

# 2022: The Year Ahead for Employers - COVID-19

By Tasos C. Paindiris & Stephanie J. Peet

January 28, 2022

## Meet the Authors



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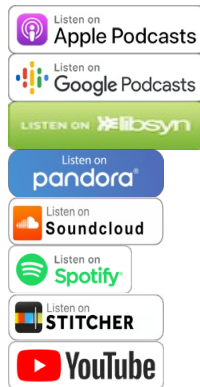
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## Details

January 28, 2022

As we enter the third year of the pandemic, change continues to be the one constant for employers. On this episode of *The Year Ahead* series, we discuss the interplay of government driven vaccine mandates and the ensuing impacts on employers, including labor shortages and union organizing, as well as potential liabilities employers could face as a result.

Jackson Lewis P.C. · 2022: The Year Ahead for Employers - COVID-19



## Takeaways

As 2022 begins, so does the third year of a sustained global COVID-19 pandemic. Close to 4,000 lawsuits related to COVID-19 were filed between March 2020 and August 2021. Hundreds of those have been brought as putative class or collective actions, a clear majority of which were in the wage and hour context. As with most wage and hour claims, they pose a significant risk of exposure and defense costs if they survive early dismissal. But the COVID-related class actions that have been filed are not limited to the wage and hour context.

### Return to Work and Remote Work Policies

Employers should address accommodation requests on a factual, case-by-case basis, and make exceptions to return to work or formal work policies in accordance with applicable law for providing accommodations.

### Religious Accommodations

With the proliferation of religious accommodations requests in response to vaccine mandates, courts are examining the threshold issue of what is an undue hardship on the employer in a religious accommodation case and whether standards should be brought in line with those used in disability accommodations claims.

### Beyond the ETS

Employment Litigation  
National Compliance and Multi-State Solutions  
Reductions-in-Force/WARN Act  
Restrictive Covenants, Trade Secrets and Unfair Competition  
Wage and Hour  
Workplace Safety and Health  
Workplace Safety Protocol

In its regulatory agenda, OSHA announced its intent to create an infectious disease standard. The standard will be a permanent rule, going through formal notice and comment rulemaking under the APA rather than the emergency mechanism used for the OSHA ETS.

## Transcript

Alitia (00:08):

Each year, Jackson Lewis publishes *The Year Ahead for Employers*, a forecasting resource to support organizations as they navigate the legislation, regulation, and litigation trends impacting their business.

In 2022, we provide the insights and analysis of our attorneys on labor and employment law from the field in a variety of digital and print formats, including this four part podcast series.

As we enter the third year of the pandemic, change continues to be the one constant for employers. Return-to-office plans have been disrupted by COVID-19 variants and labor shortages, coalitions of social forces have amplified calls for equal rights and changes in how we work, and policy shifts ushered in by the Biden administration and influential regulatory agencies converged, creating yet another challenging year ahead for employers.

On this episode of *The Year Ahead* series, we discuss the interplay of government-driven vaccine mandates and the ensuing impact on employers, including labor shortages and union organizing, as well as potential liabilities employers could face as a result.

Joining us today are Stephanie Peet, Tasos Paindiris, and Melanie Paul, principals, respectively in the Philadelphia, Orlando and Atlanta offices of Jackson Lewis.

Stephanie, Office Managing Principal of the Philadelphia office, is a strategic advisor who manages national, regional, and local client relationships. She represents management in employment discrimination and wage an hour cases filed both in federal and state courts, as well as equal employment opportunity and labor relations matters pending before federal and state agencies.

Tasos, Office Litigation Manager of the Orlando office, assists employers in complying with the challenging array of federal and state laws that protect injured and ill employees. Most notably, the ADA and FMLA. He works closely with employers to provide compliance advice and develop programs for disability leave and absence management.

Melanie is co-Leader of the firm's Workplace Safety and Health Group, and focuses her practice on occupational safety and health and wage an hour issues. Melanie's clients benefit from her inside experience as a trial attorney for the US Department of Labor for more than a decade. Stephanie, Tasos, and Melanie. Welcome, and thank you for joining us today on *The Year Ahead* series.

Stephanie Peet (02:37):

Thanks for joining us today. Now that 2021 has come to an end. Employers are

looking ahead to what's likely in store for the coming year. As part of Jackson Lewis' *Year Ahead for Employer* series, Tasos Paindiris, Melanie Paul and I, we're going to be talking about the continued COVID issues that we're still facing and will likely still face in 2022. Tasos, Melanie, I'm going to get things kicked off and talk about the COVID-related class actions.

Close to 4,000 lawsuits relating to COVID-19 were filed between March of 2020 to August of 2021, close to 4,000. Hundreds of those have been brought as punitive class or collective actions. Probably not surprising, a clear majority of which were asserted as wage an hour. And like all wage hour class actions, those suits pose a significant risk of exposure and defense costs if they survive early dismissal.

But the class actions are not limited to the wage or context. We're going to talk today about other types of class actions that we may face as 2022 unfolds. Workplace safety could be one of those, employee privacy, worker misclassification, disability, accommodation discrimination. And we're going to talk about the vaccine mandates.

All right, Tasos, Melanie, first question for you guys. What do you think is the state that had the most class action filings as it related to COVID-19? Any guesses?

Tasos Paindiris (04:09):

I'd have to say California.

Melanie Paul (04:12):

I would second that.

Stephanie Peet (04:13):

And I'd have to say you're right. Tasos, your state of Florida was not so bad off either. California was just crazy. It had 83. The next in line was Ohio and Illinois tied with 16, with your Florida coming in closely with 15. So California was definitely the state with the most COVID class actions.

All right, one more opportunity for success, Tasos and Melanie. The industry that we saw the most COVID-19 class actions, the industry? There's two of them that are pretty up there.

Melanie Paul (04:51):

Healthcare?

Stephanie Peet (04:52):

Healthcare.

Tasos Paindiris (04:52):

I'll agree.

Melanie Paul (04:53):

And meat and poultry processing?

Stephanie Peet (04:57):

It's funny, I thought it would've been the same thing too. Healthcare clearly number one, with the number two, retail. So not terribly surprising, and we'll hear today probably why.

So, as you can guess, it's going to be difficult to predict if there's going to be a wave of class actions related to COVID in 2022 for a variety of reasons. The ongoing state of the pandemic, it's consistently changing. I don't think anyone would've predicted that we'd be here where we are now in January of 2022. So that's going to create some difficulty and prediction. The delay in the return- to-work. We were all returning. Now we're delayed. And just the typical lag between the time someone actually has the action, the offense that takes place, and then the time between the complaint is filed.

Nonetheless, let's look at some examples of cases that were brought in 2021 and '20 to see if we can better understand what may lie ahead for employers as 2022 is going to unfold. As I said, initially the number one area where we're going to see class actions is probably going to be wage an hour, but there's going to be a few buckets where we may see class actions that unfold in this one area.

The first potential area is going to be what I call the screening cases. Tasos and Melanie, those are the ones where the employees spend that time waiting in the line to get their temperature checks, to see if they have the fever, to fill out the survey of questions about their health and whether or not they were exposed to other people. Whether or not that time spent screening is compensable is an issue of state law, and in '20 and '21, we saw states are kind of all over the place on this.

For example, a federal court in Missouri was faced with a screening case. Employees in this case were required to arrive to the shift 30 minutes early. It was a national retailer. They had to wait in line. They had to get temperature checked. They had to answer a series of questions about whether or not they felt healthy, whether or not they've been sick at all, and whether or not they've been exposed to potential COVID. The federal court in Missouri, with those same facts said, "Hmm, we're going to toss the case." There's no violation of the Fair Labor Standards Act. That time does not need to be compensable, and therefore the court found that plaintiff was unable to state a claim as a matter of law.

So let's go to the East Coast, New Jersey, and some very similar fact pattern. And the New Jersey district court said, "You know what? We're going to allow discovery on this issue to see whether or not the plaintiffs can indeed make out a case." So we have two courts faced with similar issues with two different issues ... two different decisions.

We have other states where punitive class actions on screening cases are pending. California, of course, for example. Wisconsin is another one of those states that's waiting to make a decision on these issues. So it's going to be interesting in 2022 to see how these cases are going to unfold and how the different courts are going to weigh on these issues.

So that's the screening case. I do think we're going to see more of that in 2022. I

also think we're going to see class actions in 2022 on the premium pay. So what am I talking about there? It's when the employer pays or promises to pay employees additional compensation for working during the height of the pandemic or during the pandemic. And in this one bucket, you're going to see a whole host of different claims.

One type of claim. The employee's saying that their employer agreed to pay them a premium pay to work through the COVID-19 pandemic, but then either failed to pay overtime for those hours that were worked, or if they did pay overtime, they didn't calculate overtime correctly.

So I certainly envision those types of claims cropping up in the next several months. We're probably going to see claims that the employer offered higher pay to care for COVID-19 patients, so we're talking about the healthcare setting. And to work through the pandemic, but the employer didn't pay those higher premiums.

California, I'm talking to you. We're probably going to see certain claims that deal with the wage statements. Specific information needs to be included on the wage statements. So even if those California employers pay the correct pay, that going to see probably claims that they didn't record the wage rate correctly on those earned statements, and therefore that's going to give rise to a class action.

We'll probably see COVID-related claims in class actions as it relates to bonuses. A lot of employers promise paying bonuses to incentivize their employees to come to work and to work through that pandemic. It's possible that we're going to see claims that, "Okay, even if you paid the bonus, you didn't calculate my bonus into the regular rate of pay, and therefore I wasn't paid correctly in violation of federal and or state law."

Finally, as it relates to premium pay rates, I think we're probably going to just see common law breach of contract claims. You promised that you were going to pay me some sort of incentive pay and that you were going to pay me some sort of incentive pay and you didn't live up to the promise. All of these types of claims are certainly conditional to class actions. The third type of wage hour claim that I think we might see in 2022, in a class action type format, is the mis-classification case. So prior to COVID, I'm sure a lot of employees were doing the exempt work and were properly classified as exempt COVID hits. People have to pivot, and now they're doing a disproportionate amount of work that is non-exempt in nature, but they're classification didn't change. Meaning they're still paid salaried and not getting overtime for hours worked more than 40.

I think we probably would've seen a lot of those types of cases in 2021, but as the pandemic is still going forward and things aren't slowing down as much as we thought, I think these cases are still going to crop up and we they're going to see them in the next several months. So it'll be interesting to see how this all unfolds. I just did a lot of talking about class actions in the wage hour context. Melanie don't want to put you on the spot, but you are our workplace safety guru. Are we going to see class actions in the work safety arena in the next several months? What do you think is going to happen here?

Melanie (11:26):

I think it's certainly possible if they're brought under state law, but under the Federal Occupational Safety and Health act or the Ash act, there is no private right of action. So, employers may have a defense to any claims brought under that act. However, that doesn't necessarily stop people from bringing those claims, especially as the pandemic wages on and with the Omicron variant, as we've been seeing, it's a lot more infectious. So anything is possible in 2022.

Stephanie Peet (12:00):

Melanie, it's the statement of the year. Anything is possible. So thank you. So we've talked about wage and hour, we've talked about workplace safety. I do think we're going to see something in relation to class actions in the discrimination context, probably specifically with disability accommodations, people are returning to work, or at least they were returning to work. And with the return to work, employers have been receiving an influx of accommodation requests. They were largely for disability accommodations. Now, generally speaking, that's perfectly fine. And employers should absolutely address those on a fact by fact basis. We're talking about class actions when the employer has a blanket return to work policy, or a formal remote work rule. When you treat everything very similar and you don't look at the factual nature of the individual inquiries that opens the door to class action challenges.

So to the extent the employers are doing that, I think that is a potential for class action treatment in 2022, Melanie and Tasos, as you probably have read the surveys that I've been reading, there have been a lot of surveys that companies have done throughout the pandemic to see the impact that the pandemic is having on a whole host of people. And what these surveys are almost unanimously showing is that remote work, show female employees are 50% more likely to prefer it. The other evidence is showing that remote workers are less likely to be promoted. I say this, because there is a potential for a disparate impact claim on a class action basis brought for gender discrimination, meaning the FEMA workers, the ones who are more likely to prefer the remote work, likely maybe less likely to be promoted as a result of their preference for that remote work.

So that is something to keep in the back of your mind as we're making employment decisions, certainly as it relates to remote work decisions. I also think the developing issue in 2022 is going to be whether employees can be liable for preferential treatment of vaccinated employees. If the non-vaccinated status is tethered to some sort of protect status. So I think that's something to watch for in 2022. Briefly, want to just talk about another potential area of the law, the WARN act. Most of us know that you need to provide written notice of at least 60 days when you're doing a mass layoff. There are exceptions to that, and obviously pandemic, COVID-19 was not included in the statute, but what is included is a natural disaster and that's things as floods, earthquakes, droughts, or unforeseen business circumstances.

Now, what we have seen in 2021 is that the courts are generally finding COVID-19 is considered a natural disaster, no surprise there. Where the courts do seem to be diverging is whether or not COVID needs to be the direct cause of the layoffs for the exemption to apply. We have two circuits that have weighed on this issue. The fifth

and the 11th circuits both have come out with different decisions. One said COVID-19 does need to be the direct cause the other does not.

So we're going to have to see again in 2022, if any other courts are going to weigh on this issue, perhaps not surprising. One of the biggest types of class actions that we're going to see in 2022 has to do with vaccine mandates. Some employees are claiming disability discrimination, as it relates to the vaccine mandate, the more claim that we have been seeing, and we're likely to see in 2022 has to do with religious discrimination. Tasos you are the vaccine mandate expert. You and I have talked about it. You with the vaccine mandates, they're still subject right to the reasonable accommodation provisions, and that includes religious accommodations. What do you think we're going to see as it relates to class actions and vaccine mandates in 2022?

Tasos Paindiris (16:12):

Thanks Stephanie. So I think there's virtually no doubt that we're going to see an increase in vaccine mandate related litigation, including class actions. My name's Tasos Paindiris. I'll talk a little bit about that. So there are really two main buckets for this type of litigation. You have the first issue of whether or not a vaccine mandate is even legal. So challenging the legality of having the mandate in the first place. And we've seen almost 400 lawsuits so far challenging vaccine mandates.

Now these cases are challenging whether or not the employer can have the mandate. And they're trying to get the court to issue an order to stop the employer from implementing the mandate on the front end. And like I said, this is generally what we've been seeing so far is this type of litigation and the early decisions that we've seen have favorite employers for the most part, in terms of the ability to require the vaccine mandate.

Now, keep in mind that these decisions are where an employee is asking the court for an injunction or restraining order to stop what the employer's doing, but the judge isn't necessarily deciding the case on the merits. The court's only deciding whether or not the employer should be stopped from implementing the mandate. And in some of these decisions, the judges have expressed some doubt on the ultimate ability of the employer to succeed on the merits. But nevertheless, the judges, would decide that the standard for issuing injunction was not met.

So in terms of the year ahead, I think it'll be interesting to see these cases go through the discovery process. And then we might be seeing some decisions on the merits to see how this all plays out, but at the injunction stage, there's a very high bar and a lot of the judges have said, "well, there isn't the type of irreparable harm that would be needed to demonstrate for an injunction."

So, as I mentioned earlier, there are two main buckets or for this type of litigation; one is whether the employer can have the mandate and employers have been successful in those types of cases, for the most part. And then the other bucket is even if the employer can have the mandate, is the employer applying it properly and considering accommodation requests. And that's what you touched on Stephanie with the religious accommodation.

So we expect to see, and frankly, we're already seeing a lot of challenges to accommodation denials on an individual basis, but what lies ahead and over the horizon is the potential for these types of challenges on a class wide basis, attacking the company's policies and practices with respect to these accommodation claims.

Most of the decisions up to this point have not addressed the merits of disability or religious accommodation claims. But I think we can all attest to the fact that our clients and a lot of employers have seen a wave of accommodation requests that they have to manage.

So when employers have implemented vaccine mandates, we've just seen many accommodation requests comes in. And that's another thing to keep in mind, frankly is that if you've recently implemented a vaccine mandate or you're about to, you have to make sure that you have the resources to review and manage the volume of what could potentially be a significant number of accommodation requests. And from what we've seen, anecdotally, it's more on the religious accommodation side than the disability accommodation side, although we're seeing both.

So in these cases, the issue is really whether the employee is entitled to an exemption from the vaccine mandate as a religious accommodation or as an accommodation for a disability. There was not a significant amount of litigation over religious accommodations before COVID and relatively speaking anyway compared to other issues like ADA accommodations. There are way more ADA cases and decisions and precedent flushing out those requirements than there are religious accommodation cases. So there isn't a lot of precedent for employers to look at for guidance.

As we see more litigation in this area in the year ahead, we think that's going to change. One of the key issues is whether a religious accommodation poses an undue hardship on the employer, and whether there's a lower threshold to establish that undue hardship for religious accommodations as compared to disability accommodations. Justice Gorsuch commented that religious accommodation standards should be reviewed and perhaps made to come in line with the disability accommodation standards. So this has caught the attention of many who follow these issues and we're certainly keeping an eye out for how courts are going to lean in terms of this threshold issue of what's an undue hardship in a religious accommodation case. Before any of these cases get to court though, they have to go through the EEOC process or the State Administrative Agency. And in the past, the EEOC has pursued claims involving the flu vaccine. Keep in mind that vaccine mandates are not a new thing. There is precedent in case law on vaccine mandates. And the EEOC has filed lawsuits on behalf of employees who alleged that they were not accommodated in the context of a vaccine mandate. But now we have a different environment where the federal government is strongly supporting vaccine mandates. In the year ahead, we'll see whether the EEOC will be less inclined to challenge vaccine mandates and exemption denials given that the federal government is pushing so hard to get more people vaccinated. So I wouldn't be surprised if we see EEOC's upper management more involved in these issues so that they get some consistency nationwide.

So in addition to this cloud of litigation hanging over employers, there are also the



various state and local laws to navigate. One of the things we learned in 2021 was that federal, state and local mask and vaccine mandates are constantly changing. There are changes due to the COVID surges, the waves that come and go, core challenges, legislative action, and executive orders that either expire or are changed. So multi-state employers are really going to have to continue to be diligent about monitoring these developments. We're seeing changes almost daily of tweaks and modifications of various state local orders.

So no matter what happens with the upcoming court decisions that are pending on the federal mandate, the CMS, the OSHA ETS, the federal contractor executive order, we're going to see a constant tug of war I think between the executive and legislative branches and what they want to do and what the courts are permitting. And one of the questions I often get is, what do I do if a state or local law conflicts with a federal requirement? I know, Melanie, I would think this is coming up a lot with the OSHA ETS and whether that will preempt conflicting state laws, right?

Melanie (23:50):

Absolutely. We are definitely seeing a lot of those questions. If you ask OSHA, they would say most certainly their ETS preempts all inconsistent state laws that attempt to legislate on issues of vaccination, masking and testing to the extent that they actually restrict those issues and therefore would conflict with the OSHA ETS. The ETS does, or least some of OSHA's FAQs on this point actually say that states that have other public health requirements like indoor masking are showing vaccination cards to enter certain businesses would not be preempted by the ETS.

Tasos Paindiris (24:35):

Okay. Well, there's no doubt that as we get more decisions from the courts, it'll help us establish what the parameters are for what the government can do and whether or not the courts are going to allow these orders to move forward as they are or scale back. And keep in mind that there are many jurisdictions at the state and local level that have some sort of vaccine mandates. They might be limited to certain occupations, especially healthcare. But in addition to monitoring what the state and local governments are requiring employers to do, we have to watch what they're restricting employers from doing because some states are passing laws that would say you have to provide certain exemptions if you're going to have a mandate or treat vaccinated employees the same as unvaccinated employees, things that go beyond religious and disability accommodations. And there are going to be court challenges on those, so we have to see how the courts interpret those various mandates. So navigating state laws, regulating vaccination policies will be an issue regardless I think of what happens with the federal OSHA ETS and the CMS rule and the executive order. So the bottom line is we can expect to see a lot of activity in 2022 surrounding these issues and a continued evolution of law and a lot of new law being made surrounding vaccine mandates. Another example is there are some bills pending that would void noncompete agreements or other restrictive covenants if an employee is terminated for refusing a vaccine mandate. These haven't passed yet but it's something that employers should be keeping an eye on. So Melanie, what are some of the other compliance issues employers should have their eye on in the year ahead, particularly with workplace safety?

Melanie (26:27):

Well, Tasos, what a rollercoaster ride it has been with the OSHA Emergency Temporary Standard for vaccine or testing, ETS. It's on again, it's off again, it's on again, it's off again. The Supreme Court said so on January 13th after hearing oral arguments on it just six days prior; record time for a decision. What the Supreme Court found was that the petitioners who were challenging the ETS and requesting the emergency stay were entitled to that stay. So the ETS is back on Ice. The case will go back to the sixth circuit for adjudication on the merits, but essentially the Supreme Court in its decision had to determine the likelihood of success on the merits. And based on that decision, if the ETS came back to the Supreme Court for adjudication, again, if the sixth circuit did something inconsistent with what the Supreme Court just did, the ETS we know would be dead on arrival.

We already know how the Supreme Court is looking at this. And they basically said that with the ETS, OSHA overstepped its authority that's delegated to it by Congress. That Congress did not clearly delegate OSHA authority to regulate something like a rule regarding vaccination for a pandemic. They expressed that the rule was more akin to a public health rule. The court expressed concern over whether OSHA even has the expertise over this area or is the proper agency to be regulating in this area because as an executive branch agency, they don't have that same political accountability as states do, as Congress does. And so those are the governmental entities that are able to regulate in this space and not OSHA.

The court did not foreclose, however, that OSHA could regulate in this space if it was specifically an occupational hazard. The trouble with COVID-19 is that it's everywhere and the court said it is really not specifically an occupational hazard outside of let's say healthcare or working in a laboratory with COVID-19 virus or some workplaces that might be very crowded where employees can't social distance. So that's what's going on with the ETS. The things to look out for now are the states. There are 22 states that have OSHA plans that cover private sector employers. Those state plans are free to do more than what federal OSHA does. And in fact, four of them did so earlier in the pandemic when Virginia, California, Michigan and Oregon passed their own emergency temporary standards for COVID-19.

Now, those predated vaccinations don't have a vaccine requirement but they could always add such requirements and other states could also come up with other emergency temporary standards related to vaccine or testing or some combination of that. So we just need to wait and see what those states are going to do. And I would watch the states out west the closest because those are the ones that typically provide additional regulations and more protections for employees. So California, Washington, Oregon, those are the ones you really want to focus on. As far as adopting the ETS, it's really not likely that the state agencies will adopt the ETS.

Minnesota was the only one that had adopted the ETS before the Supreme Court decision. But as soon as that decision was announced, Minnesota also announced that it was suspending enforcement of the ETS. So, that's what's going on there. As you also know, many states have enacted rules and regulations either favoring vaccines, or restricting vaccinations.

There are some cities that have passed requirements for having vaccines to enter

certain businesses. So you really need to keep up with those and follow state and local health department guidance and rules on that. But, Federal OSHA is not going to take a backseat and they announced after the Supreme Court decision that they will continue vigorous enforcement of COVID 19 in the workplace and they do believe that it is an occupational hazard.

They're going to be focusing enforcement efforts on certain high risk industries, which they had outlined in their National Emphasis Program for COVID 19. That National Emphasis Program or NEP they issued initially last March, they revised it in July and it's effective for one year. So July through this year, it will be in effect and if it expires, OSHA can renew it.

So what that means is that industries that are considered the higher risk industries for COVID 19, there are some in healthcare, such as hospitals, doctor's offices, dentists, assisted living communities, continuing care, retirement communities. And even outside of healthcare where you've got meat and poultry facilities, warehousing and manufacturing, supermarkets, restaurants, and temporary agencies where they place workers in higher risk work environments.

Those industries are going to be targeted under OSHA's NEP for COVID 19. That means that OSHA will randomly generate inspection lists and if your establishment is selected, if it pops up on the list, OSHA will show up one day at your door to conduct an inspection. The NEP also provides for unprogrammed inspections.

What are those? That is when you get an OSHA complaint for example. And we've seen an exponential jump in the OSHA complaints over the course of the pandemic, employees complaining about their work environment, concerns about COVID 19, and the agency has been treating them through a more informal process. But at times we are seeing now where those have turned into onsite inspections.

So that's something to be on the lookout for. And the Permanent Infectious Disease Standard is on the horizon as well. With OSHA's rule making agenda, their regulatory agenda they published in the fall of 2001, they're looking at a permanent standard that will be broader than just COVID 19. It may cover, tuberculosis, pandemic flu, COVID 19. We just don't know yet, but that is on their regulatory agenda. And it may cover industries broader than just healthcare. So be on the lookout for that.

And with this aggressive enforcement, all the more reason to provide protections to your workforce for COVID 19 to the extent feasible, even though the Supreme Court has said in most cases, OSHA probably can't regulate in this space. However, there are other reasons other than OSHA enforcement why you would want to provide protections for employees.

Those include employee morale, keeping people at the job and not having to exclude or isolate or quarantine people because of exposures to COVID 19 to keep the business up and running. And so you want to do your part to make sure that employees feel safe and you can preserve the continuity of your operations as well.

With the aggressive enforcement though, we are also going to experience increased OSHA penalties. So every January, the penalties increase because they are now tied

to the consumer price index and inflation. And as we've been experiencing the greatest amount of inflation since 1982, the OSHA penalties have jumped about 6.2% now.

So last year, the Serious and Other-Serious and Failure to Abate citations had a maximum penalty of \$13,653 per violation, and now the penalty has increased to \$14,502. And those Failure to Abate citations can be multiplied 30 times for up to 30 days. And with Repeat and Willful violations, last year, they were at \$136,532 and have increased almost \$10,000 to \$145,027. So, that's something to be concerned about.

In addition, we have seen in the Build Back Better Act that's been kicking around Congress, plans to potentially increase the statutory maximum penalties under the Occupational Safety and Health Act. The maximum penalties are currently at 7,000 for Serious and Other-Than-Serious and Failure to Abate and 70,000 for Repeat and Willful. And of course that's the pre-inflation adjustment maximum. However, the Build Back Better Act proposes to increase those statutory maximum penalties by tenfold.

So if that were to pass, then employers could see citations of \$700,000 or even more for Repeat and Willful violations. So all the more reason to make sure you're in compliance and you're doing all the right things to provide protections for employees from all safety and health hazards, not just COVID 19. So I know that was a lot, but thank you for tuning in and as always, Jackson Lewis attorneys are to help you navigate these choppy 2022 waters.

Alitia (36:22):

Thank you for joining us. Please tune in to our next program where we will continue to tell you not only what's legal, but what is effective. For more information on today's topic, our presenters and other Jackson Lewis resources, visit [jacksonlewis.com](https://www.jacksonlewis.com). As a reminder, this material is provided for informational purposes only. It is not intended to constitute legal advice, nor does it create a client-lawyer relationship between Jackson Lewis and any recipient.

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