

JacksonLewis

Covid-19 Legal Considerations For Colorado Agricultural Employers and Employees

Presented by Kathleen O'Grady and Jonathan Siegel

Kathleen.OGrady@jacksonlewis.com

(303) 876-2230

Jackson Lewis – Denver

Jonathan.Siegel@jacksonlewis.com

(949) 885-1362

Jackson Lewis – Orange County

Agenda



- Hot Off the Press – Quick Updates
- Colorado Paid Sick Leave Requirements
- Health Information Disclosures
- Financial support and job retention entitlements for employees
- Potential Liabilities

Hot Off the Press – Some Quick Updates



1. 30% Jump in OSHA Retaliation Complaints. USDOL Reports Rise in OSHA Whistleblower Claims from February 2020 through May 2020.

- Approximately 1,600 (39%) were related to COVID-19, such as claims that someone was retaliated against for claiming violations of guidelines regarding social distancing or personal protective equipment.

2. New Checklist! U.S. Food and Drug Administration (“FDA”), Centers for Disease Control and Prevention (“CDC”), and Occupational Safety and Health Administration (“OSHA”) have joined in publishing the sixteen page “Employee Health and Food Safety Checklist for Human and Animal Food Operations During the COVID-19 Pandemic” (“Checklist”).

- Checklist offers food employers with human and animal food operations a “quick reference” guide on measures the FDA, CDC, and OSHA believe are necessary to protect workers and operations from COVID-19 exposure risks

3. New FAQs. Federal Families First Coronavirus Act (“FFCRA”) – DOL issued new FAQs impacting school opening arrangements. The new FAQs – numbers 98, 99, and 100 address:

- An employee may take FFCRA leave on a child’s remote learning days in a hybrid learning method
- FFCRA leave is not available to take care of a child whose school is open for in-person attendance, but the employee chose a remote learning option for the child
- If the school year is beginning solely under a remote learning program due to COVID-19 concerns, employees may take FFCRA leave

Colorado Paid Sick Leave: Healthy Families and Workplaces Act (“HFWA”)

Colorado

Emergency Paid Sick Leave

Employer Coverage for PSL:

- All employers, regardless of size (differs from the FFCRA in this way)

Eligible Employees for PSL:

- The paid sick leave requirements would apply to all employees under a covered employer. However, an employer that, under a CBA, already provides “equivalent or more” paid leave, is exempt from other HFWA requirements, as long as the ways the CBA differs from HFWA would not diminish employee rights to “equivalent” paid leave.

Reasons of Paid Sick Leave:

- (1)The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19.
- (2)The employee has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19.
- (3)The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
- (4)The employee is caring for an individual who is needs to quarantine, isolate, or self-quarantine under government order or health care advisor advice.
- (5)The employee is caring for their son or daughter if the school or place of care of the son or daughter has been closed, or the childcare provider of the son or daughter is unavailable, due to COVID-19 precautions.

Employee Entitlement For Paid Sick Leave:

- (1) **80 hours** of paid sick leave for full-time employees.
- (2) The equivalent of the average number of hours over two weeks for part time employees.
- (3) If an employee **already received paid leave in 2020** for any of the five categories of COVID-related needs that HFVA covers, the employer can count that as part of the two weeks that HFVA requires in 2020.

PSL Benefit Amount:

- Paid sick leave is paid at the employee's regular rate but:
 - Capped: \$511 per day and \$5,110 in the aggregate when used by employee for their own condition
 - Capped \$200 per day and \$2,000 in the aggregate when used for family reasons and when employee experiences a “the substantially similar condition”
 - Paid at **2/3** the employee's regular rate when used to care for another individual or due to school/day care closure.

Documentation for Leave

“Reasonable documentation” allowable . Employers can require employees to provide documentation that the leave is for a HFWA purpose.

When taking leave for your OWN COVID-19 related reason/care for family member

- a) the date(s) for which leave is requested;
- b) The qualifying reason for leave;
- c) a statement that the employee is unable to work or telework because of the qualifying reason; and
- d) the name of the health care provider who advised the employee (or family member) to quarantine or self-isolate, or the name of the government entity issuing the quarantine or isolation order.

Documentation for Leave

“Reasonable documentation” allowable. Employers can require employees to provide documentation that the leave is for a HFWA purpose.

When taking leave TO CARE FOR CHILD due to a COVID-19 related closure

- a) the date(s) for which leave is requested;
- b) The name of the child
- c) the name of the school, place of care, or child care provider that is closed or unavailable; and
- d) a statement that no other suitable person is available to care for the child during the leave period.

Notice Requirements (7.15.2020 – 12.31.2020)





COLORADO
Department of
Labor and Employment

**Colorado Workplace Public Health Rights Poster:
Paid Leave, Whistleblowing, & Personal Protective Equipment**
Division of Labor Standards & Statistics

Poster effective July 15 - Dec. 31, 2020

**HEALTHY FAMILIES & WORKPLACES ACT (“HFWA”):
Employee Rights to Paid Leave**

Employers in Colorado Must Provide Paid Leave for COVID-19 Needs Through Dec. 31, 2020

- Employers in Colorado must provide paid leave in 2020 to an employee who:
 - (1) has **COVID-19 symptoms** and is seeking a medical diagnosis;
 - (2) is instructed by a government agent or a health provider to **quarantine or isolate** due to COVID-19 risk; or
 - (3) is **taking care of someone else** due to COVID-19 precautions -- either someone ordered to quarantine or isolate, or a child whose school, place of care, or childcare is closed or unavailable.
- Starting in 2021, HFWA requires less paid leave (1 hour per 30 hours worked, with a maximum of 48 hours’ paid leave a year) but covers a wider range of conditions, and adds 32 more hours’ paid leave (80 total) in public health emergencies.

How Much Paid Leave: Up to Two Weeks (80 hours)

- Employees can take **up to 2 weeks** of paid leave: **up to 80 hours**, depending on their weekly hours.
- Paid leave is at the employee’s **regular pay rate**, or can be at $\frac{1}{3}$ **pay for category #3** (care for someone else). The pay rate does not include overtime or bonuses. If pay is all or partly sales-based, paid leave must be either at the employee’s hourly or salaried rate, or at the applicable minimum wage (whichever is higher).
- If an employee already received paid leave in 2020 for COVID-19-related needs, that counts as part of the 2 weeks that HFWA requires, but leave provided for *non*-COVID conditions does not count toward what HFWA requires.

Retaliation or Interference with HFWA Rights

- An employer cannot fire, threaten, or otherwise **retaliate against or interfere with**, an employee who: (A) requests or takes HFWA leave; (B) informs another person about HFWA rights, or supports that person’s exercise of HFWA rights; (C) files a HFWA complaint; or (D) cooperates/assists in an investigation about a potential HFWA violation.
- If an employee’s HFWA complaint, request, or other activity is *incorrect*, an employer need not agree or grant it -- but still cannot fire or take other *action against* the employee for that reason, as long as the employee’s belief was reasonable and in good-faith. Employees *can* face consequences for misusing paid leave or other misconduct.

Coverage: All Employers and Employees, with Limited Exceptions

- **All employers in Colorado, regardless of size**, must provide HFWA paid leave, except the federal government (other government employers are not exempt) and those covered by the federal Railroad Unemployment Insurance Act.
- Employers with **under 16 employees are covered in 2020, but exempt in 2021 (then all employers covered in 2022)**
- Employers providing “equivalent or more” paid leave by collective bargaining agreement are exempt from certain HFWA requirements, as long as they don’t diminish rights, such as anti-retaliation or the right to file a complaint.
- Employee agreements or employer policies **cannot waive HFWA rights**, and are void and unenforceable.

This Poster summarizes two Colorado workplace public health laws, SB 20-205 (paid leave) and HB 20-1415 (whistleblowing and personal protective equipment). It does not cover other health or safety laws, rules, and orders, including under the federal Occupational Safety and Health Act (OSHA), from the Colorado Department of Public Health and Environment (CDPHE), or from local public health agencies. Contact those agencies for more such health and safety information.

This poster must be displayed where it is accessible to workers, shared with remote workers electronically or on paper, and replaced with the 2021 poster by January 1, 2021.

For more information, or if translations into other languages are needed, contact: Division of Labor Standards and Statistics, coloradolaborlaw.gov, cdle_labor_standards@state.co.us, 303-318-8441 / 888-390-7936.

**PUBLIC HEALTH EMERGENCY WHISTLEBLOWER LAW (“PHEW”):
Worker Rights to Express Workplace Health Concerns & Use Protective Equipment**

Worker Rights to Oppose Workplace Health/Safety Violations During Public Health Emergencies

- It is unlawful to retaliate against, or interfere with, the following acts during, and related to, a public health emergency:
 - (1) **raising reasonable concerns**, whether a formal complaint or informally to any person, about workplace violations of government health or safety rules, or about a significant workplace threat to health or safety;
 - (2) **opposing** a violation (of the type in category 1); or
 - (3) **testifying, assisting, or participating** in a proceeding about a violation (of the type in category 1).
- If a worker’s PHEW complaint, request, or other activity is *incorrect*, an employer or other business need not agree or grant it -- but still cannot fire or take other *action against* the worker for that reason, as long as the worker’s belief was reasonable and in good-faith. Workers *can* face consequences for misusing PHEW rights or other misconduct.

Workers Rights to Use Their Own Personal Protective Equipment (“PPE”)

- A worker must be allowed to **voluntarily wear their own PPE**, such as a mask, faceguard, or gloves, if that PPE:
 - (1) provides **more protection** than equipment provided at the workplace;
 - (2) is **recommended** by a government health agency (federal, state, or local); and
 - (3) does not make the worker **unable to do the job**.

Coverage: All Employers and Employees, Plus Certain Independent Contractors

- PHEW uses the terms “**principal**” and “**worker**” (not employer/employee) because it covers independent contractors.
 - (1) Any employer in Colorado, *and* any business in Colorado with *5 or more* independent contractors, is a covered “principal” that must comply with PHEW. The federal government is exempt from this law.
 - (2) An employee *or* an independent contractor at a “principal” is a “worker” covered by PHEW.

COMPLAINT RIGHTS (under both HFWA & PHEW)

- Potential violations can be submitted for investigation to the Division (contact information below).
- **Failure to provide paid leave** under HFWA is an “unpaid wage” claim that the Division **must** investigate and decide.
- **Retaliation or interference** with PHEW or HFWA rights is a claim that the Division by law **may** investigate. The Division will review all such claims, and if the decision is *not* to investigate, the Division will inform the claimant.
- Potential violations can instead be filed as lawsuits in court, but only after exhausting these pre-lawsuit remedies:
 - **HFWA**: a court lawsuit (A) cannot be filed *until* the employer is given a written demand and 14 days to respond, and (B) cannot be filed *if* the Division investigates and decides the claim (which parties can appeal).
 - **PHEW**: a court lawsuit cannot be filed without first filing with the Division, then (A) *can* be filed if the Division does *not* investigate, and (B) *cannot* be filed if the Division investigates and *decides* the claim (which parties can appeal).

Paid Sick Leave Beginning in 2021 (or 2022 for Employers with 15 or Fewer Employees)



How Employees Accrue Paid Sick Leave

Each employee earns at least one hour of paid sick leave for every 30 hours the employee works, up to 48 hours of paid sick leave per year, unless the employer selects a higher limit.

An employer may satisfy the accrual requirements of the HFWA by providing the employee with an amount of paid sick leave that meets or exceeds the requirements of the HFWA at the beginning of the year.

Exempt employees who work less than a 40-hour workweek accrue paid sick leave based on the number of hours that comprise the employee's normal workweek.

Reasons for Taking Accrued Paid Sick Leave

Employees may use accrued paid sick leave for the following reasons:

The employee:

- (i) Has a mental or physical illness, injury, or health condition that prevents the employee from working;
- (ii) Needs to obtain a medical diagnosis, care, or treatment of a mental or physical illness, injury, or health condition; or
- (iii) Needs to obtain preventive medical care.

The employee needs to care for a family member who:

- (i) Has a mental or physical illness, injury, or health condition;
- (ii) Needs to obtain a medical diagnosis, care, or treatment of a mental or physical illness, injury, or health condition; or
- (iii) Needs to obtain preventive medical care.



Reasons for Taking Accrued Paid Sick Leave

Employees may use accrued paid sick leave for the following reasons:

The employee or the employee's family member has been the victim of domestic abuse, sexual assault, or harassment and the use of leave is to:

- (i) Seek medical attention for the employee or the employee's family member to recover from a mental or physical illness, injury, or health condition caused by the domestic abuse, sexual assault, or harassment;
- (ii) Obtain services from a victim services organization;
- (iii) Obtain mental health or other counseling;
- (iv) Seek relocation due to the domestic abuse, sexual assault, or harassment; or
- (v) Seek legal services, including preparation for or participation in a civil or criminal proceeding relating to or resulting from the domestic abuse, sexual assault, or harassment;

Reasons for Taking Accrued Paid Sick Leave

Employees may use accrued paid sick leave for the following reasons:

Due to a public health emergency, a public official has ordered closure of:

(i) The employee's place of business; or

(ii) The school or place of care of the employee's child and the employee needs to be absent from work to care for the employee's child.

Taking Paid Sick Leave

Employees must take paid sick leave in one-hour increments, unless the employer permits employees to take leave in smaller increments. Employers may loan paid sick leave to an employee who has not yet accrued it.

Employers may not require, as a condition of taking paid sick leave, that the employee search for and find a replacement worker to cover the employee's paid sick leave.

Carry Over of Accrued Paid Sick Leave

Employees may carry over up to 48 hours of unused paid sick leave to the following year; however, employers can limit the amount of leave an employee may take in any year to 48 hours.



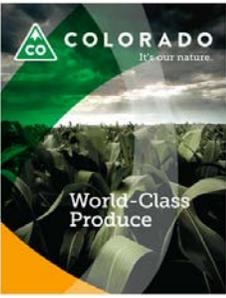
Paid Sick Leave and Public Health Emergencies (e.g., COVID-19)

In addition to the paid sick leave accrued as described earlier, employees are entitled to a one-time grant of leave in the event of a “public health emergency.”

A public health emergency is defined as an **act of bioterrorism, a pandemic influenza, or an epidemic caused by a novel and highly fatal infectious act**, for which: (1) a disaster emergency is declared by the governor; or (2) an emergency is declared by a federal, state, or local public health agency; or (3) a highly infectious illness or agent with epidemic or pandemic potential for which a disaster emergency is declared by the governor.

To ensure employees may take paid sick leave for the reasons below, employers must supplement employees’ accrued paid sick leave as necessary (**at least 80 hours** for employees who work at least 40 hours a week; for employees who work fewer than 40 hours a week, the amount of time the employee is scheduled to work or the average of what the employee actually works in a 14-day period, whichever is greater):

Reasons For Taking Leave (Public Health Emergency)



An employee's need to:

- (a) Self-isolate and care for oneself because the employee is diagnosed with a communicable illness that is the cause of a public health emergency;
- (b) Self-isolate and care for oneself because the employee is experiencing symptoms of a communicable illness that is the cause of a public health emergency;
- (c) Seek or obtain medical diagnosis, care, or treatment if experiencing symptoms of a communicable illness that is the cause of a public health emergency;
- (d) Seek preventive care concerning a communicable illness that is the cause of a public health emergency; or

Care for a family member who:

- (a) Is self-isolating after being diagnosed with a communicable illness that is the cause of a public health emergency;
- (b) Is self-isolating due to experiencing symptoms of a communicable illness that is the cause of a public health emergency;
- (c) Needs medical diagnosis, care, or treatment if experiencing symptoms of a communicable illness that is the cause of a public health emergency; or
- (d) Is seeking preventive care concerning a communicable illness that is the cause of a public health emergency;

Reasons For Taking Leave (Public Health Emergency)

Or if...

A local, state, or federal public official or health authority having jurisdiction over the location in which the employee's place of employment is located or the employee's employer determines that the **employee's presence on the job or in the community would jeopardize the health of others because of the employee's exposure** to the communicable illness or because the employee is **exhibiting symptoms of the communicable illness**, regardless of whether the employee has been diagnosed with the communicable illness;

Or to...

Care for a family member after a local, state, or federal public official or health authority having jurisdiction over the location in which the family member's place of employment is located or the family member's employer determines that the family member's presence on the job or in the community would jeopardize the health of others because of the family member's exposure to the communicable illness or because the family member is exhibiting symptoms of the communicable illness, regardless of whether the family member has been diagnosed with the communicable illness;

Care for a child or other family member when the individual's child care provider is unavailable due to a public health emergency, or if the child's or family member's school or place of care has been closed by a local, state, or federal public official or at the discretion of the school or place of care due to a public health emergency, including if a school or place of care is physically closed but providing instruction remotely;

Or due to...

An employee's **inability to work** because the employee has a health condition that may increase susceptibility to or risk of a communicable illness that is the cause of the public health emergency.

Employers may count an employee's unused, accrued paid time off toward this supplemental leave.

Record Keeping and Documentation

Employers must retain records for each employee for a two-year period, documenting hours worked, paid sick leave accrued, and paid sick leave used.

For paid sick leave of 4 or more consecutive workdays, an employer may require reasonable documentation that the paid sick leave is for a purpose authorized



Potential Liabilities

Violating the HWFA

An employee denied emergency paid leave through the end of the year can file a complaint with the Division of Labor Standards and Statistics for unpaid wages up to \$7,500 . An employee can instead file a lawsuit in court if they prefer, but only after sending the employer a written demand and giving the employer at least 14 days to respond.

The HFVA also prohibits **retaliation** against employees who take this leave, providing an avenue of relief if employees feel their employer has taken any adverse action against them.

An employee may similarly file a complaint or go straight to court, after giving employer 14 day's notice if an employer fails to comply with sick leave entitlements that go into effect next year.

Violations of the HFVA includes compensating an employee until the employee is reinstated or, if reinstatement is not feasible, for a reasonable period.

An employer who willfully retaliates against an employee will be subject to a civil fine of up to \$100 for each separate violation.

Don't Forget – Possible Disability Management

- Review whether there is a possible disability under the ADAA and state law.
- If a disability – an employer should engage in the interactive process
- If perceive an employee as infected, could also be covered. Individuals associated with someone with a disability are covered.
- Could require a reasonable accommodation of the essential functions unless an undue hardship and non-discrimination.
- Can exclude from the workplace if a “direct threat” to the themselves or others.
- Employers may take temperature even though a medical exam under the ADA for Covid-19.
- Required to maintain confidentiality of medical and related information

Workers Compensation Management

- Employers should also continue to manage any workers compensation issues. If an employee has a work-related injury or illness, the employee should be provided a claim form.
- During any trace investigation of a Covid-19 illness, an employer should consider whether the illness is work related or not. Follow the evidence and work with your HR/legal counsel
- As of July 26, 2020, Denver Posts reports there have been 1,970 claims related to Covid-19
- About 1,262 COVID-19 claims have been denied and employers have admitted liability in 628 cases as a reported in the Denver Post.

See Denver Post article: <https://www.denverpost.com/2020/07/26/colorado-workers-compensation-benefits-covid-denied/>

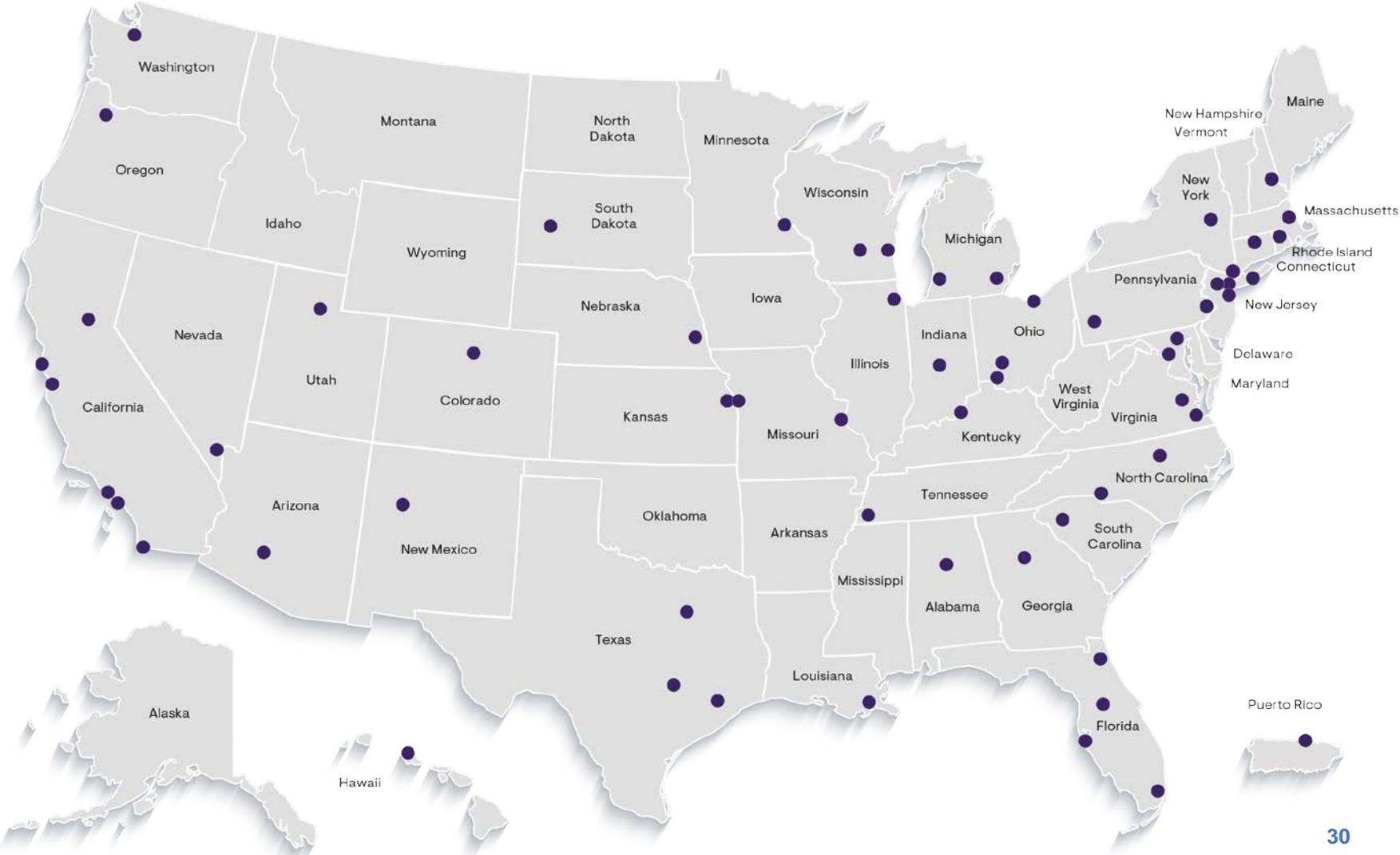
Jackson Lewis – Strategically Located

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Locations Nationwide

950+

Attorneys



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Thank **you.**

Presented by **Kathleen O'Grady** and **Jonathan Siegel**

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