

The 2021 Employment Law Year in Review

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Agenda

- 2021 Predictions Recap
- Litigation Roundup
- Administration Activity
- SEC Developments
- EEOC Developments
- NLRB Developments
- Department of Labor Developments
- Immigration Developments
- OSHA Developments
- State and Local Legislation
- COVID-19 Updates
- COVID-19 Litigation Trends
- Looking Ahead

Five Issues to Monitor in 2021

How Did We Do?

2021 Predictions—How Did We Do?

1. Returning to the office will bring an increase in accommodation requests to work from home and associated litigation
2. The price of settling cases in Virginia will increase measurably
3. Noticeable increase in claims from current employees (continuing a trend)
4. Paid leave in Virginia

Litigation Highlights

Van Buren v. United States, No. 19-783 (June 3, 2021)

- Van Buren was accused of taking money in exchange for looking up a license plate in a law enforcement database
- Van Buren was convicted of violating the Computer Fraud and Abuse Act of 1986 (CFAA) which subjects to criminal liability anyone who “intentionally accesses a computer without authorization or exceeds authorized access”
 - He allegedly used the database for an improper purpose even though he was allowed to access the database for work purposes
- The Supreme Court held that an individual “exceeds authorized access” under the CFAA when he accesses a computer with authorization but then obtains information located in particular areas of the computer — such as files, folders or databases — that are off-limits to him



TransUnion LLC v. Ramirez, No. 20-297 (June 25, 2021)

- Plaintiff attempted to purchase a car but when applying for credit, his credit information was submitted by the dealership to TransUnion
- The dealership was notified that the plaintiff's name was a "potential match" on a list of individuals deemed a national security risk by the Treasury Department's Office of Foreign Assets Control ("OFAC")
- When plaintiff requested a copy of his credit file from TransUnion, TransUnion sent him two letters: the first contained his credit file without mention of the OFAC designation and the summary of rights required by law. The second, which arrived the next day, provided information that he was on the OFAC list, but did not contain the summary of rights letter

TransUnion LLC v. Ramirez, No. 20-297 (June 25, 2021)

- Plaintiff brought suit on behalf of himself and a class of 8,185 consumers who had OFAC designation on their credit file, whether or not the file was disseminated to any third party
- The Supreme Court ruled that only individuals whose inaccurate credit information was disseminated to third parties suffered concrete injury and, thus, had Article III standing to seek damages
- Remaining class members lacked standing because, although TransUnion may have violated a statutory requirement to ensure it follow reasonable procedures to assure maximum accuracy, that violation did not harm the 6,332 class members who stipulated that their reports were never published to any third party
- A statutory violation, without more, is not a concrete harm

***Roberts v. Glenn Indus. Grp., Inc.*, 2021 U.S. App. LEXIS 15224 (4th Cir. May 21, 2021)**

- Plaintiff worked in all male environment and alleged he was subjected to homophobic, derogatory, and sexually explicit comments
- He complained and was told to “suck it up”
- After two workplace safety incidents he was terminated
- Lawsuit alleged claims for same-sex harassment and retaliation
- 4th Circuit found that same-sex harassment in the workplace under Title VII of the Civil Rights Act is not strictly limited to the three scenarios in the U.S. Supreme Court’s seminal 1998 opinion in *Oncale v. Sundowner Offshore Services*
- Same-sex harassment claims can exist even where the harasser is not homosexual and where there does not appear to be general hostility toward one gender in the workplace
- It is possible for acts of physical harassment to support a sexual harassment claim, even if not overtly sexual, where accompanied by other sexually charged commentary

***Payne v. Taslimi*, 2021 U.S. App. LEXIS 15972 (4th Cir. May 27, 2021)**

- Christopher Payne, an inmate at the Deep Meadow Correctional facility, was receiving care in the prison's "open dorm" medical unit. Payne alleged that a prison doctor walked up to his bed and said in a voice loud enough to be heard by nearby staff, other offenders, and civilians, that Payne had "not taken [his] HIV medications"
- Payne filed suit (on a *pro se* basis), claiming his medical records were confidential and the Deep Meadow Correctional Facility had violated his rights under HIPAA and the 14th Amendment when its physician announced his HIV medical diagnosis
- 4th Circuit found that there is no private cause of action to address an improper disclosure of medical information under the Health Insurance Portability and Accountability Act of 1996 (HIPAA)

Canaday v. The Anthem Companies, Inc., Case No. 20-5947 (6th Cir. Aug. 17, 2021)

- Review nurse filed proposed collective action alleging the company misclassified her and other review nurses as exempt from federal overtime rules
- In-state and out-of-state nurses opted into the action
- Canaday moved to certify a collective action of all utilization review nurses that Anthem classified as exempt from overtime
- Anthem moved to dismiss all out-of-state nurses for lack of personal jurisdiction
- District court dismissed the out-of-state plaintiffs on personal jurisdiction grounds
- Sixth Circuit held that where nonresident plaintiffs opt into a putative collective action under the FLSA, a court may not exercise specific personal jurisdiction over claims unrelated to the defendant's conduct in the forum state



Vallone v. CJS Solutions Group, LLC, d/b/a HCI Group, **Case No. 20-2874 (8th Cir. Aug. 18, 2021)**

- Employees hired on a per-project basis to train personnel on the use of medical recordkeeping software sued HCI (Florida entity) in Minnesota
- Plaintiffs moved to certify a collective action under the FLSA, including all HCI employees hired on a per-project basis who were not paid wages for out-of-town travel to and from remote project locations
- The district court conditionally certified a collective action limited to claims arising out of travel to and from Minnesota
- The Eighth Circuit held that the court properly excluded claims with no connection to Minnesota (no in-state injury and no injury to residents of the forum state)

Duvall v. Novant Health, Inc., No. 3-19-cv-00624 **(W.D.N.C. Oct. 26, 2021)**

- \$10 million punitive damages award in a “reverse” discrimination lawsuit filed by a white male former executive
- SVP sued his former employer, Novant Health, alleging that the non-profit medical network fired him and seven other white male executives as part of its diversity push
- Duvall alleged discrimination under a “mixed motive” theory, alleging that his race and/or sex was a motivating factor in the discharge decision
- Duvall alleged a pattern of white males being terminated from employment and that the Diversity and Inclusion Executive Council formed under the DE&I program determined in 2018 that Novant Health was failing to meet its diversity targets
- Jury found that Duvall proved that his race and sex were a motivating factor in the decision to terminate his employment

Administration Activity

Non-Competes

- Calls on FTC to “curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility”
- Does not change the law of restrictive covenants by itself
- Encourages the FTC to “exercise the FTC’s statutory rulemaking authority under the Federal Trade Commission Act” to regulate restrictive covenants.

Nondisplacement of Qualified Workers Under Service Contracts

- Covered successor contractors and subcontractors must offer employment on a “first right of refusal” basis to service employees employed under the predecessor contract whose employment would otherwise be terminated at the end of the contract
- The offer of employment must be for positions for which the employees “are qualified”
- Successor contractors will be required to make a written offer of employment to all covered incumbent employees to the extent there is a position available, and the incumbent employees will have at least 10 business days to accept the offer
- Predecessor contractors and subcontractors must provide a list of service employees, with their anniversary dates, to the contracting agency at least 30 days prior to the contract completion date

\$15 Federal Contractor Minimum Wage

- Proposed an increase to the minimum wage for workers performing work on federal contracts to \$15 per hour beginning January 30, 2022
- Applies to a new contract, new solicitation, extension or renewal of an existing contract, and exercise of an option on an existing contract
- “New contracts” include extensions or renewals of existing contracts or contract-like instruments, and exercises of options on existing contracts or contract-like instruments on or after January 30, 2022

The Infrastructure Investment and Jobs Act

- On November 15, 2021, President Joe Biden signed the \$1.2 trillion Infrastructure Investment and Jobs Act (IIJA) into law
- During Fiscal Years 2022-2026, the IIJA will provide \$550 billion in new investments for various transportation, water, power and energy, environmental remediation, cybersecurity, and broadband initiatives
- Wage and hour considerations for construction and labor (prevailing wages)
- New jobs in construction, retail/transportation, and manufacturing/energy
- Creation within the Executive Office of the President the Infrastructure Implementation Task Force



SEC Developments

SEC Whistleblower Program

- In fiscal year 2021, the SEC received tips from individuals in 99 foreign countries and throughout the U.S.
- Tips have grown about 300% between the program's inception in 2011 and 2021
- The largest payouts
 - \$114 million award in October 2020
 - \$110 million award in September 2021
 - Over \$50 million in 2021

EEOC Developments

New Personnel



- Currently, the EEOC has a majority of three Republican commissioners and a minority of two Democrat commissioners. Even though the chair of the EEOC, Charlotte Burrows is a Democrat, she must get majority support to make changes to regulations. Commissioner approval is also required for dissemination of guidance documents and for almost every case the EEOC files
- In July President Biden will have an opportunity to appoint a new commissioner, flipping the commission to a Democrat majority
- A new General Counsel also will likely be appointed in 2022

FY 2021 Recoveries and Activities

- EEOC recoveries dropped in FY 2021
 - \$484 million in fiscal year 2021
 - \$535.4 million in fiscal year 2020
 - \$486 million in fiscal year 2019
- Successfully resolved 41% of conciliations
- \$350.7 million in recoveries through mediations, conciliations and settlements
- \$34 million in litigation resolutions, 138 lawsuits resolved
 - \$46 million in resolution of 26 systemic lawsuits and 340 systemic investigations
- 116 lawsuits filed
 - 3 lawsuits filed under the ADA concerning COVID-19-related accommodation requests prior to end of FY

Annual EEO-1 Reporting

- “Tentatively scheduled” opening of the 2021 EEO-1 Component 1 data collection portal for April 12, 2022
- Deadline for filing May 17, 2022 (6 weeks later)
- Discontinuation of the Type 6 Establishment Report for employers who have establishments with fewer than 50 employees (which allowed reporting only the total number of employees at an establishment)
 - Instead, employers will now be required to use the Type 8 report (which requires submission of demographic data for an employer’s small establishments)

What to Expect

- The EEOC issues its enforcement priorities every four or five years, last published in 2016. A review of those priorities gives us a preview of what to expect. New guidance may be issued in 2022 after the new appointments
- Reinstatement of pay data collection under the EEO-1 process is expected when the commission's majority changes later this year

NLRB Developments

Revisiting Standards

- The 2022 regulatory agenda includes plans to engage in the formal rulemaking process on the joint employer standard in February
- NLRB solicited public input on its analysis of independent contractor status under the NLRA
- NLRB invited briefs addressing whether it should reconsider its standard for determining if a petitioned-for bargaining unit should be expanded

Department of Labor Developments

Withdrawal of Trump-Era Joint Employer Final Rule

- Withdrawal effective September 28, 2021
- 2020 Final Rule addressed standard for determining whether an employee may be jointly employed by two or more employers

Withdrawal of Trump-Era Independent Contractor Rule

- Withdrawal effective May 5, 2021
- Final Rule (which never took effect) would have established a uniform standard for determining a worker's status as an "independent contractor" under the FLSA
- DOL also withdrew two related Opinion Letters
- Evaluating two factors of the multifactor economic realities analysis above all conflicts with the FLSA, congressional intent, and longstanding judicial precedent
- Left in place the current economic realities test

Proposed New Rule to Establish Minimum Wage Standards for Federal Contractors

- Increase minimum wage for “workers performing work on or in connection with covered Federal contracts to \$15.00 per hour, beginning January 30, 2022”;
- Continue to index the federal contract minimum wage in future years to the Consumer Price Index;
- Eliminate the tipped minimum wage for federal contract workers by 2024;
- Ensure a \$15 minimum wage for workers with disabilities performing work on or in connection with covered contracts; and
- Restore minimum wage protections to outfitters and guides operating on federal lands.

New Secretary of Labor Hints at Increased Minimum Salary for Overtime Exemptions

- Secretary of Labor Marty Walsh stated that the DOL is reviewing a Final Rule in which the DOL increased the minimum salary required to qualify for the Executive, Professional, and Administrative exemptions
- Under the Final Rule, which went into effect at the beginning of 2020, the minimum annual salary rose from \$23,660 (\$455 per week) to \$35,568 (\$684 per week). In addition, the minimum salary required to satisfy the “Highly Compensated Employee” (HCE) exemption increased from \$100,000 per year to \$107,432 per year
- Secretary Walsh asserted that the current minimum salary is “definitely too low” and that the Final Rule is under active review by the DOL.

AAP Verification Process

- OFCCP Officially Launched Contractor Affirmative Action Verification Interface (AAPVI) Portal
- Implementation timeline for the AAPVI Portal:
 - Feb. 1, 2022, contractors may begin registering for access to the portal. OFCCP will also send an e-mail to each covered federal contractor in its jurisdiction whose email information is available in its system inviting them to register.
 - March 31, 2022, contractors will be able to utilize the certification feature in the portal to certify their AAP compliance.
 - By June 30, 2022, existing contractors must certify whether they have developed and maintained an affirmative action program for each establishment and/or functional unit, as applicable.

Immigration

Immigration Update



- Revoked the “Buy American, Hire American” Executive Order.
- Terminated the “Muslim Ban” and the subsequent “Africa Ban”
- Revoked the immigrant visa ban that prevented individuals who were abroad from seeking to enter the United States as permanent residents
- Rescinded the guidance memo that questioned whether computer programmers were eligible for H-1B visas
- ICE extended “flexibility” for I-9 employment verification until April 30, 2022, due to continuing COVID-19 precautions
 - Until then, employees hired on or after April 1, 2021, who work exclusively in a remote setting are exempt from the physical inspection requirements associated with Form I-9 Employment Eligibility Verification

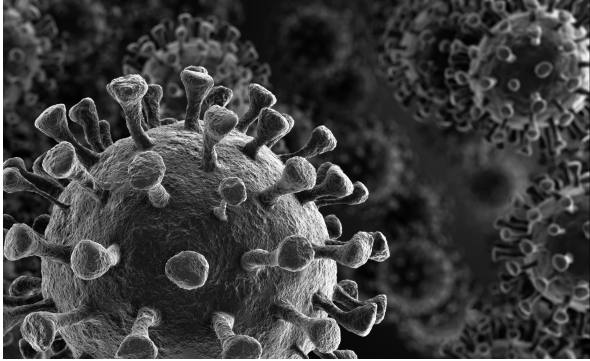
Immigration Update

- Biden Administration proposed overall immigration reform in the United States Citizenship Act
 - Increasing the number of employment-based green cards available each year;
 - Eliminating numerical limitations for those whose immigrant visa petitions have been approved and who have been waiting to adjust status for more than 10 years;
 - Eliminating per-country immigration caps;
 - Exempting U.S. doctoral STEM graduates from the numerical limitations;
 - Creating a pilot program for regional economic development that would allow additional immigrant visas based on localized economic development strategies;
 - Authorizing employment for all H-4 spouses and children; and
 - Creating a path to citizenship for Dreamers, TPS beneficiaries, and the 11 million undocumented individuals currently living in the United States.



Occupational Safety & Health

Occupational Safety and Health



- A permanent infectious diseases standard covering respiratory illnesses
 - The Biden administration plans to revive a stalled occupational safety rulemaking that would protect workers against all airborne infectious diseases, not just Covid-19
- Budget plan has a proposal due in fiscal 2022
 - Draft version of an infectious disease rule would be released and would seek public comment
 - Could require employers to protect workers from hazards such as tuberculosis, drug-resistant staph bacterial infections, and severe acute viral respiratory infections

State & Local Legislation

Virginia Updates

Gradual Increases in Minimum Wage Rate

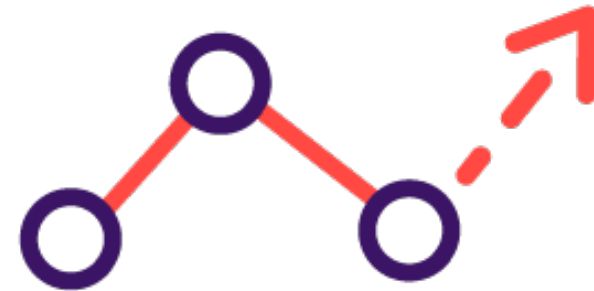
\$9.50 effective May 1, 2021

\$11.00 effective January 1, 2022

\$12.00 effective January 1, 2023

\$13.50 effective January 1, 2025*

\$15.00 effective January 1, 2026*



Effective May 1, 2021 – training wage for employees in on-the-job training programs lasting less than 90 days must be “federal minimum wage [\$7.25] or 75 percent of the Virginia minimum wage provided for in this section, whichever is greater”

Virginia's New Overtime Wage Act (Va. Code § 40.1-29)

- Effective March 31, 2021
- Must pay 1.5x regular rate of pay for hours worked in excess of 40 in a work week
- Like the Fair Labor Standards Act (FLSA), with several key differences
- Rate of Calculation differs for hourly vs. salaried employees
 - Hourly: hourly rate plus other non-overtime wages paid or allocated for the work week (minus statutory exceptions), divided by total number of hours worked in that work week
 - Salaried: one fortieth (0.025) of all wages paid for the work week
 - Significantly, appears to preclude employers paying fixed salary to employees to cover hours in excess of 40 per work week, including non-exempt employees and fluctuating schedules
 - Employers may also face greater liability for misclassifying employees as exempt
- Three-year statute of limitations, rather than FLSA's default two-year limitation
- When combined with Virginia Unpaid Wage Act amendment, *all* overtime wage violations subject to double damages (treble damages for “knowing” violations), plus 8% pre-judgment interest
- No defense of acting in “good faith”, as is found in FLSA
- Collective actions permitted



Modifications in Minimum Wage Exempt Categories

Not Exempt

- Home care providers
- Domestic service workers
- Piece workers
- Individuals with certain disabilities
- Individuals employed by employers with four or less employees
- Individuals younger than 18 who are under the jurisdiction of a juvenile and domestic relations court

Exempt

- Au pairs participating in federal Exchange Visitor Program
- Temporary foreign workers
- Individuals employed by certain amusement or recreational establishments, organized camps, or religious or non-profit educational conference centers

Virginia Paid Sick Leave for Home Health Workers

- Effective July 21, 2021
- Provides home health workers averaging at least 20 hours per week or 90 hours per month with paid sick leave
- Home health workers are individuals who provide personal care, respite, or companion services to an individual who receives consumer-directed services under the state plan for medical assistance services (Medicaid)
- Accrual begins at start of employment
- Accrue or earn at least one hour for every 30 hours worked (can be front loaded)
- 40-hour accrual cap
- Leave can be taken for personal and family reasons

Virginia Expands Disability Discrimination Protections

- Virginia Human Rights Act (VHRA) expanded to prohibit discrimination on the basis of disability
- Requires reasonable accommodation unless undue hardship
- Handbook policy required
- Poster and notice requirements

Virginia's Newest Marijuana Laws exceed DC and MD

Marijuana possession up to 1 oz. legal for adults over the age of 21

- Effective since July 1, 2021

Industrial Hemp products (e.g., CBD Oil) OK with low THC

Restrictions on asking about marijuana-based offenses



- Employers may not ask any questions related to any arrest, criminal charge, conviction, or civil offense that has been expunged
- All misdemeanors expunged as of July 1, 2021
- Virginia State Police directed to determine no later than July 1, 2025 what other marijuana-related offenses are to be expunged
- Private employers that are not subject to federal laws or regulations in the hiring process cannot require in any application, interview, or otherwise an applicant to disclose information when the record is not open for public inspection

Virginia's Newest Marijuana Laws exceed DC and MD (cont.)

Increased protection for cannabis oil users

- VA Code § 40.1-27.4 prohibits employers from discharging, disciplining, or discriminating against an employee for lawful use of cannabis oil
 - Does *not* apply to medical marijuana, only cannabis oil
- Employee must have valid written certification issued by a doctor
- BUT, employer may take adverse action against employee for any work impairment caused by cannabis oil
- Employer may also prohibit possession of cannabis oil during work hours
- Scope of these exceptions is still unknown
- Employers not required to commit any act in violation of federal law or that would cause them to lose government contract
 - Meaning government contractors who must comply with drug-free work environment are likely exempt

Additional Virginia Changes

- Prevailing wage statute
- Amendment to wage theft law
- Expanded protections of military members

Enter Governor Younkin . . .
will we see a rollback of pro-
worker laws?

D.C. Updates

D.C. Paid Family Leave and D.C. FMLA Changes

- Amendments to the D.C. Universal Paid Leave Act (UPLA) provide
 - Paid leave for prenatal medical care
 - “Prenatal medical care” is defined to include medical appointments, exams, and treatments associated with a pregnancy, including pre-natal checkups, ultrasounds, treatment for pregnancy complications, bedrest and pre-natal physical therapy
 - Separate from parental leave
 - Paid leave provided to recover from miscarriage or stillbirth
 - Expansion of number of weeks of paid leave available
 - Starting on October 1, 2021 and lasting until one year after the end of the COVID-19 public health emergency, the one-week waiting period for benefits does not apply
- Amendment to D.C. FMLA provides that D.C. employees will be entitled to D.C. FMLA leave if they have worked 1,000 hours during their prior 12 months of employment with the employer, which may be non-consecutive months, if all periods of employment occurred within the past 7 years

D.C. Paid Leave for Employees Getting COVID-19 Vaccines

- Amends the ASSLA to require D.C. employers to provide up to four hours of paid leave (two hours per dose) for employees who are receiving the COVID-19 vaccination or are accompanying their children to receive the COVID-19 vaccination
- Employers also must provide up to eight hours of paid leave per injection during the 24-hour period following the two-hour vaccination leave period for employees experiencing side effects or whose child is experiencing side effects and requires care
- Employers are not required to provide more than 48 hours of leave in total in a year starting on the effective date of the Act
- Paid leave is in addition to any other paid leave an employer provides an employee under an existing leave policy

District of Columbia Non-Compete Ban

- On December 15, 2020, the District of Columbia Council unanimously passed the Ban On Non-compete Agreements Amendment Act Of 2020
- The Act generally prohibits the use of non-compete provisions in employment agreements and workplace policies
- Applies to all employers in the District and nearly any employee working in the District regardless of how much they are earning
- Employers must provide written notice of the Act to all their employees
- Prohibits employers from retaliating (or threatening to retaliate) against employees for refusing to agree to a non-compete provision or other similar conduct
- Likely application date of April 1, 2022

Maryland Updates

Paid Bereavement Leave

- Amends the Flexible Leave Act to allow employees to also use earned paid leave for bereavement following the death of a child, spouse or parent
- No limit on amount of accrued leave employee can use for bereavement purposes
- Includes anti-retaliation provision

Updates Outside the DMV

Minimum Wage Increases

Arizona*	\$12.80	New York	Outside NYC and Nassau, Suffolk & Westchester Counties:
California*	\$15.00 (26+ employees)		\$13.20 (generally); all others
	\$14.00 (1-25 employees)		\$15.00 (generally)
Colorado*	\$12.56		(Dec. 31, 2021)
Connecticut	\$14.00 (July 1)	Ohio	\$9.30
Delaware	\$10.50	Oregon	\$12.50 ("Non-urban" counties)
Dist. of Columbia	TBD (July 1)		\$13.50 ("Standard" counties)
Florida	\$11.00 (Sept. 30)		\$14.75 (Portland Metro)
Illinois*	\$12.00 (std.)/\$9.50 (youth)		(July 1)
Maine*	\$12.75	Puerto Rico	\$8.50
Maryland*	\$12.50 (15+ employees)	Rhode Island	\$12.25
	\$12.20 (1-14 employees)	South Dakota	\$9.95
Massachusetts	\$14.25	Vermont	\$12.55
Michigan	\$9.87	Virginia	\$11.00
Minnesota*	\$10.33 ("Large" employers)	Washington*	\$14.49 (most employees)
	\$8.42 ("Small" employers/ 90-Day Training Wage/ Youth Wage)		\$12.32 (employees ages 14-15)
Missouri	\$11.15		
Montana	\$9.20		
Nevada	\$10.50 (w/o health benefits)		
	\$9.50 (with benefits)		
	(July 1)		
New Jersey	\$13.00		
New Mexico*	\$11.50		

Minimum Salaries for “White Collar” Exemptions

California	\$62,400 (26+ employees) \$58,240 (1-25 employees)
Colorado	\$45,000
Maine	\$38,250
Washington	\$52,712.80 (employers of any size)

New York (eff. 12/31/2021)

Note: Applicable to Executive and Administrative exemptions only; Professional exemption follows federal law
\$58,500 (New York City + Nassau, Suffolk & Westchester Counties);
\$51,480 (remainder of the State)

Emerging Trend in State Pay Transparency Laws

- Rhode Island entitles employees to pay range disclosures upon hire, when changing jobs, and if they ask for it
- Nevada requires employers to provide the wage or salary range to applicants who have completed an interview—even without a request. But employees still must request the range to require transparency.
- Connecticut now requires employers to provide the salary range to applicants (1) upon request and (2) by the time it extends an offer of compensation (if the applicant did not request it). It also requires disclosure to employees on hire, when changing roles, and when the employee requests it.
- New York City will require employers with at least 4 employees to include salary ranges on job advertisements

Emerging Trend in State Pay Transparency Laws

- Colorado - an employer with even one employee in Colorado that is recruiting for a job in Colorado (or that is remote) must include (1) the wage rate or range for the role, (2) a general description of other compensation available for the role, and (3) a general description of benefits for the role in the job posting
- Colorado also requires “opportunity transparency.” Employers with at least one Colorado employee must provide written notice to its Colorado employees of any “promotional opportunity” — including any hire, change in job title, or material change in job duties, opportunities, or responsibilities — before it decides who will get that new job. Even employees who are not qualified for the job must receive notice of the opportunity.

Additional State Law Updates

- Employees v. Independent Contractors
- Wage theft laws
- Prevailing wages
- Overtime standards
- Vacation and PTO
- Final pay and notice requirements

COVID-19 Updates

COVID Guidance

EEOC Pandemic-Related Resources

- Updated assistance document, *What You Should Know About COVID-19 and the ADA, Rehabilitation Act, and Other EEO Laws*
 - New section on vaccinations
- Updated 2009 technical assistance document, *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act*
- Published *COVID-19 Fact Sheet for Employees* explaining ADA rights of individuals during the pandemic

EEOC COVID Considerations: Disability?

- On December 14, 2021, the EEOC added a new section on COVID-19 and the Definition of Disability Under the ADA/Rehabilitation Act, to its COVID-19 guidance
- The updated guidance states that COVID-19 can:
 - (1) be an actual disability,
 - (2) be a record of disability, or
 - (3) cause a person to be regarded as an individual with a disability.
- The CDC uses the terms “long COVID,” “post-COVID,” “long-haul COVID,” “post-acute COVID-19,” “long-term effects of COVID,” or “chronic COVID” to describe various post-COVID conditions, where individuals experience new, returning, or ongoing health problems four or more weeks after being infected with the virus that causes COVID-19
- Determining whether a specific employee’s COVID-19 is an actual disability always requires an individualized assessment, and such assessments cannot be made categorically based on the condition

FLSA and Vaccination/Testing

- Time spent getting tested or receiving a vaccine during work hours is compensable.
- Time spent getting tested or receiving a vaccine outside of work hours is likely compensable for any employee who has direct contact with the public.
 - For employees who do not have contact with the public, an argument could be made that the time is not compensable (particularly if the employer offered a vaccine and they chose not to get it).
- Whether a COVID test is a business expense and, therefore, cannot drop an employee below minimum wage is currently unclear.
- State law can alter this result.
 - Some states have specific laws requiring payment for time spent getting vaccinations.
 - Some states do not adopt the FLSA time worked principles so need to check the particular state. Those include: AZ, CA, CO, DC, MN, NJ, NV, OR, PA, and WA.

FLSA and Vaccination/Testing



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- Some states do not adopt the FLSA time worked principles so need to check the particular state.
 - Those include: AZ, CA, CO, DC, MN, NJ, NV, OR, PA, and WA.
- Some states have state law expense reimbursement requirements which independently require employers to pay for the cost of testing
- Some states have separate requirements for the payment of medical examinations

OSHA'S EMERGENCY TEMPORARY STANDARD (ETS)

OSHA'S Vaccine Mandate



- The Occupational Safety and Health Administration (OSHA) issued an Emergency Temporary Standard (ETS), requiring employers to institute either a mandatory vaccine policy or a weekly testing and mask policy
- The ETS applies to employers with at least **100 employees** company-wide
- The ETS does not apply to employees who work from home, work in settings where there are no other individuals present, or work exclusively outdoors

Virginia Occupational Safety and Health (“VOSH”)

Virginia is a “State Plan” state that governs most of its own workplaces

VOSH enforces Virginia occupational safety and health law (Title 40.1) for:

- Most private sector employers
- All state and local employers
- Asbestos removal (including federal workplaces)

OSHA enforces the federal Occupational Safety and Health Act for:

- Federal military facilities
- Federal enclaves where civil jurisdiction has been ceded to federal government
- Temporary employees working for federal government
- Maritime employment (including shipyards, marine terminals, longshoring)
- USPS contractors
- U.S. Department of Energy sites
- Aircraft cabin crew members

VOSH Standard for COVID-19

Virginia passed the first-in-nation COVID-19 standard

- The Virginia Safety and Health Codes Board approves OSHA regulations
- Permanent Standard was further amended on September 8, 2021 to increase masking requirements for all Virginia employers, took immediate effect
- VOSH has not yet taken any action on OSHA ETS
 - No vaccine mandate yet
 - Stay tuned...

What Is In the Virginia Standard?

General requirements for all employers

- Assess workplace for hazards and job tasks that can potentially expose employees to COVID
- New mask mandate for Virginia employers took effect on September 8, 2021
 - Applicable to *all* Virginia employees, no exception for “low risk” jobs
- Policies/procedures for employees to report COVID symptoms
- Prohibit known/suspected cases at worksites
- “Flexible” sick leave policies
- System to receive reports of “outbreaks” of two or more positive tests (within past 14 days) by:
 - Employees (including temps and contract employees)
 - Subcontractors
- Mandatory handwashing stations and hand sanitizer “where feasible”
- Employers must assess risk levels of employees and suppliers before entry
- Building and facility owners must notify employer tenants of COVID-19 cases

Centers for Medicare & Medicaid Interim Final Rule



CMS's Vaccine mandate

- The Centers for Medicare & Medicaid Services (CMS) issued an Interim Final Rule (IFR) establishing the COVID-19 vaccination requirements for staff employed at Medicare and Medicaid-certified providers and suppliers (such as hospitals, long-term care facilities, nursing homes, etc.).
- The IFR provides that, covered providers and suppliers must implement mandatory vaccination policies that include a process by which staff may request an exemption from the vaccination requirement for medical or religious reasons in accordance with applicable federal law.

Phases of the IFR

PHASE ONE

Staff at all healthcare facilities covered by the regulation must have received, at a minimum, the first dose of a two-dose vaccine or a single-dose vaccine by December 5, 2021.

PHASE TWO

Staff are required to be fully vaccinated by January 4, 2022.

January 13, 2022, the U.S. Supreme Court Allows Vaccine Mandate to Continue

Federal Contractor Vaccine Mandate (EO 14042)

Executive Order 14042

- On September 9, 2021, President Biden issued Executive Order 14042, “Ensuring Adequate COVID Safety Protocols for Federal Contractors.” The mandate includes a requirement for covered contractor employees to be vaccinated against COVID-19 (except those entitled to a medical or religious accommodation) by January 18, 2022.



Requirements

- **Fully vaccinated contractor employees who work at federal sites will have to:**
 1. Provide an attestation confirming vaccination status; and
 2. Wear a mask indoors if working in a locality with high or substantial transmission rates, in accordance with the CDC's guidance.
- **Contractor employees who are not fully vaccinated or who decline to attest to their vaccination status will have to:**
 1. Take weekly or bi-weekly COVID-19 tests and provide evidence of negative tests;
 2. Always wear a mask (with limited exceptions) and socially distance; and
 3. Be subject to government-wide restrictions on official travel.

Where Does the Mandate Stand?

- In *Kentucky, Ohio, Tennessee v. Biden*, on November 30, 2021, a Kentucky federal court issued preliminary injunction on the enforcement of the Executive Order in Kentucky, Ohio, and Tennessee.
- In *Georgia v. Biden*, Alabama, Georgia, Idaho, Kansas, South Carolina, Utah, and West Virginia filed suit requesting a preliminary injunction. On December 7, 2021, the Georgia federal district court issued a **nationwide** preliminary injunction halting enforcement of the Executive Order.
- On December 20, 2021, the Eleventh Circuit refused to stay the nationwide injunction, waiting to decide on the injunction after both sides argue in January.

Compliance Considerations

- Whether to begin, stop, or move forward with any vaccination requirements.
- If moving forward, consider allowing more time for accommodations decisions and employment actions related to employees who are not vaccinated or who do not request or are denied accommodations.
- Be mindful of the state laws that may conflict with the requirements, now that the executive order has been enjoined.
- Be prepared to begin compliance efforts if the injunction is lifted and keep an eye out for new compliance deadlines, if there are any.
- Provide clear communications to employees about these developments, any changes in direction or timelines as a result of the injunctions, and the employer's decisions on further vaccination efforts in response.

CDC Isolation/Quarantine Guidance

CDC Guidance

If You Test Positive for COVID-19 (Isolate)

Everyone, regardless of vaccination status.

- Stay home for 5 days.
- If you have no symptoms or your symptoms are resolving after 5 days, you can leave your house.
- Continue to wear a mask around others for 5 additional days.

If you have a fever, continue to stay home until your fever resolves.

If You Were Exposed to Someone with COVID-19 (Quarantine)

If you:

Have been boosted

OR

Completed the primary series of Pfizer or Moderna vaccine within the last 6 months

OR

Completed the primary series of J&J vaccine within the last 2 months

- Wear a mask around others for 10 days.
- Test on day 5, if possible.

If you develop symptoms get a test and stay home.

If you:

Completed the primary series of Pfizer or Moderna vaccine over 6 months ago and are not boosted

OR

Completed the primary series of J&J over 2 months ago and are not boosted

OR

Are unvaccinated

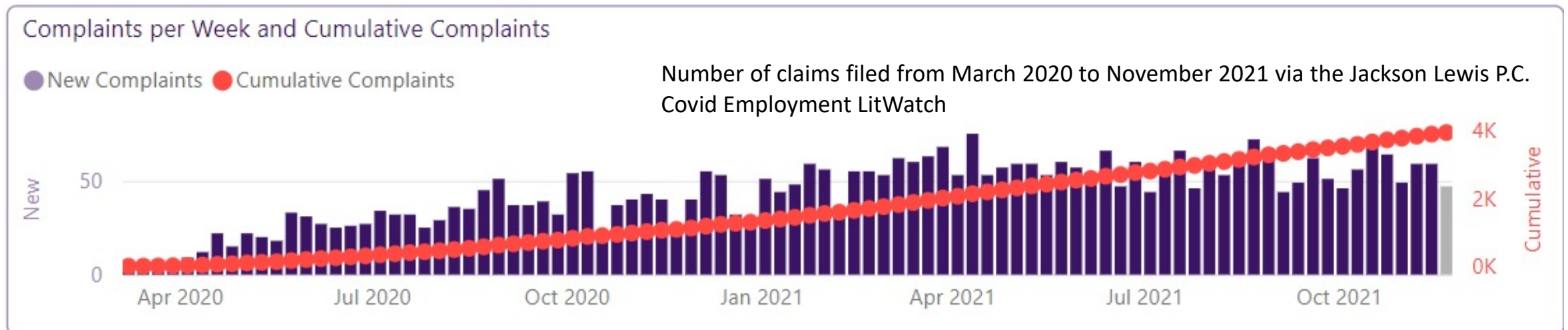
- Stay home for 5 days. After that continue to wear a mask around others for 5 additional days.
- If you can't quarantine you must wear a mask for 10 days.
- Test on day 5 if possible.

If you develop symptoms get a test and stay home

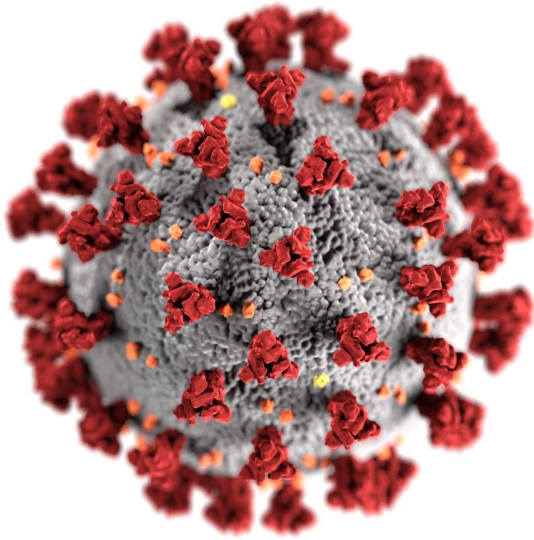
COVID-19 Litigation Trends

COVID Litigation Numbers

- 3,997 complaints filed as of December 7, 2021
- Disability, leave, and accommodation claims lead the way
- CA (1,078), NJ (451), NY (274), FL (247), OH (244)
- Class actions are up from 68 in 2020 to 116 in 2021



Covid litigation by industry



Industry	Total Complaints	% Class Actions	% Federal Complaints
+ Healthcare	962	4%	29%
+ Other	423	4%	31%
+ Retail and Consumer Goods	409	7%	26%
+ Manufacturing	314	3%	44%
+ Government	306	5%	41%
+ Education	215	2%	33%
+ Transportation	194	7%	41%
+ Construction	165	3%	30%
+ Hospitality: Restaurant	156	9%	35%
+ Automotive	155	1%	45%
+ Technology	109	10%	30%
+ Financial Services	105	6%	35%
+ Professional Services	91	2%	27%
+ Real Estate	90	0%	26%
+ Hospitality: Hotels	75	5%	35%
+ Staffing and Independent Workforce	58	10%	29%
+ Energy & Utilities	45	0%	29%
+ Media	39	5%	26%
+ Insurance	35	6%	37%
+ Life Sciences	14	7%	71%
+ Chemicals	13	8%	38%
+ Hospitality: Fitness	13	0%	23%
+ Government Contractors	9	0%	56%
+ Go	1	100%	0%
+		0%	0%
Total	3996	5%	33%

COVID Reductions in Force

- There may be increases in retaliation claims stemming from selections of employees for reductions in force or furlough because of alleged protected activity (including requesting leave for COVID-19 related reasons).
- A rise in discrimination claims is also likely, particularly from “high risk” employees, including employees with preexisting conditions, pregnant employees, and employees over 65-years-old.
- Best practice for employers is to apply reduction-in-force decisions to workers consistently, for sound business reasons, with documentation to backup decision, and with clear communication to staff.

Class Action Lawsuits

- Pandemic related class and collective actions were a first in 2020.
- Lawsuits indirectly tied to the pandemic are also expected, such as “off-the-clock” wage and hour class and collective actions by nonexempt employees who work from home.
- Employees may also fight to obtain reimbursements for their home office costs.
- Furloughed employees may seek class claims alleging employers discriminatorily decided which employees to bring back after extended furloughs.
- Additionally, class actions are expected to increase as employers begin mandating vaccines, particularly if employers disallow exemptions for certain employees based on their religion or medical condition.

Possible Basis for COVID Claims

- Disparate impact, harassment, and retaliation for COVID illness
- Disparate impact, harassment, and retaliation based on protected class
- Failure to accommodate claims
- Invasion of privacy claims by employees based on collection of health and other information
- Wrongful termination, retaliation, or discrimination from reductions in force/furloughs
- Inconsistent application of workplace policies
- Retaliation claims out of whistleblower issues related to health and safety in the workplace
- Retaliation claims stemming from requests for FMLA leave
- Wage and hour claims for increased working hours, and work from home

Potential Vaccination Claims

- Discrimination on the basis of disability under the ADA
- Discrimination on the basis of religion under Title VII
- Wrongful termination or constructive termination
- Retaliation
- Invasion of privacy
- Claims brought by third parties, including applicants for employment, clients, customers, vendors, and other invitees who are also asked to be vaccinated against COVID-19 before being allowed access onto the organization's premises.

Vaccination Claims

- **Invasion of Privacy**
 - Mandatory screening questions for on-site vaccinations could involve the disclosure of the employees' personal medical information, which could be a source of liability if not properly maintained or disclosed
 - Where an employer requests proof of vaccination obtained by the employee off-site, any questions they ask that could elicit information about a disability (such as why they are not vaccinate) could trigger an ADA claim
- **Cyber Claims**
 - Claims resulting from a cyber breach for negligence by the organization on handling employee confidential information could potentially trigger an overlap in cyber coverage



2022: Five Issues to Monitor

2022 Issues to Monitor (Predictions!)

1. A return to the office will lead to claims based on remote work – accommodation claims, disparate treatment, wage-hour, etc.
2. Impact of the hot hiring market – employees resisting non-competes and employers willing to litigate to enforce them
3. Virginia: Youngkin's rollback of Northam's agenda will be limited
4. State OSHAs will take the lead on vaccine mandates for a more targeted group of workers
5. Bitcoin will bottom out at \$15,000

JacksonLewis

Thank **you.**