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UPDATES IN NEW JERSEY EMPLOYMENT LAW

August W. Heckman III

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March 11, 2021

Presenters

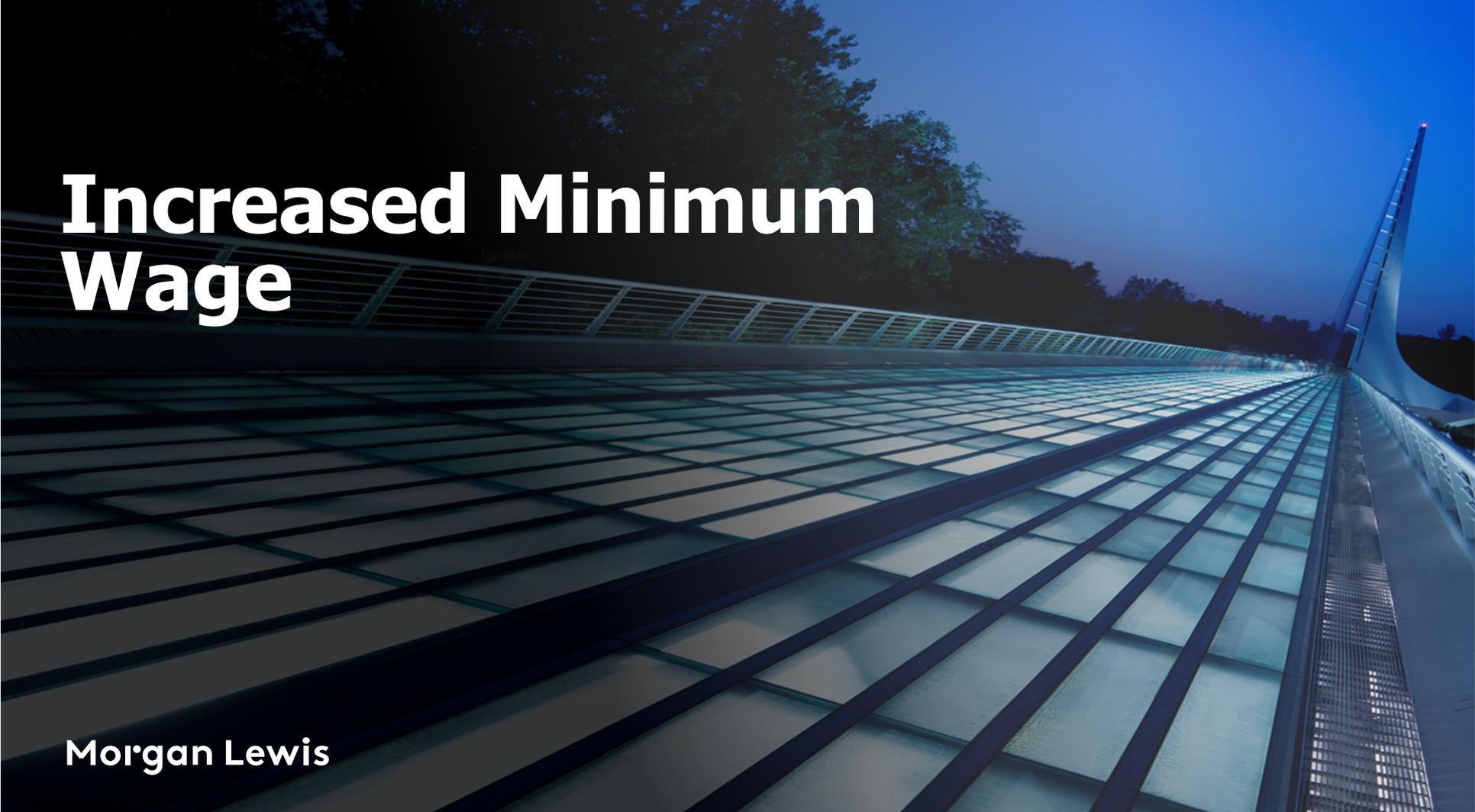


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Increased Minimum Wage

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Increased Minimum Wage

- Effective January 1, 2021, the New Jersey minimum wage is \$12.00 per hour (up from \$11 per hour in 2020) for most workers.
- Tipped employees: minimum cash wage is \$4.13 per hour (provided it equals \$12 per hour including tips).
- Exceptions: certain employees “in training,” seasonal workers, small employers, agricultural workers, and direct care staff at long-term care facilities.
- Efforts at increasing federal minimum wage have failed in latest COVID relief bill; possibility that Congress tries to implement separately or at a lower level?

Increased Minimum Wage



NEW JERSEY'S MINIMUM WAGE

Date	Most Employers	Seasonal & Small Employers (fewer than 6)	Agricultural Employers	*Cash Wage for Tipped Workers
January 1, 2019	\$8.85	\$8.85	\$8.85	\$2.13
July 1, 2019	\$10.00	NO CHANGE	NO CHANGE	\$2.63
January 1, 2020	\$11.00	\$10.30	\$10.30	\$3.13
January 1, 2021	\$12.00	\$11.10	\$10.44	\$4.13
January 1, 2022	\$13.00	\$11.90	\$10.90	\$5.13
January 1, 2023	\$14.00	\$12.70	\$11.70	NO CHANGE
January 1, 2024	\$15.00	\$13.50	\$12.50	NO CHANGE
January 1, 2025	TBD	\$14.30	\$13.40	TBD
January 1, 2026	TBD	\$15.00	\$14.20	TBD
January 1, 2027	TBD	TBD	\$15.00	TBD

* Cash wage plus tips must equal the minimum wage.

(R 10-5-2020)



New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act ("NJCREAMMA")

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NJCREAMMA

- New Jersey Governor Phil Murphy signed NJCREAMMA on February 22 enabling the constitutional amendment to legalize adult recreational use of cannabis and a companion decriminalization law.
- Each law has significant implications for employers.

5 Things You Need To Know About Marijuana Legalization In NJ

Where can you smoke it? Can you be fired or face a drug test? Here's a simple guide for anyone curious about trying cannabis in New Jersey.

 Eric Kiefer, Patch Staff 

Can I be fired if I test positive for marijuana, even though weed was just legalized? What you need to know.

Updated Feb 25, 2021; Posted Feb 25, 2021

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By [Amanda Hoover | NJ Advance Media For NJ.com](#)

Non-Discrimination

- Prohibits employers from taking adverse employment action against employees or applicants based on their use (or non-use) of cannabis items:
“No employer shall refuse to hire or employ any person or shall discharge from employment or take any adverse action against any employee with respect to compensation, terms, conditions, or other privileges of employment because that person does or does not smoke, vape, aerosolize or otherwise use cannabis items, and an employee shall not be subject to any adverse action by an employer **solely** due to the presence of cannabinoid metabolites in the employee’s bodily fluid from engaging in conduct permitted under [NJCREAMMA].” (emphasis added).

No Duty to Accommodate in the Workplace

- Employers may establish drug- and alcohol-free workplaces and do not have to permit or accommodate cannabis use in the workplace or during work hours:
“[Nothing in NJCREAMMA] [r]equires an employer to amend or repeal, or affect, restrict or preempt the rights and obligations of employers to maintain a drug- and alcohol-free workplace or require an employer to permit or accommodate the use, consumption, being under the influence, possession, transfer, display, transportation, sale, or growth of cannabis or cannabis items in the workplace, or to affect the ability of employers to have policies prohibiting the use of cannabis items or intoxication by employees during work hours.”

Drug Testing

- Employers may drug test in six instances: (1) upon reasonable suspicion of an employee's use of cannabis items at work, (2) upon finding observable signs of intoxication related to cannabis items at work, (3) as part of a work-related accident investigation, (4) randomly, (5) as part of pre-employment screening, or (6) as part of regular screening of current employees to determine use during work hours.
- A drug test must include "scientifically reliable objective testing methods and procedures, such as testing of blood, urine, or saliva" **and** a "physical evaluation."
- The individual conducting the "physical evaluation" must be certified under regulatory standards established by the Cannabis Regulatory Commission, in consultation with the Police Training Commission, as a "Workplace Impairment Recognition Expert" (WIRE).

Drug Testing

- Employers may “use the results of” the drug test—which must include the physical evaluation by the WIRE—when “determining the appropriate employment action concerning the employee, including, but not limited to dismissal, suspension, demotion, or other disciplinary action.”
- If these requirements would result in “a provable adverse impact on an employer subject to the requirements of a federal contract, then the employer may revise their employee prohibitions consistent with federal law, rules, and regulations.”

Drug Testing

- The law does not explain *how* employers may use the results of a drug test.
 - There is no “safety sensitive” exemption in the law.
 - Is random drug testing for safety-sensitive positions permissible?
 - How can an employer use a WIRE for a physical examination for pre-employment testing?
- We expect that the Cannabis Regulatory Commission’s forthcoming rules and regulations will provide further guidance.

NJCREAMMA

Effective Date

- The employment provisions of NJCREAMMA will not be enforceable until the Cannabis Regulatory Commission adopts rules and regulations.
- The Cannabis Regulatory Commission's deadline to issue those rules and regulations is August 21, 2021 (180 days from enactment).

No Express Private Right of Action

- The law does not contain an express private right of action.



Decriminalization Law

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Decriminalization Law

- Prohibition on considering an employee or applicant's marijuana-related criminal history for employment decisions:
 - “An employer shall not be permitted to, when making an employment decision, **rely solely on**, or require any applicant to disclose or reveal, or take any adverse action against any applicant for employment **solely** on the basis of, any arrest, charge, conviction, or adjudication of delinquency [for certain marijuana-related offenses].” (emphases added).
- Employers presumably may take into account—at least in part—an employee or applicant's marijuana-related criminal history when making a hiring or other employment decision.

Decriminalization Law

- **Civil Penalties**

- \$1,000 for the first violation, \$5,000 for the second violation, and \$10,000 for each violation after that.
- These civil penalties are the sole remedy for violations – the law states expressly that there is no private cause of action.

- **Effective Date**

- July 22, 2021, five months after the enactment of NJCREAMMA, to coincide with related provisions of that law.

NJCREAMMA and Decriminalization Law Compliance

Recommendations for Employers

- Update policies to ensure compliance with the nondiscrimination portions of the laws.
- Hiring and/or training an employee(s) to become a WIRE to perform on-the-job physical evaluations to determine impairment and use.
- Update drug-testing protocols with vendors.
- Train managers and human resources employees on the laws and ensure that they are aware of their nondiscrimination provisions, but also that employees are still prohibited from using, possessing, or being impaired by cannabis in the workplace or during work hours.

The One Jersey Pledge

The background of the slide is a photograph of a modern building's exterior. The building features a complex facade of glass panels and metal structural elements. A prominent feature is a large, curved, metallic structure on the right side that tapers to a point. The sky is a deep blue, suggesting twilight or dusk. The overall aesthetic is clean, modern, and architectural.

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The One Jersey Pledge

- An optional but recommended “One Jersey Pledge” program introduced by Governor Murphy in June 2020 to address workplace safety during the COVID-19 pandemic.
- A series of safety protocols that enable businesses and organizations to objectively demonstrate the steps they are taking to keep their premises safeguarded.
- Posters available for download from New Jersey’s [Covid-19 Information Hub](#).

The One Jersey Pledge



The poster features a blue background with a white outline of the state of New Jersey on the left. In the top right corner is the 'NJ ROAD BACK' logo. The title 'ONE JERSEY' is prominently displayed in the center. Below the title, there are two sections: 'Our pledge as your employer' and 'Your pledge as an employee'. Each section contains a list of commitments with checkmarks. At the bottom right, there is a white box with information for more details and a link to know your rights in NJ, accompanied by a computer monitor icon.

ONE JERSEY

Our pledge as your employer

We will:

- ✓ Provide appropriate PPE for your job
- ✓ Provide sanitization materials, training, and time to practice safe hygiene as recommended by CDC.
- ✓ Respect your privacy if participating in contact tracing efforts and/or other public health initiatives
- ✓ Administer staff health screenings and require that you and/or any of your colleagues stay home if sick
- ✓ Institute measures to clean high-touch common areas frequently

Your pledge as an employee

I will:

- ✓ Stay at home if I feel sick
- ✓ Follow hygiene guidelines, including regular hand-washing
- ✓ Wear face coverings and other required PPE
- ✓ Participate in staff health screening on arrival
- ✓ Clean high-touch areas frequently

For more information:
covid19.nj.gov

Know your rights in NJ:
nj.gov/labor



Worker Misclassification Notice

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Worker Misclassification Notice

- NJ's Department of Labor and Workforce Development ("NJDOL") released a required [notice](#) on May 20, 2020 pertaining to worker misclassification. It includes:
 - An explanation of the prohibition on misclassification
 - The standard that is applied by the NJDOL to determine whether one is an employee or an independent contractor
 - The benefits and protections to which an employee is entitled under state wage, benefit, and tax laws
 - The remedies to which workers affected by misclassification may be entitled
 - Information on how a worker or a worker's authorized representative may contact the State to provide information to or file a complaint with the NJDOL
 - Prohibitions on retaliating against workers who complain to the worker's employer or the NJDOL regarding possible worker misclassification
- Neither the statute requiring the notice (N.J.S.A. 34:1A-1.19) nor the notice address electronic notice.



Amendment to the Millville Dallas Airmotive Plant Job Loss Notification Act

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Amendment to the Millville Dallas Airmotive Plant Job Loss Notification Act

- In January 2020, Governor signed into law an amendment to the New Jersey Millville Dallas Airmotive Plant Job Loss Notification Act, commonly referred to as the “NJ WARN Act.”
- The NJ WARN Act was modified to, among other things, require payment of severance to eligible employees who suffer a NJ WARN Act-covered termination of employment and to require 90 days’ notice of such terminations.
- The Amendment was scheduled to take effect in July of 2020, but a further amendment was signed into law on April 14, 2020, that has postponed the effective date to until 90 days following the termination of the State of Emergency.
- On February 17, 2021, Governor Murphy signed Executive Order No. 222, extending the State of Emergency to March 19, 2021.



COVID-19 - Layoffs During Protected Leave

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COVID-19 - Implications of a Layoff During Protected Leave

- On March 20, 2020, the New Jersey Earned Sick Leave Law was amended to prohibit employers from terminating the employment or otherwise penalize an employee for requesting or taking time off because the employee has or is likely to have an infectious disease (including COVID-19) that may infect others at the workplace. See N.J.S.A. § 34:11D-12.
- The statute also requires employers to reinstate employees following such time off to the same position with “no reduction in seniority, status, employment benefits, pay or other terms and conditions of employment.” *Id.*
- But employees are not entitled to reinstatement if an “employer experiences a reduction in force or layoff and the employee would have lost the employee’s position had the employee not been on leave, as a result of the reduction in force or pursuant to the good faith operation of a bona fide layoff and recall system including a system under a collective bargaining agreement, where applicable.” N.J.A.C. § 12:70-1.3(b).



Good Faith Defense To Wage And Hour Claims

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Good Faith Defense To Wage And Hour Claims

- The New Jersey Supreme Court recently clarified the standard an employer must meet to successfully assert a good faith defense to state wage and hour claims.
 - In *Elmer Branch v. Cream-O-Land Dairy*, No. A-29-19 (Jan. 13, 2021), the employer asserted a good faith defense to wage and hour claims asserted against it based on several favorable administrative decisions it previously received from the New Jersey Department of Labor and Workforce Development (“NJDOL”) in connection with several audits.
 - Cream-O-Land’s defense: three prior decisions issued by employees of the NJDOL and an Opinion Letter by the Director of the Division of Wage and Hour Compliance.
 - New Jersey law provides an absolute defense to WHL claims for employers who prove that they have proceeded in good faith in conformity with and reliance on certain actions by the NJDOL.
 - The Court found none of the decisions the employer relied upon met the strict requirements of the good-faith defense because each decision came from a subordinate employee and not from the Commissioner of the NJDOL or the Director of the Wage and Hour Bureau.

Good Faith Defense To Wage And Hour Claims

Recommendations For Employers

- New Jersey employers, especially those that find themselves in the middle of a wage and hour lawsuit or audit, should proceed carefully when asserting a good faith defense.
- Additionally, those employers currently in a NJDOL audit may wish to adjust their strategy in the handling of such an audit as a “win” may no longer be sufficient to assert a good faith defense.
- In the meantime, it remains to be seen if the Legislature acts on any of the Court’s recommendations to help establish clearer contours as to the good faith defense for wage and hour claims.
- Consider getting review of a favorable audit response by the Commissioner of the NJDOL or the Director of the Wage and Hour Bureau.



Other Notable New Jersey Supreme Court Cases

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NJ Supreme Court Cases

- *Flanzman v. Jenny Craig Inc.*, 244 N.J. 119 (2020)
 - Arbitration agreement enforceable despite agreement's lack of process for selecting an arbitrator.

- *Skuse v. Pfizer, Inc.*, 244 N.J. 30 (2020)
 - Employee's continued employment can be deemed to be assent to the terms of an arbitration agreement.

NJ Supreme Court Cases

- *Arafa v. Health Express Corp.*, 243 N.J. 147 (2020)
 - Delivery drivers' wage and hour claims subject to arbitration under New Jersey Arbitration Act, despite exemption from the Federal Arbitration Act.
- *Wild v. Carriage Funeral Holdings*, 241 N.J. 285 (2020)
 - Medical marijuana user can assert a claim for employment discrimination under the New Jersey Law Against Discrimination for an adverse employment action based on an employee's off-site medical cannabis use.
 - The Court did not address the Jake Honig Compassionate Use Medical Cannabis Act enacted on July 2, 2019, which amended the Compassionate Use Act. That amendment contains explicit workplace protections for medical cannabis patients and affirmatively prohibits employers from taking an "adverse employment action" against an employee who is a registered qualifying patient based solely on the employee's status as a registrant.

Diversity and Inclusion

A photograph of a modern building's glass and metal facade at dusk. The image shows a grid pattern of windows and a prominent vertical architectural element on the right side. The sky is a deep blue, and the building's surface reflects the ambient light.

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First Black Woman on New Jersey Supreme Court

- On September 1, 2020, the NJ Supreme Court made history by swearing in Fabiana Pierre-Louis as the newest Supreme Court justice.
- Ms. Pierre-Louis is the first Black woman to be chosen for the role.
- Daughter of Haitian immigrants, and former assistant U.S. attorney in New Jersey.
- Only Black judge currently seated and its youngest member.



New CLE Requirement: Diversity, Inclusion and Elimination of Bias

- Effective January 1, 2021, New Jersey attorneys [must complete 5 ethics credits](#) (up from the 4 previously needed), 2 of which must be Diversity, Inclusion, and Elimination of Bias.
- Diversity, Inclusion, and Elimination of Bias programs address diversity and inclusion in the legal system of all persons regardless of race, ethnicity, religion, national origin, gender, sexual orientation, gender identity, or disabilities.
- Possible topics may include ways to create diversity programs in law firms, transformational leadership, ways to identify and eliminate unconscious bias, and culturally competent lawyering.

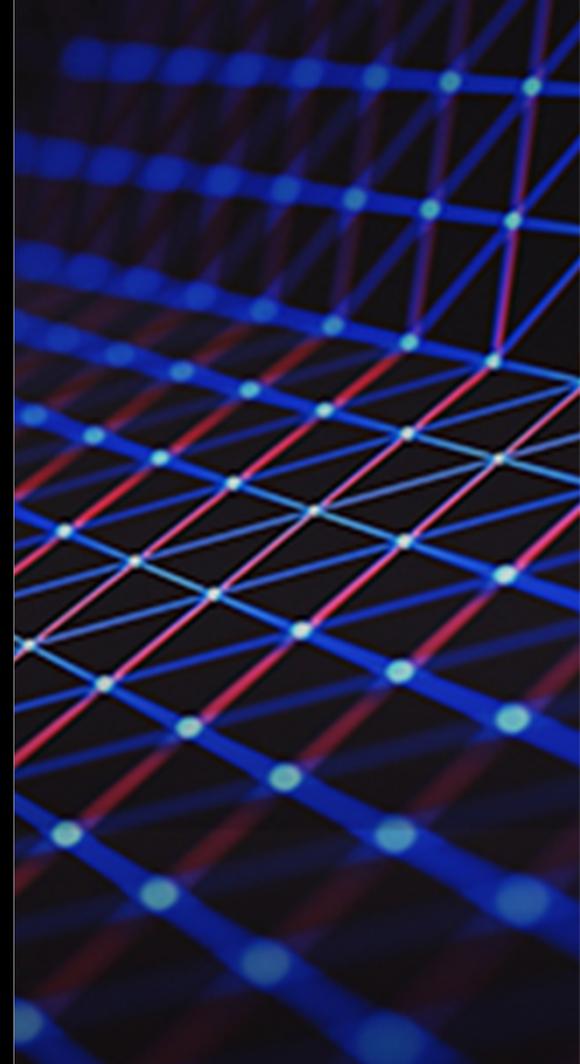
Coronavirus COVID-19 Resources

We have formed a multidisciplinary **Coronavirus/COVID-19 Task Force** to help guide clients through the broad scope of legal issues brought on by this public health challenge.

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To help keep you on top of developments as they unfold, we also have launched a resource page on our website at www.morganlewis.com/topics/coronavirus-covid-19

If you would like to receive a daily digest of all new updates to the page, please visit the resource page to [subscribe](#) using the purple “Stay Up to Date” button.



August W. Heckman III



August W. Heckman III has a diverse practice handling wage and hour class and collective action matters, restrictive covenant and trade secrets litigation, employee benefits litigation, and a full panoply of discrimination, retaliation, contract and common law claims on behalf of employers in courts, arbitral tribunals and agencies around the US. His clients operate in a wide group of industry sectors that include financial services, transportation, media, pharmaceutical, telecommunications, ecommerce, social media, and retail industries.

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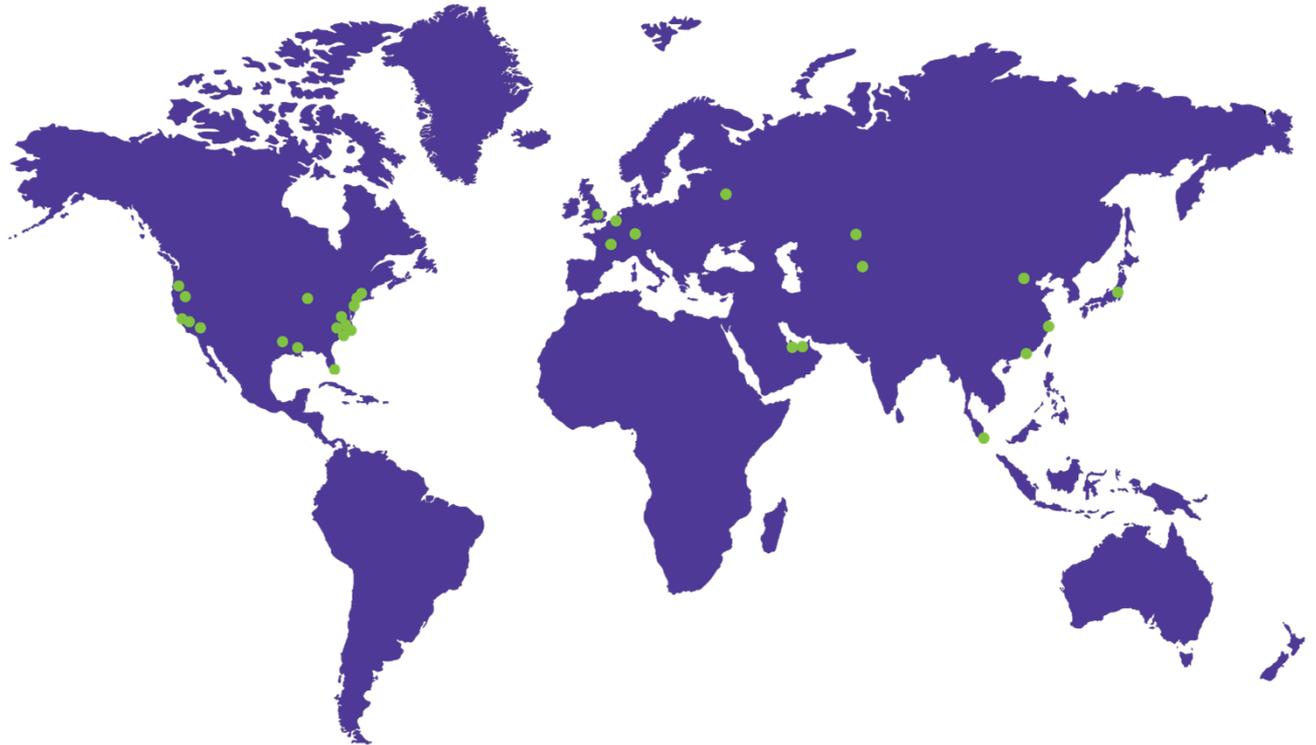
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