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10 Developments That Shaped Employment Law In 2021

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2021 was a transformative year for labor and employment law and fundamental employment dynamics. There was no shortage of highly influential decisions issued by courts around the country in 2021 — and California continues to sit at the eye of the storm.

And, as we've seen for decades, what happens in California doesn't stay in California; California employment-related decisions and legislation tend to influence the landscape in jurisdictions around the country over time.

What's more, the COVID-19 pandemic and a profound labor shortage have had a dramatic impact on employers and employees alike in various ways, ushering in a new normal with new risks.

Here are 10 key employment issues and events that transpired this year, each of which are profoundly affecting employers' risk calculations and interactions with their employees.

10. EEOC Recoveries and Notable Activities Amid the Pandemic

On Nov. 16, the U.S. Equal Employment Opportunity Commission released its annual Agency Financial Report for fiscal year 2021. The AFR reports on data from the EEOC's previous fiscal year and summarizes the agency's overall recoveries for the year.

Following a record year of recoveries for the EEOC in fiscal year 2020, the recoveries in fiscal year 2021 dropped and were roughly equivalent to recoveries in fiscal year 2019. Specifically, the EEOC's recoveries dropped from $535.4 million in fiscal year 2020 to approximately $484 million in fiscal year 2021. The EEOC recovered approximately $486 million in fiscal year 2019.

The amount recovered through mediations, conciliations and settlements was approximately $350.7 million in fiscal year 2021, and was recovered on behalf of 11,067 individuals in the private sector and state and local governments. Additionally, the EEOC recovered in excess of $100 million on behalf of 2,169 federal employees and applicants.

Furthermore, the EEOC reported resolving 138 lawsuits and obtaining $34 million as a result of litigation resolutions, and resolving more than 26 systemic lawsuits and over 340 systemic investigations on the merits and obtaining over $46 million in benefits for individuals as a result of those efforts.

It is also noteworthy that the EEOC filed a flurry of lawsuits prior to the end of its fiscal year in September, several of which are eye-catching.

In particular, the EEOC has now filed three lawsuits under the Americans with Disabilities Act concerning COVID-19-related accommodation requests.

In one, EEOC v. ISS Facility Services,[1] the EEOC focuses on an alleged denial of an employee's request to work remotely two days per week and take frequent breaks while working onsite due to a pulmonary condition.

The EEOC alleges that although the company allowed other workers in the same position to work from home, it denied the employee's request and, shortly thereafter, terminated her employment in violation of the ADA.

Rulings in favor of the EEOC in these cases could make it easier for employees to effectively insist upon remote work as an accommodation, particularly since remote work has become more common during the pandemic.

In light of this risk, employers should carefully assess each employee's request for remote work, and appreciate the potential implication of granting or denying the request.

9. Surprising California High Court Ruling on Break Premium Calculations

On July 15, the California Supreme Court imposed what has been characterized by many as a new standard by which employers must calculate meal and rest break premium payments— and it applies retroactively.[2]

California employers have been required to pay one-hour premiums for employees who are not provided a meal period or rest period pursuant to Labor Code Section 226.7(c).

In Ferra v. Loews Hollywood Hotel LLC, the court clarified that meal and rest period premiums must be paid at the same regular rate of pay that employers calculate for purposes of overtime pay.

This includes calculating not only hourly straight-time wages but also, all nondiscretionary payments for work performed by employees as well.

Accordingly, employers that pay additional amounts such as performance-based bonuses and commissions must take that compensation into account in calculating the one-hour premium payment for meal and rest break violations.

This new interpretation may come as a surprise to many California employers at a time when California meal and rest break class actions have become commonplace. It requires California employers to revisit and update their payroll practices for meal and rest period premiums to ensure employees are paid out at the appropriate rate of pay.

8. $137 Million Race Bias Verdict In Single-Plaintiff Case

On Oct. 4, Tesla Inc. was ordered to pay $137 million in damages to a former Black California-based elevator operator who claimed he was subject to a racially hostile work environment and that the company failed to take adequate steps to prevent the harassment.

The plaintiff in Diaz v. Tesla worked for Tesla as a subcontractor. He reported that he experienced bullying and taunting, including the use of racial slurs by his supervisors and colleagues. He also pointed to drawings of swastikas and derogatory images of Black children left around the factory.

This case was tried before a federal San Francisco jury, which awarded Owen Diaz $6.9 million for emotional distress and $130 million in punitive damages.

This massive verdict is a wake-up call regarding the serious risks that jury trials in employment discrimination and harassment pose.

As a practical matter, this verdict should spur employers to revisit and strengthen their policies, provide more rigorous training, and institute measures to swiftly and thoroughly vet and escalate complaints and/or information relating to discrimination and harassment.

7. BIPA And Illinois Workers' Compensation Act Preemption

Over the past few years, Illinois companies have suffered through a proliferation of Illinois Biometric Information Privacy Act class actions, with some cases settling for tens of millions of dollars.

But hope for employers might be in sight, as the Illinois Supreme Court is poised to rule on whether the Illinois Workers' Compensation Act preempts claims for statutory damages under the BIPA in McDonald v. Symphony Bronzeville Park LLC.[3]

BIPA requires employers to provide notice, obtain a written release and publish a retention policy prior to collecting an employee's biometric information. It provides for a private right of action, and permits an aggrieved party to seek statutory damages of $1,000 for each negligent violation, and $5,000 for each willful violation.

In McDonald, the plaintiff brought a putative class action alleging her employer violated BIPA in connection with its scanning of fingerprints for use with a time-clock system. The Circuit Court of Cook County denied the employer's motion to dismiss, but certified the following question for interlocutory appeal:

> Does the exclusivity provisions of the Workers' Compensation Act bar a claim for statutory damages under [BIPA] where an employer is alleged to have violated an employee's statutory privacy rights under [BIPA]?

The Illinois Appellate Court said no.

This closely watched case is now before the Illinois Supreme Court, and a ruling in the defendant's favor would hand Illinois employers a much-needed defense to BIPA actions.

In the meantime, Illinois employers have a pressing need to become familiar with BIPA's strict requirements and ensure that they are appropriately providing the required notice, obtaining releases and publishing retention policies before collecting biometric information.

6. Ninth Circuit Ruling on Mandatory Arbitration in California

California A.B. 51, originally effective as of Jan. 1, 2020, added Section 432.6 to the California Labor Code, which prevented employers from requiring employees to sign arbitration agreements covering employment-related disputes as a condition of employment.

It imposed criminal and civil penalties on employers that conditioned offers of employment on an employee's agreement to arbitrate.

The U.S. Chamber of Commerce and others filed a motion for preliminary injunction against the enforcement of Section 432.6 with the U.S. District Court for the Eastern District of California. The trial court issued a preliminary injunction preventing California from enforcing A.B. 51.

But, on Sept. 15, in a 2-1 decision, in Chamber of Commerce of the U.S. v. Bonta,[4] the U.S. Court of Appeals for the Ninth Circuit reversed in part the trial court's decision and vacated the preliminary injunction.

It held that Section 432.6 is not preempted by the Federal Arbitration Act provision "to have consensual agreements to arbitrate enforced according to their terms" because Section 432.6 is "solely concerned with pre-agreement employer behavior."

The decision focused on the distinction drawn by the court that the FAA does not regulate the pre-employment relationship; rather, it regulates whether an existing executed arbitration agreement is enforceable.

The Ninth Circuit also affirmed the preliminary injunction insofar as it struck down the civil and criminal penalties that apply when an employer succeeds in having applicants or employees sign an arbitration agreement.

While this decision permits California employers to successfully enter into voluntary arbitration agreements with employees that are ultimately executed, they need to take careful steps to ensure that the agreements cannot be construed as mandatory.

There are of course many practical benefits to arbitration versus litigation in courts — e.g., such as speed and cost considerations — but there are contrary perspectives and serious consequences to mandating this form of dispute resolution in California that employers need to be sure to steer clear of.

Fortunately for California employers, arbitration agreements entered into before Jan. 1, 2020, are not covered by Section 432.6.

The U.S. Chamber of Commerce has petitioned for rehearing en banc.

5. Appellate Court Jurisdictional Rulings Regarding FLSA Collective Actions

On consecutive dates in mid-August 2021, both the U.S. Court of Appeals for the Sixth Circuit and the U.S. Court of Appeals for the Eighth Circuit ruled that federal courts lack jurisdiction over Fair Labor Standards Act claims arising from out-of-state conduct where the defendant is not subject to the court's general personal jurisdiction.

The Sixth Circuit case is Canaday v. the Anthem Companies Inc.[5] and the Eighth Circuit case is Vallone v. CJS Solutions Group doing business as The HCI Group.[6]

These decisions — which are the first circuit court decisions to tackle this issue — embrace the U.S. Supreme Court's 2017 decision in Bristol-Myers Squibb v. Superior Court of California,[7] which established the appropriate location for pursuing tort mass actions where the plaintiffs are nonresidents and the case is unrelated to the forum state.

The Sixth Circuit emphasized that:

> Where, as here, 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 [s]tate.

Similarly, the Eighth Circuit recognized that personal jurisdiction must be assessed on a claim-by-claim basis, and each failure to pay wages is a separate FLSA violation that gives rise to a distinct claim.

These cases are important wins for employers because they enable employers to limit FLSA collective actions, which have become commonplace, and are often sprawling and accompanied by demands for substantial damages.

However, there is a potential for a circuit split, particularly given that this issue is percolating before the U.S. Court of Appeals for the First Circuit in Waters v. Day & Zimmermann NPS Inc.,[8] and thus the U.S. Supreme Court may ultimately weigh in.

4. U.S. Supreme Court Article III Standing Ruling

On June 25, in TransUnion v. Ramirez,[9] a Fair Credit Reporting Act class action, the U.S. Supreme Court ruled that Article III standing does not exist where a plaintiff has not suffered "concrete harm."

The plaintiff, Sergio Ramirez, filed suit in federal court purporting to represent a class of consumers who were mistakenly identified on a U.S. government watch list of specially designated nationals.

His credit report incorrectly indicated that he was on the terrorist watch list maintained by the Office of Foreign Assets Control. The class had 8,185 members, but credit reports containing the OFAC alert for only 1,853 class members were disseminated to a third party.

On appeal, the Ninth Circuit ruled that all class members had Article III standing.

But the U.S. Supreme Court held that the 6,332 class members whose names were not identified on a credit report had failed to demonstrate concrete harm, and thus lacked standing to sue in federal court. For those individuals, there was only a mere risk of future harm.

That's not enough. According to the court, every class member must have standing to recover individual damages.

This is a notable win for employers, and as a practical matter, it may lead to more limited class actions — i.e., actions not including putative class members who cannot establish a tangible or meaningful injury — being filed in federal courts.

That, in turn, may result in fewer actions being filed and potentially lower settlements given reduced class sizes. But it is unrealistic to conclude that this decision will make no-concrete- harm class actions simply go away in large measure.

Rather, plaintiffs counsel could find ways to work around the decision by, for example, filing class actions where no concrete injury was suffered in state courts that have more lenient standing requirements.

3. Over $1 Billion in Bounties for SEC Whistleblower Program

Since 2011, the U.S. Securities and Exchange Commission has awarded more than $1.1 billion to 214 whistleblowers, including approximately $564 million in payouts in the 2021 fiscal year.[10]

The largest payout to date was a $114 million award, provided in October 2020, followed by a $110 million award in September 2021.[11] The third biggest payout of over $50 million was also made earlier this year.

Additionally, in fiscal year 2021 alone, the SEC received tips from individuals in 99 foreign countries and throughout the U.S. The number of tips has grown about 300% between the program's inception in 2011 and 2021.[12]

These sky-high bounties are apt to attract employees' attention, and could lead to more whistleblower claims in the future.

Employers thus have a continued need to:

- Invest in corporate compliance programs;
- Encourage employees to promptly lodge reports internally so that they can be thoroughly investigated before potential fraud matures; and
- Teach employees that retaliation for lodging complaints is prohibited.

2. Rage Against the Vaccine

Since the beginning of 2020, the U.S. has experienced tens of millions of COVID-19 cases,[13] and we have seen how the pandemic can compromise productivity in various industries while employees have been gone from the office.

But now with the availability of vaccines, employers are planning for their employees to return to the office in greater numbers while facing new battlefields — within and outside the courtroom.

Multistate employers face a patchwork of state regulations governing vaccination or testing mandates, and at the federal level, as of Sept. 9, the Biden administration required vaccination for all federal employees.[14]

Then, on Nov. 5, the Occupational Safety and Health Administration published an emergency temporary standard mandating employee vaccinations or testing for employers with 100 or more employees.

However, on Nov. 6, the U.S. Court of Appeals for the Fifth Circuit issued an order granting a temporary stay of the ETS, which was extended on Nov. 12. On Nov. 16, the Judicial Panel on Multidistrict Litigation issued a ruling consolidating all challenges to the ETS in the

U.S. Court of Appeals for the Sixth Circuit.

Still, many employers have required employees to get vaccinated.

Meanwhile, employers that mandate vaccinations are facing backlash from employees, which has led to litigation and resignations. While employers have generally prevailed in the courtroom, one sticky area where employees have gotten traction involves religious and medical objections.

Employers must consider accommodations for employees with conflicting medical conditions or religious beliefs, and the EEOC has issued helpful guidance.[15]

The future of vaccine mandates for private employers remains an open point of contention and impacts a resumption of business as usual. Accordingly, employers should carefully review an employee's request for accommodation, and understand the risks of granting or denying the request.

1. The Great Resignation and Major Changes to Fundamental Work Structures

We are at an inflection point with respect to workplace dynamics as we know them.

According to CNBC, as of the end of September, "roughly 34.4 million people have quit their jobs this year, with more than 24 million doing so since April,"[16] in part of what has been called the Great Resignation. Myriad explanations have been offered, including existential epiphanies.

Joe Brusuelas, chief economist at RSM, observed:

> This is what happens after great wars or depressions. It's hard to spot while you're in it, but we've gone through a shock that has elicited an unexpected change upon the population. And it will take some time to sort through.[17]

Others have offered explanations ranging from a shift in workplace power dynamics to employee burnout to a generational shifting perspective toward work and priorities to more job openings and greater options. And yet others believe this resulted from protests to vaccine mandates and the issuance of benefits from the government.

The Great Resignation has caused labor shortages, which have resulted in employers offering greater salaries and perks to attract new employees, as well as retention bonuses and other benefits to keep current employees working. This, in turn, has resulted in increased costs at a time when inflation is already high.[18]

This wave of resignations has occurred amid the COVID-19 pandemic, when employers have shifted to remote work and hybrid work arrangements. There are concerns that those shifts may compromise employee productivity and may upend a company's culture — risks that are of course exacerbated by large-scale departures.

Likewise, there are concerns that these changes could invite various legal risks resulting from, for example, potential differences in opportunities based on gender and wage and hour issues.

Employers have a very real and pressing need to adapt and find ways to retain talent, whether that be through improved benefits and compensation, or providing greater flexibility. They need to critically evaluate the legal and practical risks these events pose and innovate to maintain stable workforces and their culture while attracting talented employees.

Looking Forward

2021 was a blockbuster year in employment law, ushering in new risks for employers around the country, with California becoming an even more challenging jurisdiction.

In 2022, we can expect to see legislative advancements and impactful decisions relating to the enforceability of arbitration agreements; potential fall out from the Great Resignation, including novel claims from employees and efforts by employers to adapt to labor shortages; continued conflicts with employees relating to vaccine mandates; and more changes in work-related dynamics and work cultures precipitated by the COVID-19 pandemic.

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[1] EEOC v. ISS Facility Services, No. 21-cv-3708 (N.D.).

[2] Ferra v. Loews Hollywood Hotel, LLC , 11 Cal. 5th 858 (2021).

[3] McDonald v. Symphony Bronzeville Park LLC , 174 N.E.3d 578 (Ill. App. Ct. 2020).

[4] Chamber of Commerce of the U.S. v. Bonta , 13 F.4th 766 (9th Cir. 2021).

[5] Canaday v. the Anthem Companies Inc. , 9 F.4th 392 (6th Cir. 2021).

[6] Vallone v. CJS Solutions Group d/b/a The HCI Group, 9 F.4th 861 (8th Cir. 2021).

[7] Bristol-Myers Squibb v. Superior Court of California , 137 S.Ct. 1773 (2017).

[8] Waters v. Day & Zimmermann NPS, Inc. , No. CV 19-11585-NMG, 2020 WL 4754984, at *1 (D. Mass. Aug. 14, 2020).

[9] TransUnion v. Ramirez , 141 S.Ct. 2190 (2021).

[10] SEC, Whistleblower Program: 2021 Annual Report to Congress, available at https://www.sec.gov/files/owb-2021-annual-report.pdf.

[11] Id.

[12] Id.

[13] See CDC, United States COVID-19 Cases, Deaths, and Laboratory Testing by State, Territory, and Jurisdiction (updated as of Nov. 28, 2021), https://covid.cdc.gov/covid-data-tracker/#cases_totalcases.

[14] Executive Order on Requiring Coronavirus Disease 2019 Vaccination for Federal Employees, The White House (Sept. 9, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/09/09/executive-order-on-requiring-coronavirus-disease-2019-vaccination-for-federal-employees/.

[15] EEOC, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws (updated May 28, 2021), available at: https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws.

[16] Jennifer Liu, A Record 4.4 Million People Quit in September as Great Resignation Shows No Signs of Stopping, CNBC (Nov. 12, 2021), available at: https://www.cnbc.com/2021/11/12/a-record-4point4-million-people-quit-jobs-in-september-great-resignation.html.

[17] Matt Egan, A Record Number of Americans are Quitting Their Jobs, CNN Business (Oct. 12, 2021), https://www.cnn.com/2021/10/12/economy/jolts-job-openings/index.html.

[18] Nina Trentmann andMark Maurer, CFOs Plump Salaries, Perks to Land Elusive New Employees, Wall St. J. (Oct. 25, 2021), https://www.wsj.com/articles/cfos-plump-salaries-perks-to-land-elusive-new-employees-11635154200?redirect=amp.

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