

# THE TOP 18 WORKPLACE LAW STORIES FROM SEPTEMBER 2021

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It's hard to keep up with all the recent changes to labor and employment law. While the law always seems to evolve at a rapid pace, there have been an unprecedented number of changes for the past few years—and this past month was no exception.

In fact, there were so many significant developments taking place during the past month that we were once again forced to expand our monthly summary well beyond the typical "Top 10" list. In order to make sure that you stay on top of the latest changes, here is a quick review of the Top 18 stories from last month that all employers need to know about:

1. **[5-Step Plan for Employers After President Biden Announces Workplace Vaccine Mandates](#)**

In arguably the most far-reaching move of the COVID-19 pandemic, the Biden administration announced on September 9 that federal workplace safety officials will soon issue a rule that will require all employers with 100 or more employees to either ensure their workers are vaccinated or require unvaccinated employees to produce a weekly negative test result before coming to work. Businesses will also be required to give workers paid time off to get vaccinated and to recover from any vaccine side effects as part of the forthcoming emergency rule expected from the Occupational Safety and Health Administration (OSHA). The announcement was part of the Biden administration's "**[Path Out of the Pandemic](#)**," which outlines a six-pronged, comprehensive national strategy to combat COVID-19, which also

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includes vaccine mandates for federal contractors ([discussed here](#)) and many additional healthcare workers, and providing further access to federal financial assistance. Here is a summary of the expected rule along with a five-step action plan you can implement immediately.

2. [\*\*Federal Contractors Subject to New COVID-19 Vaccine Mandates and Federal Contractors Face Vaccine Mandate by December 8: An Employer's Plan for Success\*\*](#)

As part of the Biden administration's "[Path Out of the Pandemic](#)" plan released on September 9, President Biden issued an executive order [adding COVID-19 vaccination requirements affecting nearly all federal contractors](#). The new mandates are significantly more aggressive than the federal employee COVID-19 safety protocols issued on July 29 that simply required vaccination certification or testing for "every federal government employee and onsite contractor." Onsite contractors who cannot confirm they are fully vaccinated will still have to follow safety protocols (mask wearing, maintaining workplace social distancing, complying with weekly or twice weekly COVID-19 testing, and limiting official travel). But now most federal contractors – regardless of whether they have employees working on federal property – will soon be required to follow new vaccine mandate requirements, effective with contracts with pending solicitations or entered into on or after October 15. What do federal contractors need to know about these significant new developments?

3. [\*\*Most Healthcare Employers Will Soon Need to Implement Vaccine Mandate\*\*](#)

The Biden administration's September 9 "[Path Out of the Pandemic](#)" expands the COVID-19 vaccine mandate covering nursing home workers and will soon reach 17 million healthcare workers at Medicare and Medicaid-certified facilities. These sweeping vaccine requirements will soon apply to approximately 50,000 providers and cover a majority of healthcare workers across the country. This new mandate will encompass hospitals, dialysis facilities, ambulatory surgical settings, and home health agencies, among others, as a *condition of participation in the Medicare and Medicaid programs*. The Centers for Medicare & Medicaid Services is



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expected to establish and publish a CMS Rule with more specifics on the vaccine requirements by October – what does your healthcare organization need to know in advance of this significant development?

4. **First Shot Fired: EEOC Files First Pandemic-Related Remote Work Discrimination Lawsuit**

After the COVID-19 pandemic required many employers to implement remote work arrangements (both to continue their operations and to comply with new state and federal regulations), many employers – and employment lawyers – have wondered how this development would impact businesses' obligation to allow employees to work from home as an accommodation to a disability in the future. As a result of a first-of-its-kind case filed last month by the U.S. Equal Employment Opportunity Commission, employers may soon get a glimpse at the administrative body's attitude toward the future of work-from-home arrangements. What lessons can employers learn from the September 7 lawsuit?

5. **Protected Concerted Athletic Activity? Labor Memo Calls for Employee Status for College Athletes**

A new memo from the National Labor Relations Board (NLRB) could pave the way for student-athletes at private universities to unionize, or at least fall within the jurisdiction of the NLRB when engaging in concerted activity. According to the September 29 release, these athletes could now qualify as employees and be entitled to protections of the National Labor Relations Act (NLRA), the federal labor law governing collective bargaining. Although not yet binding precedent, General Counsel Jennifer Abruzzo's memo notes that the agency will support efforts to bring an appropriate case before the Board for an official decision on the issue, which means it could just be a matter of time before this position becomes reality. What does your institution need to know about this significant development?

6. **An "Either Or" Approach: NLRB General Counsel Pushes for Expanded Remedies Against Employers Regardless of PRO Act's Fate**

While organized labor continues to hope that Congress will pass legislation that would tilt the labor relations



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playing field in their favor, the National Labor Relations Board's (NLRB's) newly appointed General Counsel has made clear that the Board will not wait around for lawmakers to implement new remedies against employers. Less than a month after being sworn in as General Counsel, Jennifer Abruzzo made clear to Regional Offices through a September 8 memo that they have the Board's full support to request any and all available remedies against employers liable for committing unfair labor practices or unlawfully terminating employees. Regardless of whether the Protecting the Right to Organize Act (PRO Act) ever becomes law, employers can expect the NLRB to begin to fashion creative remedies for workers that might include consequential damages such as healthcare expenses on top of the usual remedies such as back pay, front pay, and reinstatement. What do employers need to know about this troubling development?

7. **Congressional Proposal Could Mean Massive Increase to Workplace Safety Penalties**

Democrats recently introduced a budget bill that proposes significant changes to employers nationwide – including massive hikes to penalties in cases where workplace safety officials find employers out of compliance. What do employers need to know about the September 8 proposal, and what should you do to prepare yourself for this potential development?

8. **The Heat Is On: White House Initiative Aims to Protect Workers from Extreme Heat**

The Occupational Safety and Health Administration, in conjunction with the **Biden administration's initiative** to combat climate change, **announced that it will be taking enhanced and expanded efforts to address heat-related illness in the workplace.** Recognizing that heat is the nation's leading weather-related killer, the White House announced on September 20 that these mitigation efforts will include an enforcement initiative on heat-related hazards, a National Emphasis Program (NEP) on heat inspections, and a rulemaking process to develop a workplace heat standard. Although OSHA's compliance efforts have not yet been finalized, employers can begin preparing now.



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9. **The Arbitration Whipsaw Continues – Court Reinstates Portions of California Prohibition of Mandatory Arbitration Agreements**

A split Ninth Circuit panel just voted 2-1 to partially uphold California’s Assembly Bill 51 (AB 51) that prohibits employers from conditioning employment on an employee’s execution of an arbitration agreement for nearly all types of employment claims. The September 16 ruling is a mixed bag for California employers. The court held that the Federal Arbitration Act does not preempt the portion of the law that precludes employers mandating arbitration agreements as a condition of employment or from retaliating against employees or applicants who refuse to sign an arbitration agreement. However, the court emphasized as part of its ruling that the law *does not* invalidate arbitration agreements that are otherwise enforceable under the FAA, including agreements that violate the new law. The Ninth Circuit also upheld the lower court ruling that invalidated the enforcement mechanisms included in AB 51 that would have imposed civil and criminal penalties against employers who violate the new law. Thus, while the ruling partially validates the California legislature’s ongoing efforts to sidestep the FAA and prevent employment arbitration agreements, the ruling does not impact enforceability of current agreements and largely removes the most concerning aspects of the law that would create new civil or criminal penalties against employers that maintain mandatory arbitration programs.

10. **COVID-19 International Travel Ban to Be Lifted for Vaccinated Visitors: What Employers Need to Know**

The White House announced plans on September 20 to reopen international travel to the United States in early November, a move that will surely come as welcome news for many employers and businesses. Under the plan announced by COVID-19 Response Coordinator Jeff Zients, travelers will need to show proof of full vaccination prior to boarding their overseas flights, and a negative COVID-19 test will also be required within three days prior to departure. According to the announcement, enhanced contact tracing and masking will also be required, but there will be no quarantine requirement. This is an early glimpse of the administration’s plans to open up international travel to the United States, and the details could change in upcoming weeks. Until specifics emerge,

Workplace Safety

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what should employers do in preparation for this significant development?

11. **California's COVID-19 Supplemental Paid Sick Leave's Sun Has Set: What Employers Can Expect Now That SB 95 Has Expired**

California was one of the first states to pass a pandemic paid sick leave requirement for employers – but now that the leave obligations have expired, employers are bound to have questions. **SB 95 went into effect** on March 29, 2021 (retroactive to January 1, 2021), extending and expanding the requirements for employers to provide supplemental paid sick leave (SPSL) to employees impacted by COVID-19. But with SB 95 having expired on September 30, 2021 and Governor Newsom's office having indicated there are no plans to extend the law or otherwise mandate CA SPSL beyond the end of September, what do you need to know?

12. **Kentucky Hospital Employees Latest to File Suit Over Workplace Vaccine Mandate**

Coming on the heels of Kentucky's record-high number of COVID-19 infections, dozens of employees of St. Elizabeth Healthcare filed a lawsuit in the U.S. District Court in Covington against the hospital in response to its announced workplace vaccine mandate. The September 3 lawsuit alleges the employees have been coerced into being vaccinated with an "unapproved" vaccine, despite the fact the Pfizer-BioNTech vaccine received full approval from the U.S. Food and Drug Administration (FDA) on August 23. All previous efforts by workers across the country to overturn an employer vaccine mandate through litigation have failed, but what do employers need to know about this latest attempt?

13. **Florida Employers, Get Ready for Double Digits – Minimum Wage Jumps to \$10**

Florida workers will see a substantial increase to the state's minimum wage – and the increases will only continue for the next five years. Effective September 30, 2021, the hourly minimum wage you will have to pay your workers will rise from \$8.65 to \$10.00. **And as part of Constitutional Amendment No. 2 that voters approved in the 2020 general election**, the state's minimum wage will continue to increase at this time each year on its way to

\$15.00 per hour in the year 2026. The standard applies to both public and private employers, regardless of your size, and you also have new obligations if you employ tipped workers. Besides boosting pay, Florida employers also face posting obligations to reflect the new amounts. What do you need to know to come into compliance?

14. **California Employers with Warehouse Distribution Centers Face First-in-Nation Law Regulating Production Quotas**

California Governor Gavin Newsom signed into effect a first-in-the-nation law that specifically targets warehouse distribution centers with complicated restrictions that regulate the use of production quotas. While much of the media attention surrounding AB 701 has focused on high-profile online retailers, the broad scope of the bill signed yesterday means it will potentially apply to many employers across a wide range of industries that utilize warehousing operations and distribution centers. This new law, signed on September 23, contains a multitude of legal risks and goes into effect on January 1, 2022. If AB 701 applies to your operations, you will need to start preparing now. What do employers need to know about this significant new law.

15. **Changes to Texas Sexual Harassment Law Should Prompt Employers to Take Immediate Action**

Given Texas's historically employer-friendly posture when it comes to workplace law, recent amendments to the Texas Labor Code that expanded protections to employees might be particularly surprising. Indeed, the changes that took effect September 1, 2021 now expand the rights of those who assert claims of sexual harassment even beyond protections traditionally provided by federal law. And while the amended provisions provide several limitations that may not make this as sweeping of a change as some had hoped or feared, they still will require Texas employers to make some immediate changes to policies and practices.

16. **Massachusetts Extends COVID-19 Paid Leave Obligation for Bay State Employers**

Massachusetts Governor Charlie Baker just signed legislation on September 30 extending the statewide mandate for employers to provide emergency paid leave

related to COVID-19. These COVID-19 Paid Leave obligations will now continue until April 1, 2022. What do Bay State employers need to know about this latest change in an already confusing sea of voluntary and mandatory leave mandates?

17. **California Raises the Stakes for Workplace Safety Compliance with New Penalties**

Governor Newsom just signed into law a bill that could have significant ramifications for California employers by extending Cal/OSHA's scope of enforcement and creating additional penalties for employers. In particular, SB 606 makes significant changes to Cal/OSHA by creating two new categories of violations – “Enterprise-wide Violations” and “Egregious Violations” – subject to the same penalty as willful or repeated violations. The bill was signed on September 27, 2021 but will not take effect until January 1, 2022, buying some time for you to get your organization prepared for the changes ahead. What do employers need to know about this new law?

18. **China's Ban on Crypto-Related Transactions Should Remind Employers That Volatility is a Feature, Not a Bug**

The People's Bank of China (PBOC) released a September 24 statement declaring that all cryptocurrency-related transactions will be deemed illegal and that foreign exchanges are banned from providing services to residents in China through the internet. This announcement – the latest in a long line of actions taken by China reinforcing the country's tough stance against cryptocurrencies – should serve as a reminder to employers across the country that volatility is inevitable when it comes to this area.

We will continue to monitor developments related to all aspects of workplace law. Make sure you are subscribed to [Fisher Phillips' Insight system](#) to get the most up-to-date information. If you have questions, contact your Fisher Phillips attorney.