



## **FP Forecast: April 2022 Edition**

Insights

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*Welcome to FP Forecast, a monthly outlook featuring Fisher Phillips thought leaders providing their insights into what employers can expect in 2022 and beyond. By following along each month, you'll be in the best position to anticipate the expected changes and prepare your organization for what lies ahead. This month we look at the future of employee leaves and accommodations and employee benefits and tax – and take a special look at what automotive dealership and education employers should prepare for.*

### **Employee Leaves and Accommodations**

**Myra Creighton, Megan Winter – Co-Chairs of FP's Leaves and Accommodations Practice Group**

#### **Mental Health Challenges Will Dominate Conversation**

Employees are still struggling with pandemic anxiety, depression, and other mental health challenges that have exploded in the past few years – and open discussion of these subjects has now been normalized. In 2022, employees that may have not previously recognized these symptoms or kept them to themselves will approach you with their concerns. And while your managers may be well trained to recognize when an employee may need an accommodation for a physical disability, they may not recognize when an employee expresses that they have a work problem related to a mental health issue that needs an accommodation or triggers the interactive process. You will need to train your managers on these issues before the year is out.

#### **Job Descriptions Will Take on Renewed Importance Due to WFH Demands**

As you bring employees back to the workforce, you will begin to receive requests from employees to work remotely as an accommodation for their mental or physical disabilities. And thanks to heightened scrutiny by the EEOC and state enforcement agencies, you will have to establish that employees cannot perform the essential functions of their job from home if you seek to deny or limit these requests. That may be a tall order considering many employees have been successfully performing the job from home for two years now. Most employers have not traditionally thought about defining the essential functions of jobs or writing the job descriptions with in-person attendance in mind – and that could come back to bite you unless you act quickly. You should spend Q2 of 2022 considering the elements of the job that were lost or diminished by at-home work and revise your job descriptions before the accommodation claims land on your desk.

## **Patchwork of Paid Leave Laws Will Continue to Frustrate Compliance Efforts**

Despite a renewed push by President Biden during last month's State of the Union address, Congress will not pass a federal paid leave program in 2022. And given that Democrats are likely to lose control of Congress in November, federal paid leave does not appear in the cards for the foreseeable future. But employees became accustomed to paid COVID sick time, and states and local governments will pick up the slack in the absence of federal action. We'll see even more sick leave, paid leave benefit programs, and expanded state family leave programs across the country, leaving multi-state employers to deal with a morass of compliance obligations and notice requirements. The work-from-home or hybrid option will only complicate this compliance puzzle because most of these local ordinances apply to where the work is performed – which is now the location of someone's home – not where the company office is located.

## **Employee Benefits and Tax**

***Sheldon Blumling, Chair of FP's Employee Benefits and Tax Practice Group***

## **401(k) Plan Excessive Fee Litigation Will Skyrocket**

Employers were hoping that 2022 would be the year that the Supreme Court would stem the tide of largely copycat 401(k) excessive fee cases. We came into the new year looking forward to SCOTUS establishing a reasonable pleading standard for ERISA fiduciary breach claims that would require more than mere naked allegations regarding administrative fees and investment options. But our hopes were dashed with January's Hughes v. Northwestern University decision that thus far has appeared to make it easier for these cases to survive court scrutiny at the outset of the case. As a result, we will see an explosion of this type of litigation for the rest of 2022 and beyond. And while most of the litigation thus far has targeted the largest plans and employers, with plan assets in the billions or multiple hundreds of millions of dollars, we will start to see plaintiffs' attorneys target smaller employers this year. Accordingly, now is the time to review your practices for selecting and monitoring plan service providers and investments, regardless of the size of your plan.

## **Health Plan Compliance Obligations Will Reach a Tipping Point**

Since the passage of the ACA, the volume and complexity of health plan compliance obligations has been steadily growing. And recent years have seen significant new administrative requirements to reduce cost-sharing surprises, as well as various initiatives intended to protect mental health-related benefits and prohibit discrimination. Historically, many employers have relied on insurance carriers and brokers for most of their health plan compliance needs. However, the volume and complexity of these needs has now reached a tipping point in 2022 where most employers will need to invest in additional resources to ensure your compliance practices are not exposing you to regulatory and litigation risks.

## **To Attract and Retain Executive Talent. You'll Need to Get Creative with Compensation**

A market base salary and annual bonus, coupled with a competitive standard benefits package, has become mere table stakes for attracting and retaining key executive talent. In order to recruit and hold on to your leaders, you'll need to display more commitment and creativity in 2022 when it comes to incentives and executive compensation. Consider longer-term incentive and deferred compensation plans to create the opportunities demanded by executives and the retention incentives demanded by boards and shareholders. This is particularly true for privately held employers that may be struggling to compete with the equity compensation opportunities available from publicly traded employers. Many privately held employers are getting creative with phantom equity, deferred compensation, and other longer-term incentive arrangements to compete.

## **Automotive Dealership Industry**

**Matt Simpson, Co-Chair of FP's Automotive Dealership Industry Team**

### **Compliance Will Take on Renewed Importance**

The cost of litigation has always made compliance with workplace laws essential. What's different in 2022, however, is that many of the tools dealers have used to rely on to manage employment litigation have been eroded. For example, Congress enacted legislation earlier this year prohibiting employers from unilaterally enforcing arbitration agreements for disputes involving sexual harassment – and many states are not only following suit but pushing the prohibition further to cover all sorts of employment claims. It is therefore imperative in 2022 that dealers update their policies to reflect the modern era and train their managers to understand the ever-changing employment law landscape. This will help you be ready to manage challenging personnel decisions as they arise.

### **Pay Plans and Leave Policies Need to be Bolstered to Attract and Retain Workers**

Labor shortages are not new to the dealership industry. For years, dealers have had to work hard and creatively to attract all manner of employees, from technicians to salespersons. Unfortunately, what we're dealing with in 2022 is different – and there does not appear to be relief on the horizon. Dealers will have to continue to find creative, yet compliant, methods for recruiting and retaining qualified employees in an increasingly competitive labor market. As wages increase across all industries, dealerships will be forced to revisit the traditional, incentive-based commission pay plan for more secure guaranteed pay. And, as businesses offer employees more flexible scheduling opportunities, dealerships will have to reconsider their own leave and time-off policies.

### **Cyberattacks Will Lead Dealers to Take Security Seriously**

Given the highly sensitive nature of much of the information stored in dealer systems, data security and workplace privacy will become even more critical in 2022. Ransomware attacks are on the rise, and we will see regulators across the country step up their efforts to ensure businesses are securing personal information. This has already begun in the employment context with several cities

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and states having passed legislation restricting employee monitoring (including telephone, email, and internet usage) and the use of biometric data for timekeeping, security, and identity authentication purposes. Your dealership will need to adapt to this new era in 2022 or risk facing potentially devastating consequences.

## **Education Industry**

***Suzanne Bogdan, Chair of FP's Education Industry Team***

### **Culture Wars Will Continue to Rage**

We will see a continuation of the culture wars that are raging in several states throughout 2022. The debate will center around three main areas: prohibitions or limitations on the discussion of sexual and gender identity issues in schools; whether to allow transgender girls to play in girls' sports; and education – including employee training – on race discrimination and implicit bias. Many existing laws in these areas presently apply to public schools, but private schools should expect that debate about these restrictions will bleed into their programs as well. You should expect parents to make demands for more disclosure or restrictions in 2022. As various groups have challenged many of these laws as violating free speech and civil rights, schools will be left in limbo until the courts sort through the claims. And since many of these laws carry personal liability for the teachers, administrators, or counselors, expect to field questions and concerns from your staff as well.

### **Gender Identity Accommodation Requests Will Continue to Skyrocket**

Meanwhile, schools will continue to see an exponential increase in gender identity accommodation requests – for both students and employees. Your administration will be at the forefront of tackling these challenging issues in 2022. Many of the requests will be made on behalf of very young students, which will present confidentiality challenges – not to mention the need to properly frame boundaries around appropriate discussion of sexual topics at school. If you haven't yet created a game plan for how you will handle such requests, you need to do so immediately to prepare for the inevitable.

### **Religious Rights Will Be Pushed as Never Before**

Just as we'll see more movement in the culture wars, we'll also see more activity with religious schools wanting to strengthen and understand their rights to uphold their tenets in both employee and student relationships and behavior standards. As gender identity issues become more prevalent and the Biden administration re-implements stronger protections for transgender students in 2022, we'll see more challenges to laws that do not presently contain exemptions for religious institutions in the coming year. We will also see more cases where religious schools and institutions assert their rights claiming the ministerial exception permits them to terminate teachers and other functional ministers who fail to comply with important religious guidelines established by the school.

## Conclusion

We will deliver monthly [FP Forecast insights](#) forecasting what to expect across the entire spectrum of workplace law over the entire course of 2022, so make sure that you are subscribed to [Fisher Phillips' Insights](#) to get the most up-to-date information direct to your inbox. If you have further questions, contact your Fisher Phillips attorney or the authors of this Insight.

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Employee Benefits and Tax

Employee Leaves and Accommodations

## ***Industry Focus***

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