

TOP 10 WAGE AND HOUR TRENDS FOR 2022 – AND WHAT EMPLOYERS SHOULD DO TO PREPARE

Insights
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We recently provided our predictions for what employers could expect to see in the wage and hour field over the next year as part of [our FP Forecast series](#) – but we had too many insights to fit into that edition. So we've taken things to the next level and developed a comprehensive piece that provides employers with the top 10 trends you can expect to see in 2022 – and offers guidance on how you should proactively prepare. And if you want more information, join us for [an exclusive webinar on February 23](#) where we'll dive deeper on all of these topics.

- 1. Feds Will Turn Up the Heat** – The Department of Labor announced in early February that it will be hiring at least 100 new wage and hour investigators, while we also understand it's staffing up with agency lawyers for enforcement purposes – and there's no doubt the agency will be looking for a return on that investment. The domino effect of these measures means we will see more investigations in 2022, increased liquidated damages and civil money penalties, more challenges filed by employers to DOL findings, and increased litigation. How can you avoid this mess? Begin auditing your pay practices now to ensure compliance before any outside investigation – or lawsuit – takes place.
- 2. Misclassification Challenges Will Cause Businesses to Reevaluate Structure of Workforce** – A collection of federal agencies and state regulators have indicated that they will place independent contractor arrangements in their crosshairs in 2022, while also aiming to capture as

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Kathleen McLeod Caminiti

Partner and Co-Chair, Wage and Hour Practice Group

908.516.1062



J. Hagood Tighe

Partner and Co-Chair, Wage and Hour Practice Group

many businesses as possible in joint employment situations. This effort to impose liability for misclassification and a variety of wage and hour violations should cause you to rethink business affiliations and contractor structures with this new reality in mind.

803.740.7655

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- 3. Hiring Minors to Address Workforce Shortages Will Come Back to Bite Unsuspecting Employers** – Many employers that expanded their hiring pool by lowering minimum ages in 2021 will find themselves at the mercy of federal and state regulatory agencies and class action lawsuits in 2022. The wage and hour rules for hiring 14- and 15-year-olds are far more restrictive than those for 16- and 17-year-olds, and those unfamiliar with the lay of the land will face the music. You must train your managers about these restrictions and hold managers accountable for compliance.
- 4. Retention Bonuses and Incentives Will Cause Trouble** – Besides hiring minors, the other solution that many employers arrived at to address workforce shortages was to throw money at workers through retention bonuses and incentives. While there's nothing inherently wrong with doing so, employers who did not carefully think through their bonus and incentive plan documents to minimize legal risks could be facing a problem in 2022. You can also expect a wave of new litigation from employees who believe they were unfairly denied or shorted on such bonus payments.
- 5. The Great Remote Work Migration Will Lead to The Great Remote Work Litigation** – Working from home became entrenched in the lives of up to 60% of American workers for much of 2020 and 2021, and many employees will remain remote or hybrid for the foreseeable future. And more employers are using apps to communicate with employees outside of the office. Which means you can expect a wave of wage and hour litigation from workers claiming they are not getting paid for all hours worked (including time spent checking employer-required apps) and have not been properly reimbursed for business expenses (Wi-Fi, data plans, cell phones, etc.). Two steps you can take: make the effort to track employees' work through technology and consistent communication, and proactively develop policies and compliance systems.

6. Class and Collective Litigation Will Go Overtime –

Another area where you can expect to see a greater amount of litigation in 2022 is in class and collective claims involving overtime pay. The scenarios that will lead to such an increase have in many cases already played out: many employers handed out hazard pay, bonuses, and other incentives during the pandemic to retain and recruit new workers and to reward staff. But in classic “no good deed goes unpunished” fashion, these efforts may come back to bite you in the end. If you failed to account for overtime calculations in your payments, you could hear from plaintiffs’ attorneys or government investigators looking to build on your generosity. Review your payment structures now with the help of a wage and hour lawyer to make sure you’re in the clear before you get bad news later in the year.

7. Labor Department’s New Overtime Rule Will Ruffle

Feathers – Speaking of overtime, the DOL has indicated it will issue a new federal regulation transforming the overtime rule by April 2022, and the new standard is bound to upset some businesses. Under the FLSA, only employees who earn more than \$35,568 (and meet certain job criteria) are exempt from overtime pay. To make more employees eligible for overtime, we expect DOL to not only significantly raise the minimum salary – we’ve heard it could be close to the \$47,000 rate proposed by the Obama DOL or as high as \$82,000 by 2026 – but to include a mechanism calling for automatic updates every one to three years. The time is now for you to once again focus on who should and should not be classified as exempt, and reevaluate how to compensate non-exempt employees, especially since these changes will lead plaintiffs’ lawyers to hone in on classification litigation late in 2022.

8. Infrastructure Efforts Will Lead Unwitting Employers to Make Wage Mistakes

– The amount of cash floating down from the federal government as a result of the infrastructure legislation and related executive orders will be too much money for many businesses to ignore, and we’ll see a whole host of businesses unwittingly become obligated to comply with laws they have no experience with as they become federal contractors or subcontractors (sometimes without even realizing it). We will see a flood of businesses unfamiliar with the Davis-Bacon Act, the Service Contract Act, and state law

prevailing wage claims scramble to understand what they got themselves into. New government contractors will need to develop new compensation plans and increase labor and benefit budgets in order to stay on the right side of the law. And even those businesses familiar with such obligations may need a refresher in 2022, as DOL has stated it intends to “update and modernize” the Davis-Bacon rule – which will likely only complicate things.

9. **Look to the States for the Real Action** – The plaintiffs’ bar is sick and tired of facing judges they consider to be employer-friendly in federal court, forcing them into settlements they aren’t happy with and handing them losses in cases they thought were winners. You can expect workers’ attorneys to bring more wage and hour class action lawsuits in state courts in 2022, especially in jurisdictions with longer statutes of limitations and less-developed law. We are also familiar with situations where procedural problems related to personal jurisdiction in multi-state collective actions frustrate plaintiffs’ attorneys, further leading them to state courts. For this reason, you should prioritize an audit for wage and hour compliance, taking state law into account, by the middle of the year.
10. **Commissions and Bonuses Will Receive Increased Legal Focus** – Some states, such as New York, have specific legislation requiring the payment of commissions to be specifically laid out in written agreements. This is because commissions are often mistaken for bonuses, seen as one in the same by employers and workers – until a plaintiffs’ attorneys gets a glimpse of the situation. The problem is that once a commission or bonus is “earned,” it must be paid and there is no way to claw back the payment when a third party doesn’t pay you the amount that is intended to fund the payout, or the employee resigns, without running afoul of the state rules prohibiting deductions. Review and update your comp plans now, as we expect great focus on these issues in 2022.

Conclusion

Fisher Phillips will continue to monitor these developments and provide updates as appropriate. Make sure you are subscribed to [Fisher Phillips’ Insight System](#) to get the most up-to-date information.

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For further information, contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in [Wage and Hour Practice Group](#).