

The Year Ahead: Litigation Hot Spots at a Glance

By Nadine C. Abrahams, Justin R. Barnes, Monica H. Khetarpal & Michelle E. Phillips

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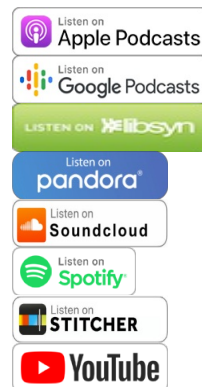
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Details

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Jackson Lewis P.C. · The Year Ahead: Litigation Hot Spots at a Glance



Takeaways

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What Employers Need to Know

- The spread and fallout from COVID-19 across the United States ushered in a slew of novel claims and lawsuits. This year, employers and educational institutions should be on the lookout in the following areas:
 - Negligence-related lawsuits.
 - Disability discrimination, accommodation and retaliation and whistle blower claims.
 - Claims specific to the education field, tuition and fee reimbursement.
- How can organizations minimize risk?
 - Review your contracts for in-person work requirements and reservation of rights clauses.
 - Consider waivers of liability or assumption of risk or arbitration provisions.
 - Implement signage, masking and social distancing policies. Consider



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Related Services

Class Actions and Complex
Litigation

COVID-19

Employment Litigation

Higher Education

Wage and Hour

mitigating measures like plexiglass, sanitizing stations, spacing out employee workspaces, etc.

- Communicate the above safety policies clearly and document all safety precautions taken.
- Train employees to comply with the above policies; monitor for compliance.
- There are unique risks associated with remote workers that employers should be aware of.
 - Failure to accurately record time for non-exempt employees.
 - Missed meal and rest breaks.
 - Reimbursement of home office expenses.
 - Specific to exempt employees:
 - Changes to salary as a result of a reduction in revenue; and
 - A permanent change in an employee's duties.
- The Biden Administration's decisions will impact how cases are litigated and the types of theories advanced to support claims. Employers can expect federal?? agencies to be more aggressive about their enforcement actions.
- In 2020, the U.S. Supreme Court issued two key decisions which created protections for sexual orientation and gender identity on a federal level to promote a uniform application of the LGBT laws across the 50 states. We expect these decisions to extend beyond employment discrimination to such areas as housing, education and sports.
 - Challenges to recent LGBTQ+ protections will likely come in the form of religious exemptions/accommodations and insurance coverage requirements.
 - To avoid legal challenges in this area, employers should consider including LGBTQ+ harassment prevention training as part of their EEO/anti-discrimination training as well as transgender employer policies and a gender transition plan.

Transcript

Alitia ([00:06](#)):

Welcome to Jackson Lewis' podcast, We get work™. Focused solely on workplace issues everywhere and under any circumstances, it is our job to help employers develop proactive strategies, strong policies, and business- oriented solutions to cultivate a workforce that is engaged, stable, and diverse. Our podcast identifies the issues dominating the workplace and its continuing evolution, and helps answer the question on every employer's mind. How will my business be impacted?

With COVID-19 giving rise to a whole host of new claims, ranging from issues surrounding remote work to tuition reimbursement, as well as new developments in the area of sexual orientation and gender identity, employers need a preventative strategy to minimize risk and avoid reputational damage at all costs. This episode of We get work™ identifies litigation trends impacting employers and tips for a proactive preventative strategy to address and hopefully avoid costly litigation and promote an inclusive workplace.

Our hosts today are Nadine Abrahams, co-leader of our general employment litigation group, Justin Barnes, co-leader of our wage an hour group, Khetarpal , co-leader of our higher education group, and Michelle Phillips, co-leader of the firm's out professionals and allies in law. When it comes to defending employers and employment litigation, our four co-podcasters have either individually or collectively seen it all. Nadine, Justin, Monica and Michelle. The question on everyone's mind today is, how will 2021 litigation trends impact my business?

Nadine ([01:53](#)):

Thanks, Alitia. This is Nadine, and that is a great question. I am excited today to moderate this discussion with my colleagues from across the country, as we address the year ahead and how to navigate what we expect to be some of the challenges that will be faced by employees in 2021 now that we have all managed to survive and navigate around the minefields of 2020. I'm going to actually start with a few questions for Monica. So, Monica, with the rise and prevalence of COVID-19 all across the United States, we've certainly seen a slew of new and novel lawsuits. And what I'm wondering is, what do you think employers and educational institutions should be on the lookout for in 2021?

Monica ([02:46](#)):

Thanks, Nadine. That's a good question. And I think that a lot of these things are what are keeping educational institutions and employers in general up at night. Lots of people are worried about what's coming down the pike. We have just recovered from all of the shock of what happened with COVID last year. So, what's coming next? And we really see this coming in a couple different angles. The first are sort of negligence-related lawsuits. These would come from people who contracted COVID and are going to try to blame that on either their employer or the campus, in a higher ed setting, the campus environment. And basically, they're arguing that either the university or their employer failed to implement reasonable precautions to keep them from contracting COVID.

The big question here is, first of all, what kind of duty of care does the employer or the university owe to all of their people? Some situations call for a special relationship. So, for example, colleges and universities, there's case law that says that they do have a special duty of care to students, and you might see the same sort of thing in a healthcare setting. And when we look at this, we focus on causation. Obviously, people can get COVID from the grocery store, from cheating and going out with their friends or wherever. So, we're looking at things like concentrated breakouts that would indicate that there's a higher likelihood that people contracted COVID from their workplace or from their campus environment. And we make arguments about comparative negligence. Like, yeah, maybe you contracted it here, but you also engaged in risky activity somewhere else. So, how does my portion of your damages get portioned out? We also talk about assumption of risk. When people go into a workplace or when they agree to return to campus, they assume some of the risk of contracting COVID.

Another area would be disability discrimination claims. And so, for example, long haulers. We know that many people suffer from COVID related symptoms and complications for many, many months. And the question is, could that be

considered a disability? That's obviously a novel question that still is going to be worked out, but very likely it could be. So, are employers terminating people because they're missing too much time, either recovering from COVID or quarantining or test results, there have been lawsuits on that basis. There have also been lawsuits when people terminate employees for refusing to come to work because they're high risk. And that turns into a discrimination claim, because people say, "Well, I was high risk because of a disability and you discriminated against me when you fired me for that."

And the flip side of that is actually accommodation claims, related especially to masks and vaccines. And we've seen people say that they can't wear a mask because of a disability, and they sue when they're not accommodated. We have seen requests for accommodations denied when people have immune system vulnerabilities. So, that's something that's litigated as to whether and how those vulnerabilities have to be accommodated. Long haulers may need more time off or something like that in terms of accommodations. And then there are religious objections to vaccines that need to be accommodated as well. And when they're not, that could result in litigation.

We're also seeing retaliation and whistleblowing. So, terminations coming from people who raise concerns about a lack of PPE or something like that. So, for example, there have been lawsuits when employees are terminated after they send emails or post on social media or whatnot, demanding more PPE from their employers, or just voicing concerns that their employer hasn't done enough to protect employees, or even sort of calling in government entities and reporting their employers or universities for failing to follow contract tracing requirements, which could be different in different localities.

And specifically in the education field, and even if you're not in the education field, a lot of people are just generally interested in this because they have kids in school and colleges and universities. We've seen a cottage industry of tuition and fee class actions. There have been over 300 class actions filed nationwide against colleges and universities. And those are arguing that when schools pivoted to online learning in March of last year, the education that students received was not what they had bargained for and not what they had contracted for. And they should be refunded a prorated portion of those tuition fees. Those are in all sorts of different stages of litigation across the country. We've had some success dismissing those lawsuits and some are ongoing. And I really don't see those going anywhere anytime soon.

Nadine ([07:31](#)):

Thanks, Monica. That is somewhat daunting, the list that you just provided. So, I'm wondering, based on those threats of these types of claims, are there certain actions that employers or educational institutions should be taking to minimize the risk of liability?

Monica ([07:49](#)):

Yeah, I think, I always tell my clients there are two questions here. The first is, can somebody sue me? And the answer is almost always yes. And the second question

is, can I defend it? And that's really what we're looking at here. How are you going to defend what may be inevitable litigation as the world continues to be flipped upside down with COVID? So, some of our general recommendations are to take a look at your contracts, whether you're in K through 12 education, higher education or an employer in literally any other industry, is there anything in your contract, your employment contracts, your vendor contracts, anything that guarantees in-person work? Is there something that you could arguably say, okay, this guarantees in-person education, or guarantees that the type of services that your business provides is going to be provided in person. Are you in an industry that requires that your employees work in person?

So, take a look at those situations and see if you need to modify your contracts to account for those changes. So, some of the things you should be looking at are inserting force majeure clauses, where they didn't already exist. Reservation of rights, so that would be something like, subject to change due to circumstances beyond your institution's control. You could consider waivers of liability or assumption of risk or arbitration agreements in class action waivers to sort of mitigate the burden of defending these claims.

And then going back to just those negligence claims that can really crop up anywhere, make sure that you're implementing signage, masking and social distancing policies, but not just that, make sure everybody is trained to understand how to comply with those requirements, and make sure you're monitoring for compliance. Make sure that those policies are communicated well and clearly, and that you're documenting that you did that. And look at mitigating measures. Plexiglass, sanitizing stations, spacing out employee workspaces, things like that. That way, you can say that you took adequate care and did what you were supposed to do to try to reduce the risk of the spread of COVID in your workplace or in your educational institution, even if it's just impossible to eliminate that risk.

Nadine ([10:04](#)):

Thanks, Monica. Those are great tips to consider, and a lot of food for thought. I'm going to move on to Justin. And Justin, from a wage an hour perspective, now that we have employees all across the country who've been working from home in some circumstances for almost a year, and some companies are considering making work from home permanent, are there certain factors that employers should be considering to avoid litigation associated with the remote workers?

Justin ([10:36](#)):

Thank you, Nadine. And the answer is yes. There are certainly unique risks associated with a remote work environment. And to be clear, these risks have always been around in the context of remote workers. It's not like remote work didn't exist before the pandemic. So, employers should certainly watch out for these risks, even in the non-pandemic context. But what COVID-19 did is the percentage of remote workers went through the roof, and it did so almost overnight. So, many employers who had few or no remote workers at all went to an almost entirely remote workforce overnight with basically no preparation and no heads up. And that's created a whole host of challenges, especially for those

employers who were not used to remote workers.

The US Department of Labor has issued some guidance that can help, and they issued this guidance last year, but it certainly will not inoculate companies from all risks. And there's an open question about how long that guidance really is good for, considering the fact that we've been working remotely for almost a year now. And as you noted, Nadine, a lot of companies are using this as an opportunity to transition to a fully remote workforce. So, these are certainly issues that employers should watch out for. And there are a lot of them, frankly, but there are about five that, from a wage an hour perspective, we see the most.

The first, and I think the riskiest and most important to watch out for, is the failure to accurately record time for your non-exempt employees. If you have employees who are used to working in an office environment, and especially employees who may be used to clocking a time clock, and now they're working from home, they may not be used to keeping track of their own time, so it's really important that employers take steps to make sure that their non-exempt employees are accurately recording all the hours that they're working.

Another risky issue that we see with non-exempt employees is missed meal breaks. And I'm from Georgia, so we're really only concerned about federal law here, but there are a lot of states that have very specific and strict meal and rest break requirements. And employers need to take steps to make sure that they're ensuring that their non-exempt employees are taking all the meal and rest breaks that they need to take, whether that's through attestation language on their time records or some other measures, employers should pay attention to that.

And there are also some unique challenges to exempt employees who are paid on a salary basis. It's important that employers not forget that they can certainly bring claims as well related to how COVID-19 has impacted the way they're working and paid. And there's really two main issues we see with exempt employees. The first is to the extent you're changing an exempt employee salary as a result of a reduction in revenue. Under federal law, it's okay to do that on a prospective basis. But the problem we see is when people or when companies start doing that frequently and flip-flopping back and forth between a higher or a lower salary, that could create issues. And also, to the extent there's a permanent change in someone's duties, that can create issues, because while DOL guidance says that a temporary change in duties will not impact exempt status, certainly a permanent one could.

And the last thing I want to mention is one that I think a lot of employers don't think about, and that's reimbursement of home office expenses. There could be issues where, if you're not properly reimbursing employees for their out of pocket costs associated with having to set up a home office, that both exempt and non-exempt employees could assert claims on that basis. So, those are the five issues that we see the most. And we haven't seen a wave of litigation yet, but certainly suspect it's coming.

Nadine (15:01):

Thanks for that, Justin. There are certainly a lot of factors that need to be

considered, I think, as we all, and many employers navigate the working from home considerations. I know that one of the issues that many people have been grappling with is, now that we're several weeks into the Biden administration, do you think that the new administration will lead to an increase in wage an hour litigation and wage an hour types of claims being made?

Justin ([15:31](#)):

Well, Nadine, I'll be honest, wage an hour litigation has always remained relatively steady regardless of the administration. I think that plaintiff's attorneys do not discriminate on the basis of who's in the White House at the time. But what I do think will happen is a change in administration can impact, one, how cases are litigated, and two, the types of theories that we see advance in litigation. And I think the best example of this is the question of how much deference courts will give to agency interpretations when they're ruling on various issues in a lawsuit.

In the last 20 years in particular, we've seen a lot of regulatory flip-flopping, depending on who's in office, in particular from the Department of Labor, as it relates to wage an hour guidance. And to be clear, I don't blame that on any particular party. I think that there's been an equal amount of flip-flopping on both sides, and we've already seen the Biden administration take steps to delay, or even try to reverse some of the policies that were put forth by the DOL under the Trump administration. So, I think we can expect some change in guidance. And there's a big question about how much are courts going to defer to the interpretations put forth by the Biden administration, considering that some of them could be completely different, 180 degrees from what the Trump administration said.

And courts have already started calling this into question over the years, especially as it relates to sub-regulatory guidance, not official regulations, guidance that can be put out without following formal notice and comment procedures. Courts are struggling with how much deference to give. So, I think when it comes to litigation, that is the biggest impact that a change in administration will have, as well as I think we can expect agencies under the Biden administration to be more aggressive about their own enforcement actions in filing new lawsuits, like we saw under the Obama administration as well.

Nadine ([17:50](#)):

Okay. So, it sounds like we need to stay tuned and wait and see how things flesh out in the next couple of months. Okay. So, turning to Michelle. Michelle, I know this is something very near and dear to your heart, so I have some questions for you about the impact of the Supreme Court ruling last summer in the Bostock case. And as I'm sure most of the listeners know, that case held that title sevens protection extends to sexual orientation. And what I'm wondering is what should employees be aware of in order to avoid litigation based on that relatively recent decision?

Michelle ([18:28](#)):

Thanks, Nadine. I can't underscore the importance of the Bostock decision. I mean, it changed the standards from across the country in terms of protections based on sexual orientation and gender identity. And this was when Justice Ginsburg was still on the court. And so, the court has very much changed since that time. But the breadth of the decision is nothing short of historic. The fact that it used to be the case that we would say you could be married to a same-sex partner in one state, and you could be fired in another state, because there were these differing standards on a state by state basis.

And now with this really revolutionary decision in June of last year, that is just not the case anymore. And when we think about it under the federal law, you have to have 15 or more employees. But the fact that these cases that have just been lashed about, people were looking for a legislative response, but the fact that the Supreme Court came out and granted protections both based on gender identity and sexual orientation really changes the landscape for employers in terms of what they have to think about going forward with this decision.

Nadine ([19:50](#)):

Do you expect that the Bostock decision will spill over to other areas of sexual discrimination, or impact other areas of the law in any way?

Michelle ([20:02](#)):

Yeah, it gets into the essence of what do we mean by gender? What do we mean by sex stereotyping? And that affects a number of different areas. That affects housing discrimination, that affects, Monica was talking about how it affects schools and title nine coverage. There's a number of lawsuits, there's a case pending in Connecticut right now where you have cisgender athletes who are bringing claims based on gender identity and a competitive advantage for someone who's transitioned in the role. There's a real question, it's completely not dealt with in terms of gender non-binary. So, a lot of it is presumptive of a male female dichotomy, this gender binary. So, there's a big question now as to whether or not people who are more genderfluid in their presentation or people who potentially go by the pronouns they or them and other such pronouns, how is that impacted by this decision?

The court also said that they held for a later day, how are we going to deal with restrooms? They only dealt with it in the employment discrimination context, so there's definitely laws being made now, whether it's in the school situation, whether it's in the private sector, where originally it was that restroom usage was based upon the gender you're assigned at birth. And there's been a big movement to have restroom usage being based on gender presentation, so it doesn't matter how you were born. It doesn't matter what procedures you've had done, surgically or not, or whether you're on hormones, really what the critical issue is, how are you presenting in the workplace? And that that should guide employers in terms of restroom usage, and not based upon someone's stereotypes or fears or prejudices about a particular person in the restroom. So, that's really an open question.

One of the big areas is religion. And so, there's always been this balance between

LGBTQIA rights and how does that work in the context of either a religious employer, or it could be a religious employee who has equal concerns about religious freedom, concerns about what their sincerely held religious beliefs and practices in the workplace. So, interestingly enough, and I know we're going to talk about this, but in Our Lady of Guadalupe case, that was a significant undercutting to the Bostock decision in the context of religious employers.

There's also the question of transgender medical insurance, and is there going to be a requirement that employers have to have equal medical coverage for someone who is in the process of transition. There's been a number of cases throughout the country. The ESC, for example, takes the position that yes, an employer does have to have coverage based on someone's transgender status. Now, what's not that clear is how much coverage, what procedures have to be covered. Really, the law hasn't gotten that granular on that issue, so I think we're going to see more cases on that front. Those are probably the biggest concerns right now.

Nadine ([23:17](#)):

So, Michelle, based on all of those open issues and concerns that are out there, is there something that you can recommend that employers proactively institute based on that decision and concerns raised that flow from the decision?

Michelle ([23:34](#)):

Well, certainly in jurisdictions, both where training is required, such as Illinois and New York, California, Connecticut, in part Massachusetts, and other locations. If an employer is going to be conducting harassment prevention training, it's really critical that you include an LGBTQ component in that training. And certain states actually require that, New York and California being the specific ones. So, any training you're going to do on harassment, you must educate staff on what are appropriate pronouns. Does the employer have a gender transition plan. And you should be preventive with this. You shouldn't wait until someone comes to you who's in the process of transitioning. It's really important for employers to be ready and prepared, whether that's having a transgender employment policy or whether that, companies are all over the map on this.

Some companies have a very short, it's a paragraph that gets included into a harassment policy. Other companies have 16-page gender transition guidelines, and it really walks you through very methodically from the moment that someone is transitioning all the way through, whether it's in terms of training, medical coverage, confidentiality of medical information, whether it involves changing the legal name in terms of documentation relating to someone's identity. How is this going to be informed? How are we going to inform customers or third parties or other clients? Those are really significant.

What are we going to do with the restroom? Some companies, when this first came out, companies would say, "Well, we're just going to have a separate restroom for the person in transition." Well, that doesn't seem very fair. That's like having a yellow light, transgender person, right? That'd be the worst thing that you would want to do in that situation, right? People should be allowed to use the restroom that's consistent with their gender presentation. And often what I hear

in training, and employers need to be concerned about, is the employee who now raises an objection and says, "I won't use the restroom with someone who I consider to be a male or who I consider to be a female." And really, the truth is, it's about equal access for everyone. So, if someone has a concern, it's as simple as letting them choose which restroom they want to use, but banning anyone from a restroom based on stereotypes and prejudices is really important to stay away from as an employer.

Nadine ([26:08](#)):

Thank you, Michelle. That was all very insightful. And I think it's going to be very helpful for employers to be aware of those issues, as we move forward in the aftermath of both our Lady of Guadalupe and the Bostock decisions. And I think we're now out of time, so I want to thank Monica, Justin and Michelle, and hopefully this has been helpful for employers as they look ahead for the rest of 2021.

Alitia ([26:38](#)):

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