



# Key Employment Issues in 2020

Free Employment Law Webinar

Vandenack Weaver LLC

January 2020

# Michael J. Weaver

- **Managing Member**

- **Michael J. Weaver** is a managing member of **Vandenack Weaver LLC** in Omaha, Nebraska, a tax and business boutique.
- Mike's practice focuses on providing experienced counsel to businesses and individuals. His areas of expertise include corporate and business law, real estate transactions, federal and state taxation and tax planning, estate, retirement and financial planning, and trust administration and probate. In his practice, Mike represents a wide variety of business interests on tax, corporate, contract, real estate, and financial matters, including sole proprietorships, partnerships, limited liability companies and corporations of all sizes. Mike especially enjoys working with closely held businesses. He helps them reach their goals by providing practical advice that minimizes risk while navigating complex legal issues associated throughout the life-cycles of their business. Mike represents individuals in all stages of life on their estate, retirement and financial planning, be it a newly married couple establishing their first estate plan or a business owner working on complex business succession issues.

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# Matthew G. Dunning

- Attorney

- Matt is an accomplished attorney with extensive risk management experience and more than two decades of legal experience. He brings strong analytical and problem-solving skills to complex business challenges. His ability to negotiate and resolve intricate disputes in fast changing, complex business environments has helped him effectively represent the interests of 501(c)(6) organizations as well as advise large non-profit organizations on employment compliance issues across 11 jurisdictions, including California, New York and the District of Columbia. Dunning has successfully litigated and mediated employment contract issues including for-cause terminations and non-competition and non-solicitation agreements. In his career, he had defended clients against discrimination and harassment claims in Iowa and Nebraska courts and in administrative proceedings in multiple states, including in the Eighth Circuit Court of Appeals.

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# Monte L. Schatz

- **Attorney**

Monte Schatz offers clients a wealth of experience in practice areas vital to business and finance. His expertise includes estate and trust administration, probate, estate planning, tax, securities, corporate and employer-employee relations law.

Schatz's client service is strengthened by a 30-year work history that includes key executive positions with national and regional bank corporations. Monte assists individuals and businesses with wealth strategies, trusts and estates, asset protection, tax planning/preparation employment law issues, tax issues and risk management.

Monte's wide scope of expertise includes both federal and state legal, tax, and regulatory issues and compliance with particular emphasis in the financial services industry.

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# Ryan J. Coufal

- Attorney

- Ryan Coufal joined the firm as an attorney in 2019. A 2019 graduate and appointee to the Order of the Barristers, a national honors society recognizing students who have excelled in litigation and advocacy, Coufal brings energy and a legal expertise to individuals and businesses.

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## Setting Every Community Up for Retirement Enhancement Act

- The SECURE Act contains many provisions that apply to employer-sponsored retirement plans in 2020. Significant impact on both employers and employees.
- Plan amendments do not have to be made for a few years, plan administration (including notification to employees and participants and revised election forms). Employers will need to make changes to their sponsored plans much sooner.

# SECURE Act Employee Benefit Plan Provisions Provides Incentives to Employer

- **Greater Availability of Multiple Employer Plans.** If certain fiduciary and registration requirements are met, a qualified defined contribution plan may be maintained by unrelated employers, which can reduce the burden on individual employers.
- **Relaxed Requirements for Non-Elective Safe Harbor 401(k) Plan.** The safe harbor notice requirement is eliminated for nonelective 401(k) safe harbor plans that provide a nonelective contribution of at least 4 percent.
- **Combined Annual Reports for Certain Defined Contribution Plans.** In broad terms one consolidated form 5500 Annual Return for Employee Benefit Plans will be allowed for defined contribution plans if they 1) share the same trustee, named fiduciaries and administrator, 2) have the same plan year, and 3) provide the same investments or investment options to participants and beneficiaries.
- **Fiduciary Safe Harbor for Selection of Lifetime Income Provider.** If specified safe harbor guidelines are met the plan fiduciary will be protected from liability for selected lifetime income providers failing to pay full amount of benefits.
- **Testing Relief for Certain "Soft" Frozen Defined Benefit Plans.** Expands existing minimum participation and nondiscrimination testing relief for defined benefit plans that provide continuing benefit accruals for existing participants but are closed to new participants.
- **More Time to Adopt Certain Retirement Plans.** For employers adopting qualified retirement plans *other than 401k plans*, the employer may adopt a plan before filing deadline including extensions and treat the plan as adopted on the last day of taxable year.

# SECURE Act Employee Benefit Plan Provisions Affecting Employees

- **Long-Term, Part-Time Employees 401(k) Plan Eligibility.** Employees who work 500 hours per 12 month period for 3 consecutive 12 month period are allowed to participate in 401(k) plan; employee does not qualify for match from employer and are excluded from nondiscrimination and top heavy testing.
- **Increase in Age for Required Beginning Date for Mandatory Distributions.** Age for required minimum distribution has increased from 70 ½ to 72 effective 1-1-20. Applies to participants who turn 70 ½ after December 31, 2019.
- **Increase of 10 Percent Cap for Automatic Enrollment Safe Harbor.** Previously, the safe harbor rules on qualified automatic contribution arrangements (QACAs) limited the maximum automatic contribution rate to 10 percent of a participant's compensation. Under the SECURE Act, the 10 percent cap remains until the last day of the first plan year that begins after the employee's date of participation, but in subsequent plan years the maximum permissible automatic contribution rate is 15 percent.
- **Penalty-Free Withdrawals Related to the Birth or Adoption of a Child.** A participant may take a penalty free withdrawal of up to \$5,000 to cover expenses related to birth or adoption of a child under the age of 18 or incapable of self-support, during the one year period following the date the child is born or adopted.

## SECURE Act Employee Benefit Plan Provisions Affecting Employees, Cont.

- **Portability of Lifetime Income Options.** Plan participants with lifetime income investments such as an annuity contract that are no longer deemed authorized investment options under 403(b) or 457 (b) plans may take in-service transfers of these investments without violating plan restrictions on in-service distributions (basically distributions while still employed by non profit or governmental employer).
- **Lifetime Income Disclosure.** Lifetime income disclosures will have to be included in annual benefit statements provided to participants of defined contribution plans
- **Modified Required Distribution Rules for Designated Beneficiaries.** Pursuant to the SECURE Act, distributions made to many designated beneficiaries following the death of a participant in a defined contribution plan or IRA must be made within 10 years following the participant's death. Several exceptions to this rule.
- **The remedial amendment period to make any amendments required under the SECURE Act runs until the last day of the first plan year beginning on or after Jan. 1, 2022, or for governmental plans, Jan. 1, 2024.**

# Fair Labor Standards Act (FLSA) 2020 Updates and Considerations

- **Fair Labor Standards Act**
  - Federal Statutes that establish:
    - Federal Minimum Wage
    - Federal Overtime
    - Defines “Hours Worked”
    - Defines requirements of Employer Recordkeeping
    - Establishes Child Labor Protections

# FLSA 2020 Overtime Provision Update

- Took effect **January 1, 2020**
- Increased the “Standard Salary Level” from currently enforced level of \$455/week to \$684/week or \$23,660 to \$35,568.
- Applies to exempt “white-collar employees”—such as executive, administrative, and professional employees—who are salaried and exempt from the FLSA’s overtime provisions AND are now earning less than the new minimum salary level
- If an employer fails to pay an affected employee less than the required minimum salary, the overtime exemption will be lost, making the employee a nonexempt employee and eligible for overtime under federal or state law at a rate of 1/5 times their regular hourly rate for all time worked more than 40 hours in a single week.
- Some states have their own overtime law provisions, and these must be also taken into account. **Nebraska** does not have its own provisions and follows the federal provisions.

# The Threat of FLSA Litigation Regarding Unpaid Wages and Overtime

- **Rise of Wage and Hour Litigation Across Country**
  - Value of the 10 leading wage and hour class action settlements in 2019 was \$449.1 million (up 77% from \$253 million in 2018)
  - Settlement values for all employment related class action categories totaled \$1.34 billion in 2019
  - Top Cases involved Overtime, Worker Status, Meal and Rest Breaks, and Pre-Shift Duties
- **Failure to pay overtime due to improperly classifying workers**
  - Improperly classifying workers as independent contractors or interns.
- **Threats of Class Action and Collective Action lawsuits**
  - Ability to Collect Attorneys' Fees provide incentive for abundant litigation.

# Avoiding and Decreasing Changes of FLSA Collective or Class Action Litigation

- Maintain accurate time-keeping and record-keeping policies and utilize up-to-date scheduling and logging systems. Ensure these policies are put into practice by employees.
- Provide back-up schedules to clarify hours scheduled to work and hours actually worked by each employee
- Train managers on the differences between exempt and nonexempt employees and require compliance from managers to report wage issues early. Have managers acknowledge practices and policies of business's recordkeeping.
- Conduct periodic wage and hour audits to verify employees have been correctly classified as exempt or nonexempt.
- Assess the type of work independent contractors do for business, and how they are completing work for your business.

## **Eighth Circuit Affirms Employer's Good Faith Belief Defense**

- **Elements to support a defense:**
  - Thorough and documented investigation by an independent human resources or other person.
  - Clear policy, consistently applied.
  - Make a well-reasoned and well-supported recommendation to the decisionmaker, and document that person's reliance on the HR investigation.

# Joint Employment Liability

Final Rule Issued by the Federal Department of Labor

- **Four factors to determine joint employment status; whether the other company:**
  - 1) Hires or fires the employee;
  - 2) Supervises and controls the employee's work schedule or conditions of employment to a substantial degree;
  - 3) Determines the employee's rate and method of payment; and
  - 4) Maintains the employee's employment records

# NLRB Confidentiality in Employer Investigations

- Prior Obama-era ruling

# THANK YOU FOR ATTENDING!

Vandenack Weaver LLC

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January 2020

**Our next FREE Webinar will be held in March 2020!**  
Be sure to register for Harassment Investigations in the #MeToo Era:  
Whistleblower and Retaliation Claims