

THE TOP 16 WORKPLACE LAW STORIES FROM NOVEMBER 2021

Insights
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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 16 stories from last month that all employers need to know about:

1. OSHA's Vaccine ETS Halted by Federal Appeals Court and Assigned to Sixth Circuit Court of Appeals for Next Round of Litigation – What Should Employers Do?

- Citing potential "grave statutory and constitutional issues" with the mandate-or-test emergency vaccine rule unveiled by OSHA in early November, [a federal appeals court issued a November 6 order](#) blocking the ETS from taking effect on a nationwide basis.
- In a terse 22-page opinion, [the U.S. Court of Appeals for the Fifth Circuit reaffirmed its preliminary stay](#) that blocked the mandate-or-test Emergency Temporary Standard (ETS) on November 12, further complicating the status of the federal rule that aims to require companies with 100 or more employees to ensure that those employees are either fully vaccinated or

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produce a weekly negative test for COVID-19 beginning January 4, 2022.

- With the spin of a wooden raffle barrel in a D.C. court clerk's office and the random selection of a ping-pong ball, the fate of President Biden's ambitious vaccine mandate-or-test rule could have been sealed on November 16. [The Judicial Panel of Multidistrict Litigation announced that the conservative Sixth Circuit Court of Appeals, which typically hears disputes arising in Ohio, Michigan, Tennessee, and Kentucky, would decide the outcome of OSHA's ETS.](#) Within a matter of weeks, that Court may deliver the next nail in the coffin for the mandate-or-test ETS – a rule that aimed to impact tens of millions of workers and tens of thousands of employers. But is this all just an irrelevant prelude to an inevitable final showdown at the U.S. Supreme Court? This Insight will explore what happened in more depth and, with the help of a former Sixth Circuit Court insider, provide a glimpse into the possible future that awaits the ETS – and, in turn, the future obligations of many American employers.
- But because the ETS could get jolted back to life at any moment, either by a surprise appeals court ruling or by a final ruling from the U.S. Supreme Court, employers need to prepare. There's no telling when those events could occur – next week is just as likely as next month – leaving employers uncertain what steps to take during this uncomfortable limbo period. Adding to your discomfort is the patchwork of new state laws that may or may not conflict with your ability to implement such measures, and which may or may not be rendered invalid if and when the federal ETS is upheld. How should you approach the days ahead – balancing the risk of having to quickly perform a huge amount of work if the ETS survives the legal challenge against the chances that all of your work could be for nothing? [Here is a commonsense approach that employers should consider during these confusing times.](#)

2. Sweeping New Workplace Vaccination Rule for Medicare and Medicaid Participants Blocked by Court Orders



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- Following marching orders from the Biden administration's "Path Out of the Pandemic," the Centers for Medicare & Medicaid Services (CMS) published [its long-anticipated Rule](#) that expands vaccine mandates to more than 17 million healthcare workers nationwide. This Rule goes well beyond the [Healthcare ETS issued by OSHA in June](#). Specifically, CMS announced it will require all employees of healthcare facilities participating in Medicare and Medicaid to be fully vaccinated by January 4, 2022. Being "fully vaccinated" means two weeks have elapsed after receipt of either the second of a two-dose vaccine or a single shot of the one-dose vaccine. The Rule, impacting approximately 76,000 health care facilities across the country, is part of the administration's expansive plan to curb the deadly spread of COVID-19 and enhance patient safety in the vulnerable healthcare industry. [Here is an overview of what you face and a five-step survival guide for employers](#).
- On November 29, [a federal judge in Missouri temporarily blocked CMS from enforcing its COVID-19 mandate in 10 states](#): Alaska, Arkansas, Iowa, Kansas, Missouri, Nebraska, New Hampshire, North Dakota, South Dakota, and Wyoming. The Court's 32-page opinion questions the anticipated breadth and the scope of the mandate issued by the agency in early November, as compared to the data and rationale that CMS cites in support of the rule. While this Order is a significant victory for some covered healthcare providers that do not want to require employees to be vaccinated, its limited geographic scope creates further questions and uncertainty – especially for national healthcare employers with employees that fall both inside and outside the reach of the court's order. Regardless of your location, this decision is worthy of your attention because it could influence other courts to issue similar rulings in the near future. [What should covered healthcare employers know about this decision?](#)
- And then on November 30, [a Louisiana federal court took one giant step further and blocked the rule from taking effect in any healthcare facility across the country](#) not covered by the Missouri decision. The judge's 34-page order contends that the federal



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government does not have the authority to implement the vaccine mandate, effectively putting the entire rule on ice for the time being. But with a January 4, 2022 deadline looming for covered workers to be vaccinated (and a December 6 deadline for accommodation requests and the first vaccine dose), as well as the ever-present threat that this court order could be overturned by an appeals court or the Supreme Court, [what should healthcare employers do while waiting for a final decision?](#)

3. [Court Blocks Federal Contractor Vaccine Mandate in Kentucky, Ohio, And Tennessee](#)

As a result of a somewhat surprising ruling from a federal court judge in Kentucky, the federal government is currently blocked from enforcing [the vaccine mandate for federal contractors and subcontractors](#) in all covered contracts in Kentucky, Ohio, and Tennessee. In his 29-page Opinion and Order enjoining the federal contractor COVID-19 vaccine mandate in those three states, Judge Van Tatenhove based his decision to grant the preliminary injunction on a narrow question:

Question: "Can the president use congressionally delegated authority to manage the federal procurement of goods and services to impose vaccines on the employees of federal contractors and subcontractors?"

Answer: "In all likelihood, the answer to that question is no."

What do federal contractors in Kentucky, Ohio, and Tennessee need to know about the November 30 ruling – and what (if anything) should contractors in the rest of the country do?

4. [NLRB's General Counsel Tells Unionized Employers They Must Bargain Over Mandate-or-Test Vaccine ETS Rule](#)

The National Labor Relations Board's General Counsel issued a Memorandum staking out her position that unionized employers must bargain with their unions over the implementation of [OSHA's recently announced mandate-or-test Emergency Temporary Standard \(ETS\)](#). That rule – [currently stalled in litigation but poised to potentially be resurrected at any moment](#) – will require



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covered employers with 100 or more employees to either mandate their workforce receive the COVID-19 vaccination or test them weekly to ensure they are not infected. What do unionized employers need to know about the November 10 memorandum, and what should they do while waiting for the ETS implementation date?

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5. **[U.S. House Passes Federal Paid Family Leave Bill – Could It Be Coming Your Way Soon?](#)**

The U.S. remains one of only a handful of developed countries without a federal paid family leave law – but we are one step closer to such a plan becoming reality as the U.S. House of Representatives recently passed a program that would provide four weeks of paid family and sick leave to many workers beginning in 2024. As we previously [discussed](#), the Biden administration has made this legislation a priority, originally proposing 12 weeks of paid family leave in the Build Back Better Act. After briefly jettisoning paid family leave altogether, the House passed a slimmed-down version on November 19. It now faces an uncertain future at the Senate, where its prospects for survival and passage are hazy at best. What do employers need to know about this legislative provision and what can you expect in the coming weeks and months?

6. **[California Presses Pause on Implementing New Federal Workplace Vaccine Emergency Rule](#)**

California is the latest state to hold off on implementing the [newest federal OSHA Emergency Temporary Standard \(ETS\)](#) in light of the onslaught of legal challenges across the United States. That rule – [currently stalled in litigation but poised to potentially be resurrected at any moment](#) – will require covered employers with 100 or more employees to either mandate their workforce receive the COVID-19 vaccination or test them weekly to ensure they are not infected. Depending on what happens with the federal litigation and the current temporary stay of the federal ETS, California’s pause could be short-lived or longer in duration – creating some uncertainty in workplaces across the state for now. What should California employers do in the meantime?

7. **[Florida Passes Legislation Banning Vaccine Mandates: What Employers Need to Know](#)**

During a special legislative session, Florida passed a new law banning private employers from mandating COVID-19 vaccines unless several exemptions are offered to employees. The law, signed by the governor on November 18, comes as OSHA's national emergency temporary standard mandating vaccines is [embroiled in legal challenges](#). What do Florida employers need to know about this new law, which takes effect immediately

8. [New Tennessee Law Restricts Workplace Vaccine Requirements: What Should Employers Do?](#)

In response to [OSHA's Vaccination and Testing Emergency Temporary Standard](#) that seeks to require covered employers across the country to either mandate the vaccine or test for COVID-19 on a weekly basis, Tennessee Governor Bill Lee recently signed sweeping [new COVID-19 legislation](#) into law to counteract the federal mandate-or-test rule. The new law took immediate effect when he signed it on November 12, restricting employers' and businesses' ability to require proof of COVID-19 vaccination and take adverse actions against employees for refusing to show proof COVID-19 vaccination. It also prohibits public employers and public schools from mandating vaccination or requiring masks on premises unless certain conditions are met. Additionally, the new law – creating Title 14 of the Tennessee Code – provides that employees may collect unemployment benefits if they are separated from employment as a result of refusing to receive a COVID-19 vaccine. Considering the conflict with [the OSHA ETS](#), which is [currently blocked by a federal court order](#), and the expected wave of lawsuits challenging Title 14, Tennessee employers might feel they are stuck between a rock and a hard place. Below is our assessment of how Title 14 impacts your ability to impose vaccination requirements and mask mandates and how you should reconcile the conflicting Tennessee and federal law.

9. [Denver-Area Employers Face New COVID Mask Mandate](#)

Given the recent uptick in COVID-19 cases in the local area and concerns related to hospital capacity, Denver – joined by other local counties (Adams, Arapahoe, and

Jefferson – [is reinstating mask mandates for public indoor spaces](#) regardless of vaccination status effective now through January 3, 2022 at 11:59 p.m. unless extended. These spaces include but are not limited to common areas of apartment buildings, offices, gyms, shops, cultural facilities, restaurants, bars and night clubs. This latest development will impact employers throughout the Denver metro area, requiring you to take proactive steps in order to comply with new local health protocols. What do you need to know about [this new mandate](#) – and what do you need to do?

10. [**New York Extends Paid Family Leave to Care for Siblings**](#)

New York employers will soon need to provide Paid Family Leave to employees to care for additional family members with a serious health condition: siblings. Governor Kathy Hochul signed into law an amendment to New York's Paid Family Leave law that expands the existing paid leave rights of New York employees. What do employers need to know about this November 1 development?

11. [**New York Employers Must Soon Provide Notice of Digital Workplace Monitoring**](#)

New York employers who monitor employee's telephone calls, emails, or internet use must soon provide written notice to employees. The change comes during an era where many employees are communicating with each other via digital means on a near-constant basis, leading to the opportunity to look over workers' shoulders like never before. Such activity will now be regulated in New York, leading to new compliance obligations for employers. Here's what employers need to know about this new law, signed by the governor on November 8 and taking effect in May 2022.

12. [**Federal Immigration Officials Smooth Path for Spouses of Highly Skilled Workers to Receive Work Authorizations**](#)

Federal immigration officials released helpful guidance that eases the process of spouses of highly skilled workers to receive their work authorization documentation, no doubt welcome news for employers across the country. The November 12 policy guidance

issued by the United States Citizenship and Immigration (USCIS) to amend its Policy Manual addressed the automatic extension of employment authorization for certain H-4, E, and L nonimmigrant dependent spouses, rescinding restrictive previous guidance. This move comes not long after the USCIS entered into a settlement agreement promising to provide significant changes to the employment authorization process for the spouses of H-1B and L-1 employees. Thousands of spouses have been suffering from long-delayed processing times for employment authorization renewals, including many who have lost employment, so this policy guidance should bring some immediate relief. What do employers need to know about this new development?

13. **[In a Win for Agricultural Employers, Federal Appeals Court Gives Green Light To H-2A Laborer Arbitration Agreements](#)**

A west coast federal appeals court opened the door for H-2A employers to enforce arbitration agreements in employment disputes even outside the context of a collective bargaining agreement. The Ninth Circuit Court of Appeals – which has jurisdiction over most states on the west coast – found there was no “economic duress” or “undue influence” in the H-2A employer’s use of an arbitration agreement that ensures disputes are resolved by arbitration rather than through litigation in the courts. The November 3 decision in *Martinez-Gonzalez v. Elkhorn Packing Co., LLC* is huge news for H-2A employers already using arbitration agreements or considering rolling out an arbitration policy. What does your business need to know about this critical ruling?

14. **[Federal Departments Shed Light on Upcoming Health Plan Disclosure Requirements](#)**

A collection of federal agencies recently released guidance to assist group plan health sponsors navigate upcoming disclosure obligations. On November 17, the Internal Revenue Service, the U.S. Department of Labor, and the U.S. Department of Health and Human Services, along with the Office of Personnel Management, issued interim final rules (IFR) to help group health plan sponsors understand and prepare for new disclosure and reporting obligations regarding health plan costs and spending under the Consolidated Appropriations

Act, 2021 (CAA). The CAA technically requires group health plans to file the first round of required information by December 27, 2021. Thankfully, the IFR reaffirms [guidance from August 2021](#) that delays initial filing for another year until December 27, 2022. What else do group health plan sponsors need to know?

15. [**College Basketball Players Group Tips-Off Battle Over Student-Athlete Employment Status**](#)

A nascent “advocacy” group just opened the first front in the newest battle over the status of collegiate student-athletes under the National Labor Relations Act. The College Basketball Players Association filed a one-line [unfair labor practice charge](#) against the NCAA on November 10, claiming the NCAA violated the NLRA by classifying college athletes as student-athletes. The filing comes on the heels of a [recent memorandum](#) from the NLRB’s general counsel in which she announced her belief that student-athletes were employees under the NLRA. What do universities need to know about this development?

16. [**Keep \(Some\) Opinions to Yourself: Court Decision Reminds Sports Executives the Importance of Documentation During Hiring Process**](#)

A recent federal appeals court decision demonstrates to employers in the sports industry the value of documenting conversations and notes made during the hiring process – and serves as a critical warning about how easily an innocent (but unfortunate) comment could be taken out of context to spell doom in a lawsuit. The November 18 decision from the Seventh Circuit Court of Appeals in *Reinebold v. Bruce* upheld the dismissal of an age discrimination claim filed by an applicant for a university’s head baseball coach position, relying upon the good notes taken by hiring personnel during the candidate’s interview. What can your organization learn from the decision, and how can you avoid the potential misstep that almost came back to bite the team?

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.

