RETAIL INDUSTRY

YEAR IN REVIEW

2024

10th Annual

HUNTON

Table of Contents

Dear Clients and Friends,

Thank you for once again trusting us to handle the dynamic retail matters central to your businesses. Here, we provide a recap of some of the most important issues in retail law over the past year. With diverse topics ranging from data breach litigation to insurance coverage to ESG developments to cashless bans to PFAS litigation to new labor union dynamics, we hope you find our *2024 Retail Industry Year in Review* valuable and informative.

As many of you know, the retail industry is a core concentration at Hunton. Recognized as a leading retail firm in *Chambers USA*, with a team comprised of more than 300 lawyers in 20 practices, we advise more than 500 retail clients across complex transactional, litigation, and regulatory matters in the US and worldwide—including 108 new retail clients we are proud to have welcomed in the past 12 months. We also expanded our team this year, bringing on board a former VP and senior policy counsel of the National Retail Federation with nearly 25 years of experience advising on retail-related policy matters. Our experience in virtually every legal discipline, broad view of business realities, and forward-looking perspective on emerging issues make us a logical choice for leading retailers in the US.

We focus on cutting-edge work related to retailers and consumer products companies.

You can expect to see that focus represented not only in our matters going forward in the coming year, but also in the strategic communications we expect to bring you in 2025 based on predicted trends, such as: the implementation and effect of AI-driven innovation, machine learning, and other technological advancements; a continued focus on sustainability and privacy concerns; new ways to obtain competitive advantages; and the evolution of physical stores into experiential shopping centers.

It is our privilege to counsel and support you as you strive to adapt, advance your products and other offerings, and exceed customer expectations. We hope you had a productive 2024 and wish you continued success in the new year.

Sam

Samuel A. Danon
Managing Partner

Federal Privacy Legislation Presents Challenges and Opportunities for the Retail Industry

Retailers faced key legislative challenges as the 118th Congress engaged in months-long efforts in 2024 to pass three separate privacy bills. We examine the challenges retailers faced with these federal bills in this article and analyze how the issues of greatest importance to the industry last year produced the outcomes we saw and might be resolved in this new 119th Congress to enable passage of comprehensive and children's privacy legislation retailers can support.

Protecting Americans' Data from Foreign Adversaries Act

The privacy bill that caught the industry by surprise in 2024 was H.R. 7520, the Protecting Americans' Data from Foreign Adversaries Act of 2024 (or PADFAA). PADFAA moved rapidly through Congress in just several weeks without much scrutiny from lawmakers because it was overshadowed by the attention-grabbing bill it traveled with throughout its legislative process—the TikTok divestiture bill.

Recently upheld as constitutional by the Supreme Court, the TikTok bill had been in development for more than a year and had strong bipartisan support in Congress. By contrast, extraordinarily little attention was paid to the novel and unvetted language of PADFAA, which appeared to address the central issue at the heart of Congressional concern over TikTok. PADFAA's stated intent was to prohibit Americans' personal data from being made available to a foreign adversary of the United States, or to a company controlled by a foreign adversary.

The retail and restaurant industry trade associations raised significant concerns over the language of PADFAA, especially the bill's broadly defined terms and scope of application to a wide array of data, including internal corporate data that may be shared by a US company with their own subsidiaries or employees located in China. They warned the bill could have unintended consequences threatening lawful business operations of global retailers and chain restaurants with establishments in China.

In particular, the bill's definition of "controlled by a foreign adversary" could potentially be interpreted to cover US businesses that had high-level employees located in China. The bill's broad definitions of "data broker" and "sensitive data" also left room for interpretation by the Federal Trade Commission, which could enforce the new law in ways that went beyond PADFAA's stated intent.

As the Senate considered these views on the House-passed legislation, the TikTok bill and PADFAA found an alternative path that ensured passage by Congress quickly and without amendment. The House-passed language of these bills was inserted into H.R. 815, the emergency supplemental spending bill to aid Ukraine, Israel and Taiwan that was approved by Congress on April 23 and signed into law the next day by President Biden as Public Law 118-50 (138 Stat. 895).

Although PADFAA took effect in June, several industry coalitions formed to develop PADFAA amendments to clarify the law's definitions and provide greater certainty that legitimate US business operations in China would not be unintentionally impacted by PADFAA's prohibitions. As we begin 2025, it is likely we will see renewed efforts to "fix" PADFAA with corrective legislation.

American Privacy Rights Act

While PADFAA passed Congress under the radar, the next major privacy bill to appear was the most anticipated of the year. H.R. 8818, the American Privacy Rights Act of 2024 (APRA), began circulating in draft form in April as a newly revised version of the American Data Privacy and Protection Act of 2022 (ADPPA). The ADPPA had been approved by the House Energy and Commerce Committee two years before but had ultimately failed to move forward in the House. The APRA fared even worse than the ADPPA by failing to pass its committee of jurisdiction. The APRA's demise was similar to all other comprehensive federal privacy bills over the past two decades, largely resulting from the inability of Democrats and Republicans to find common ground on the two most controversial issues at the center of this legislation: federal preemption of state law and private rights of action to enforce the federal law.

As nationwide retailers were seeing their data privacy compliance burdens increase with each newly enacted state privacy law, the industry's primary goal has been ensuring that any federal privacy law effectively preempts state privacy laws to establish uniform national standards. This policy objective for a national privacy law is paramount to the industry because the proliferation of state privacy laws is increasingly challenging to manage.

Many industry stakeholders and Republican lawmakers view preemption as the *raison d'etre* for federal privacy law. Their view is that the federal law must become a nationwide ceiling on state regulation, rather than become the 51st law of the country that must co-exist with state laws or set a nationwide floor from which state laws could regulate upward. For these stakeholders, the latter would not yield a national law where all Americans had the same rights, and it would perpetuate the burdensome and costly compliance work from the proverbial "patchwork" of state privacy laws as states tried to one-up other states by enacting increasingly restrictive privacy regulations.

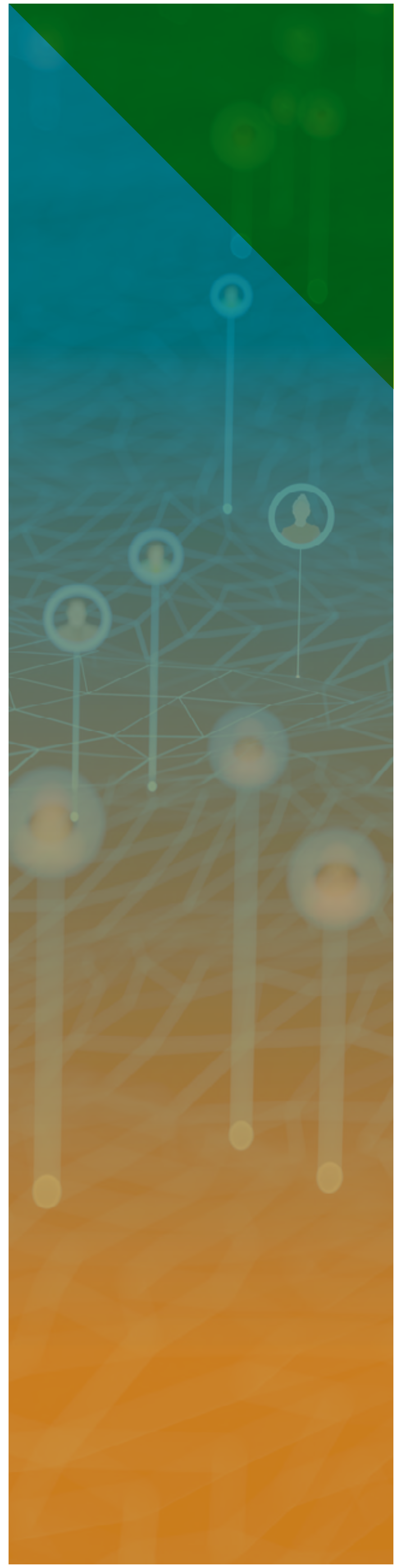
Despite the bill's stated intent to preempt state laws, the APRA's preemption language would not effectively create the uniform national standard that retailers desired. Specifically, it was not drafted to withstand anticipated challenges in federal court by state attorneys general who would litigate to maintain the continued validity of their own state privacy laws.

Retailers also objected to the APRA's authorization of private rights of action to enforce its provisions. In contrast to the APRA, comprehensive state privacy laws had exclusive government enforcement along with, in many cases, "notice-and-cure" provisions permitting businesses to correct compliance mistakes and limit their liability exposure.

The opposition from retailers and restaurants to private actions was supported by a broad cross-section of industry stakeholders because, unlike the enacted state privacy laws to date, the APRA would encourage litigation against businesses for technical non-compliance without the opportunity to cure compliance mistakes and avoid a lawsuit. Additionally, the APRA did not offer protections against demand-letter campaigns by trial lawyers, like retailers have experienced in litigation related to patent infringement, robocall, website accessibility and, more recently, various theories of interception in the digital context.

After three months of sustained legislative advocacy efforts by the leading retail and chain restaurant industry trade associations, the House Republican leadership indicated publicly that it too shared their concerns with both the APRA's preemption and private rights of action provisions. As a result, the committee's markup of the bill was canceled, and federal comprehensive privacy legislation effectively ended for the year.

Despite the sudden ending for the APRA, this year presents a new opportunity for retailers to help Congress develop and support comprehensive federal privacy legislation that achieves their policy goals. With both the House and Senate now controlled by Republicans, there is a renewed



> Hunton's lawyers are responsive and practical.
>
> *Chambers USA*, 2024

possibility for federal privacy legislation that differs from the APRA and that may resolve retailers' concerns that prevented past federal privacy bills from moving forward. Congress may be in a position to finally enact a preemptive, comprehensive privacy bill modeled on successful and well-crafted state privacy laws that retailers and other industry sectors could support—the type of federal privacy law that proved challenging in the divided Congresses of the past four years.

Children and Teens' Online Privacy Protection Act

After years of Congressional hearings fueling bipartisan concerns that social media companies' data and ad practices harmed children and minors, anticipation grew in 2024 that Congress would succeed in passing children's privacy and online safety legislation.

In July, the Senate passed by a nearly unanimous vote of 91-3 a package of children's legislation that contained the text of S. 1418, the Children and Teens' Online Privacy Protection Act (a.k.a., "COPPA 2.0") that would have amended the Children's Online Privacy Protection Act of 1998 (COPPA).

Despite the nearly unanimous vote by the Senate, the package faced unlikely passage by the House. The House version of the COPPA 2.0 bill (H.R. 7890) raised concerns from retailers, restaurants, and other businesses that marketed goods or services online to a general audience. Among other changes to COPPA, the bill included an outright prohibition on delivering interest-based advertising to individuals under 17 years old. Retailers and restaurants were concerned with the potential unintended consequences if this bill was enacted in the form approved as an Amendment in the Nature of a Substitute (AINS) by the House Energy and Commerce Committee in September.

A significant concern for these industry sectors, as well as the technology and advertising industries that served them, was the knowledge standard that would be applied to businesses with respect to the prohibition on interest-based ads. The Senate-passed version of COPPA 2.0 contained a single knowledge standard that applied to the interest-based ad prohibition: a business that delivered advertising or marketing to an individual under 17 would be in violation of the law if it had "actual knowledge or knowledge fairly implied on the basis of objective circumstances that an individual is under the age of 17…"

Industry stakeholders raised concerns that the Senate bill's knowledge standard created unacceptable uncertainties as to what the FTC would consider to be the objective circumstances on which their potential liability would rest for any errant ads inadvertently delivered to children under 17. To address this concern, the House Energy and Commerce Committee amended its version of the bill to create a three-tiered definition for “knowledge” of a child or teen user on a given website or online service. Under this structure, “high-impact social media companies” (and only such companies) would be held to a broad “knew or should have known” standard. Retailers would largely fall into the bill’s middle tier: “knew or acted in willful disregard of the fact that the individual is a child or teen.” Smaller businesses would be held to an actual knowledge standard, the narrowest standard in the bill’s definition. Additionally, the House removed the FTC’s authority to determine knowledge standards and produce guidance around its definition of knowledge.

Both the Senate and House versions of COPPA 2.0 also attracted opposition over the effect of its preemption clause. The bills had identical text that would replace the text of the nearly three-decades old COPPA, which prohibited inconsistent state laws, with text effectively making the federal law a floor upon which the states could regulate upward by providing “greater protection to children or teens.” Retailers proposed striking this clause so that COPPA 2.0 remained silent on preemption, leaving the existing COPPA language in place.

After the House resumed session following Election Day for the “lame-duck” period of Congress, Speaker Johnson ended speculation on children’s online privacy and safety legislation passing Congress as part of the year-end continuing resolution he was assembling to fund the government, releasing a statement that he would work with the incoming Trump administration to address this type of legislation.

At the outset of the new 119th Congress, the Senate and House are poised to pick up where they left off in December 2024, and we suspect COPPA 2.0 will be re-introduced early in the year. While there remain issues to resolve over the knowledge and preemption standards, there is an expectation that, with both chambers of Congress now controlled by Republicans, COPPA 2.0 could move forward without amending COPPA’s existing prohibition on inconsistent state laws. •

Paul Martino

Paul is a partner in the regulated industries and government relations practice group in the firm’s Washington, DC, office. He recently joined the firm after serving for more than 10 years as vice president and senior policy counsel for the National Retail Federation, the world’s largest retail trade association, where he led the industry’s strategy and advocacy efforts on consumer data privacy legislation.

The Evolution of PFAS Litigation

Insurance Coverage for Retailers Facing False Advertising Claims

Over the past two decades, thousands of lawsuits have emerged nationwide targeting PFAS, or per- and polyfluoroalkyl substances, over concerns about potential harm to human health. While these legal battles were first focused on manufacturers accused of causing bodily injury, a new wave of class action lawsuits is now hitting companies—including retailers—premised on allegedly misleading advertising of products containing PFAS.

This emerging basis for liability could have significant insurance coverage implications if appropriate coverages are not in place. Retailers, therefore, should examine and routinely reexamine their insurance portfolios to ensure that their scope of coverage continues to match their risk profile and, where it does not, consider enhancing their insurance portfolios with advertising-specific coverages that can be found under coverage lines such as errors and omissions (E&O), media liability and even cyber liability insurance.

What are PFAS?

PFAS, known as "forever chemicals" due to their slow breakdown and accumulation in people and the environment, are used in many consumer products like clothing, cosmetics, cleaning items, and cookware. Because of their widespread utility, PFAS can be found nearly everywhere. In fact, according to the CDC, most of the U.S. population has been exposed to PFAS, with levels typically low. In the past two decades, concerns have been raised about the environmental and biological persistence of certain PFAS (specifically PFOS and PFOA). Although the science surrounding any human health impacts of exposure to PFAS remains inconclusive, there has been a significant regulatory and media focus on the chemicals, leading to a wave of lawsuits around the country.

The Surge of Allegedly Misleading Advertising Claims Against Retailers

The focus of PFAS litigation has evolved from manufacturers of PFAS and those that use it in their products to retailers that sell or distribute PFAS-containing products. Whereas claims against manufacturers sounded in product liability, claims against retailers are centered on unfair and deceptive trade practices, violations of consumer protection laws, false advertising and fraudulent or negligent misrepresentations.

For example, in 2024, both Target and Costco found themselves at the center of high-profile class action lawsuits over the manner in which the retailers advertised products containing PFAS.[1] In *Gudgel v. Target Corporation*, the plaintiff claimed

1 *Gudgel v. Target Corp.*, No. 6:24-CV00870-PGB-EJK (M.D. Fla.); *Bullard v. Costco Wholesale Corp.*, No. 3:24-cv-03714-RS (N.D. Cal.).

that Target failed to disclose on its packaging that its Target-branded bandages contained PFAS. The plaintiff argued that she would not have purchased the bandages had the packaging disclosed the use of PFAS. The amended complaint consisted of one count focused on an alleged violation of Florida's Deceptive and Unfair Trade Practices Act.

Costco was targeted in a similar case. In *Bullard v. Costco Wholesale Corp.*, the retailer was accused of misleading consumers by advertising its Kirkland Signature Baby Wipes Fragrance Free as being "made with Naturally Derived Ingredients." The suit further alleged, however, that the wipes contain PFAS. The *Bullard* complaint contained 10 counts, including alleged violations of consumer protection and false advertising laws in California and New York, breach of express warranty, unjust enrichment, fraud, fraudulent concealment or omission and negligent misrepresentation.

These lawsuits, which unlike the initial wave of PFAS liability lawsuits are not premised on any alleged bodily injury or property damage, underscore the expanding and evolving legal risks for retailers with regard to the marketing and sale of products that contain PFAS.

Insurance Coverage for Allegedly Misleading Advertising Claims Against Retailers

While much has been written about insurance coverage for lawsuits alleging bodily injury caused by PFAS under traditional products liability coverages, the coverage inquiry shifts when the claim is not based on specific harm or injury, but rather on the economic harm that results from the alleged violation of consumer protection laws, breaches of express or implied warranties, false advertising and fraudulent or negligent misrepresentations. These types of alleged liability implicate entirely different lines of insurance from those typically associated with claims alleging bodily injury. These newly implicated coverage lines include E&O, media liability and cyber.

Errors and Omissions

In its most basic sense, E&O insurance covers claims based on professional negligence. These claims often allege errors, mistakes, omissions or failures to meet expected standards of care or service levels, including false advertising, negligent misrepresentation and certain violations of consumer protection laws.

Experience dictates, however, that insurers may not agree and may attempt to limit or deny coverage for PFAS-related claims based on wrongful act exclusions or even pollution and contamination exclusions. Whether these or any other exclusion might apply is highly fact-specific, so a careful review of the exclusion against the specifics of the alleged wrongful act is essential. And, in any case, wrongful acts exclusions seldom relieve an insurer of its duty to defend, which can often be of greater value to the insured than any ultimate liability. Furthermore, under most E&O coverages, the insurer will be obligated to defend unless and until the insured is actually adjudicated to be liable for the alleged wrongful act. Additionally, while courts have not specifically ruled on its applicability to PFAS-related lawsuits against retailers, the typical pollution exclusion would appear on its face to simply not apply. Generally, pollution exclusions apply to the "actual or threatened discharge, dispersal, or release of a pollutant." But where the claim involved the manner of marketing or sale of the product, as opposed to the product having an adverse impact on the environment, the requisite trigger for the exclusion (e.g., a "discharge…") simply is not present. Similarly, history teaches that where even a hazardous product is put to its intended use, pollution exclusions do not apply.

Media Liability

Media liability insurance protects companies against third-party claims related to advertising injury. This coverage is broader than the personal and advertising injury coverage provided by standard general liability insurance policies and has a particular focus on the manner by which a company advertises its products. For example, commercial general liability policies provide coverage for claims for infringement on a person's or business's personal or intellectual property rights, such as claims for slander, libel and copyright infringement. In contrast, media liability policies provide coverage for various types of claims related to the advertising or dissemination of content, including for advertising that results in negligence in connection with the content or unfair competition or unfair trade practices.

Given that the lawsuits against retailers are centered around the advertisement of products in various forms of media, media liability insurance will be implicated where the alleged conduct falls within the scope of a covered advertising injury.

Here, too, however, insurers should be expected to raise the potential applicability of exclusions for antitrust violations or deceptive trade practices, which are included in many media liability policies. These exclusions usually apply to claims based on alleged violations of antitrust and consumer fraud or protection laws. Even so, retailers should scrutinize their specific insurance policy wording closely, as it may include carve-outs that allow coverage for certain wrongful acts. For example, the exclusions may preclude coverage for claims alleging a violation of consumer protection laws, unless the claim also arises out of another type of covered wrongful act. Moreover, as previously noted, if the complaint includes any claims covered under the policy, the insurer is likely obligated to defend the entire suit, even if some allegations fall outside the scope of coverage.

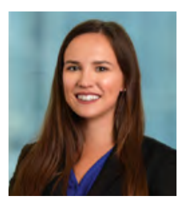
Cyber Insurance

Most cyber insurance policies include media liability coverage, offering retailers protection against claims of slander, libel and false advertising related to online content. Some policies even provide the option to extend this coverage to print materials. Traditionally, these protections were included in standard general liability policies. More recently, however, general liability insurers have added exclusions to the personal and advertising injury coverages that limit coverage for claims arising from online content, making cyber insurance coverage even more valuable for retailers.

Key Takeaways

PFAS liabilities continue to evolve, with retailers now facing class action lawsuits over the manner by which they advertise PFAS-containing products. These economic harm-based actions create a need for uniquely specialized insurance that many retailers may not have as part of their present insurance portfolio. As with any expanding and evolving potential for liability, retailers should be proactive about ensuring that they are adequately protected against potential PFAS liabilities tied to the manner in which they market and package their products. Given the evolving nature of these claims and the anticipated response from insurers as the frequency and value of claims rise, retailers should consult with their insurance professionals, including experienced coverage counsel, to evaluate their specific risk profile and ensure that their insurance is tailored appropriately for potential PFAS-related liabilities.





Michael Levine, Latosha Ellis and Adriana Perez

Michael is a partner and Latosha is counsel in the insurance coverage practice in the firm's Washington, DC office. Adriana is an associate in the insurance coverage practice in the firm's Miami office.

Shaping the Immigrant Workforce

What a Second Trump Administration May Mean for Retailers

Following his victory in the 2024 presidential election, Donald Trump and those he has nominated for cabinet and other administration positions have talked about their plans to deal with various immigration issues immediately after the inauguration on January 20, 2025. These plans include:

- Mass deportation of undocumented aliens
- Increasing enforcement of immigration laws, including I-9 enforcement and investigations and H-1B/L-1 site visits
- Terminating various humanitarian programs, including Temporary Protected Status (TPS) and Deferred Action for Childhood Arrivals (DACA)
- Applying tougher standards for H-1B and other nonimmigrant visa petitions as well as the permanent residence (green card) process
- Terminating birthright citizenship found in the Fourteenth Amendment to the Constitution

These changes will affect US retailers who employ foreign nationals in many ways.

How will deportation of undocumented workers and the end of humanitarian programs affect retailers?

Many employers at the beginning of the supply chain rely on undocumented workers to perform jobs that US workers will not perform. Companies' inability to refill the positions of those deported and those with humanitarian work permission will affect the entire supply chain, resulting in retailers having fewer goods to sell.

In addition, retailers that employ TPS/DACA workers could find themselves with many positions to fill on short notice, positions critical to daily functions.

How will changes in H-1B and other nonimmigrant visa adjudication affect retailers?

During the first Trump administration, the White House put pressure on the US Citizenship and Immigration Services (USCIS) to question every petition filed, even if the petition was to renew the work authorization for the same employee, filed by the same employer, for the same role, with no material changes. It is expected that the process of "deferring" to prior approvals in these cases, which returned under President Biden, will go away again. This means that a retailer who files an extension petition for a long-term employee may find that petition denied or the subject of an extensive request for additional evidence. This is particularly applicable to those in the STEM field, especially IT employees.

Other visa categories, such as L-1 intracompany transfer visas, TN visas for those from Canada and Mexico and O-1 visas, are likely to be scrutinized under a much narrower set of criteria, leading to more requests for evidence and denials.

How will changes to the permanent residence process affect retailers?

The employment-based green card process already is very complicated and time-consuming. The new administration is expected to make it more difficult to sponsor foreign nationals for permanent residence. Depending on the changes, some employers may lose sponsored individuals for a number of years while the permanent residence process plods along.

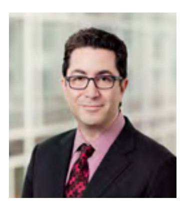
What should retailers do to prepare for I-9 and other enforcement processes?

Retailers should conduct internal audits of their I-9s and I-9 processes to ensure that any deficiencies are resolved before notice of an investigation. Investigators tend to go easier on companies that correct their I-9s on their own rather than in response to a notice of investigation.

Increases in H-1B/L-1 site visits are expected, so retailers should ensure that, if there were any changes in their visa holders' roles, an analysis was performed for each to determine if the changes required amended H/L visa petition filings. If an investigator finds that a person's role has changed enough that an amended petition was required but not filed, USCIS could revoke the petition, requiring the person to depart the United States and wait for a new petition covering the new role to be filed and approved.

How will the end of birthright citizenship affect retailers?

While the legality of an executive order terminating a right guaranteed by the Constitution will be in question, until a decision is made, nonimmigrant visa holders and permanent residents (green card holders) that subsequently give birth to children in the United States may find themselves in a quandary as to whether the children acquire dependent status from them and what steps they must take to have the status of their children recognized by the US government. This can affect foreign travel and return to the United States until their status is resolved.



Ian Band

Ian is a partner on the labor and employment team in the firm's Washington, DC office.

FTC Passes "Click-to-Cancel" Rule but Fate Hangs in Balance

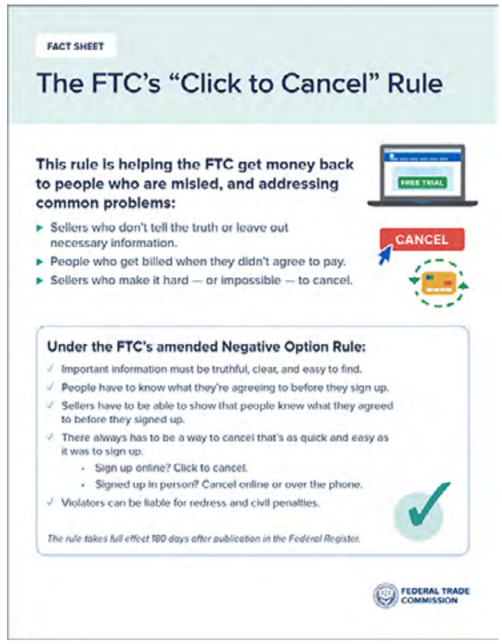
Negative option programs are widespread in the marketplace and come in a variety of forms. All share a central feature: each contains a term or condition that allows a seller to interpret a customer's silence, or failure to take an affirmative action, as acceptance of an offer. The FTC's Negative Option Rule, first promulgated in 1973, governs certain, but not all, negative option plans. Recognizing that the original regulation does not reach most modern negative option marketing (and given the "thousands" of complaints the FTC says it receives), the agency sought to update its reach. In March of 2023, therefore, the Federal Trade Commission announced a sweeping proposal to modernize the Negative Option Rule.

While the Rule affects all sellers, it especially upends the way retailers interact with consumers online. Under the FTC's proposal, retailers marketing any form of negative option feature—automatic renewals, continuity plans, free-to-pay conversions or fee-to-pay conversions, or pre-notification negative option plans—would be required to offer a method of cancellation that is "at least as easy to use as the method the consumer used to initiate the Negative Option Feature." The FTC also proposed requiring retailers to provide key information about fees, billing cycles and cancellation prior to obtaining the consumer's billing information, and that companies obtain consumer consent before charging them and again before trying to save a cancellation. Finally, in a controversial move, the FTC proposed to prohibit any person from misrepresenting, expressly or by implication, any material fact regarding the entire agreement—not just facts related to a negative option feature.

The FTC took public comment on this proposal and received 16,000 submissions from consumers, federal and state enforcers, advocacy groups and trade associations. On October 16, 2024, by a 3–2 vote, the FTC announced its final "Click-to-Cancel" Rule, which retained virtually all of the FTC's initial proposal. [Note that the FTC removed from the final Rule the "save" provision described above].

> “
>
> Too often, businesses make people jump through endless hoops just to cancel a subscription. The FTC’s rule will end these tricks and traps, saving Americans time and money. Nobody should be stuck paying for a service they no longer want.
>
> **Lina Khan, Former FTC Chair**

The Rule, which radically alters the way businesses must interact with consumers when offering negative options, is well summarized in this FTC fact sheet:



FACT SHEET

The FTC’s “Click to Cancel” Rule

This rule is helping the FTC get money back to people who are misled, and addressing common problems:

- Sellers who don’t tell the truth or leave out necessary information.
- People who get billed when they didn’t agree to pay.
- Sellers who make it hard — or impossible — to cancel.

Under the FTC’s amended Negative Option Rule:

- ✓ Important information must be truthful, clear, and easy to find.
- ✓ People have to know what they’re agreeing to before they sign up.
- ✓ Sellers have to be able to show that people knew what they agreed to before they signed up.
- ✓ There always has to be a way to cancel that’s as quick and easy as it was to sign up.
  - Sign up online? Click to cancel.
  - Signed up in person? Cancel online or over the phone.
- ✓ Violators can be liable for redress and civil penalties.

The rule takes full effect 180 days after publication in the Federal Register.

FEDERAL TRADE COMMISSION

The Click-to-Cancel Rule was set to go into effect on January 14, 2025, with a compliance date of May 14, 2025. However, notwithstanding the FTC’s definitive assertions and goals, it is far from clear that the Click-to-Cancel Rule actually will go into effect. This is because the Rule faces multiple obstacles, from active litigation challenges to administration changes to regulatory freezes.

One week after the FTC announced the final Rule, multiple trade associations and businesses filed suit in federal appeals courts to block the Rule. The lawsuits challenge the Rule as arbitrarily capricious and an abuse of discretion. According to the plaintiffs, the FTC exceeded the statutory limits required by the Administrative Procedure Act and saddled American businesses and consumers with a new, complex set of regulations that apply to *all*—more than one billion—recurring subscriptions, not just those traditionally regulated by the FTC. The FTC is said to have acted without establishing that unfair or deceptive practices involving recurring subscriptions are prevalent in the US economy. The parties have filed for a stay of the Rule pending judicial review.

The post-election changes in administration provide an opportunity for the FTC to completely rethink its approach to the Click-to-Cancel Rule. The Rule was approved 3–2 by a narrow Democratic majority, with the agency’s two current Republican commissioners—Melissa

Holyoak and Andrew Ferguson—voting against the Rule. Republican Commissioner Melissa Holyoak issued a strongly worded dissenting statement arguing that the FTC exceeded its statutory authority by engaging in illegal legislating and that the Rule was unnecessarily rushed politically. On December 10, incoming President Donald Trump announced that he would be elevating Andrew Ferguson to the position of FTC chair. Given Ferguson's and Holyoak's harsh words about the Rule, it seems likely that the FTC will change its position in the litigation to better match the goals of a Republican-led Commission. It is also possible that the new Commission will rescind the regulation, or reopen the rulemaking for additional revision.

Finally, there is the possibility that Congress will pass a joint resolution of disapproval invalidating this rule under the Congressional Review Act (CRA). The CRA allows Congress to review "major" rules issued by federal agencies before the rules take effect. Congress may review and disapprove federal agency rules for a period of 60 days using special procedures. If the resolution of disapproval is enacted, a rule subject to the CRA will have no force or effect. Since the Click-to-Cancel Rule was issued so close to the end of the current congressional session, it is vulnerable to the CRA process.

We will be avidly watching this space and reporting out developments that will impact retailers in 2025.

Phyllis Marcus

Phyllis is a partner and head of the advertising compliance and counseling practice in the firm's Washington, DC office.

Developments in Cashless Bans

The regulatory landscape affecting retail payment methods continues to evolve across the United States. In the past year, momentum toward cashless practices led to new legislative efforts to preserve consumers' ability to pay with cash.

During the pandemic, many businesses adopted cashless payment systems such as mobile payments and digital wallets to conduct transactions with minimal physical contact. Consumers, too, embraced the convenience and speed of cashless transactions, prompting many businesses to stop accepting cash entirely.

This shift has raised concerns about discrimination against unbanked individuals who lack credit or debit cards. In response, legislators at the local, state and federal levels have introduced "cashless bans" that require retailers to accept cash for in-person transactions.

Legislative Landscape

Berkeley, San Francisco, West Hollywood and Philadelphia enacted cashless bans in 2019, with New York City following suit in 2020, Miami-Dade County in 2022 and Detroit in 2023. In Washington state, new cashless bans took effect January 1, 2025, in Snohomish County and July 1, 2025, in King County.

Massachusetts's cashless ban, enacted in 1978, remained the only statewide ban in effect until recent years, when Colorado, Connecticut, Delaware, Montana, New Jersey, Oregon and Rhode Island enacted their own bans. Ten additional states introduced cashless ban legislation in 2024, but those efforts all failed, while Washington, DC, suspended its existing ban until 2025.

Congressional efforts to enact a national cashless ban also made little progress in 2024. The Payment Choice Act, introduced in both the US House and Senate, sought to mandate cash acceptance for certain in-person transactions. Despite bipartisan support, both bills stalled in committee, halting any federal movement until next year when the bills can be reintroduced in the 119th Congress.

Complying with Cashless Bans

Most cashless bans include exceptions that allow retailers to comply while reducing the costs associated with handling cash, including the risk of robbery. For example, in some jurisdictions, retailers may install kiosks that convert cash into prepaid debit cards, enabling customers to use their cash without handing it to a clerk at the point of sale. These kiosks typically must meet certain requirements, such as not charging fees or interest, to ensure cash payers are not discriminated against. Other jurisdictions allow businesses to use cashless points of sale as long as there are other points of sale that do accept cash.

In the District of Columbia, city council members introduced a bill to amend the District's existing cashless ban that would allow businesses deemed particularly vulnerable to crime to go cashless, while maintaining the ban for a majority of retailers. Efforts to adjust the scope of cashless bans will likely continue as lawmakers respond to feedback from the retail industry.

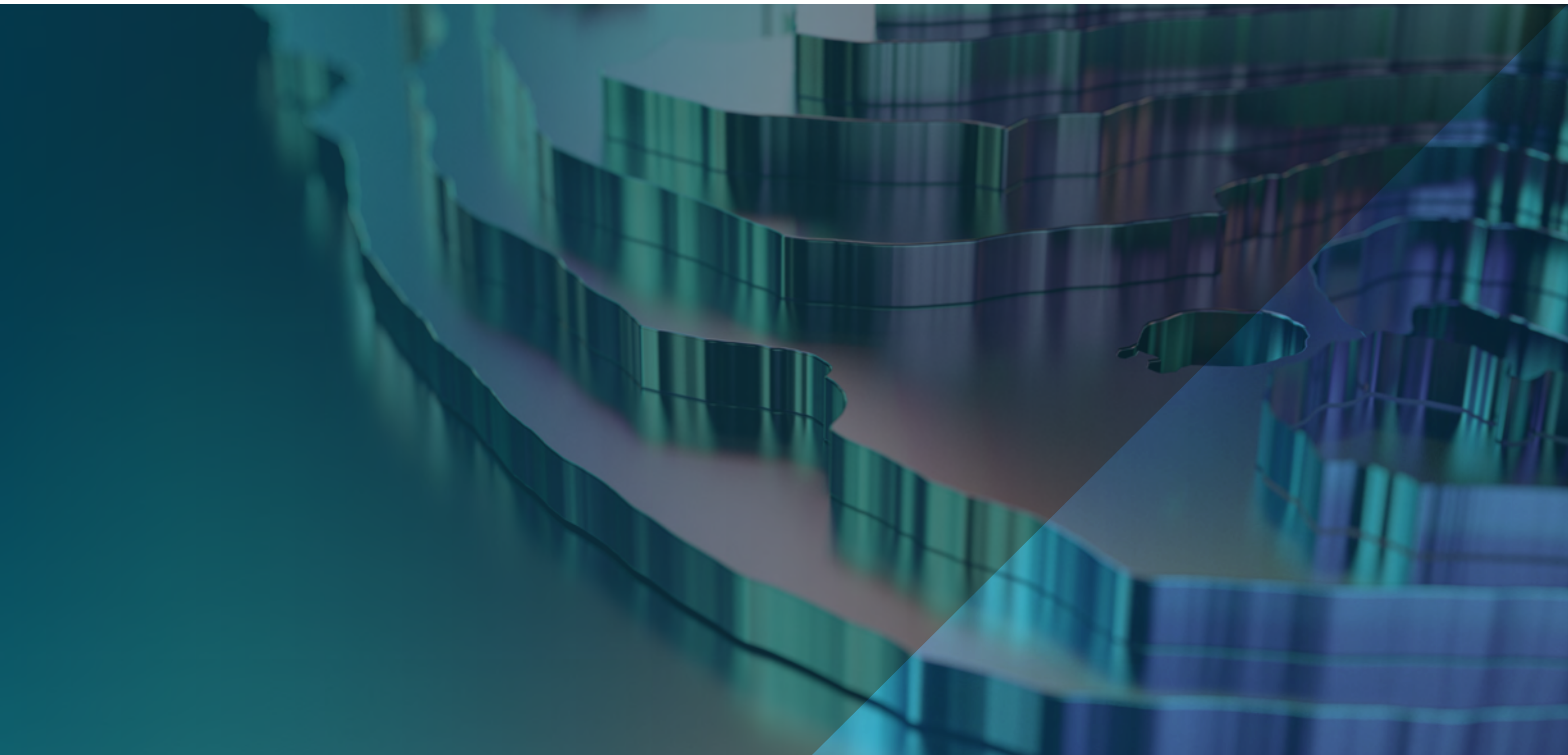
While most states vest sole enforcement power in their attorney general, consumer protection department or some other state agency, enforcement mechanisms vary. Authorities in New Jersey, for example, have already enforced the state's cashless ban with civil penalties. Delaware, New Jersey and Rhode Island empower individuals injured by cashless practices to take legal action, providing an additional deterrent to businesses that might seek to sidestep the ban.

Conclusion

While the landscape regarding cashless bans remains largely unchanged from last year, the recent flurry of legislation suggests that millions of retail outlets may soon become subject to new cashless bans. Retailers considering a shift to cashless operations should be mindful not only of their obligations under applicable cashless bans, but the prospect of future bans that could affect them. To that end, retailers can consult the Cashless Ban Tracker to find bans in effect at the state and local level, as well as legislation proposing statewide bans. Hunton will continue to monitor cashless ban activity and is available to assist retailers navigating this evolving regulatory landscape. •

Torsten Kracht, Mark Ingram and Rob Edwards

Torsten is a partner in the antitrust and consumer protection practice, Mark is an associate in the corporate, securities and government investigations practice, and Rob is an associate in the commercial litigation practice in the firm's Washington, DC office.



California Retailers Stand to Benefit from PAGA Amendments

Many California retailers have large hourly nonexempt workforces, and that has made retailers a popular target of lawsuits seeking penalties pursuant to California's Private Attorneys General Act of 2004, Cal. Lab. Code § 2698, et seq. (PAGA). PAGA allows individual aggrieved employees to sue their employers on behalf of themselves and all other aggrieved employees for alleged Labor Code violations. The original PAGA statute—and cases interpreting that statute over the last 20 years—made PAGA lawsuits both difficult and expensive to defend against. But recent amendments to PAGA, which were signed into law on July 1, 2024, will benefit employers in the Golden State. These are the five most pro-employer changes to the statute.

1. Employees Cannot Pursue Violations They Did Not Personally Experience Within One Year of Commencing the PAGA Action

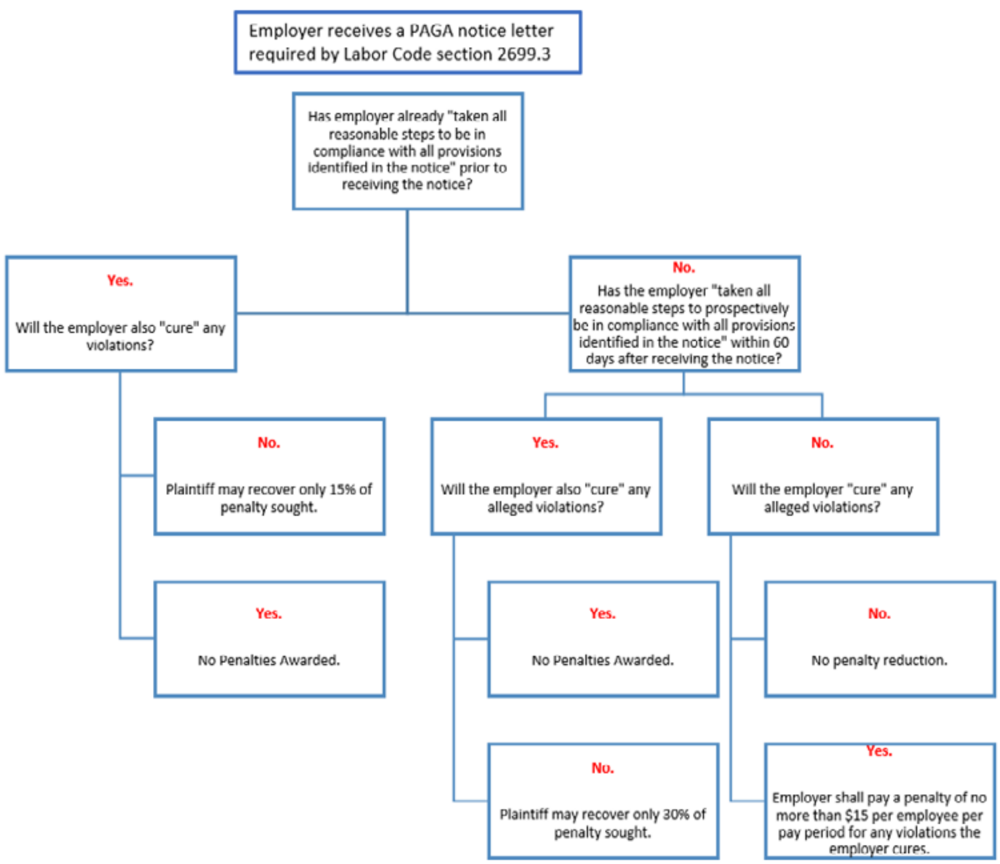
Before the recent amendment, a PAGA plaintiff who allegedly experienced one kind of Labor Code violation could pursue penalties for all Labor Code violations experienced by other employees, even if the plaintiff did not experience those violations. The employee also had standing to represent other employees even if the employee did not personally experience a Labor Code violation within the applicable limitations period. This led to boilerplate lawsuits containing the same general allegations

of wage and hour noncompliance without any details specific to the plaintiff. As long as the plaintiff could show during discovery that they arguably experienced at least one Labor Code violation (for example, a single missed meal break at some point during their employment), their attorneys could essentially audit the company's wage and hour practices through broad-based discovery to find other violations affecting more employees.

The PAGA amendments address this by allowing an employee to pursue penalties only for those Labor Code violations the employee personally experienced within one year of commencing the PAGA action. So, for example, the employee who experienced only a missed meal period can only pursue penalties related to meal periods. Plaintiffs' attorneys will likely continue to file boilerplate complaints that lack facts related to the plaintiff, but once the plaintiff has identified in discovery the violations they allegedly experienced, employers will be able to limit discovery—and the scope of the case moving forward—to only those violations.

2. Proactive Employers Can Reduce Available Penalties

PAGA penalties typically range from $100 to $200 per employee per pay period. But amendments to PAGA allow employers to reduce the penalties available in a PAGA lawsuit by 70 to 85 percent by implementing compliant wage and hour policies and practices, or to completely eliminate penalties by "curing" the alleged violations. The diagram below shows how an employer's actions impact the penalties that can be recovered:



The phrase "all reasonable steps" is defined in the statute by a non-exhaustive list. With regard to an employer who has taken "all reasonable steps" before receiving a PAGA notice letter, the employer may have "conducted periodic payroll audits and took action in response to the results of the audit, disseminated lawful written policies, trained supervisors on applicable Labor Code and wage order compliance, or [taken] appropriate corrective action with regard to supervisors." The non-exhaustive list is similar for the employer who takes "all reasonable steps" in response to a PAGA notice letter. Whether the employer has taken all reasonable steps is determined based on the totality of the circumstances after considering the size and resources of the employer, and the nature, severity and duration of the alleged violations. Importantly, the existence of a violation is insufficient to show that the employer failed to take all reasonable steps.

An employer "cures" violations through two separate steps. First, the employer must correct the violation alleged by the aggrieved employee and be in compliance with the statutes identified in the employee's PAGA notice letter. Second, the employer must make each aggrieved employee "whole," which means paying each employee "an amount sufficient to cover any owed unpaid wages due under the underlying statutes specified in the notice dating back three years from the date of the notice, plus 7 percent interest, any liquidated damages as required by statutes, and reasonable lodestar attorney's fees and costs."

Alleged violations of Labor Code section 226(a), which identifies the information that must be included in an employee's wage statement, are subject to separate "cure" procedures, but an employer who cures an alleged violation of Labor Code section 226(a) is not required to pay any penalties for those violations under PAGA.

3. Courts Can Ensure PAGA Lawsuits Are Manageable

PAGA lawsuits are often framed broadly. For instance, while the named plaintiff may have worked in only one location of a particular retailer, that plaintiff may file a PAGA lawsuit in which they seek to represent all non-exempt employees in California. Given this framing, before the recent amendments, parties to PAGA lawsuits frequently argued over whether a court had inherent authority to strike or otherwise narrow the scope of unmanageable PAGA lawsuits. Courts of appeal that considered the issue reached opposite conclusions, and the California Supreme Court later held that courts lack inherent authority to strike a PAGA claim on manageability grounds, but allowed that courts could limit evidence or use "other tools to assure that PAGA claim can be effectively tried."

Fortunately, the PAGA amendment addresses this issue and confirms that courts can "limit the evidence to be presented at trial or otherwise limit the scope of any claim…to ensure that the claim can be effectively tried."

4. Employers Have Avenues to Resolve Cases Quickly

The amendments to PAGA have procedures for curing violations with the Labor and Workforce Development Agency and for staying court proceedings pending an early evaluation. These procedures are available to different employers based on their size.

- **Cure Process with the LWDA:** Within 33 days of receiving a PAGA notice, employers with fewer than 100 employees can send the Labor and Workforce Development Agency (LWDA) a confidential proposal to cure one or more alleged violations. The LWDA will then determine whether the proposal is facially sufficient and may conduct a conference with the parties or request additional information. If the LWDA determines the cure is not sufficient, the employee may proceed with litigation and the employer can request a stay and early evaluation, as described below. If the LWDA determines the cure is sufficient, the employer has a limited period of time to complete the cure and provide required confirmatory documentation. There is then a process for the LWDA to confirm the cure was completed, and a process for the employee to appeal the LWDA's decision.
- **Stay and Early Evaluation:** Upon being served with a summons and complaint, an employer with 100 or more employees (or a smaller employer whose cure proposal was rejected by the LWDA) may file a request for a stay of the court proceedings and seek an early evaluation. The early evaluation process allows the parties to exchange the facts supporting their positions on the alleged violations, and gives the employer an opportunity to propose a plan to "cure" alleged violations. If the neutral evaluator or plaintiff rejects the proposed cure plan, the employer can file an evidentiary motion with the court to approve the cure.

5. Employers Are No Longer Punished for Weekly Pay Periods

PAGA penalties are assessed per pay period, and plaintiffs generally cannot obtain multiple penalties for multiple occurrences of the same violation within a single pay period—i.e., the PAGA penalty is the same whether there was one meal period violation or two meal period violations within the pay period. In the original PAGA statute, this had the effect (likely unintended) of penalizing employers that paid their employees on a weekly basis, because their employees had around twice as many pay periods per year as employees paid biweekly or twice monthly. The amended statute corrects this by stating that any penalties recovered "shall be reduced by one-half if the employees' regular pay period is weekly rather than biweekly or semi-monthly." •

Andrew Quigley

Andrew is counsel on the labor and employment team in the firm's Los Angeles office.

2024 Left Retailers More Vulnerable to Unionization Than Ever

Developments at the National Labor Relations Board (Board or NLRB) have made all employers—especially retailers—more vulnerable to unionization than ever.

Last November, the Board issued two blockbuster decisions that seek to strip employers of their rights to speak to employees about unionization: *Amazon.com Servs., LLC*, 373 NLRB No. 136 (2024) and *Siren Retail Corp. d/b/a Starbucks*, 373 NLRB No. 135 (2024). The decisions were historically significant, together overturning about 120 years of Board law precedent.

The decisions build on changes in recent years and go a long way toward eliminating the biggest obstacle facing unions during an organizing drive: employees who are informed about unions.

Although a new administration occupies the White House soon, it remains unclear whether reversing the pro-labor trends in Board rulings will be a priority of the new administration, and, if so, to what degree. In this new year, it would be prudent for retailers to prepare for the worst while hoping for the best.

The Board drastically curtailed employers' rights to hold mandatory group meetings with employees to address unionization

In *Amazon*, the Board decided that employers no longer have the right to hold mandatory group meetings with employees to address unionization. The decision is of monumental importance. Since the US Congress added a free speech provision to the National Labor Relations Act (Act or NLRA) in 1947, employers have freely exercised the right to speak to employees about unionization, particularly when there is a union organizing drive afoot. Absent these meetings, employees are left to decide whether to unionize based on inaccurate and/or incomplete information provided to them by unions.

As part of the Board's decision in *Amazon*, the NLRB set forth "safe harbor" guidelines for employers to follow if they wish to discuss unionization with a group of employees. According to the guidelines, employers should provide employees the following assurances "reasonably in advance" of any such meeting and be sure to follow through with these assurances: (1) "[t]he employer intends to express its views on unionization at a meeting at which attendance is voluntary;" (2) "[e]mployees will not be subject to discipline, discharge, or other adverse consequences for failing to attend the meeting or for leaving the meeting;" and (3) "[t]he employer will not keep records of which employees attend, fail to attend, or leave the meeting."

The Board's decision applies prospectively.

The Board placed restrictions on employer statements to employees about how employees' relationships with management can be adversely impacted in a unionized environment

A few days earlier, in *Starbucks*, the Board rejected employers' rights to tell employees that employees' relationships with management can be adversely impacted if the employees unionize unless that statement is "carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond its control." The NLRB opined:

> When an employer makes a statement that contradicts [the NLRA] by asserting that an existing practice of permitting individual employees to address issues with management must end if employees choose union representation, that statement amounts to an unlawful threat of retaliation that an employer may end existing practices, "solely on his own initiative."

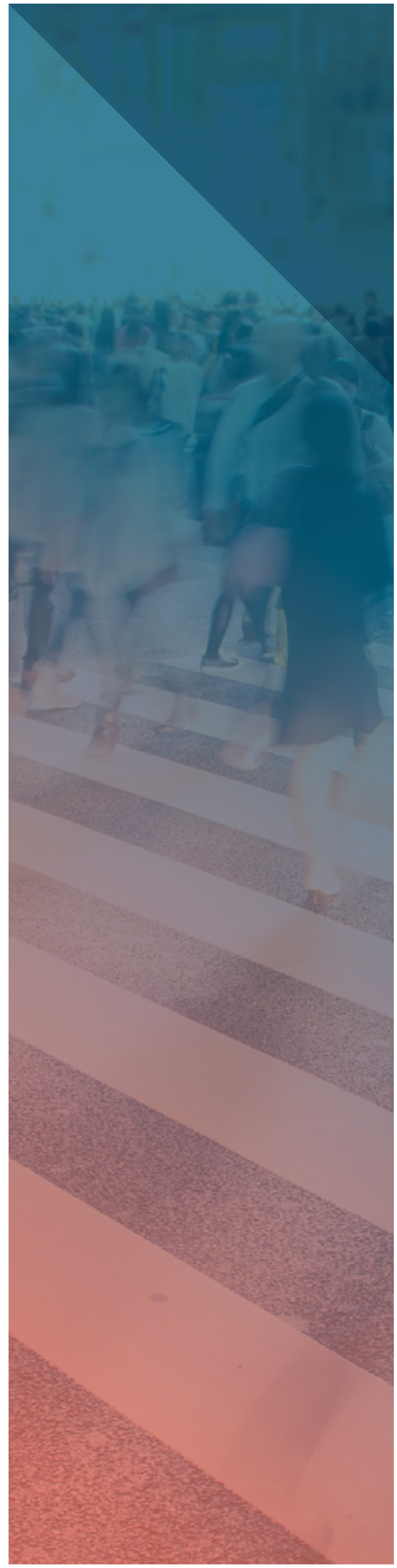
A practical consequence of the decision is that, for the first time in nearly 40 years, employers risk a violation of the Act for making basic statements to employees along the following lines: "if you unionize, you may need to raise workplace issues with your union instead of me directly." These kinds of statements are not only common during union organizing drives, but (contrary to the Board's opinion) they align with the NLRA. They also reflect the realities of working in a union environment and can be important for employees to understand before deciding whether to elect a union as their exclusive collective bargaining representative.

Like the *Amazon* decision, this decision applies prospectively.

The decisions in *Amazon* and *Starbucks* build on changes in recent years that already heavily tilt the playing field in favor of unions

The *Amazon* and *Starbucks* decisions build on the following recent changes that have already set a favorable stage for union organizing.

- The resuscitation of the "micro unit" standard, which makes it easier for a union to cherry-pick the unit of employees to unionize. *Am. Steel Constr., Inc.*, 372 NLRB No. 23 (2022).
- A return to a "quickie" election process, which expedites the time between the filing of an election petition with the NLRB—which is when many employers first learn about a union organizing drive—and the election itself. 88 Fed. Reg. 58076 (2023).



- Novel paths by which a union can become the exclusive collective bargaining representative of employees if a union secures signed authorizations from a majority of employees in an effectively unregulated setting, and an employer does not voluntarily recognize the union. *Cemex Constr. Materials Pacific, LLC*, 372 NLRB No. 130 (2023). With such authorizations, the Board now can certify a union: (1) without even affording employees an opportunity to vote if an employer fails to file a petition for an election within 14 days of receiving a union's demand for recognition and the union does not file a petition in that timeframe; or (2) if employees vote against the union and an employer commits an unfair labor practice that is less than the egregious conduct historically necessary to deny employees a new election.

The Board's recent rulings are subject to challenge and reversal, particularly in light of the new administration, but we don't know to what extent or when

It is not clear whether the Board's recent pro-union rulings will stand the test of time. They can be subject to reversals by federal appellate courts or the NLRB itself under the new administration.

President Trump already has started to shake things up at the Board. On his first day in office, he named the lone Republic Board member (Marvin Kaplan) the agency's Chairman. During his second week, President Trump terminated the current general counsel of the Board, Jennifer Abruzzo, who had consistently urged the NLRB to implement drastic pro-union changes. Trump appointed an acting general counsel (Jessica Rutter, who previously held other positions at the agency, including deputy general counsel) to hold the position pending the installation of a replacement whom he nominates for the US Senate's consideration. Trump also terminated one of the two Democratic Board members (Gwynne Wilcox) in the middle of her term, leaving the Board with just two members for now (Chairman Kaplan and member David Prouty). No president has previously terminated a Board member and the action likely will face legal challenge. For now, this leaves the Board—which consists of five Board member seats—without a quorum of at least three members necessary for the Board to exercise its delegated authority. The agency's regional offices still can continue to operate, but their actions may be limited. Trump now has an opportunity to nominate three Board members to the currently vacant seats and give Republicans majority control of the Board.

Even with these and additional anticipated changes in NLRB leadership, it remains unclear when new leaders would take office, the extent to which they would be willing to better balance the union organizing process and when any such balancing would take effect. In a surprise to many, Trump has nominated Lori Chavez-DeRemer to head the US Department of Labor. As a member of the US House of Representatives, Chavez-DeRemer supported the Protecting the Right to Organize (PRO) Act, legislation that would even more dramatically open the door to union organizing than the current Board's actions have. So Trump's Board nominations could be more union friendly than many anticipate.

Union organizing is on the rise and, in a sign of the times, the rulings in *Amazon* and *Starbucks* concerned retail companies

Irrespective of any changes to the union organizing process, there has been a recent surge in union organizing and that very well may continue even with a less union-friendly Board at the helm. According to NLRB statistics, the agency received 3,286 election petitions last fiscal year (covering October 1, 2023, to September 30, 2024), a 27 percent increase from the prior year. Gallup has reported that Americans' approval of labor unions now hovers around 70 percent, a significant increase from 15 years ago when the percentage was less than 50.

Retailers should take note that this calendar year, they continued to be among union organizing targets, some for the first time. Unions have garnered headlines in their efforts to organize Apple, Barnes & Noble, Costco, H&M, Peet's Coffee, Starbucks, The GAP, Trader Joe's and Walgreens, to name a few.

There are measures retailers can and should take now

With an increased risk of union organizing, there are actions retailers can take to help insulate themselves. Some questions to consider include the following:

1. Are any of your stores more vulnerable to an organizing drive than others? Are there certain departments and/or employee groupings that are most vulnerable? Are there actions you can take now to reduce those vulnerabilities?
2. Are there steps your company can take now to counter a union's efforts to cherry-pick a voting unit?
3. Do your store managers understand the role they play in protecting your organization from union organizing? Do they know how to detect union activity and notify the appropriate people at your company? Are you confident they can effectively and lawfully respond to questions employees may ask about unions?
4. Is your organization prepared to handle strikes, walkouts, unfair labor practice charges and other potential job actions? Are there other entities that will be impacted/should be involved (e.g., other tenants, property owners, local police)?
5. How would members of your management team respond to a union demand for recognition? Is your company prepared to timely file a petition for an election with the NLRB?
6. Does your organization have a position on unions? How will you communicate any such position to employees? When will you communicate such position? If you've had a strategy in place, does it need to be reconsidered in light of the Board's new restrictions on employer speech?
7. How will your company respond to media inquiries about union activity? What about unflattering news articles containing incorrect information about your organization's working conditions? Does it make sense to proactively communicate with shareholders?

There was some good news last year…

There were some positive labor law developments for employers, including retailers, last year. Perhaps most notably:

- The Board dismissed an appeal to a federal appellate court seeking to reverse a lower court decision that vacated a joint employer rule promulgated by the NLRB that would have made it much easier for the Board to hold one entity liable for the unfair labor practices committed by another. *NLRB v. Chamber of Commerce of U.S. of Am.*, No. 24-40331 (5th Cir.).
- In *Starbucks Corp. v. McKinney*, 602 U.S. 339 (2024), the Supreme Court of the United States decided that the traditional standard for obtaining preliminary injunctive relief applies to the Board when it seeks injunctive relief in federal court, and not some compromised standard that entitles the agency's arguments to deferential treatment. The decision is favorable to employers to the extent a pro-union NLRB, like the current one, seeks injunctive relief against employers based on legitimate business decisions they make amid a union organizing drive. This has been a tactic the current Board general counsel espoused throughout her tenure.
- The Supreme Court has signaled that it may be inappropriate for courts to apply special agency deference to NLRB decisions. In a non-labor case, *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), the Supreme Court reversed *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) and explained that courts need not defer to an agency's interpretation of ambiguous statutory language. Since then, the Supreme Court has remanded two labor cases back to lower courts, asking them to reconsider their decisions in light of *Loper Bright*. These cases are *Hospital Menonita de Guayama, Inc. v. NLRB*, No. 24-138 (U.S.) and *United Natural Foods, Inc. v. NLRB*, No. 23-558 (U.S.). Absent special deference, the Board will be held more accountable by courts for their decisions. •

Conclusion

We urge retailers to let the adage "an ounce of prevention is worth a pound of cure" ring loud in the new year and guide their approach to labor relations. Labor relations counsel can assist retail employers in raising awareness within management of the new dynamics, and adjusting labor relations programs to meet the new challenges. •

James La Rocca

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Data Breach Litigation Update: The Rise of the MDL

In 2024 the retail industry saw a continued focus on data breach litigation—particularly with several large-scale, class action multidistrict litigations (MDLs) involving a third-party vendor breach and numerous businesses. Several of these massive incidents arose from zero-day vulnerabilities, where attackers exploited a security vulnerability wholly unknown to the vendor, and for which no patch was available. These cases have impacted a number of major retailers, department stores, clothing stores, and online marketplaces. MDLs often endure for years and result in protracted litigation and even multimillion dollar class action settlements. Hence, it is critical for retailers to understand the landscape of cybersecurity threats and developments in data breach litigation.

Fortra

***In re Fortra File Transfer Software Data Security Breach Litigation*, 24-3090 (S.D. Fla.)**

In January 2023, a cybercriminal organization known as Cl0p exploited a zero-day vulnerability in GoAnywhere Managed File Transfer, a file transfer solution provided by Fortra. This reportedly enabled Cl0p to access the systems of more than 130 corporate clients of GoAnywhere over the course of 10 days. This incident affected businesses in retail, as well as health care, energy, and cybersecurity and the personal information and personal health information of millions of individuals.

Class action plaintiffs filed dozens of lawsuits against Fortra and its customers in the wake of this incident. These lawsuits have now been consolidated in the US

District Court for the Southern District of Florida. In March 2024, the court structured the MDL into two "hub-and-spoke" groups among four "tracks." In September 2024, the court dismissed certain claims against NationsBenefits (the other "hub," along with Fortra) and allowed others to proceed. As of December 2024, the parties were briefing motions to dismiss as to Fortra and the other tracks. The case has resulted in at least one $7 million class action settlement.

The Fortra case is one of several hub-and-spoke type MDLs that are currently making their way through the federal courts, and it demonstrates the complexity that data breach litigation continues to take on.

MOVEit

***In re MOVEit Data Security Breach Litigation*, 23-3083 (D. Mass.)**

In late May 2023, the Cl0p gang struck again, exploiting a zero-day vulnerability in MOVEit Transfer, a file transfer solution provided by Progress Software. In an attack of even larger proportions, Cl0p used the unknown vulnerability to infiltrate the MOVEit environments of thousands of companies and organizations worldwide, affecting the data of tens of millions of individuals.

Since then, more than 300 cases have been filed against more than 100 defendants—including Progress, retailers, major financial institutions, government agencies, educational institutions, and more. The cases are now being coordinated in an MDL in the US District Court for the District of Massachusetts.

Central to data breach litigation is the question of Article III standing. Under *TransUnion* and other Supreme Court jurisprudence, plaintiffs must show they suffered an "injury-in-fact" that (1) is concrete, particularized, and actual or imminent, (2) was caused by the defendant, and (3) is redressable by the court. To assert an injury-in-fact in data breach cases, plaintiffs often rely on an increased risk of identity theft or misuse of their data, rather than actual identity theft or misuse. In the First Circuit, where plaintiffs rely on such a "material risk of future harm," the court considers three factors: (1) whether the data was stolen in a targeted attack, (2) whether some of the information stolen has already been misused, and (3) whether the stolen data was highly sensitive. *See Webb v. Injured Workers Pharmacy LLC*, 72 F.4th 365 (1st Cir. 2023).

On December 12, 2024, Judge Alison D. Burroughs issued a sweeping ruling in *MOVEit* that "(most) Plaintiffs have standing to pursue their claims." *In re: MOVEit Customer Data Security Breach Litigation*, No. 1:23-MD-03083-ADB-PGL, 2024 WL 5092276, at *1 (D. Mass. Dec. 12, 2024). Applying the factors laid out in Webb, the court first found that the incident was a targeted attack by cybercriminals, rather than an inadvertent exposure. Second, the court determined that plaintiffs had adequately pleaded that MOVEit was a *single* cybersecurity incident rather than *multiple* security incidents. Because of this, the fact that *some* plaintiffs had allegedly experienced misuse was sufficient to establish a material risk of harm for *all* other plaintiffs—even those whose data was maintained by other defendants.

Third, because at least *some* plaintiffs allegedly had sensitive information (i.e., Social Security number, financial information, or personal health information) impacted, the court also found this sufficient for *all*.

MOVEit serves as a cautionary tale to retailers and others that courts may be willing to find standing across multiple cases arising from allegedly related cybersecurity incidents—even where few plaintiffs have experienced actual identity theft or misuse of their data.

Snowflake

***In re Snowflake Inc. Data Security Breach Litigation*, 24-3126 (D. Mont.)**

Finally, in late May 2024, cyber attackers known as ShinyHunters obtained stolen access credentials that could be used to access instances of Snowflake, a cloud-based data storage platform provided by Snowflake, Inc. The attackers breached the instances of potentially hundreds of businesses and organizations, including major retailers.

Dozens of lawsuits were filed against Snowflake and several of its customers. These cases are being coordinated for pre-trial proceedings in the US District Court for the District of Montana. The parties recently submitted a joint proposal for case management issues—which ultimately may follow the lead of earlier cases or take on a new life of their own.

More than 15 data breach MDLs have been created since 2018—most of which are still ongoing. The complexity and risk associated with coordinating dozens if not hundreds of parties in multi-district litigation present real challenges for retailers navigating the post-incident response. It remains a space that requires cross-disciplinary expertise in cybersecurity, privacy, litigation and insurance.

The attorneys at Hunton have successfully handled some of the largest and most complex data breach cases on behalf of retailers to date. •

Reiko Koyama

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Hunton represents more than **500** retail and consumer products clients

The Money-Back Guarantee Defense in Consumer Class Actions

Retailers and consumer products manufacturers have a powerful but underutilized tool in the fight against no-injury class actions: the money-back guarantee. Class actions about purportedly false statements on product labels have gone from a nuisance to a plague in the past decade. Plaintiffs typically claim they were misled into overpaying for the product, seeking recovery on behalf of a class despite the fact that there is nothing wrong with the product itself.

Enter the money-back guarantee. In *Perez v. Scotts Co. LLC*, 2024 U.S. Dist. LEXIS 207921 (S.D. Fla. Nov. 14, 2024), a pair of plaintiffs sued Scotts (the product manufacturer) and Walmart (the retailer) alleging that a pesticide they purchased had misstatements on the label. The plaintiffs were represented by three firms with a long history of similar litigation. According to the plaintiffs, the pesticide's label misstated both the product's efficacy and the number of treatments it contained. They sought money damages and injunctive relief under the Florida Deceptive and Unfair Trade Practices Act.

The district court dismissed the claim on the basis that the label also contained a money-back guarantee. According to the district court, the "product's offer of a money-back guarantee moots [the] plaintiff's economic injury." *Id.* at *8. As a result, the plaintiffs did not have Article III standing to sue. With that, Perez became the latest in an unbroken string of cases in the Eleventh Circuit holding that a money-back guarantee deprives plaintiffs of standing in labeling class actions. *See, e.g., Fields v. Walmart Inc.*, 2024 WL 1984586, at *2 (M.D. Fla. Apr. 8, 2024) ("Defendant argues that Plaintiff fails to demonstrate an injury in fact because she has not and cannot allege that she suffered an actual economic injury in light of Defendant's unconditional money-back guarantee. The Court agrees.").

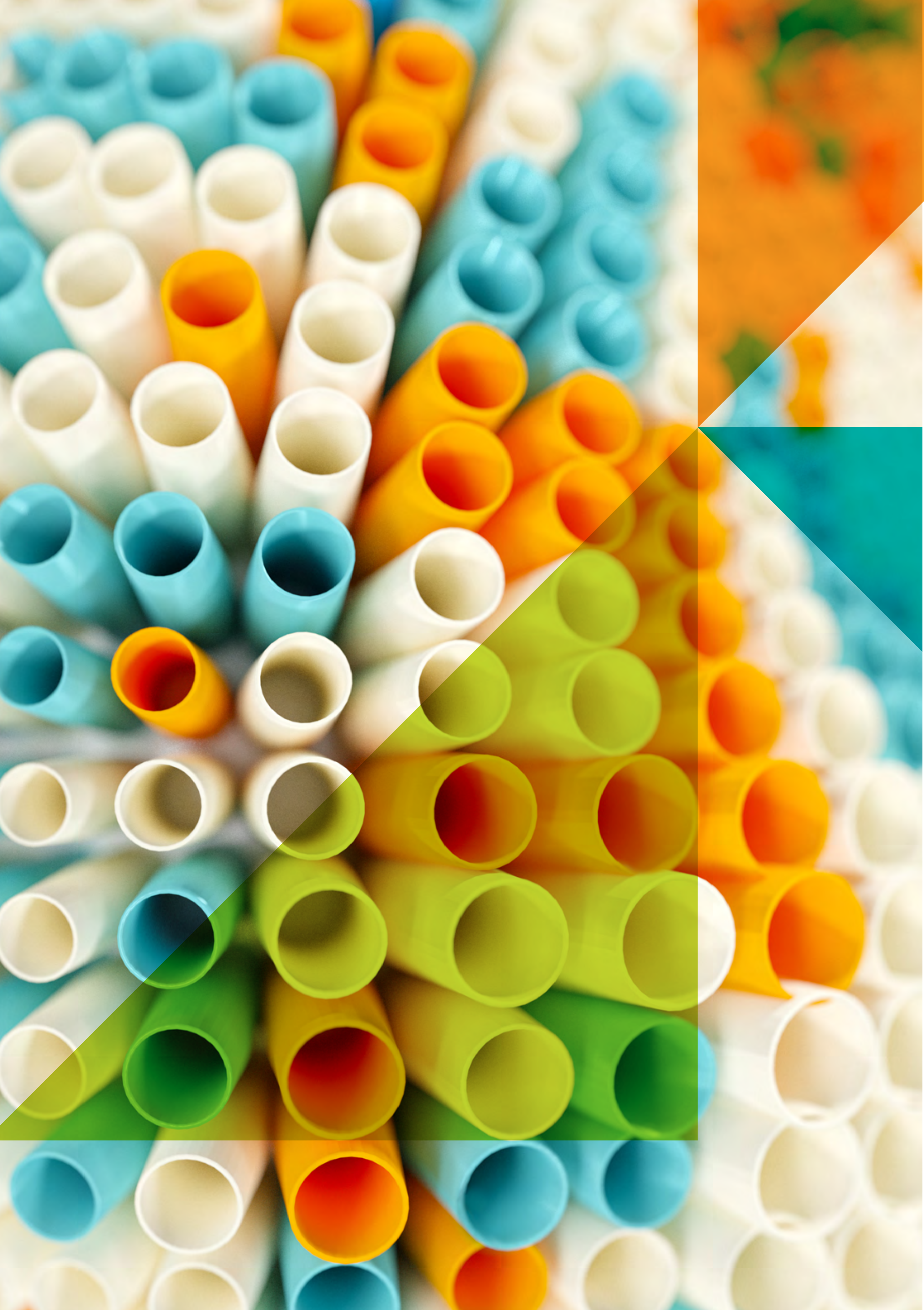
This argument hasn't worked everywhere—specifically, the Ninth Circuit. For instance, in *Gamino v. Thinx Inc.*, 2024 WL 249307 (C.D. Cal. Apr. 18, 2024), a district court rejected the argument that the defendant's money-back guarantee mooted the plaintiff's claim. One key distinction in *Gamino*, though, was that the guarantee was only good for 45 days. *Id.* at 6.

Retailers, in particular, may be well-positioned to use a money-back guarantee in this way. For instance, in *Valiente v. Publix Super Mkts., Inc.*, 2023 WL 3620538 (S.D. Fla. May 24, 2023), a plaintiff alleged the defendant grocery store violated FDUTPA by deceptively selling cough drops with no lemon ingredient in them, despite displaying a picture of lemons on the cough drops' label. *Id.* at *1. The grocery store, however, provided a money-back guarantee on the back of the cough drops' label. *Id.* at *3. The plaintiff did not allege that he attempted to return the cough drops and was denied, or that he was unaware of the option to seek a refund, so the court dismissed for lack of standing. *Id.* The fact that the defendant accepted in-store returns—as opposed to mailing a proof-of-purchase—weighed in favor of finding that the plaintiff had not suffered an injury, monetary or otherwise.

Ultimately, a money-back guarantee is not a panacea, and obviously carries with it costs and administrative burdens. A guarantee also is not right for every product—it is a more viable option for a low-cost product, where both refunds and return rates will be relatively lower. And as a general rule, the tail shouldn't wag the dog: business decisions should drive litigation strategy, and not the other way around. But at a minimum, the money-back guarantee argument is worth keeping in mind when facing a new labeling class action—and it may be a way to avoid such actions in the first place.

Tom Waskom

Tom is a partner and co-head of the product liability and mass tort litigation practice in the firm's Los Angeles office.



Is Plastics the Next Big Thing?

2024 marked a significant increase in legal risk related to plastics. Major changes in both the regulatory and litigation landscapes are affecting companies up and down the supply chain, including retail companies that sell products contained in plastic packaging, suppliers of plastic resins and manufacturers of packaging products. Since most of these changes are happening at the state level, they are likely to continue intensifying in 2025, notwithstanding the change in federal administration.

Regulatory Landscape

Plastics are primarily being regulated under state extended producer responsibility (EPR) programs targeting single-use packaging. Since 2021, five states have passed EPR programs, and more are considering similar legislation. These programs target "producers," typically defined as the manufacturer or brand owner for packaged products sold in the relevant state. Producers are generally required to join a Producer Responsibility Organization (PRO), which is responsible for collecting data regarding the volume of single-use packaging being sold into the state, charging producer fees based on their contribution and using the funds to improve recycling infrastructure across the state.

Circular Action Alliance (CAA) is expected to serve as the PRO in Oregon, Colorado, California and Minnesota, and rulemaking processes are at various stages across the states. Implementation is moving forward most quickly in Oregon, where producers are required to pre-register with the PRO and submit data on covered products sold into the state by March 31, 2025. The third and final draft of CAA's implementation plan, which is currently undergoing review by the Oregon Department of Environmental Quality, sets forth a base fee schedule encompassing 60 material categories. Importantly, CAA's fee-setting methodology allocates estimated material management costs to each category based on supply quantities, revenue benefit and recycling rates, such that producers of materials recycled at high rates pay a lower share of overall program costs. In addition, CAA will offer fee adjustments to producers that make changes to the way in which they produce, use and market covered products, leading to lower fees for covered products with a lower environmental impact.

Litigation Landscape

At the same time that retailers and other companies across the supply chain are facing expanding regulatory pressures and changing market dynamics, the litigation landscape is also in flux. 2024 saw a significant increase in filings, with approximately 30 plastics-related lawsuits pending as of December 1. With respect to litigation involving allegations of environmental pollution, state attorneys general (including California Attorney General Rob Bonta and New York Attorney General Letitia James) and municipalities are leading the charge, with various NGOs asserting similar claims. These lawsuits have primarily targeted producers and manufacturers of plastics, as well as companies that manufacture single-use consumer products sold in plastic packaging, alleging that these companies have deceived the public over the recyclability of plastics. They further allege that this deception led to inflated sales and corresponding environmental harms, pollution and natural resource impacts. Following similar playbooks to those deployed in climate change and PFAS litigation, causes of action have centered on broad theories of public nuisance, negligence and trespass, as well as violations of state consumer protection and environmental laws. Relatedly, in fall 2024, Connecticut Attorney General William Tong, in partnership with NYU Law's State Energy and Environmental Impact Center, cohosted a national forum on "plastics pollution," which he called a "crisis" and "a growing threat to human health and our environment."[1] Forum attendees included more than 20 state attorney general offices (and several attorneys general) and more than a hundred academics, NGOs and industry representatives. Increased plastics lawsuit filings by municipalities may likewise cause state attorneys general to more closely examine their role.

Throughout 2024, we also observed notable momentum in the consumer class action space. Plaintiffs in these cases have targeted a variety of consumer products, alleging that certain recyclability representations on the products were untrue; that the alleged presence of microplastics in products rendered "pure," "natural," "BPA-free" or similar claims untrue; or that other plastics-related "greenwashing" was misleading or deceptive. To date, these lawsuits are still largely in the pleadings stage. Of motions to dismiss that have been decided, defendants have seen mixed success, with some securing early dismissal and others moving into discovery. The overall trajectory of these claims is likely to be more clearly revealed as the litigation progresses in 2025.

Opportunities to Manage Risk

All of these dynamics have substantial potential to affect retailers and markets for plastic products. Companies that sell products covered under state EPR programs must gain a detailed understanding of those programs in order to make strategic business

1 https://portal.ct.gov/ag/press-releases/2024-press-releases/attorney-general-tong-to-convene-national-forum-on-plastics

decisions about product development and collect the data necessary to demonstrate improvement to the PRO. Packaging suppliers will in turn need to be responsive to changing demand so that they can position themselves to fulfill their clients' needs. And material suppliers, such as manufacturers of plastic resins, must identify and focus on supplying the types of materials that can help with downstream compliance. California's draft rules, for example, would make it very difficult for "chemical recycling" methods to qualify as recycling under the program.

Additionally, given the increasing focus on plastics by state attorneys general and municipal plaintiffs, retailers may have opportunities for proactive messaging and engagement with government and other stakeholders as part of a broader risk management strategy.

Finally, litigation preparedness is key. Retail and other companies affected by these issues should be tracking litigation trends and assessing company-specific risk and mitigation opportunities. Aggressive defense grounded in sound science will be critical for managing the reach of this tort litigation wave. Hunton's Plastics and Microplastics Team stands ready to help.

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Client relationships with more than half of the **20** largest retailers on the 2024 National Retail Federation's Top **100** Retailers List, representing retailers responsible for more than **$2 trillion** in US sales during 2023, including the two largest retailers in the country.

ESG Reporting Developments of Interest to Retailers

The election of President Donald J. Trump to a second term is likely to have significant implications for the ESG reporting landscape. The new administration's broader agenda is expected to be less supportive of federal regulations and policies surrounding ESG matters. In line with this direction, the president-elect recently nominated Paul Atkins as chairman of the US Securities and Exchange Commission (SEC), whom we expect to tack in a different direction than the outgoing SEC chair, Gary Gensler, on matters concerning climate and social disclosure. Accordingly, the SEC will likely withdraw support for its Climate Disclosure Rule, which is currently stayed pending litigation. If the court does not vacate the rule in its entirety, we expect the SEC to begin a process to repeal it. Even with SEC-level uncertainty, we believe companies should continue to prioritize ESG strategies as we detail below.

Legislation by Certain US States

Thus far, state governments have introduced a range of legislation surrounding ESG matters between 2020 and 2024, focused in particular on reporting and disclosure matters, highlighting the role of state governments in shaping the future of corporate responsibility. This type of legislation could become more common in some states, especially if the SEC walks back its climate disclosure rule.

In 2023, California enacted Senate Bill 253, Senate Bill 261 (both amended by Senate Bill 219 in September 2024) and Assembly Bill 1305, which require certain public and private companies doing business in California to provide climate-related disclosures regarding their climate emissions, climate risk, carbon-neutral claims and use of offsets. While litigation challenging SB 253 and 261 is ongoing, these laws remain in effect. In fact, the California Air Resources Board recently opened a public comment period on rules it must write to effectuate portions of these new laws.

Other states may follow California's lead on climate disclosure, particularly if the California laws survive judicial scrutiny. In January 2023, for example, New York proposed Senate Bill S897A, which would require businesses with more than $1 billion in revenue to report scopes 1, 2 and 3 emissions to an emissions registry. While this bill is still in its early stages, it demonstrates the importance for companies to keep ESG in mind to comply at the state level.

ESG for Investors

Despite political challenges, ESG remains important for segments of the broader business and investment community, with long-term value creation driving its importance for certain investors. ESG can be a tool for investors to analyze a company's priorities and identify risks, enabling them to compare these with others. Some investors are not only focusing on returns but also on making a difference. Notwithstanding regulatory developments, climate and sustainability will remain important social causes for many consumers. Therefore, investors will continue to use ESG data in varying ways to evaluate companies. United States-based companies may find it wise to continue focusing on ESG, regardless of short-term political shifts, as part of its stakeholder engagement.

International Rules Requiring Compliance from Large United States-Based Companies

The global nature of business means US companies may remain subject to international ESG regulations. For instance, the European Corporate Sustainability Reporting Directive (CSRD), a European Union (EU) regulation requiring large companies to disclose detailed sustainability and ESG information, will still apply to many US businesses with European subsidiaries. The CSRD is expected to impact around 50,000 companies based outside the EU, many of which are in the United States.

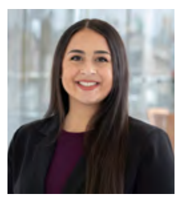
Additionally, the EU recently formally adopted and put into force the Corporate Sustainability Due Diligence Directive (CSDDD or Directive) on July 25, 2024. The core elements of the CSDDD require companies to identify and address potential and actual adverse human rights and environmental impacts in the company's own operations, its subsidiaries and those of its business partners related to its value chains. The Directive also requires large companies to adopt and implement a transition plan for climate change mitigation aligned with the 2050 climate neutrality objective of the Paris Agreement. While this new rule largely applies to companies within the EU, it will also apply to all US companies with annual group-wide revenue from the EU market exceeding €450 million, regardless of whether they have subsidiaries or branches in the EU. Furthermore, any company that does not meet the prescribed revenue thresholds but is the ultimate parent company of a group that does will also fall under the scope of the CSDDD. Non-EU companies will have between three and five years to comply, depending on their turnover in the EU, with a deadline of 2027 for non-EU companies that generate more than €1.5 billion in turnover in the EU. Thus, despite a reduction in the United States's focus on ESG, the CSRD and CSDDD may still impact the reporting decisions of many US companies.

Voluntary Reporting

Apart from regulatory requirements, ESG issues are increasingly important to many consumers, employees and other stakeholders. Companies that lead in this space can positively impact their reputations and customer loyalty. In the retail industry, for example, there may be a benefit to keeping ESG in focus as many consumers increasingly demand sustainable business practices. By adopting ESG principles, retailers can promote sustainability and position themselves as responsible corporate citizens. ESG strategies are not only about compliance but can also be key drivers of long-term business resilience, reputation and financial performance.

Ultimately, ESG trends are likely to fluctuate with each new administration. While the regulatory landscape may shift, ESG is unlikely to disappear forever as public and corporate interest in sustainable practices continues to grow.





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> “The practitioners have a very deep knowledge of the industry and regulatory trends.
>
> *Chambers USA*, 2024

States Tackle Workplace Violence Risks, with Retailers in Focus

Many states have workplace violence laws applicable to health care. Retail workplace violence laws are an emerging trend. California has a broad workplace violence law, which was effective in July 2024. New York has a new law exclusive to the retail industry that goes into effect in March 2025. Other states are anticipated to follow with similar legislation.

California Requires Comprehensive Workplace Violence Plans for Nearly All Employers

California requires virtually all employers with physical work locations in the state to implement workplace violence prevention plans. The law imposes detailed requirements for each employer's plan, including site-specific workplace violence hazard assessments, processes to accept and respond to reports or threats of workplace violence, employee training, emergency response and a prohibition on retaliation. The law also requires employers to maintain "Violent Incident Logs" that include summary details regarding any threats of violence or violent incidents that occur at the site.

The law requires employers to coordinate plans, training and plan implementation with other employers that have employees present at the worksite. The law also requires sharing of the Violent Incident Logs with the other involved employers. All of this creates tremendous complication. Big-box retailers may have any number of employers with employees on-site—make-up counter, coffee, tailoring, food services, vendor deliveries/stocking, etc. The management company operating a mall has an even more significant problem with scores of employers. The California Division of Occupational Safety and Health will be

> “
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> The [retail] team is very responsive and thorough.
>
> *Chambers USA*, 2024

implementing regulations, which ideally will make compliance easier. The regulations are unlikely to be less burdensome, but they should make responsibilities between/among employers easier to follow than the current law.

On the other coast, the New York legislature passed retail-specific workplace violence rules in 2024 that will take effect on March 4, 2025. The New York Retail Worker Safety Act applies to employers with 10 or more retail employees, and imposes additional “panic button” requirements for employers with 500 or more retail employees nationwide. The law defines a covered retailer as any “store that sells consumer commodities at retail and which is not primarily engaged in the sale of food for consumption on the premises,” so it excludes restaurants and delis.

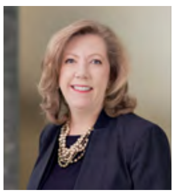
The law requires covered employers to maintain a retail workplace violence prevention policy that lists all of the factors that might create workplace violence risk, including late or early working hours, exchanging money with the public, working alone or in small numbers, or uncontrolled, public access to the workplace. The policy also must include methods the employer uses to prevent incidents of workplace violence, including reporting systems for threats and incidents of violence. Employers are prohibited from retaliating against any employee for exercising rights under the law and this prohibition must be part of the policy and training. The New York Department of Labor has promised to release a model plan before the March 4 implementation date that employers may use to create their plans.

The law also requires detailed employee training requirements on the plan and methods employees can use to protect themselves from workplace violence, including de-escalation tactics. For larger employees, the law requires installation or provision of panic buttons “throughout the workplace” or via wearable or mobile-based means. The panic button requirements, which resemble similar safety measures implemented for hotel workers in some states, are not effective until January 1, 2027.

Retailers that do not operate in New York or California also should focus attention on violence mitigation. The federal OSH Act’s General Duty Clause (GDC) and its state-law equivalents require employers to provide employees with workplaces that are free from recognized hazards that are likely to cause serious injury or death. OSHA considers industry standards when engaging in GDC enforcement, and OSHA considers what a particular employer is doing to protect its employees at other of its worksites when evaluating whether the employer has violated the GDC.

In this manner, these new state laws can impact federal OSHA enforcement. Federal OSHA may use enhanced New York and California workplace violence programs against retail employers in general, claiming this is now the industry standard. Also, OSHA can and will hold nationwide employers to the level of effort in their New York and California sites at their sites in the other 48 states.

Federal OSHA has cited employers under the GDC for workplace violence events for decades, so this is not entirely new. Enforcement in the retail industry, though, has largely been confined to late-night retail or other establishments with employees working alone. Now, the risk of enforcement is across the board and all retail employers should take a fresh look at their existing violence prevention programs to make sure they are taking steps to mitigate the risk of violence. •




Susan Wiltsie and Reilly Moore

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Federal Courts Are Raising the Bar on Employees' FMLA Retaliation Claims

The Family and Medical Leave Act (FMLA) prohibits employers from retaliating against employees who exercise rights under the Act. 29 U.S.C. § 2615(a)(2). Since 2009, 3,211 FMLA retaliation lawsuits have been filed against retail employers. Only employers in the health care industry had more cases filed against them.

These cases are very difficult to defend. Retail managers are financially motivated to keep staffing levels calibrated to demand. Consider this routine example of an employee with a certification for intermittent FMLA leave. Employee calls off at the last minute for an FMLA-covered reason. Management may not legally require the employee to find his/her own replacement. The Department of Labor (DOL) considers that to be a violation of FMLA. Management must either find a replacement or everyone working that day must do additional work, including the manager on duty. This often creates irritation and resentment—just the types of facts that help a plaintiff prevail on a claim that any subsequent adverse employment action was motivated at least in part by FMLA retaliation.

Retail employers have strong reason to believe that defending these cases is getting easier.

Historically, federal circuit courts have applied the "motivating standard" analysis to claims of FMLA retaliation. Under this standard, a plaintiff only is required to show their exercise of FMLA rights was one factor in the employer's decision to take an adverse action against them. The plaintiff need not prove it was the only factor or even that it was the biggest factor in the employer's decision. If the plaintiff shows the employer at least considered their FMLA-protected activity in some way, the retaliation claim would survive dispositive motion practice. This is the current DOL position.

In *Lapham v. Walgreen Co.*, 88 F.4th 879 (11th Cir. 2023), the Eleventh Circuit held that plaintiffs seeking to pursue FMLA retaliation claims must prove causation according to the "but-for" standard. The but-for standard is satisfied only if the plaintiff can prove the adverse employment action would not have happened *but for* the protected activity—a much more difficult standard for the plaintiff.

The *Lapham* court relied upon the US Supreme Court's ruling in *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338 (2013), which involved claims of retaliation under Title VII of the Civil Rights Act of 1964 (Title VII). 42 U.S.C. § 2000e. In *Nassar*, the Court noted Title VII's retaliation provision provides that "[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees…*because* he has opposed any practice made an unlawful employment practice by this subchapter, or *because* he [engaged in a specified protected activity]." The Court also noted the "because" language in Title VII's retaliation provision stood in contrast to its discrimination provision, which expressly establishes a motivating-factor causation standard. This difference persuaded the Court that the proper standard for retaliation claims under Title VII is but-for causation.

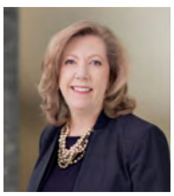
The *Lapham* court concluded that, although the FMLA's retaliation provision does not include any express "because of" language like that of Title VII, "but for" causation should apply because the FMLA language is "sufficiently similar" to Title VII's retaliation provision. The Second Circuit is the only other court of appeals to expressly apply this standard. *See, e.g., Carter v. TD Bank, N.A.*, No. 23-950, 2024 WL 2828470, at *4 (2d Cir. June 4, 2024) ("Like Title VII discrimination claims—and unlike ADA discrimination and Title VII retaliation claims—FMLA retaliation claims are subject to the more lenient 'motivating factor' causation standard") (citing *Woods v. START Treatment & Recovery Ctrs., Inc.*, 864 F.3d 158, 166 (2d Cir. 2017)).

Shortly after the *Lapham* case, the Supreme Court issued its landmark opinion in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 219 L. Ed. 2d 832 (2024), ending *Chevron* deference. Under *Chevron*, courts deferred to the expertise and opinions of agencies in interpreting ambiguous language in the laws that the agency is tasked with enforcing. Following *Loper Bright*, however, federal courts now have the power to decide what ambiguous statutory language means for themselves.

Since *Lapham* and *Loper Bright*, both the Third and Fifth Circuit courts have

questioned—but not decided—what the appropriate evidentiary standard should be for FMLA retaliation. *See, e.g.*, *Coleman*, 2024 WL 4490602, at *3 n. 4 (3d Cir. Oct. 15, 2024) (noting whether the application of the "motivating factor" standard in FMLA retaliation claims withstands the *Loper Bright* holding "is open to question"); *accord Decou-Snowton v. Jefferson Par.*, No. 24-30079, 2024 WL 4879466, at *4 (5th Cir. Nov. 25, 2024) ("In this circuit, the causation standard in FMLA retaliation cases is an unsettled question"). The Sixth Circuit has not yet ruled on this issue, but has stated the "but-for" standard "is likely" to apply to the causation analysis for FMLA retaliation claims. *Sharp v. Profitt*, 674 Fed. Appx. 440, 451 (6th Cir. 2016).

The divergent federal circuit court opinions make this issue ripe for Supreme Court consideration and *Loper Bright* gives reason for optimism regarding the ultimate outcome. In the meantime, multidistrict retail employers should consider whether there is an opportunity to transfer FMLA retaliation cases to courts applying the more demanding "but-for" causation, or, regardless of where the case is pending, take a more aggressive defensive stance given better odds of success. •

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Trends in Food and Beverage Litigation and What Retailers Can Expect in 2025

Food and beverages remained a focus of products and consumer litigation in 2024, with several novel trends driving claims. Fueled by media attention and regulatory and legislative activity, three of these emerging trends are likely to continue in 2025, with direct and indirect impact for retailers.

Plastics

Following media and scientific attention on the environmental impacts of plastic waste and the potential human health impacts of microplastics, 2024 saw a significant uptick in litigation involving plastics. Although manufacturers of the chemicals that make plastics have been the primary target of these claims, companies in the food and beverage industry that sell products in single-use plastic packaging are also in focus. These claims fell into two primary categories.

First, state attorneys general, municipalities and various nongovernmental organizations have brought public nuisance and statutory consumer protection claims focused on companies' allegedly false marketing of their single-use plastic packaging as "recyclable." Plaintiffs claim that these recyclability claims and other allegedly false representations of the companies' sustainability practices lead to increased plastics usage, which—because the majority of plastics are not actually recycled—lead to excess plastic waste that plaintiffs argue break down in the environment to form allegedly harmful microplastics in drinking water and food sources. These claims typically seek abatement of the alleged nuisance through cessation of the use of plastics and clean up of existing waste, as well as monetary damages.

Second, food and beverage companies have seen related consumer class actions, again focused on false claims of recyclability and other "greenwashing" statements allegedly rendered untrue by the companies' single-use plastic packaging. Other putative class actions have alleged that plastic packaging leads to the migration of microplastics to the food or beverage product that they contain, yielding other types of marketing claims untrue (e.g., "natural" or "pure").

Plastics are expected to be a focus of state legislation and regulatory activity in 2025, which has the potential to increase new filings. We recommend that—in addition to the steps set forth in the separate plastics article in this publication—retailers prepare for increased consumer focus on single-use plastics and take the opportunity to assess any plastics-related recycling or sustainability claims in light of this heightened litigation focus.

PFAS

Driven by a regulatory and legislative frenzy, claims involving per- and polyfluoroalkyl substances—commonly termed "PFAS" or "forever chemicals"—have become one of the fastest-growing areas of litigation in the country. While most of the litigation focuses on cleanup of municipal water sources, consumer class actions involving PFAS in products and/or product packaging have steadily increased. Although the claims to date have not involved human health effects, and instead allege that the presence of PFAS renders a marketing claim or ingredient list untrue, food and beverage products have been a key target, likely because they present a vector for possible PFAS ingestion. Numerous common retail food and beverage products, including snack foods, candy, protein powders, juices and other drinks, have been the subject of these claims over time (as well as California Proposition 65 PFAS-focused notice letters), and new filings continued in 2024. Defendants have continued to see mixed success at the motion to dismiss stage, with some securing complete dismissals and others opting for settlements following motions practice.

PFAS consumer class actions will continue to be filed in 2025 given the ubiquitous presence of PFAS in the environment, including in food and drinking water sources. Further, the first wave of personal injury claims involving PFAS exposure from aqueous film forming foam (AFFF) is set to be tried in a federal MDL in 2025, the results of which could lead to even more claims. We also expect continued government focus on PFAS at both the federal and state levels. Although a Trump-EPA may roll back some of the more aggressive regulatory measures or extend the timing for implementation, PFAS regulation has mostly been a bipartisan priority, and we do not expect a substantial change in the new administration.

Ultra-Processed Foods and Soda

Finally, ultra-processed foods (UPFs) have come under significant media and public health scrutiny in recent years. UPFs are generally defined as foods that contain significant amounts of preservatives, colorings, flavorings and other additives or have undergone extensive industrial processing and chemical modification from their original state. Although they are touted for their convenience, affordability and palatability, UPFs have been linked to negative health outcomes and a growing public health crisis of obesity.

In recent years, enterprising plaintiffs' firms and nongovernment organizations have initiated litigation involving UPFs and soda through consumer class actions involving marketing and labeling claims. These lawsuits have focused on statements about the health or "natural" characteristics of food products and/or omissions regarding the presence of UPFs. Retailers have been specifically named in these cases based primarily on marketing claims on store-brand products.

Notably, at the end of 2024, a first-of-its-kind individual personal injury action was filed by a national plaintiffs' firm against a number of well-known food and beverage companies, alleging that UPFs and soda, their allegedly addictive properties and the defendants' marketing campaigns caused the young plaintiff's type 2 diabetes and nonalcoholic fatty liver disease. The progress of this case, and whether follow-on claims surface, will be important to watch in 2025.

Government focus on UPFs is also expected to increase in 2025, which often incentivizes more litigation. Robert F. Kennedy, Jr., Trump's pick to lead the Department of Health and Human Services (HHS), has been a vocal critic of UPFs and the American diet. If confirmed, he will lead one of the agencies responsible for US dietary policy. Additionally, every five years, the US Departments of Agriculture and HHS publish the Dietary Guidelines for Americans (DGAs), which offer advice on what and how much to eat and drink to meet nutritional needs, promote health and prevent disease. The 2025–2030 DGAs, set to be published in late 2025, are in process with UPFs' impact on health as one of the designated areas for review. •



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About Us

Hunton is a global law firm handling transactional, litigation and regulatory matters for clients in myriad industries including retail and consumer products, energy, financial services, real estate and technology. Areas of practice focus include labor and employment, capital markets, mergers and acquisitions, intellectual property, P3, public finance and infrastructure, and privacy and cybersecurity. With offices across the United States and in Europe, the Middle East and Asia, we're aligned with our clients' businesses and committed to delivering exceptional service.

Our retail industry lawyers represent businesses at every step, from factory floor, to retail outlet, to online store. Our extensive list of international, national and regional clients includes many well-known restaurant chains, malls, home improvement centers, supermarkets, and media and entertainment companies, as well as manufacturers and retailers of apparel, baby products, cosmetics, electronics, fine jewelry, luxury goods, toys and other merchandise. Our retail team is composed of more than 300 lawyers who represent retailers in the Fortune 500® and virtually every retail sector.

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