

THE TOP 16 WORKPLACE LAW STORIES FROM DECEMBER 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. Vaccine Showdown at the Supreme Court

The two most ambitious workplace vaccine rules issued by the Biden administration this fall – the OSHA ETS and the CMS Healthcare Mandate – will get their day at the Supreme Court after a rollercoaster December. Both rules entered the month on life support, having been blocked in whole or in part across the country as of December 1.

- Serving up yet another curveball for healthcare employers, the Fifth Circuit Court of Appeals effectively [reactivated the CMS vaccination mandate across nearly half of the country with a surprise decision on December 15](#). The ruling raised further challenges and posed new questions for affected employers regulated by the Centers for Medicare and Medicaid Services (CMS).

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- In one of the more shocking developments in a year full of surprises, [a federal appeals court breathed new life into the Biden administration's mandate-or-test emergency vaccine rule with a stunning decision on December 17](#). A three-judge panel of the Sixth Circuit Court of Appeals – which had been widely expected to keep the ETS on ice pending resolution of the many legal challenges against it – overturned the stay blocking the rule from taking effect. The upshot? Employers now have a January 10 deadline to work toward, which means the time to take action is now.
- The nation's highest Court then announced it will step in and rule whether both rules should be temporarily blocked or are permitted to move forward as planned. In a pair of brief orders issued on December 22, [the Supreme Court accepted review of the challenges to both OSHA's ETS and CMS's healthcare mandate](#) and announced that oral argument will be held for both cases on January 7.
- Want more info? [Our latest Insight](#) provides a preview of the main arguments being raised by both sides, our predictions for what we expect to have happen, and a step-by-step plan for what employers should do while waiting for the rulings.

2. [5-Step Plan for Employers as CDC Reduces COVID-19 Isolation and Quarantine Periods](#)

In response to the ongoing Omicron wave of COVID-19 cases, the Centers for Disease Control and Prevention just updated its [guidance](#) to reduce, in most instances, both the length of time an individual must isolate after contracting COVID-19, and the quarantine period for those exposed to the illness. While it may be a good sign the CDC believes shorter periods are appropriate due to the prevalence of milder Omicron cases, this new guidance doesn't come without complexities. The December 27 guidance not only abruptly changes rules employers had in place for several months, it also leads to questions about which guidance employers should now follow given the status of [OSHA's Emergency Temporary Standard \(ETS\)](#). What do employers need to know about this latest curveball? This Insight provides a practical five-step compliance plan.



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3. **Federal Contractor Vaccine Mandate Now Blocked Nationwide: A Playbook for Federal Contractors and Subcontractors**

“The Court ORDERS that Defendants are ENJOINED, during the pendency of this action or until further order of this Court, from enforcing the vaccine mandate for federal contractors and subcontractors in all covered contracts in any state or territory of the United States of America.” With these words on December 7, a federal court in Georgia granted an injunction that blocks the federal government from enforcing the federal contractor mandate, which aimed to require covered contractors and subcontractors to mandate COVID-19 vaccinations (among other things) by January 18, 2022. What do federal contractors need to know about this ruling – and what should you be doing now that you are stuck in litigation limbo? This Insight reviews the court decision and presents you with a playbook for proceeding in the coming weeks.

4. **Here We Go Again – Top 10 Things Employers Need to Know as Cal/OSHA Ramps Up Emergency COVID-19 Workplace Rules**

The Cal/OSHA Standards Board just voted to “re-adopt” the COVID-19 Emergency Temporary Standards (ETS) for a second time – but this latest move introduces some significant changes for California employers, including a return of COVID-19 testing, social distancing rules, and face covering requirements for fully vaccinated employees in certain circumstances. The December 16 vote means the new ETS will be in effect from January 14, 2022 through the middle of April. What are the top ten things California employers need to know about the new ETS?

5. **Labor Board Will Roll Back Joint Employer Standard in 2022**

As an early holiday present to organized labor, the National Labor Relations Board recently announced it will issue proposed rulemaking on joint employers in February 2022, almost certainly reworking the legal standards to make it easier for workers to be considered employed by more than one entity for labor relations purposes. The notice of proposed rulemaking, released on December 10, means we can expect the newly constituted Board to



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make significant changes to the current joint employment rule, bringing us back to the future once more. What can employers expect from this impending unwelcome change?

6. **Unhappy New Year for Gig Economy Companies? Labor Board Will Reconsider Independent Contractor Standard in 2022**

In one of its final moves of the year, the National Labor Relations Board announced in late December that will reconsider the current legal standard for determining whether workers are independent contractors or employees. This almost certainly means we'll see a new test created in 2022 that makes it harder for gig economy companies and other businesses to classify their workers as contractors for union organization and other labor relations purposes. What do businesses need to know about this December 27 announcement?

7. **7 Key Takeaways for Employers as EEOC Says COVID-19 Is "Sometimes" a Disability Under The ADA**

As we predicted would happen in our [Insight in July](#), the Equal Employment Opportunity Commission just [released guidance](#) to clarify under what circumstances COVID-19 may be considered a disability under the ADA and the Rehabilitation Act. While there is nothing groundbreaking or particularly surprising in the EEOC's December 14 guidance, employers can take comfort knowing that the EEOC has made clear that its analysis for determining whether COVID-19 is a disability will be conducted in a manner that is no different from the way it assesses other conditions or alleged disabilities. Therefore, with a few minor tweaks to your standard approach, you can properly handle disability-related issues or inquiries arising from COVID-19. Here are seven key takeaways employers need to know.

8. **California Adopts Reduced CDC Quarantine and Isolation Periods – With a Catch**

On the heels of the [CDC's updated isolation and quarantine guidance](#) reducing the length of time an individual must isolate after contracting COVID-19 and the quarantine period for those exposed to the illness, California has largely aligned these new timeframes – but with a catch. The California Department of Public Health



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(CDPH) just released [updated guidance](#) to conform to the new CDC guidelines but adds additional requirements, including testing to exit isolation or quarantine at Day 5 and improved masking. The December 30 guidance also inserts the issue of booster shots for the first time. What do California employers need to know about the new guidance?

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9. [Workplace Immigration Officials Extend "Relaxed" Remote Work I-9 Rules Into 2022](#)

Federal workplace immigration officials [recently announced](#) that "relaxed" I-9 rules have been extended until April 30, 2022, ensuring that employers can inspect I-9 documents for certain employees working remotely due to COVID-19 restrictions by way of camera or fax. U.S. Immigration and Customs Enforcement (ICE) noted that this extension, [as previously reported by Fisher Phillips here](#), will ensure that the guidance for employees hired on or after April 1, 2021, and working exclusively in a remote setting due to COVID-19-related precautions will remain in place for the next several months. What do employers need to know about this December 15 announcement?

10. [Federal Government Announces New Affirmative Action Plan Certification Requirements for Federal Contractors](#)

Federal officials announced that supply and service federal contractors and subcontractors who meet the designated jurisdiction thresholds for creation and maintenance of Affirmative Action Plans (AAPs) will soon need to register and certify they are meeting their compliance obligations to develop and maintain annual AAPs via the online Contractor Portal (an OFCCP Affirmative Action Program Verification Interface). This new requirement, announced on December 2, will be a significant addition to your compliance obligations if you are covered by this new requirement. In fact, until now, OFCCP has never required annual reporting regarding the maintenance of AAPs. While the contractor community has been awaiting this development since September 2020, when OFCCP published a notice seeking comment on the possibility of an annual AAP certification and verification process, this announcement still sends quite a jolt to those employers who will quickly need to ramp up their compliance efforts. What do federal contractors need to know about this development?

11. **[The Winter of Discontent? California Brings Back Indoor Masking for All – Regardless of Vaccination Status](#)**

Hopefully you didn't throw away those face coverings quite yet. Responding to the emerging Omicron variant and an anticipated winter COVID-19 surge, the California Department of Public Health (CDPH) issued an updated **[Guidance for the Use of Face Coverings](#)** which re-institutes indoor masking for all, regardless of vaccination status. This new mandate – it is in fact a requirement despite the use of the term “guidance” – is in effect from December 15 through at least January 15, 2022. What do California employers need to know about this new requirement?

12. **[An Employer's Guide to the Baseball Lockout: Answering Your Questions About the First MLB Work Stoppage in Almost 30 Years](#)**

For the first time since the 1994-1995 seasons, Major League Baseball entered a work stoppage on December 1 – and you have questions. What led to this point? What is a lockout versus a strike? What are the two sides fighting over? And most importantly: can we look forward to the annual joy of spring training or are games in danger of getting canceled? The Fisher Phillips Labor Relations Practice Group and our Sports Team have joined together to answer your pressing questions.

13. **[“Close the Door!”: U.S. Supreme Court Finally Agrees to Reconsider the Rule Against California PAGA Waivers in Arbitration Agreements](#)**

After repeatedly denying requests to decide the same issue, the U.S. Supreme Court has finally agreed to review the rule prohibiting California Private Attorneys General Act (PAGA) waivers in individual arbitration agreements. The high court announced on December 15 that it granted the writ of certiorari filed in *Viking River Cruises, Inc. v. Moriana* to answer this question: whether the Federal Arbitration Act (FAA) preempts a California Supreme Court ruling that arbitration agreements waiving the right to bring representative actions under PAGA were unenforceable under state law. Employers in California, and other states fashioning legislation similar to PAGA, may be seeing a beacon of light in the dark tunnel of representative litigation of recent years.

14. [All NYC Employers Must Prepare for Sweeping COVID-19 Vaccination Mandate](#)

All private sector employees in New York City will need to be vaccinated in order to work in person effective December 27, per a sweeping [announcement by Mayor Bill de Blasio](#) earlier today. Dubbed the first such requirement in the nation, the mandate is being touted as a preemptive strike against the Omicron variant, especially with the increased risks associated with cold weather and holiday gatherings on their way. This impending vaccine mandate expands upon the existing ["Key to NYC"](#) requirements that have been in effect since mid-August, pursuant to which both employees and customers of [indoor dining, fitness facilities and entertainment venues need to have at least one dose of vaccine in order to work at or patronize the business](#). It comes during Mayor de Blasio's final weeks in office and in the wake of [ongoing legal challenges](#) to OSHA's Emergency Temporary Standard (ETS), the stalled federal rule blocked by court order that aims to require companies with 100 or more employees to ensure that those employees are either fully vaccinated or produce a weekly negative test for COVID-19. Here's what NYC employers need to know about the vaccine mandate ([and here's a subsequent post with more detailed guidance](#)).

15. [Who Works for You? Massachusetts High Court Clarifies 4-Factor "Joint Employment" Test for Employers](#)

The Massachusetts Supreme Judicial Court just provided much-needed and helpful guidance on the appropriate standard for determining whether an entity is an individual's "joint employer" in order to determine liability under the Massachusetts wage-and-hour laws ([Jinks v. Credico \(USA\) LLC](#)). In short, the Court confirmed on December 13 that the same "totality of circumstances" test used when analyzing federal wage and hour matters will be used for determining joint employment status in Massachusetts, guided by four factors: whether the entity (1) had the power to hire and fire the individual, (2) supervised and controlled the individual's work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records. What do Massachusetts employers need to know about this welcome change and what can you do to capitalize on this ruling?

16. **NYC Council Passes Bill Granting Paid COVID-19 Child Vaccination Leave**

Parents in the Big Apple will soon receive paid time off from work to accompany their child to receive a COVID-19 vaccine injection or to care for the child if experiencing side effects from the injection. The New York City Council recently passed a bill granting parents or legal guardians of a child four hours of paid COVID-19 child vaccination time, per child and per injection. The law was enacted without the mayor's signature on December 24, 2021. New York City employers should be prepared to comply with this impending new legislation, which took immediate effect.

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.