

Neither Shaken Nor Stirred:

Don't Be Surprised by These Trends in Employment Litigation

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Agenda

What we **know**,
What we **expect** &
What we **can do**

General Employment Litigation

Arbitration

Employee Compensation

Antitrust in the Labor Market

Workplace safety

Labor & Unions

Social & Political Issues



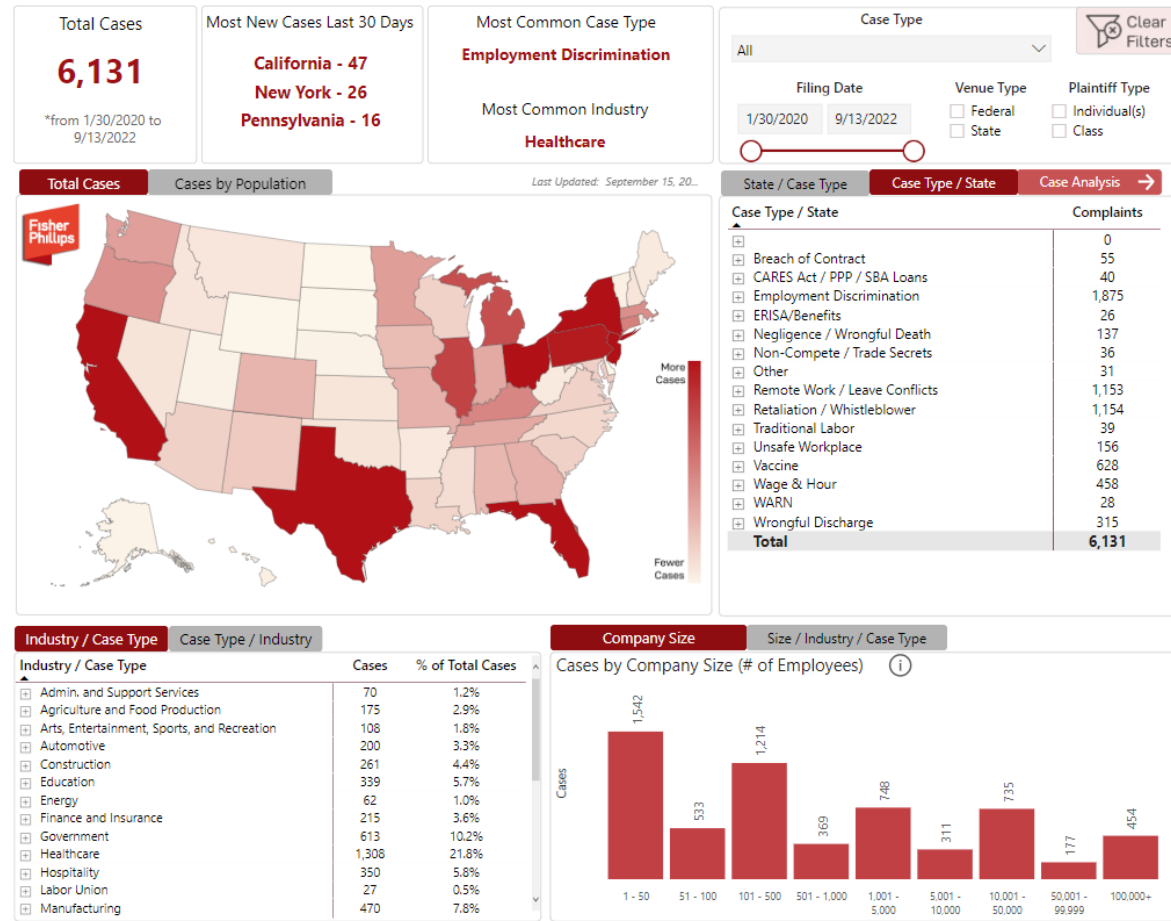
General Employment Litigation

What we know...

- Covid lawsuits on the decline

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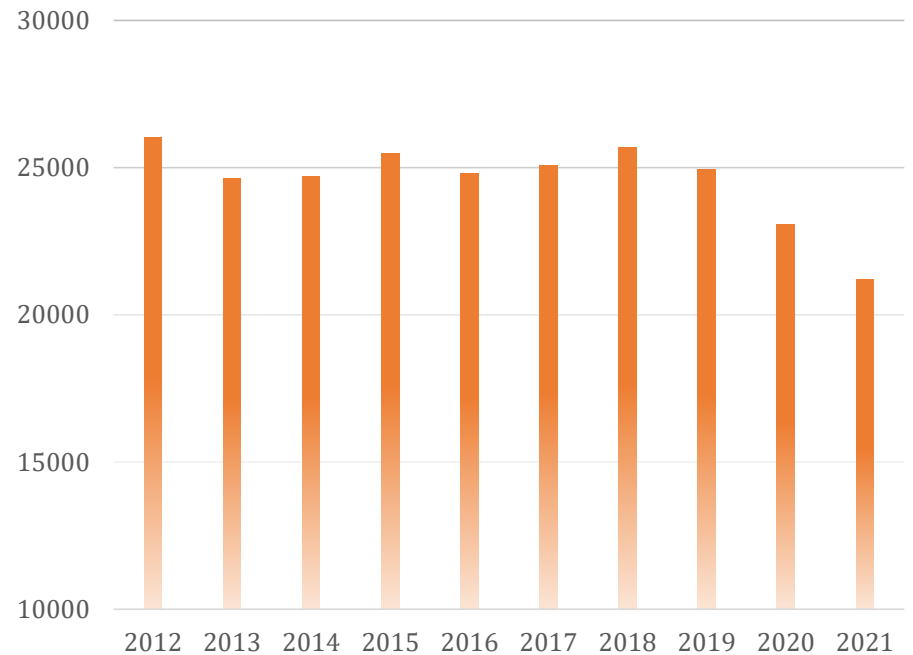
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What we **know**...

- Arbitration and rule changes may be affecting filings
- Agencies getting more aggressive
- Most cases settle

FEDERAL EMPLOYMENT CASES





What we **expect** . . .

- More federal lawsuits likely
- Plaintiffs will look for ways to drive up litigation costs
- Courts will keep applying settlement pressure



What we **can do** . . .

- Early case assessment and clear identification of case goals
- Carefully manage litigation costs
- Avoid unnecessary fights about peripheral issues
- Consider early summary judgment or settlement



Arbitration Agreements



What we **know** . . .

FAA Amendment

- “Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act”
- Courts determine arbitrability applying federal law
- Class action waivers invalid

Supreme Court

- Sticking close to statutory text, e.g. *Badgerow v. Walters*
- Unless there is an underlying basis for federal court jurisdiction, awards may need to be confirmed in state court



What we **expect** . . .

- Litigation to shape contours of arbitrability under amended FAA
 - E.g., no mention of retaliation in statutory text
 - If retaliation “relate[s] to conduct that is alleged to constitute sexual harassment” claims may be covered
- Tough cases where some claims are arbitrable and others are not
- Post-claim arbitration agreements



What we **can do** . . .

- Evaluate current arbitration agreements
- Decide whether to carve out SA/SH claims, provide employee option, or leave it alone
- Consider alternatives such as jury trial waivers



Employee Compensation



What we **know** . . .

- DOL hiring spree
 - 100 investigators for WHD
 - Lawyers for enforcement
- Continued push to ↑ minimum wage to \$15 and ↓ tip credit
- States enacting paid leave and pay transparency laws



What we **expect** . . .

- DOL will likely issue a new overtime regulation
 - Current minimum salary for exemptions = \$35,568 (\$684 per week)
 - Expected to increase substantially
 - May build in automatic increases
 - Duties tests may change
- Continued enforcement focusing on deductions below minimum wage and hours worked but not paid
- Pay equity and transparency litigation



What we **can do** . . .

- Carefully review positions and exemptions
 - E.g., managers must have primary duty of managing company or department, regularly direct the work of at least 2 FTEs, and be paid at least \$684/week in salary
- Ensure time record are accurate and signed by employees
- Consider pay equity review
- Review pay ranges for positions to prepare for pay transparency



Antitrust in the Labor Market



What we **know** . . .

- Criminal Enforcement Actions
 - No Poach Agreements
 - Wage fixing
- DOJ not dissuaded
- Civil Lawsuits will lead to enforcement actions & vice versa



What we **expect** . . .

- FTC Rulemaking
 - More DOJ prosecutions
 - DOJ/FTC CIDs
 - Federal legislation?
- Patchwork Noncompete Legislation
 - Limiting non-competes for low-wage workers
 - Requiring prior notice to employees
 - Fining employers for unreasonable agreements
 - Attorneys' fees for employees
 - Outright ban



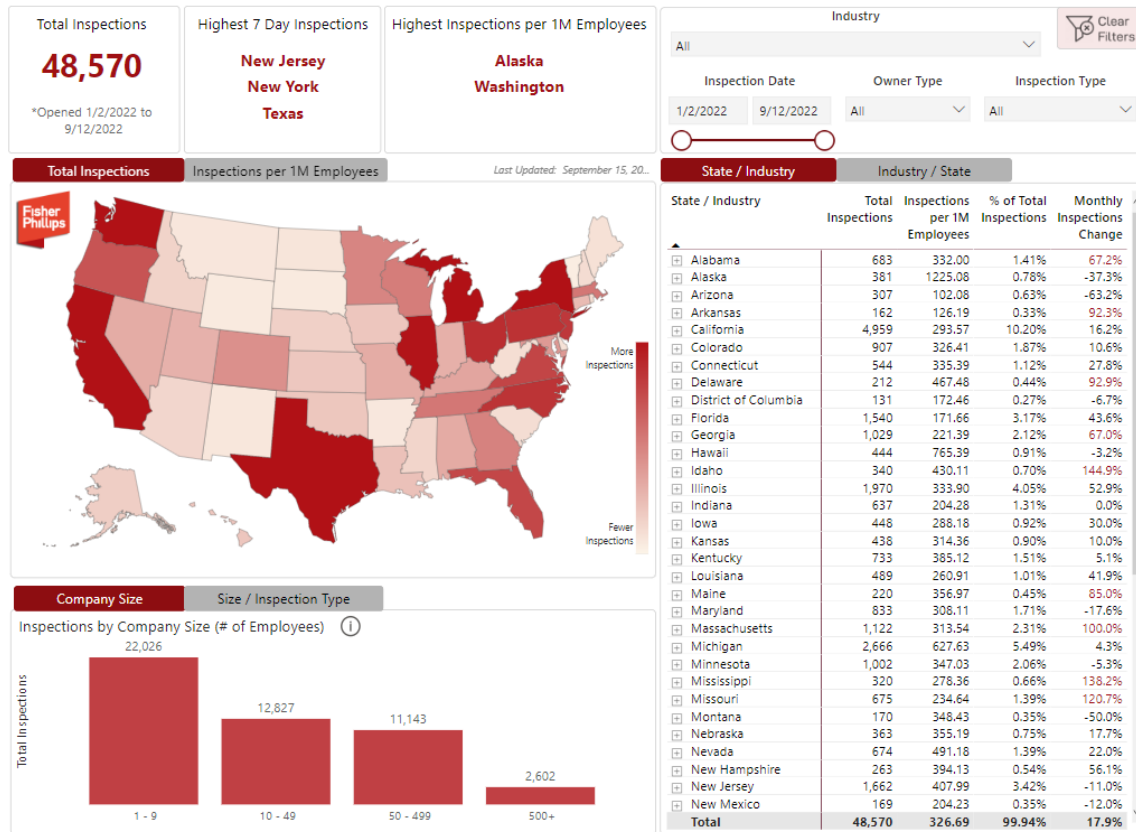
What we **can do** . . .

- Beware of labor-market antitrust risks
- Do not share confidential wage information with competitors
- Review non-competes
- Consider non-solicitation and confidentiality agreements



Workplace Safety

OSHA Inspection Tracker





What we **know** . . .

- OSHA is shifting focus away from Covid
- On-site inspections picking up
- National Emphasis Programs
 - Outdoor and Indoor Heat-Related Hazards
 - Trenching and excavation



What we **expect** . . .

- Legislature has approved increased budget
 - More enforcement inspectors and broader inspections
- Increased penalties
 - Max for Serious & Other-Than-Serious ↑ from \$14,502 to \$70k per violation
 - Willful, repeated, and failure to abate, max fine ↑ to \$700k, minimum ↑ to \$50k
- More willful citations and criminal referrals
- Focus on heat safety
- Focus on whistleblower protection
- Enforcing anti-retaliation rule (largely dormant since 2016)



What we **can do** . . .

- Continue to train on safety and awareness
 - If you see something, say something
- Take action to correct risks before and after incidents
 - Largest penalties are for willful, repeated, or unabated violations
- Learn from others
 - Monitor trends in OSHA inspections



Labor & Unions



What we **know** . . .

- Workers increasingly hold positive view of organized labor
- Anxiety and concerns about job security, workplace safety, and compensation may lead to increased efforts to organize
- Smaller workplaces are at increased risk of unionizing
- NLRB committed to sharing info with EEOC, DOJ, FTC



What we **expect** . . .

- Virtual meetings are here to stay, may include union meetings
- In person organizing efforts will increase as more workers return to physical workplace
- NLRB will modify rules to be more labor-friendly



What we **can do** . . .

- Cultivate a pro-employee environment
- Focus on employee loyalty and engagement
- Identify organizing sentiment and activity early
- Involve a labor lawyer early if there are signs of organizing activity



Social & Political Issues



What we **know**...

- Political issues are polarizing
- Companies being pressured to get into (or stay out of) political issues
- Media & social media quick to react

Hot Button Examples:

- *Dobbs*
- Stop WOKE Act to limit CRT in schools and workplaces
- Florida Parental Rights in Education (aka “Don’t Say Gay”) Act



What we **expect** . . .

- Stop WOKE is currently enjoined, but future is uncertain - *Honeyfund.com v. DeSantis*
- Companies will consider how to address issues like *Dobbs*
- Employees will have strong beliefs about new laws; will discuss them at work; some of these conversations will go poorly
- Employees and others may expect or demand the company take a stand; politicians may retaliate; social media



What we **can do** . . .

- Continue to closely monitor pending legislation for necessary changes to company policy
- Review social media policy with eye toward balance of individual expression and preservation of company image
- Prepare HR to address employees potentially inappropriate speech and conduct
- Do not tolerate violent, disruptive employee conduct—courts do not generally view that as protected speech



Questions?

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Thank You!



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