Top 5 Employment Law Trends for 2022

Barbara E. Hoey, Mark A. Konkel

February 3, 2022

The start of a new year is the time for annual retrospectives, predictions, and promises to get back into the gym. Although we can't help with that last one, we wanted to take this opportunity to offer our own analysis on the state of employment law in 2021, and to see if we can predict the hot-button issues for the rest of 2022.

COVID Concerns

For now, the headline issue remains COVID. 2021 had seemed to offer a glimmer of hope that the pandemic was coming to an end, only for those hopes to be dashed by the virulent Delta and Omicron variants. Big cities like New York implemented sweeping vaccine mandates for businesses and customers, while some states and even the federal government issued more targeted mandates for healthcare workers and contractors. Earlier this year, we saw the Supreme Court issue two seemingly divergent rulings on vaccine mandates, eliminating President Biden's requirement for employers with 100+ employees to mandate vaccination or masking for those in the workplace. Meanwhile, a New York judge in Nassau County struck down the state's masking requirement for public spaces (the order is currently stayed pending appeal).

Employers are left with a hodgepodge of COVID-related rules and regulations depending on where they and their workers reside. New laws and lawsuits are inevitable, but they only amplify the collective wish for the pandemic to be extinguished—here's hoping.

Restrictive Covenants

The onset of COVID-19 ushered in the remote-work revolution. But this phenomenon, coupled with the so-called "great resignation" has led to employers confronting some novel legal issues. When seeking to enforce a restrictive covenant against a former worker, which law applies? The question was a simpler one in the Before Times—back when it was obvious that the worker lived and worked in the same state as the employer. But now, a vague restrictive covenant might no longer apply to an employee who made a big move.

Even after confronting choice-of-law issues, expect to see more arguments over what restrictions are now viable in a world where an employee can work remotely for a competitor across the country just as easily as your competitor down the block.

Of course, these are just the issues exacerbated by the pandemic. As ever, restrictive covenants remain a thorny issue and fodder for frequent legislation. For instance, Oregon has passed a law making any restrictive covenant lasting for more than a year to be unenforceable. Expect a lot of activity in this area throughout 2022.

The End of Mandatory Arbitration?

With a GDP roughly equivalent to those of the bottom 25 states *combined*, California's employment laws can serve as a bellwether for the rest of the country. For that reason, the 9th Circuit's ruling in *Chamber of Commerce of the United States of America v. Bonta*, No. 20-15291 (September 16, 2021) may be one of the biggest stories still flying under the radar. The case involves a dispute over California's AB 51, which effectively banned mandatory arbitration agreements in the employment context. In a 2-1 decision, the Court of Appeals reversed the District Court, partially upholding AB 51, albeit on narrow grounds.

Current arbitration agreements in California are still in effect, but an employer can violate the California Labor Code if the execution of an arbitration agreement is a condition of employment. There is currently a petition for a writ of cert pending with the Supreme Court. The outcome of this case can have sweeping implications for employers across the country, so be sure to keep an eye on this one.

Indiscriminate Anti-Discrimination

The winds of change will continue to blow through 2022, as both state and federal legislators continue to draft anti-discrimination laws. North Carolina and Oregon expanded their respective definitions of a "protected class," while in Illinois, it is now unlawful to discriminate against an employee for being "associated" with a disabled person.

As more and more states decriminalize marijuana, expect to see a push in a growing number of jurisdictions to keep employers from discriminating against employees who partake in the drug's use while off-duty. The stresses of the pandemic have opened the door to discussions regarding mental health concerns and self-care, so we can expect to see employees crying foul when required to work despite illness or exhaustion, or when instructed to not take prescribed medication.

New York has passed new protections for whistleblowers, in our view "all but ensuring a new wave of whistleblower claims." Additionally, the Pregnant Workers Fairness Act (PWFA), currently before the Senate, would expand short-term disability protections for expecting workers.

For every swing of the pendulum, there must come a backswing. Following the Supreme Court's landmark *Bostock v. Clayton County* decision in 2020, which extended Title VII protections to LGBTQ employees, we can now expect to see lawsuits seeking to clearly demarcate how far those protections may extend. The argument goes that the opinion may conflict with religious liberty rights protected by the federal Religious Freedom Restoration Act (RFRA). Currently, *Bear Creek Bible Church v. EEOC*, 2021 WL 5449038 (N.D. Tex. Nov. 22, 2021) has scored a win for those putting forth that argument, holding that a non-denominational Christian Church was exempt from Title VII, and that a for-profit Christin institution was not required to comply with Title VII since compliance would substantially interfere with its free exercise of religion.

Meanwhile, as Americans return to the workplace following years of lockdowns and a shrinking economy, expect to see discrimination litigation accelerate generally.

Pay Equity and Class Actions

Pay equity cases will continue to prove a thorn in the side of employers—these cases tend to rely heavily on fact discovery and expert opinion, and are thus particularly difficult to dispense of through motion practice. And despite what the headlines might lead you to believe, these lawsuits are not exclusive to female employees. In response to this groundswell, states and cities have recently

instituted bans against employers requiring that applicants provide salary history. Considering the costs presented by equal pay litigation, this legislation may be doing employers a favor. Ironically, this is a situation where *fewer* documents may be helpful to employers.

The inverse is true of wage-and-hour actions, where an employer's recordkeeping is crucial. For all the disruptions caused to employers since March 2020, clean recordkeeping nears the top of the list. Not only does a transition to virtual work mean that wage and hour records mean that records may have been misplaced, entered incorrectly, or never entered at all, but some employers have struggled to adapt their pay practices to remote work, resulting is unpaid hours, misclassified employees, and an utter nightmare when a class action lawsuit arrives on their doorstep. All these pitfalls can only mean an increase in wage and hour class actions.

Beyond the Law

Peering past the miasma of litigation and legislation, we're left with the fundamental question underpinning every issue in this space: how do I keep my workers satisfied and my business running without needless interruptions? To that question, avoiding legal troubles is only half the answer. Employers of every size and in every industry are innovating and finding new ways to keep their workers happy and to stay competitive in the marketplace. Certainly these business decisions, such as vaccine mandates, remote/hybrid work policies, or paid leave and other benefits plans, only complicate the employer/employee relationship and only lead to more legal questions. But deciding the direction you want your business to move in is the threshold issue—you can leave it to us to help you figure out the rest. However you decide to innovate and adapt in our rapidly-evolving world, Kelly Drye & Warren has your back.

So here's to a happy, healthy, and successful 2022!