illness when a worker is infected on the job. Therefore, employers need to know whether their employees are infected, how they got infected, and fill out the appropriate OSHA Form 300 if necessary.

In planning for a pandemic, employers will have to consider how to maintain essential operations and services when necessary resources may not be available. In particular, employers will have to determine if core business activities can be sustained over an extended period of time when only a minimal workforce may be available. The U.S. Department of Homeland Security provides some steps employers can take now to ensure that their respective businesses can survive and continue to provide critical goods and services to the public. These steps include:

- Identify your company's essential functions, such as payroll or information technology, and identify the individuals that can perform them;
- Cross train non-essential employees to perform essential functions;

- Ensure sufficient essential resources are available at each worksite;
- Plan for interruptions of essential government services, such as mass transit;
- Update and modify sick leave policies and communicate with employees the importance of staying away from the workplace if they become ill;
- Establish policies and practices to allow employees to work from home;
- Collaborate with insurers, health plans, and major healthcare facilities to share your pandemic contingency plans and to learn about their capabilities and plans;
- Promote and maintain a healthy work environment by, for example, providing easy access to alcohol-based hand sanitizer products;
- Communicate with your employees about the threat of a pandemic and the steps that you, as their employer, are taking to prepare for it.

For more information on what your business can do to be prepared for a pandemic, visit the U.S. Department of Homeland Security's website www.ready.gov.

EMPLOYMENT LAWSCENE ALERT: REVIEW YOUR COMPANY'S "TOP-HAT FILING" STATUS NOW TO AVOID INCREASED FORM 5500 PENALTIES

Companies that have entered into arrangements (1) to pay deferred compensation to key employees (including owners), or (2) to provide employee benefits specifically for apprentices or trainees should immediately determine whether a "top-hat filing" is required, and, if so, whether it has been properly filed with the Department of Labor. Two very recent legal developments—increased penalties and a new filing search tool—indicate that enforcement activity on top-hat filing compliance is increasing. Penalties for not filing can be extremely costly, and the penalties have been increased, effective January 15, 2020. Fortunately, a low-cost correction option is available for corrections made prior to a DOL assessment of penalties.

Top-Hat Overview

A top-hat filing is a short informational submission to the DOL that describes the company's contact information and the nature of the sponsored plan. It is legally required to be submitted with respect to any compensation arrangement for key management and owner employees (or employee benefit plans provided only to apprentices or trainees) that constitutes a top-hat plan. So named in apparent reference to gentility as evoked by Lincoln-era fashion standards, a top-hat plan is an agreement or plan maintained by an employer primarily for the purpose of providing deferred compensation to a select group of key employees, apprentices, or trainees.

The term “select group of management or highly compensated employees” is not clearly defined, but must, instead, be determined in the context of the particular facts and circumstances that apply to the employer. Neither the IRS definition of “highly-compensated employee” or of “key employee” applies in determining whether a compensation arrangement is a top-hat plan. Instead, relevant factors include the duties and responsibilities of the employee and the level of the employee’s compensation as compared to the compensation of the employer’s work force, in general.

Top-Hat Filing – Required within 120 Days of Plan Effective Date

In general, all employer-provided benefits are subject to ERISA’s requirements, unless an exception applies. In the case of top-hat payment arrangements, DOL guidance has expressed that “certain individuals, by virtue of their position or compensation level, have the ability to affect or substantially influence, through negotiation or otherwise, the design and operation of their deferred compensation plan, taking into consideration any risks attendant thereto, and therefore would not need [all of] the substantive rights and protections of” ERISA. The DOL also permits this lower-protection status for arrangements that provide employee benefits (including health benefits) only to apprentices or trainees, or both.

In light of the reduced need for ERISA protections for these plans, the DOL authorizes an exemption from the otherwise-applicable ERISA mandates regarding participation, vesting, funding, and fiduciary rules. Importantly, an additional exemption from ERISA’s reporting and disclosure rules is also available, but *only if* a “top-hat filing” is submitted to the DOL within 120 days of the initial effective date of such plan.

Because ERISA’s reporting and disclosure rules include the requirement to file an annual Form 5500 to the DOL, this annual Form 5500 filing requirement continues to apply to a top-hat plan unless a top-hat filing has been timely submitted. Alternately, an initial failure to submit a top-hat filing can generally be corrected, retroactively, for a relatively small compliance fee.

Form 5500 Penalties at an All-Time High

An employer that fails to timely file a Form 5500 may be subject to a DOL penalty of $2,233 per day (as adjusted annually for inflation). This new penalty amount of $2,233 per day is effective January 15, 2020. (For the prior year, the penalty amount had been $2,194 per day). This is not a typographical error. The law applies these penalty amounts *per day* for each day past the required filing date(s). The penalties are cumulative and become exponentially large for failures stretching over multiple years. While an aggregate penalty assessment could likely be negotiated downward by experienced ERISA legal counsel, an assessed DOL penalty for a late Form 5500 is guaranteed to be large.

The IRS imposes separate penalties for the failure to timely file a Form 5500, unless a showing of reasonable cause is made. Until recently, the IRS penalty was $25 for each day of the failure up to a maximum penalty of $15,000 per year. Under the Setting Every Community Up for Retirement Enhancement (SECURE Act) enacted on December 20, 2019, however, the IRS penalties for a late Form 5500 have increased tenfold to $250 per day, up to an annual maximum of $150,000. These increased IRS penalties apply for any Form 5500 due to be filed on and after January 1, 2020.

New DOL Top-Hat Filing Search Tool

Earlier this week, the DOL published a new online search tool to enable the public to search for top-hat filings. The search tool is available here. Results can be printed or downloaded to Excel.

Prior to the DOL making the search tool available, generally only benefits professionals and practitioners ever searched for top-hat filings, and then only via a website maintained by a private company that regularly obtained the information from the DOL through Freedom of Information Act Requests.

The issuance of the public DOL search tool is a positive development that will assist employers in confirming their top-hat filing compliance status. Of course, this increased access likely also signals increased DOL interest in enforcing late Form 5500 penalties for those employers that have not timely filed a top-hat statement. In light of the ease of searching, it will now be harder for employers to reasonably contend that they were unaware that a top-hat filing had not been submitted. Similarly, it is conceivable that plaintiffs' attorneys or disgruntled employees could use the tool themselves to determine whether a company is likely out of compliance with the top-hat filing, and therefore, the Form 5500 filing, rules. If this knowledge were used to inform the DOL, which, in turn, could trigger a penalty assessment, the penalty amounts could be devastating.

Correction Option

If you determine or suspect that your company has inadvertently failed to submit a top-hat filing for a covered top-hat plan, take steps right away to amend this oversight by submitting a delinquent filer voluntary compliance application. If you catch the error before the DOL has assessed a penalty, then you can retroactively correct the issue for a fee of only $750 for a single year (or a maximum of $1,500 for multiple years). The IRS generally accepts this same correction method as sufficient to avoid the separate IRS Form 5500 penalties, as well. Indeed, this DOL correction method often works to abate the IRS penalties after these have already been assessed.

Conclusion

It is common for companies that implement deferred compensation arrangements to consider the tax implications of such arrangement, including, for example, the application of Internal Revenue Code Section 409A. Equally important, however, is consideration of the other federal law that may govern such arrangements—ERISA. It is simply not true that all compensation agreements for key employees are exempt from ERISA's requirements. Failure to anticipate this reality—and to submit a top-hat filing when required—exposes the employer to significant Form 5500 penalties.

To avoid these penalties, check on your company's top-hat filing compliance now. The attorneys of the OCDHL Employment Law Team can assist you with assessing whether your company's key employee compensation agreements constitute top-hat plans within the meaning of ERISA, or whether an exemption may apply. If you maintain a top-hat plan for which no top-hat filing was ever submitted, we can assist in correcting the inadvertently missed prior filings, thereby potentially eliminating the existing exposure to thousands of dollars.

EMPLOYMENT LAWSCENE ALERT: NEW YEAR – NEW LABOR AND EMPLOYMENT LAW DEVELOPMENTS EVERY EMPLOYER SHOULD KNOW

In 2019, several federal agencies, including the U.S. Department of Labor, Equal Employment Opportunity Commission, and the National Labor Relations Board have either issued new regulations, new guidelines, or employer-friendly decisions that every employer should be aware of as we begin our journey into this 2020 election year. Most of the changes coming at the federal level are the result of the Trump administration's agenda to level the playing field for employers by tilting back for employers the shift that occurred in the legal landscape during the Obama administration. Here are the latest labor and employment law developments every employer should know as we venture into 2020.

U.S. Department of Labor (DOL)

New Overtime Regulations Go into Effect January 1, 2020

Effective January 1, 2020, the salary threshold necessary to exempt executive, administrative

and professional employees from the Fair Labor Standard Act's minimum wage and overtime pay requirements increases from $23,660 (or $455 per week) to $35,568 (or $684 per week). The DOL's new rule is the product of the Trump administration's efforts to reset the Obama administration's 2016 final rule that established the salary threshold at $47,476 per year or $913 per week. Now is the perfect time for employers to audit their payroll data to make sure that every employee who is being treated as an exempt executive, administrative or professional employee is being paid at least the salary threshold amount of $35,568 (or $684 per week). Employees who do not meet this new minimum salary threshold should be treated as non-exempt and employers should begin to pay these newly minted non-exempt employees overtime compensation (1.5 times their regular rate) if they work over 40 hours in a workweek.

DOL Issues Final Rule Clarifying the Regular Rate of Pay

In December, the DOL announced a final rule clarifying for employers what "perks" and benefits must be included in the regular rate of pay when calculating overtime compensation. The "regular rate" is the hourly rate that is paid to employees and must not only include an employee's hourly wage rate, but it must also include in its calculation other forms of compensation received in a workweek, including bonuses, commissions, and other forms of compensation, subject to eight specified exclusions. Perplexing to employers, and exposing employers to additional risk for overtime liability, was the uncertainty as to whether certain kinds of "perks," benefits, or other miscellaneous payments must be included in the regular rate. The DOL attempted to eliminate this uncertainty in its final rule by confirming what employers may offer to employees through the following non-exhaustive list of "perks" and benefits without the risk of additional overtime liability:

- The cost of providing certain parking benefits, wellness programs, onsite specialist treatment, gym access and fitness classes, employee discounts on retail goods and services, certain tuition benefits (whether paid to an employee, an education provider, or a student-loan program), and adoption assistance;
- Payments for unused paid leave, including paid sick leave or paid time off;EEOC, EE
- Payments of certain penalties required under state and local scheduling laws;
- Reimbursed expenses including cellphone plans, credentialing exam fees, organization membership dues, and travel, even if not incurred solely for the employer's benefit; the DOL also clarified that reimbursements that do not exceed the maximum travel reimbursement under the Federal Travel Regulation System or the optional IRS substantiation amounts for travel expenses are per se "reasonable payments";
- Certain sign-on bonuses and certain longevity bonuses;
- The cost of office coffee and snacks to employees as gifts;
- Discretionary bonuses, by clarifying that the label given a bonus does not determine whether it is discretionary and providing additional examples; and
- Contributions to benefit plans for accident, unemployment, legal services, or other events that could cause future financial hardship or expense.

The DOL's final rule becomes effective on January 15, 2020.

National Labor Relations Board (NLRB)

Employers Can Cut-Off Union Dues Upon CBA Expiration

In a 3-1 ruling, the NLRB overturned an Obama-era decision (*Lincoln Lutheran of Racine*, 362 NLRB 1655 (2015)) requiring employers to continue to honor the dues checkoff provision in an expired labor contract. In *Lincoln Lutheran of Racine*, the NLRB held that an employer's statutory obligation to check off union dues continues to be enforceable under Section 8(a)(5) of the National Labor Relation Act after expiration of a collective bargaining agreement that establishes the checkoff arrangement. The Obama-era Board reasoned that the "dues checkoff" provision could not just dissipate once a contract expired, but instead could be ignored only if all parties to the contract agreed. On December 16, 2019, the NLRB reversed course in *Valley Hospital Medical Center*, 368 NLRB No. 39 (2019), holding that while dues checkoff provisions are mandatory subjects of bargaining, they also fall into a special "limited category" of unique union rights that are contractual in nature and do not necessarily relate to wages, pensions, welfare benefits, and other terms and conditions of employment. Given its special category, a dues-checkoff provision remains enforceable only during the term of the agreement in which those contractual obligations were created by the parties. Consequently, the Board held that there is no independent statutory obligation to check off and remit dues after expiration of a collective-bargaining agreement containing a checkoff provision, just as no such statutory obligation exists before parties enter into such an agreement. The Board's ruling brings more balance to the bargaining table and provides the employer some leverage when contract negotiations may extend beyond the expiration of the labor agreement. It also incentivizes the union to reach an agreement before expiration of the labor agreement to avoid loss of union dues. Of course, the right to cut-off union dues under the Board's *Valley Hospital* decision does not exist when the employer and the union agree to extend the labor agreement during the pendency of negotiations.

NLRB Provides Employers, Once Again, the Power to Control Company-Owned Email

On December 17, 2019, in *Caesars Entertainment* (368 NLRB No. 143) the NLRB overturned its 2014 controversial *Purple Communications* decision (361 NLRB No. 126) which had held that employees have the right to use their employers' email systems for non-business purposes, including communicating about union organizing. The NLRB's *Purple Communications'* decision overturned its 2007 *Register Guard* decision (351 NLRB No. 70) where the Board recognized the long-standing precedent that the NLRA generally does not restrict an employer's right to control the use of its equipment, which applies to company-owned email systems, and held that while union-related communications cannot be banned because they are union-related, facially neutral policies regarding the permissible use of

employers' email systems are not rendered unlawful simply because they have the "incidental" effect of limiting the use of those systems for union-related communications. The *Purple Communications* decision upset this precedent and held, for the first time in the history of the Board, that employees do have the right to use company-owned equipment for non-work purposes. The Board's decision in *Caesars Entertainment* basically restored the standard set forth in the *Register Guard* decision before the *Purple Communications* decision stripped employers of an important property right with the only exception being those rare cases where an employer's email system provides the only reasonable means for employees to communicate with one another. Now, under the *Caesars Entertainment* decision, employers may prohibit employees from using company-owned email systems for non-work-related purposes, including communications concerning union organizing activities. Employers, however, are permitted to implement such a prohibition only if the employer's rules or policies are not applied discriminatorily by singling out union-related activities or communications.

NLRB Restores Employers' Right to Impose Confidentiality in Workplace Investigations

On December 16,2019, in a 3-1 decision, the NLRB overruled a 2015 NLRB precedent (*Banner Estrella Medical Center*, 362 NLRB 1108) that required a case-by-case determination of whether an employer may lawfully require confidentiality in specific workplace investigations. The Board had ruled that employees have a Section 7 right to discuss discipline and ongoing investigations involving themselves and other co-workers. In *Apogee Retail*, 368 NLRB No. 144 (2019), however, the NLRB returned to its previous standard, and now allows employers to implement blanket nondisclosure rules requiring confidentiality in all workplace investigations. The NLRB's ruling aligns itself with the EEOC's position against the backdrop of the #MeToo movement where confidentiality rules imposed during a workplace sexual harassment investigation encourage victims and witnesses to come forward. The standard set forth by the Board in *Apogee Retail* only applies to open and-on-going investigations and only to those employees directly involved in the investigation. Obviously, on the other hand, any confidentiality order or rule imposed by the employer cannot be imposed on employees not involved in the investigation or to an investigation that has concluded. The Board's decision in *Apogee Retail* provides employers an important tool to maintain the integrity of its internal investigations without fear that imposing the safeguards of confidentiality requirements during the pendency of an investigation violates Section 7 rights.

Equal Employment Opportunity Commission (EEOC)

EEOC Rescinds Policy Against Binding Arbitration

The EEOC voted 2-1 to rescind its 1997 *Policy Statement on Mandatory Binding* Arbitration where the EEOC had stated its position that mandatory arbitration agreements that keep

workers' discrimination claims out of court clash with the civil rights laws the agency enforces.

The EEOC based its decision to rescind its policy regarding binding arbitration based on the fact that its policy statement did not reflect current law, especially given the Supreme Court's numerous and consistent decisions since 1997 that favor agreements to arbitrate employment-related disputes as being enforceable under the Federal Arbitration Act (FAA). The EEOC found that its 1997 policy conflicted with the arbitration-related decisions of the Supreme Court where the Court rejected the EEOC's previously enunciated concerns with using the arbitral forum – both within and outside the context of employment discrimination claims. It should be noted by employers, however, that the EEOC's decision to rescind its 1997 policy statement on mandatory arbitration should not be construed to mean that employees cannot file charges of discrimination with the agency if they signed an agreement to arbitrate or that the EEOC is prohibited from investigating such charges. Moreover, the EEOC makes clear that its rescission of its 1997 policy should not be interpreted as limiting the EEOC's ability, or that of the employee, to challenge the enforceability of any agreement to arbitrate. This change in the EEOC's policy position regarding mandatory arbitration of employment disputes is not surprising given the long-line of Supreme Court decisions favoring arbitration in employment disputes. Given the positive change in the EEOC's position on mandatory arbitration agreements in employment, along with strong precedent-setting federal court decisions favoring arbitration, employers should consider revisiting whether they should be utilizing agreements with their employees for mandatory arbitration of employment disputes.