

# TOP 10 WORKPLACE LAW PREDICTIONS FOR 2022

Insights

Jan 3, 2022

Workplace law has changed dramatically over the past two years of the pandemic. Unfortunately, 2022 (or is it “2020 too”?) is shaping up to be another year full of new rules and regulations within this volatile area of law. Of course, the biggest labor and employment changes in the coming year will once again be related to the pandemic and the challenges that it creates, but there are other issues that will plague the workplace. Here are our top 10 labor and employment law predictions for 2022.

## 1. COVID-19 Issues Will Dominate the Workplace

COVID-19 is first on this list for a reason. The pandemic continues to dominate the news, especially with the emergence of the new Omicron variant. What will COVID-19 hold for employers in the new year?

- **More Workplaces Will Delay their Return to Work –** An increasing number of employers will delay the return to the office for their workforces. In addition, as many employers have recognized that some employees do not need to be in the office every day, we will see organizations permanently adopt a remote or hybrid schedule. The rise of the Omicron variant means this trend is likely to continue well into 2022 – and some workplaces that have returned to

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the office may even choose to return to a remote or hybrid schedule again.

- **The Supreme Court Will Determine the Vaccine Mandate's Fate** – The Supreme Court announced that it will hear oral arguments over both [OSHA's ETS](#) (covering all businesses with 100 or more employees) and [CMS's healthcare mandate](#) (requiring all employees of healthcare facilities that participate in Medicare and Medicaid to be fully vaccinated by January 4). Our prediction? SCOTUS will permit the CMS mandate to move forward given the serious nature of the pandemic at healthcare organizations, but will block the general ETS as being an overbroad exercise of regulatory power. This is just one prediction, however, so you should begin preparing to comply as if both rules will be given the green light. You can review a series of steps to prepare

## 2. The Supreme Court Will Decide Several Labor and Employment Law Cases

There are several additional cases currently before the Supreme Court that will impact employers, and additional cases could be added during the term ending in June 2022. Several cases we're watching include:

- **Retirement-Plan Sponsors**– The question before the Court in *Hughes v. Northwestern University* revolves around the obligations of those entities that control defined-contribution retirement plans such as 401(k)s. SCOTUS will determine whether allegations that such a plan paid or charged its participants fees that substantially exceeded fees for alternative available investment products or services are sufficient to bring a claim against plan fiduciaries for breach of the duty of prudence under ERISA. The Petitioners claim that lawsuits regarding excessive fees allow plan participants a remedy when they believe that there is imprudent management. Moreover, the Petitioners assert that without these lawsuits it would be impossible for plan participants to seek imprudence claims based on excessive fees.

- **PAGA Waivers in Arbitration Agreements** – The case of *Viking River Cruises, Inc. v. Moriana* is of critical importance for employers in California. The Supreme Court has held that arbitration agreements are fully enforceable even in cases involving collective or representational adjudication of certain claims. But courts in California do not follow this precedent for claims brought under the California Private Attorneys General Act (PAGA), which allows employees to seek monetary awards on a representative basis on behalf of other employees. The question presented in this case is whether the Federal Arbitration Act (FAA) preempts California court rulings that said arbitration agreements waiving the right to bring representative actions under PAGA are unenforceable under state law. Our prediction? The Court will decide that California courts are required to enforce arbitration agreements in PAGA cases. [You can read more about this case here.](#)

### **3. Midterm Elections Will Doom President Biden's Legislative Agenda**

The midterm elections in November 2022 will ultimately control President Biden's ability to pass his political agenda, which includes labor and employment laws like [the PRO Act](#). Currently, the Senate is split 50-50 (with Vice President Harris casting any deadlocked vote) and the Democrats hold a razor-thin eight-seat advantage in the House of Representatives. There is no doubt that the Democrats face a tough battle to maintain control of both chambers, especially given the historical track record of the party losing the White House gaining big numbers at the next midterm election. We predict the Republicans will once again regain control of both chambers, making it near impossible for the president to pass his legislative agenda given the expected lack of bipartisan support. Of course, the outcome of the election will not change Biden's ability to implement new rules and regulations through various federal agencies – so expect to see a flurry of activity at the Department of Labor, the National Labor Relations Board (NLRB), OSHA, and various other agencies.

#### 4. Labor Board Will Broaden Enforcement and Expand its Administrative Agenda

Speaking of the NLRB, it is one of the most active government agencies that affects the workplace. It is unique in that any change in administration causes a shift in the regulations and interpretations of prior cases. 2022 will be the first full year that the NLRB can make these changes since the balance on the Board only recently changed to favor the Democrat appointees (the Board currently has three Democrat appointees and two Republican appointees). Among the changes that you can expect in the new year:

- **A change to the joint employer standard** – The NLRB released a notice of proposed rulemaking on December 10 and it is expected to issue the proposed rule in February 2022. The rule will likely make it easier for employers to be classified as joint employers if both employers have the right to direct an employee's working conditions. This rule will dramatically affect any employer that uses staffing companies. You can read more about the joint employer standard
- **Union organizing** – We predict the Board will expand union access to employer property, including the employers' email for union solicitation and distribution of organizing materials.
- **Lowered standard to establish an unfair labor practice** – We believe the Board will reexamine the *Wright Line* case, currently requiring that the General Counsel to make an initial showing that (1) the employee engaged in Section 7 activity, (2) the employer knew of that activity, and (3) the employer had animus against the Section 7 activity in order to proceed with an unfair labor practice charge. Once the General Counsel makes its initial case, then the burden of persuasion shifts to the employer to prove it would have taken the same action even in the absence of the Section 7 activity. We predict that 2022 will see the Board adopt a lowered standard that will be less favorable to employers.

- **Expanding the definition of covered employees** – For example, the NLRB will be looking to expand the NLRA to cover college athletes and workers previously classified as independent contractors. The NLRB will adopt a new standard for determining whether a worker is an independent contractor, and it will make it more difficult for workers to be properly classified as independent contractors. The General Counsel has specifically requested to entertain cases to determine whether a party has met its burden of establishing independent contractor status, with emphasis on the significance of entrepreneurial opportunity. Moreover, in the last week of December, the Board requested briefs on whether it should retain the standard that it adopted in 2019 or return to the Obama-era standard.
- **Enhanced remedies for violations** – The General Counsel has instructed the Regional Directors to seek expanded remedies, including consequential damages, front pay, and injunctive relief for violations of the National Labor Relations Act.

## **5. OSHA Will Vigorously Enforce Workplace Safety**

OSHA's 2022 agenda largely depends on whether the Supreme Court upholds the COVID-19 vaccine mandate-or-test ETS. If this rule is permitted to move forward, then the agency can be expected to begin vigorous enforcement. Regardless of the outcome of the Supreme Court case, you should expect OSHA to vigorously investigate any complaints related to COVID-19 throughout the new year. The agency already keeps [an up-to-date page with COVID-19 violations](#) and you can expect that list to grow in 2022.

## **6. Workplace Mental Health Issues Grow in Importance**

There is no doubt that the pandemic has played havoc on people's mental health. Many professions have become even more overworked and workers in these areas have resigned in massive numbers (e.g., healthcare, hospitality, retail, other frontline workers,

etc.). School cancellations, quarantine requirements, and remote schooling have also made balancing work and home more difficult for parents, which has further contributed to mental health problems. Unfortunately, mental health issues are not going away. [One survey from the Center for Disease Control even found](#) that around two in five adults reported experiencing depression and anxiety during the pandemic.

As we pass the second anniversary of the pandemic, we don't think it's a bold prediction to say that more of your employees will experience mental health issues. You must be prepared to address the issue of mental health or you will suffer from increased resignations, lower productivity, and other problems. This may be especially true at the beginning of this year as the Omicron variant delays many companies' plans to return employees to work, some schools shift to remote learning, more individuals voluntarily remain at home, and social gatherings become less frequent.

## **7. Union Elections and Organizing Will Increase**

2021 saw critical developments regarding union organizing in the workplace last year, including several high-profile organizing events across the country. We predict such activity will increase this year – not only because workers are now feeling more empowered, but because the NLRB General Counsel's agenda will result in more worker-friendly regulations. One such area where we can expect to see new rules? The issue of smaller unit sizes, which will make it easier for employees to organize and will force employers to bargain with several smaller units rather than a single larger unit. At a minimum, you should enter 2022 aware of issues related to union organizing to avoid violating the National Labor Relations Act.

## **8. The Great Resignation and Great Reshuffling Will Continue**

Among concerns of higher inflation and supply chain constraints, employers in the coming year must continue to respond to the higher-than-normal loss of

employees through resignations and an inability to find replacements for them. This is not strictly a workplace law topic, but legal issues are often at the heart of poor retention and recruitment problems. Many employees are suffering from burnout and mental fatigue, as explained above. But many others are leaving their jobs due to a perceived poor work environment or better opportunity at other locations. Employers that are experiencing a loss of employees need to determine the cause so that they can address it. Employers in this circumstance are well advised to communicate with their employees to determine why they are leaving through exit interviews. [Here is a review of our latest survey on the subject, along with some recommendations to address the crisis.](#)

## **9. Ransomware Attacks, Consumer Privacy Laws, and Cybersecurity Concerns Will Skyrocket in the New Year**

When it comes to data security and workplace privacy, employers will need to keep their guard up like never before in 2022. Ransomware attacks, consumer privacy legislation, biometric privacy, and the Biden administration's cybersecurity efforts need to be front of mind as you plan for the new year. [Our Privacy and Cyber team published its predictions for 2022 and can be found here](#) – but the bottom line is that preparation, diligence, and immediate responsiveness are absolutely necessary.

## **10. Cryptocurrency, the Blockchain, and the Metaverse will Take Center Stage in 2022**

2021 was a huge step forward for cryptocurrencies and blockchain technology as they officially garnered mainstream attention, with NFTs being the breakout crypto trend of 2021. Everywhere you looked, from Saturday Night Live to South Park, the world was talking about how crypto and blockchain technology could change the world. We expect this trend to continue in 2022 as more companies continue to evaluate how cryptocurrency and blockchain technology can enhance their business opportunities,

whether through payments, NFTs, smart contracts, or permissions/permissioned blockchains. These evaluations will invariably have a huge impact on the workforce, as employers will need to evaluate the options available to them both from a cultural and legal perspective. And let's not forget about the newest development in cryptocurrency that will dominate the conversation in the new year: the Metaverse.

Employers are still figuring out what the Metaverse is and how it will impact their businesses. But make no mistake, it's coming – and employers would be wise to start figuring on the pros and cons of this revolutionary development and how it may impact the future of work as we know it. Stay tuned for much more about this topic from Fisher Phillips in the very near future.

## **Conclusion**

As with the past two years, COVID-19 will continue to dominate employer's concerns in 2022. Moreover, the coming year is starting to look a lot like the year that just passed – with increasing infection numbers and concerns about breakthrough cases in workers that are vaccinated. The good news is that you will soon get some clarity on issues related to workplace vaccine rules when the Supreme Court issues its rulings on these mandates in January. The bad news: the rest of the year will include much uncertainty and whiplash-inducing changes in direction. Employers that stay on top of trends and remain flexible will thrive in 2022.

Regardless of what happens, you must be prepared for labor and employment law changes. We will monitor key developments throughout 2022 and provide updates as warranted, 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 author of this Insight.