

# FP TRACKER REVEALS: HOT COVID LITIGATION SUMMER COULD FORESHADOW TROUBLE FOR EMPLOYERS

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A sharp increase in pandemic-related workplace litigation this summer could spell trouble for employers, as we expect to see a steady increase in COVID-19 lawsuits filed by employees across the country. That's just one of 10 key findings that can be revealed from a fresh look at Fisher Phillips' nationally recognized [COVID-19 Employment Litigation Tracker](#), developed by our Knowledge Management team and updated on a constant basis. What do employers need to know about the latest examination of statistics and trends from the FP Tracker?

## 1. Increase in Summer Litigation Portends a Rough End to 2021

"We typically see a slowdown in new lawsuit filings over the summer for a number of obvious reasons," says [Jay Glunt](#), a Pittsburgh-based Fisher Phillips partner who spends considerable time defending employment litigation. "But the fact that we didn't see much of a lull in employment-related COVID litigation – and in fact saw an uptick – sends a clear signal that we could be in for a rough couple of months ahead."

Last summer (June-August 2020), employees filed a total of 444 COVID-19 workplace lawsuits. That seemed like a high number at the time, as it represented the highest monthly totals we'd seen in the immediate wake of the pandemic's start. But the summer of 2021 was far worse for employers: 715 COVID-19 workplace lawsuits landed on the desks of the nation's employers, nearly doubling what we saw the previous summer.

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That continues a general upward trend in COVID-19 workplace litigation the [FP Tracker](#) has revealed for 2021. The first eight months of the year have averaged 253 new claims filed per month, compared to 159 new lawsuits filed in the final eight months of 2020 – a staggering 59% increase.

And the hidden concern? That the number of lawsuits may be tied to the surge of COVID-19 cases across the country. The three busiest months of pandemic workplace litigation to date (January-March 2021, with 826 cases filed) happened to closely follow the late autumn/early winter surge of COVID-19 cases that sprung up from coast to coast. The [FP Tracker](#) shows a sharp increase in lawsuits filed from July 2021 (209 claims) to August 2021 (246 claims). And that 18% jump could be just the start of a lawsuit wave that follows the Delta-fueled surge, matching what we saw earlier this year.

## 2. Same States Lead the Pack When It Comes to Location of Lawsuits

“It’s absolutely not surprising that California employers continue to face the greatest number of COVID-related workplace lawsuits,” says [Ariella Kupetz](#), a litigation attorney in our Los Angeles office. “What may be surprising is just how many more lawsuits have been filed here compared to any other state.” Indeed, according to the information found on the [FP Tracker](#), California employers have faced more COVID-19 workplace claims (895) than the next three states combined (New Jersey: 416; Florida: 232; New York: 221).

Besides those four states, the top 10 listing of areas seeing the most COVID-19 workplace litigation are common hotbeds for all sorts of employment lawsuits. They include Ohio (207), Texas (153), Pennsylvania (119), Michigan (99), Illinois (95), and Connecticut (75).

## 3. But Some New Hotspots Are Revealed When You Peel Back the Layers

The [FP Tracker](#) allows for examination of employment-related COVID cases filed by state. An even more fascinating feature, however, is its ability to review the number of cases filed per state as a ratio of state population. Using this tool, the [FP Tracker](#) can reveal the areas of the country where employers are more likely to



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become the target of a COVID-19 workplace lawsuit – and some surprising data stands out.

New Jersey stands out as the most dangerous place for employers when it comes to COVID-19 workplace litigation, with a staggering 46.84 cases filed for every million residents. This is more than double the area that comes in second place (Washington, D.C., with 22.67 cases/million residents). And remember that New Jersey also finished second in the overall ranking of cases filed per state (see above), meaning that Garden State employers should feel especially troubled as the most likely of all businesses to face such litigation.

Besides New Jersey and D.C., the rest of the list includes some other states that have the highest number of overall claims filed as well: California (22.65/million), Connecticut (21.04), Ohio (17.71), and New York (11.36) round out the top 10 list. But some new states are revealed to be difficult places for employers to operate. They include Kentucky (15.67/million), Montana (14.03), Vermont (12.82), and New Hampshire (11.03).

#### **4. Healthcare Employers Continue to Bear the Brunt of COVID-19 Litigation**

Just as when we examined overall [FP Tracker](#) trends in [November 2020](#) and [January 2021](#), employers in the healthcare industry are far and away the biggest targets when it comes to COVID-19 workplace litigation. More than one in every five COVID-19 employment cases filed across the country (22.2%) has been against a healthcare employer. That is more than double the industry in second place.

A full listing of the top 10 industries:

- Healthcare: 718 COVID-19 employment cases to date
- Retail: 310
- Manufacturing: 259
- Government: 218
- Hospitality: 216
- Education: 162

- Professional and Technical Services: 155
- Construction: 154
- Transportation: 137
- Finance and Insurance: 128

## 5. Remote Work, Leaves, Discrimination, and Retaliation Claims are Most Popular

The [FP Tracker](#) also has the ability to examine cases filed by type – as there are a wide and varied number of workplace grievances related to the pandemic that can lead to litigation – and the data shows that three types of cases dominate this space:

- Remote Work/Leave Issues: 909 cases (28% of total)
- Employment Discrimination: 842 (26%)
- Retaliation/Whistleblower: 784 (24%)

These three claims comprise more than three out of every four cases that land on court dockets across the country, with no other type of case totaling more than 10% of claims filed.

The second category of claims filed that include lesser-filed types include Wage and Hour (7%), Unsafe Workplace (3%), Wrongful Discharge (3%), and Negligence/Wrongful Death (3%).

The final category – exceedingly rare cases – still involve very serious types of claims but do not fill up court dockets. They include Non-Competition and Trade Secrets (1.1%), Breach of Contract (1.1%), CARES Act (0.8%), and WARN Act (0.8%).

Note: the [FP Tracker](#) has just begun picking up Vaccine-related claims, currently tracking 20 such claims (comprising just 0.6% of all COVID workplace claims filed). According to one of the attorneys on our Vaccine Subcommittee, employers should expect to see this number grow significantly. “With more employers moving toward benefit plan surcharges and outright vaccine mandates, we are already seeing a rise in requests for religious accommodations,” says [Aymara Ledezma](#). “Those will no doubt cause a spike in claims if impacted

employees feel that adverse action has been taken against them.”

## 6. Smaller Employers are More Likely Targets

“One feature of our tracker that other law firms can’t match is our ability to examine the size of employers getting hit with all of these COVID claims,” says [Jennifer Mendez](#), Director of Knowledge Management Innovation and the creator of the [FP Tracker](#). “Looking at the data, we can see that smaller employers are the most likely to be sued for pandemic-related reasons.”

The numbers don’t lie. Employers with 50 or fewer employees have been sued at a far greater rate than larger employers, facing a staggering 31% of COVID-19-related lawsuits. When adding in mid-sized companies with between 51 and 100 employees (receiving another 10% of claims) and those with 101 to 500 employees (just over 20%), we see that businesses with under 500 workers have been hit with more than 60% of all COVID-19 workplace litigation across the country.

To a certain extent, this is to be expected. Smaller employers are less likely to have robust compliance systems in place. Further, they may have been (or are still) operating in “survival mode,” adjusting to the challenges of conducting business in a pandemic and unable to devote significant resources to getting up to speed on the slew of new legal obligations created over the past 18 months.

However, this data reinforces the need for employers of all sizes – but especially those with under 500 employees – to ensure compliance with new and existing laws. When examined further, the [FP Tracker](#) reveals that the most common case type affecting smaller employers are remote work and leave law conflicts. This is a stark reminder of the importance of complying with the Families First Coronavirus Response Act (FFCRA) and other applicable laws, even if certain provisions may not apply to employers with fewer than 50 employees.

## 7. Single-Plaintiff Cases Are Much More Common Than Class Actions

If there’s a silver lining for employers to be found in the data, it’s that you are not likely to face a disruptive

COVID-related employment class action if you find yourself on the receiving end of a lawsuit. Of the 2,027 cases filed this year alone, single-plaintiff cases account for 97% of them (1,970 cases) while only 3% (57 cases) are class actions.

## 8. There's Been a Huge Jump in Closed Cases

Another unique feature of the [FP Tracker](#) is its ability to track the closure status of all claims to determine the final resolution of COVID-related workplace litigation. And the data (which can be found by clicking on "[Case Analysis](#)") reveals that more than half – 52% – of all pandemic lawsuits have already been closed. This is a huge jump in the past nine months, as [only 25% of cases had been resolved at that point](#). The fact that this number has increased so substantially, especially given that a large number of additional claims have been filed during this time frame, demonstrates that the cases are being quickly handled by courts and parties themselves.

Of the cases that have been closed, we can see that federal courts are handling their dockets more efficiently than state courts. Nearly 70% of all closed cases are in the federal court system. And while only 31% of state court cases have been closed, the state court system has made progress by leaps and bounds since the beginning of this year when [only 4% of their cases had been resolved](#).

Also of note: 63% of all closed COVID-19 employment cases have been resolved through a settlement between the parties, while 25% of cases were dropped and 12% of cases were dismissed through court action.

## 9. CARES Act Claims Most Likely to Be Wrapped Up, Discrimination Claims Least Likely

A staggering 82% of all pandemic lawsuits related to the CARES Act (the federal law creating a stimulus program, extending unemployment provisions, and offering payroll loans, among other things) have already been resolved, the highest number of any type of claim. Interestingly, only 6% of them were closed by court action and 94% were resolved by the parties through a settlement or voluntary dismissal.

But the [FP Tracker](#) also shows that employers have a long road ahead of them. Of the three most common claims filed against employers (see above), the vast majority of lawsuits remain active. Only 18% of employment discrimination claims, 21% of retaliation claims, and 32% of remote work/leaves claims have been closed to date.

## 10. It's All-or-Nothing When It Comes to Vaccine-Related Litigation

Finally, the [FP Tracker](#) shows that 33% of the 20 vaccine-related cases that have been filed

have already been resolved. This is a surprisingly high number given that vaccine litigation is a relatively newer phenomenon. Even more surprising is that all have been closed by court action. 100% of the vaccine cases that have left court dockets have done so because of court dismissal. At this point, parties have not seemed willing to privately resolve lawsuits related to vaccine mandates or accommodations, demonstrating the high-risk, all-or-nothing posture of these types of lawsuits.

### Thirsty for More Data?

But the exploration doesn't end here. This Insight only scrapes the surface of the treasure trove of data and information that can be found on our website. For further information about COVID-19-related litigation being filed across the country, and to run your own analyses of our litigation data, you can visit Fisher Phillips' [COVID-19 Employment Litigation Tracker](#).

Fisher Phillips will continue to monitor the rapidly developing COVID-19 situation and provide updates as appropriate. Make sure you are subscribed to [Fisher Phillips' Insight System](#) to get the most up-to-date information. For further information, contact your Fisher Phillips attorney.