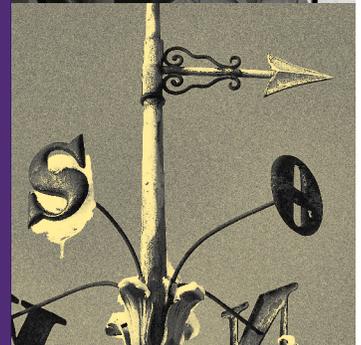




# 2022: The Year Ahead For Employers

In 2021, the workforce continued adapting to an evolving global pandemic, increasingly consequential social movements and a dramatic shift in employment policy ushered in by a change of leadership at the federal level.

*2022: The Year Ahead for Employers* highlights the legislation, litigation, regulation and trends nationwide that will impact businesses in 2022.





# COVID-19

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.

## Key Points

### **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**

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.

## Current Climate

California has 83 COVID-19-related class action lawsuits filed, followed by Ohio and Illinois with 16 each and Florida with 15. The healthcare and retail industries saw the most COVID-related class action activity.

- Failure to pay higher premiums after promising to pay higher premiums
- Improper accounting on wage or earning statements in California
- Bonus pay is not calculated into regular rate of pay
- Breach of contract

## Wage and Hour Claims

The most common area for COVID-19 class action lawsuits is in the wage and hour arena. Within that, there are a number of sub-areas to watch.

### Screening Cases

Employees subject to screening want to be compensated for their time. Screening can include time spent waiting in line for temperature checks or filling out a survey of questions about their health and whether or not they were exposed to COVID. Whether that time spent screening is compensable is an issue under federal and state wage and hour laws. And in 2020 and 2021, we saw states taking opposite stances on the issue.

For example, a federal court in Missouri was faced with a screening case. Employees of a national retailer were required to arrive at their shifts 30 minutes early for temperature checks and health screening. The federal court dismissed the case, holding there was no violation of the Fair Labor Standards Act. On the other hand, a New Jersey district court allowed a similar case to go forward with discovery to see whether or not the plaintiff could make a case.

Similar cases are pending in California and Wisconsin. It will be interesting to see in 2022 how these cases unfold and how the different courts are going to weigh in on these issues.

### Premium Pay

Premium pay is additional compensation promised for work during the pandemic. And in this one area, there could be a whole host of claims.

- Failure to pay overtime
- If overtime paid, an improper calculation was made

## Workplace Safety Claims

Under the federal Occupational Safety and Health Act, there is no private right of action. However, class actions with respect to workplace safety are possible if brought under state law. While employers may have a defense to any claims brought under the federal act, that doesn't necessarily stop people from bringing those claims, especially as the pandemic wages on.

## Disability Accommodations

With the return to work in 2021, employers have received an influx of accommodation requests.

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

## WARN Act

The WARN Act requires employers to provide written notice of at least 60 days when implementing a mass layoff, with the exception of a natural disaster such as floods, earthquakes, droughts, or unforeseen business circumstances. COVID-19 has been found to be a natural disaster by the courts that have addressed this issue. The legal issue is whether COVID needs to be the direct cause of the layoffs for the natural disaster exception to apply.

Two circuits have weighed in on this issue, the 5th<sup>1</sup> and the 11th<sup>2</sup> circuits, and both have come out with different decisions. One said COVID-19 does need to be the direct cause, the other does not. Expect to see more activity in this area in 2022.

# Vaccine Mandates

One of the biggest types of class actions to be seen this year will revolve around vaccine mandates and disability discrimination claims. There are two main questions in this area.

## Legality of Mandate

Many lawsuits challenge the legality of a mandate. Almost 400 lawsuits have been filed so far on this issue. Plaintiffs are asking courts to issue an order stopping employers from implementing a mandate on the front end. Early decisions have favored an employer's ability to mandate vaccines. However, in many of the cases, the court has only decided whether the employer should be stopped from implementing the mandate while the case goes through the judicial process. And in some of these decisions, judges have expressed some doubt on the ultimate ability of the employer to succeed on the merits.

Nevertheless, many judges decided that the standard for issuing injunction was not met. We may see cases proceed to the discovery stage in 2022, followed by decisions on the merits.

## Accommodations

If the employer can legally implement a mandate, plaintiffs may challenge whether the employer is properly considering accommodation requests. The issue is whether the employee is entitled to a religious or disability accommodation from the vaccine mandate. Challenges to accommodation denials are on the rise, as 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.

There was not a significant amount of litigation over religious accommodations before COVID-19.

If your organization is preparing to implement or recently implemented a vaccine mandate, be sure you have the resources to review and manage the volume of accommodation requests that employees may be submitting.

From our experience, religious accommodations requests outnumber disability requests. One of the key issues is whether a religious accommodation poses an undue hardship on the employer. Supreme Court Justice Gorsuch has commented that the religious accommodation standards may need to be reviewed and perhaps brought in line with the disability accommodation standards.<sup>3</sup>

Before any of these cases reach a court, they typically must proceed through the EEOC or the state administrative agency processes. In the past, the EEOC has actively pursued claims and filed lawsuits on behalf of employees alleging they were not accommodated in the context of a flu vaccine mandate. In light of the federal government support of vaccine mandates, we expect the EEOC to be less active in this area than in years past, but this could certainly change. In the year ahead, watch for how the agency approaches challenges to vaccine mandates and exemption denials.

## State and Local Laws

In addition to these types of litigation claims and federal regulations, employers must also comply with various state and local laws. In 2021, federal, state and local mask and vaccine mandates were constantly changing due to the COVID-19 surges, court challenges, legislative action and executive orders that either expired or were changed. Multi-state employers should continue to be diligent and monitor these developments as changes are occurring almost daily.

## State v. Federal

Regardless of the outcome of pending court decisions on federal mandates, the CMS and executive orders, we will see a constant tug of war between the executive and legislative branches and what the courts are permitting.

## Preemption

In the face of conflicting federal, state and local laws, the preemption question arises: Which law must an employer follow? The preemption issues around the vaccine mandates are a current and relevant example.

OSHA unsuccessfully argued that its Emergency Temporary Standard (ETS) preempts all inconsistent state laws attempting to legislate on issues of vaccination, masking and testing to the extent that they restrict those issues, as stated in the ETS and OSHA's FAQs. OSHA also recognized, however, that states have other public health requirements like indoor masking or showing vaccination cards to enter certain businesses, and these requirements are not preempted by the ETS.

And keep in mind that many jurisdictions at the state and local level 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, watch what they are restricting employers from doing. Some states are passing laws that would require employers to provide exemptions if a mandate is in place or treat vaccinated employees the same as unvaccinated employees. These exemptions go beyond religious and disability accommodations.

In another example, some bills pending would void non-compete agreements or other restrictive covenants if an employee is terminated for refusing a vaccine mandate. These have not passed yet, but it is something employers should keep an eye on.

## OSHA ETS and Beyond

The Supreme Court granted petitioners challenging the OSHA ETS an emergency stay on January 13, 2022 after hearing oral arguments just six days prior, a record time for a decision. The case will go back to the Sixth Circuit for adjudication on the merits, but in its decision, the Supreme Court essentially had to determine the likelihood of success on the merits. And based on that decision, if the ETS returned to the Supreme Court for adjudication should the Sixth Circuit determine the ETS was valid, it is anticipated that the Supreme Court would invalidate the ETS.

The Supreme Court ruled that OSHA overstepped its authority delegated by Congress, expressing concern over whether OSHA has the expertise in this area or is even the proper agency to regulate a public health emergency because as an executive branch agency, they

lack the same political accountability that states and Congress do.

The court also questioned whether OSHA was the proper government entity to regulate in this space if COVID-19 was not specifically an occupational hazard. The court noted that COVID-19 is everywhere, and the court said it is not specifically an occupational hazard outside of limited contexts, such as healthcare or working in a laboratory with the COVID-19 virus or some workplaces that might be very crowded where employees cannot socially distance.

### State Activity

Be prepared for activity at the state level. There are 22 states that have OSHA Plans that cover private sector employers. Those State Plans are free to do more than the federal OSHA. 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.

Those state emergency temporary standards predate vaccinations and do not have a vaccine requirement, but such requirements could be added. Other states could also introduce other emergency temporary standards related to vaccines or testing or some combination thereof. Lastly, several cities have passed requirements for having vaccines to enter certain businesses. Employers need to keep up with state and local health department guidance and rules on vaccines, mask and testing requirements.

### OSHA NEP

After the Supreme Court's ruling on January 7, 2022, OSHA announced that it believes COVID-19 is an occupational hazard and will vigorously enforce safety in the workplace related to the COVID-19 hazard, particularly in certain high-risk industries listed in its National Emphasis Program (NEP) for COVID-19 in effect through July 7, 2022. High-risk industries include healthcare, such as hospitals, doctor's offices, dentist's offices, assisted living communities, continuing care and retirement communities. Outside of healthcare, meat and poultry facilities, warehousing and manufacturing, supermarkets, restaurants and temporary agencies are also considered high-risk.

Those industries likely will be targeted under OSHA's NEP for COVID-19. OSHA will generate inspection lists, but the NEP also provides for unprogrammed inspections. There has been an exponential increase in OSHA complaints by employees over the course of the pandemic, and the agency has been treating many of them through its informal process. However, we are likely to see an increase in formal on-site inspections.

## Permanent Infectious Disease Standard

OSHA announced its intent to promulgate a Permanent Infectious Disease Standard in its fall 2021 regulatory agenda. The permanent standard would be broader than just COVID-19, potentially covering tuberculosis, pandemic flu and airborne infectious diseases. It could also extend beyond the healthcare industry.

## Protect Your Workforce

With proposed initiatives and aggressive enforcement, employers should continue to provide protections for employees against COVID-19 in the workplace to the extent feasible. In addition to regulatory compliance, providing workplace protections can be positive for employee morale and help the continuity of operations to reduce the numbers of employees who would have to isolate or quarantine because of infection or exposure to someone with COVID-19.

## Enforcement and Penalties

With aggressive enforcement may come increased OSHA penalties. Penalties increase each year in January because they are tied to the consumer price index and inflation. OSHA penalties increased by 6.2% in 2022.

In 2021, the Serious and Other Serious and Failure to Abate (FTA) citations had a maximum penalty of \$13,653 per violation. The penalty has increased to \$14,502 in 2022, and FTA citations can be assessed daily for up to 30 days. Repeat and willful violations have increased from \$135,532 per violation to \$145,027 per violation.

## BBBA

The Build Back Better Act includes provisions that potentially increase the statutory maximum penalties by tenfold under the Occupational Safety and Health Act.

If those provisions remain in the bill and it is passed, employers could see citations of \$700,000 or even more for Repeat and Willful violations. All the more reason for employers to ensure they are in compliance and providing protections for employees from all safety and health hazards, not just COVID-19.

---

<sup>1</sup> *Benson v. Enter. Leasing Co.*, No. 6:20-cv-891, 2021 U.S. Dist. LEXIS 55137, at \*13 (M.D. Fla. Feb. 4, 2021).

<sup>2</sup> *Easom v. US Wells Servs.*, 527 F. Supp. 3d 898, 900 (S.D. Tex. Mar. 19, 2021).

<sup>3</sup> *Small v. Memphis Light, Gas & Water*, U.S. No. 19-1388, cert. denied 4/5/21 and *Dalberiste v. GLE Associates, Inc.* U.S. No. 19-1461, cert. Denied 4/5/21

# Our Contributors



## Tasos C. Paindiris

**Principal and Office Litigation Manager**

Orlando • (407) 246-8440 • [Tasos.Paindiris@jacksonlewis.com](mailto:Tasos.Paindiris@jacksonlewis.com)

Tasos Paindiris' practice concentrates on litigation and advising clients in many different areas of workplace law and forums, including state and federal courts, the state and federal Departments of Labor, state and local human rights agencies, the Equal Employment Opportunity Commission and the Office of Federal Contract Compliance Programs.



## Melanie L. Paul

**Principal**

Atlanta • (404) 586-1869 • [Melanie.Paul@jacksonlewis.com](mailto:Melanie.Paul@jacksonlewis.com)

Melanie Paul is a co-leader of the firm's Workplace Safety and Health practice group. Her practice focuses on occupational safety and health advice and counsel, defense of inspections and litigation before the Occupational Safety and Health Review Commission. Melanie's clients benefit from her inside experience as a trial attorney for the U.S. Department of Labor for more than a decade.



## Stephanie J. Peet

**Office Managing Principal**

Philadelphia • (267) 319-7818 • [Stephanie.Peet@jacksonlewis.com](mailto:Stephanie.Peet@jacksonlewis.com)

Stephanie Peet is a strategic advisor who manages national, regional and local client relationships. She regularly represents management in employment discrimination and wage and hour cases filed in both federal and state courts as well as equal employment opportunity and labor relations matters pending before federal and state agencies.

# Resources

## Does Your Federal Contract Require a Vaccine Mandate?

Federal contractors and subcontractors recently received guidance from the Safer Federal Workforce Task Force when applying President Biden’s Executive Order Ensuring Adequate COVID Safety Protocols.

The order and guidance are implemented only through a contract clause in covered contracts.

The executive order applies to four types of contracts:

- Procurement contracts for services, including construction contracts over \$250,000;
- Service contracts covered by the prevailing wage requirements of the Service Contract Act;
- Concession contracts; and
- Contracts for the provision of services on federal land.

Listen

<https://www.jacksonlewis.com/podcast/federal-contracts-and-vaccine-mandates-new-order>



## Immigration Considerations for a Post-COVID-19 Manufacturing Workforce

Many companies that have been working remotely during COVID-19 expect to continue to do so, at least to some extent after the pandemic.

At first, manufacturing may not seem to be an industry where remote models would be prevalent. But due to a changing occupational mix, only two-fifths of employees are involved in actually “making things.”

Accordingly, the manufacturing industry needs to pay attention to the relevant remote and flexible hybrid work models, particularly as they relate to foreign national employees.

Read more

<https://www.jacksonlewis.com/publication/building-post-covid-19-workplace-immigration-requirements-must-be-mix>



## What Has the International COVID-19 Response Been?

In response to the COVID-19 pandemic, governments worldwide are employing extraordinary new measures in an effort to protect their populations against infection, mitigate business losses, stabilize employment relationships and preserve economic security.

Find insights and analysis from around the world through our international alliance partner, L&E Global <https://knowledge.leglobal.org/corona/>

## Do You Have Coworking Spaces?

As workplaces are reopened, employers and operators of coworking spaces need to consider how to operate safely in the age of the COVID-19 pandemic.

Coworking spaces have become an intriguing work alternative for remote employees, hybrid workers, self-employed individuals, independent contractors and others. Employers and operators of coworking spaces should consider such issues as the security of sensitive company or employee information and compliance with COVID-19 health and safety rules, among others.

Best practices businesses can adopt when implementing a COVID-19 protocol that meets OSHA requirements in the coworking space environment include:

1. COVID-19 vaccination or testing;
2. Sanitation stations;
3. Cleaning and disinfecting policies;
4. Proper ventilation and spacing; and
5. Contact tracing.

Read more

<https://www.jacksonlewis.com/publication/coworking-spaces-covid-19-considerations>

## Internal Investigations Are on The Rise — Are You at Risk?

In light of COVID-19 and the various issues impacting the workplace, such as vaccine mandates or masking requirements, there has been a significant increase in internal complaints alleging harassment or discrimination.

These complaints may require employers to conduct an internal investigation. Key areas to watch:

- The passion held by individuals who are either for or against a particular issue will continue to lead to more internal concerns, requiring investigation and perhaps remedial action;
- Federal and other government funding made available to organizations during the pandemic will prompt increased whistleblower claims asserting misuse of such funds; and
- These whistleblower claims may also provoke increased government investigations. The ability to conduct timely and comprehensive investigations will be paramount.



## Data Best Practices in Remote Work Environments

Remote work during COVID-19 presented a number of challenges including how to manage data privacy and security risks and how to comply with related laws that are being passed and amended at a dizzying pace.

- Changes catalyzed by COVID-19 are likely to outlast the pandemic.
- Businesses will continue to collect health information about employees and need to maintain appropriate safeguards to protect that information — including when it is in the hands of service providers and other third parties.
- Data privacy and security laws in the U.S. are governed by a patchwork of federal, state and local laws that are often tied to the state of residence of the data subject, not the location of the business.
- Conducting business with employees and customers who are geographically dispersed can result in wide-ranging data privacy and security obligations.

Listen

<https://www.jacksonlewis.com/podcast/understanding-post-pandemic-data-risks>

## Considering At-Home COVID-19 Testing?

In fulfillment of President Biden's promise to make at-home COVID-19 tests more available for all of us, two significant action steps have now occurred.

1. Every U.S. household has access to free at-home COVID-19 tests. As of January 18, 2022, any individual with a residence in the United States may request up to four (4) at-home COVID-19 test kits. There is no cost to register or for the kits themselves.
2. At-home COVID-19 testing is available at no cost without a prescription under an employer's group health plan. On January 10, 2022, the Department of Labor released updated guidance and an FAQ that, as of January 15, 2022, now extends an employer's obligation to cover all types of COVID-19 tests, between those performed or prescribed by a physician or other health care provider, and for in-home COVID-19 tests provided without a doctor's order.

Read more

<https://www.benefitslawadvisor.com/2022/01/articles/covid-tests/at-home-covid-19-testing-options-and-alternatives/>



## Are Your Restrictive Covenants Enforceable?

In 2020 and early 2021, employers encountered reticence from courts in enforcing restrictive covenants against employees who were laid off or furloughed as a result of COVID-19 or related government orders.

Now we are seeing employees depart, voluntarily or involuntarily, for refusal to comply with vaccine requirements. The extent to which courts may or may not be willing to enforce restrictive covenants against such employees remains to be seen.

Less sympathy for this group of employees than those who were involuntarily laid off as a result of the pandemic is anticipated.

There are several bills pending, both at the state and federal levels, that would void non-compete agreements or other restrictive covenants for employees terminated for refusing a vaccine mandate.

Employers need not take action yet, but should monitor the situation and discuss with counsel if any of these bills become law.

A woman with glasses is shown in profile, sitting at a conference table and gesturing with her hands as if in a meeting. Other people are blurred in the background.

# DEI in the Workplace

Regulatory actions, changing customer demographics, employee expectations and recommendations from investors and financial institutions are holding companies and organizations to account on matters of diversity, equity and inclusion. The global response to the death of George Floyd, and the #MeToo and #TIMESUP movements, are pushing companies to be more representative of and responsive to diverse stakeholders. Increasingly, individuals from underrepresented groups are attaining seats of power. New policies are emerging at the regulatory level and as voluntary measures within organizations responding to customer and employee demands.

## Key Points

### DEI Influencers

The power of stakeholders and employees is emerging as organizations increasingly adopt zero-tolerance harassment and discrimination policies, holding employees at all levels accountable.

### Data and DEI

Data are key to demonstrating a commitment to having an inclusive workplace.

Organizations will face an increasingly competitive recruiting and retention terrain in 2022 as labor shortages persist and organizing activity continues to gain momentum.

### Assessment and Strategy

Effective DEI initiatives are focused on the collective whole, not one group or individual. They ensure that equal opportunity is afforded to all and reinforce that commitment throughout the employment life cycle and workplace. Assessments are an important first step in building DEI and harassment prevention strategies.

# DEI Influencers

Calls for change are coming from a coalition of stakeholders—employees, customers, regulators, shareholders and any group that has a significant direct interest in a business—demanding that society, including corporate America, do a better job of responding to racial justice issues. A heightened awareness by the media, public interest groups and the general public is generating a corporate response greater than anything seen since the Civil Rights Movement of the 1960s.

## State and Federal Regulators

State regulatory agencies are beginning to take action to ensure that publicly traded and other large companies be representative of their investors. California passed legislation requiring publicly held companies headquartered in the state to have at least one woman on the board, and later, to have at least two members from an underrepresented minority group. The two pieces of legislation are being challenged in court. However the cases are determined, the message that boards must be more diverse has been sent.

The Securities Exchange Commission announced a similar requirement for board nominations, going further to require an explanation if there is a lack of diversity on a board. CalPERS and the New York State Department of Financial Services are pursuing similar requirements.

## Voluntary Initiatives

Private sector actors are also taking proactive steps. Nasdaq took an aggressive stance, requiring at least two diverse board members—at least one female and one minority or LGBTQ+ member—and went farther to say that if your board does not reflect this diversity, a statement must be issued explaining why. Additionally, Goldman Sachs indicated it would not underwrite an IPO unless there is a diverse board of directors.

## Employees

Employees are probably the most powerful stakeholder. The emergence of employee resource groups and calls for leadership to disclose and report statistics on

the racial, sexual orientation and gender makeup of teams are placing internal pressure on organizations to communicate how disappointing numbers will be rectified. At the same time, union organizing and activity is becoming more common. Unions are beginning to call on companies at annual shareholder meetings to conduct a diversity assessment.

# Trends to Watch

Seismic change in corporate culture with new levels of accountability is currently in play. Whether related to racial justice, LGBTQ+ equity or other underrepresented groups such as employees with disabilities or veterans, it is not enough to issue a diversity statement. There is a demand for actual policies and actions that establish and promote equity and justice and create a sense of inclusion and belonging in the workplace.

## Extension of Protections v. Religious Liberties

The U.S. Supreme Court decision in *Bostock v. Clayton County* extended protections and rights based on gender identity and sexual orientation. Since then, a tension between granting protections from discrimination and harassment and religious liberties both under the first and 14th amendments and the Religious Freedom Restoration Act with governmental entities has emerged. Courts across the country are interpreting the laws differently, providing a patchwork of opinions and compliance challenges for employers.

## Accountability and Data

Stakeholders, the courts, external criteria and regulations are attempting to hold entities accountable in a different way. There are calls for transparency and a desire to see policies and statistics behind statements of commitment to DEI. The emergence of “cancel culture” has put pressure on organizations externally and internally. Data is critical to an employer’s response.

Stakeholders are moving entities to collect and analyze DEI data. Disclosure requirements will soon follow.

At the moment, there is an opportunity for companies to create their own identity when it comes to pay equity; establishing policy and process, documenting and publishing data and setting new standards and timelines for achievement are all ripe for exploration. Companies can take concrete steps and raise the bar for others.

Organizations should decide how they want to be perceived and assess what commitments were previously made and what progress has been made to that end. From there, organizations can develop DEI goals and metrics as well as communications plans to reach different stakeholders.

## Beyond Pay Equity

Pay equity is not a single lane anymore, bleeding over into bonus programs or a sign-on bonus. Prospective employees are evaluating the distribution of equity, putting an emphasis on more than a starting salary and more to opportunity parity—they are asking questions like “what is the time to promotion?” and “who is promoted into what roles?”

Measuring these numbers is driven by data. To date, organizations typically report data on the whole, identifying a share of the company that was diverse. Looking at the department level and then at racial and gender minorities within each department is more illuminating and indicative of places for action.

For example, members of the Asian community may make up a large percentage of one department. Aggregated, this may send the message that the company as a whole has a diverse workforce. But this data may not indicate that there are few Black employees or that Asian employees are only in a technical department but missing elsewhere.

How and what data is collected becomes an important step in assessment. Currently, there is a juxtaposition between what data is required to be collected, such as EEO-1 reports collecting binary gender data, and what data the internal employee population would like to see collected. There will be moves to reconcile the two.

# What Employers Can Do

## Disclosure Requirements on the Horizon

Organizations will face pressure to disclose or actual legal requirements to disclose data in the near future.

- Define who you are as an organization
- Analyze your current data and composition
- Evaluate how your data aligns with your diversity goals
- Should there be a need for corrective measures, collect the data proactively and ensure it is in your control before being released to the public
- Create communications plans to address stakeholders

## Create Measurable Goals

Successful DEI initiatives have measured goals grounded in fact. Tailor your assessment first by defining the measured population. The desire to increase representation of people of color by five percent is admirable. But is it actually achievable, or are you setting up your organization for failure? Data may reveal a lack of a representation issue given the role’s requirements and/or what population is available. Oversetting goals can run the risk of legal issues if decisions are made on the basis of race or gender, which is prohibited by law.

## Recruiting and Retention

Open your aperture. Looking for candidates in new places does not mean lowering standards. Keep employees engaged with mentoring programs and visible paths to promotion and professional growth. Succession planning can help identify leadership tracks. Create an atmosphere of psychological safety where employees can give dissenting views or different opinions without fear of retribution. Last, provide impactful DEI training that clearly communicates expectations and what needs to be done in the workplace.

## Ensure Privacy and Confidentiality

Employees need to feel confident that disclosing personal demographic data will not jeopardize their employment. Define who will have access to data and how they will use it. Determine circumstances where aggregate data rather than employee-specific data can suffice. Last, be clear in communications with stakeholders around data to instill confidence and trust.

# Our Contributors



## Weldon H. Latham

### Principal

Washington, D.C. Region • (703) 483-8333 • [Weldon.Latham@jacksonlewis.com](mailto:Weldon.Latham@jacksonlewis.com)

Weldon Latham is the founder and leader of the Corporate Diversity Counseling practice group. He also is the leader of the firm's internal Diversity, Equity and Inclusion Committee and a member of the firm's Board of Directors.



## Laura A. Mitchell

### Principal

Denver • (303) 225-2382 • [Laura.Mitchell@jacksonlewis.com](mailto:Laura.Mitchell@jacksonlewis.com)

Laura Mitchell partners with her clients to build pay equity programs that benefit employees and create a stable, high-functioning workplace. She is also a member of the Pay Equity group.



## Michelle E. Phillips

### Principal

New York Metro, White Plains • (914) 872-6899 • [Michelle.Phillips@jacksonlewis.com](mailto:Michelle.Phillips@jacksonlewis.com)

Michelle Phillips is a member of the firm's Diversity, Equity and Inclusion Committee and handles various types of employment litigation with an emphasis on sexual, racial and disability harassment and LGBTQ+ matters.

# Resources

## Keep Your DEI Initiative Legally Compliant

The balance between antidiscrimination and data privacy and security laws requires thoughtful planning. Considerations include:

### Leadership and goals

- Who are the key individuals involved in developing, implementing and maintaining the DEI program?
- What are the goals of the DEI program, initiative or strategy?

### DEI data

- What data is being collected?
- Who will be responsible for collecting, using, transferring, storing and disposing of the data?
- Who will have access to the data?
- Is collection mandatory or recommended by law or guidance?
- What is the legal basis for data processing and what are your consent policies and protocols?
- Will the type of data change over time? Has the organization already been collecting this data for other business purposes?
- For global organizations, will the type of data collected vary by location?
- Does the organization have a privacy policy related to employee and job applicant personal data already in place? If so, how should it address DEI uses?

[Read more](#)

<https://www.jacksonlewis.com/publication/workplace-diversity-equity-inclusion-data-privacy-and-security-issues>



## What Role Is DEI Playing in Your Organization?

Employers are facing increasing scrutiny on the DEI front. Some want to get ahead of it, and make sure their DEI programs are current and relevant. Others need to respond to simmering issues within their workforce. Climate surveys are a new tool in an employer's arsenal that can help you tackle these and other issues in an objective and systematic way.

### What is a climate survey?

- An informal conversation with participants, not an investigation.
- A comprehensive review of data.
- Post-survey recommendations.

[Listen](#)

<https://www.jacksonlewis.com/podcast/climate-surveys-should-you-have-dei-report-card>



## Do You Have an Inclusive Culture Promoting Employee Engagement?

Psychological safety in the workplace allows employees to speak up candidly with ideas, questions and concerns, and even make mistakes without fear of reprisal or adverse repercussions. The resulting security created by a culture that supports a safe workplace contributes to inclusivity and can improve performance as employees are able to be more engaged and connected at work.

Employers can increase engagement by addressing three needs.

- **Belonging**  
Making employees feel like they matter
- **Security**  
Being transparent about the health of the organization and the role the employee plays in the organization's future
- **Self-actualization**  
Finding projects or assignments that encourage innovation or allow creative thinking

Employers can do the following to foster psychological safety:

- Encourage curiosity;
- Lead with courage and vulnerability;
- Provide training;
- Conduct a climate study to monitor and assess the inclusiveness of the work culture;
- Run a D&I diagnostic to identify areas of improvement;
- Review internal processes for reviews, feedback and mentoring; and
- Be transparent.

### Listen

<https://www.jacksonlewis.com/podcast/psychological-safety-workplace>

## Do You Have a Gender Transition Plan?

Often, in the early stages of an employee's transitioning process, we are unaware that someone in the workplace is considering a gender transition. Therefore, it is best to proactively create a pathway for employees to notify and work confidentially with human resources (and, perhaps, others in the organization) to facilitate the education, training and logistics that must be coordinated to make a smooth transition.

### Preparation

Review your equal employment opportunity/nondiscrimination and anti-harassment policies to determine whether legal obligations, or competitive imperative, demand that gender identity and transgender status be included in the policies.

### Education

Provide programs focused on gender identity, sex stereotypes and transgender status to a transitioning employee's managers and coemployees. This is essential for an employee's successful transition and to avoiding claims of discrimination and harassment in the workplace.

### Training

At a minimum, include discussions of transgender/gender nonconforming nondiscrimination and anti-harassment in ongoing anti-harassment training. (California and New York require this by law.)

### Read more

<https://www.jacksonlewis.com/publication/march-31-international-transgender-day-visibility>



## Is Yours a Racially Equitable Workplace?

For employers that want to follow through on their commitments, advancing racial equity in the workplace does not need to be overwhelming. By following some general guidelines, companies can honor their commitments, build trust with their Black employees and their allies and increase the recruitment and retention of Black talent.

1. Understand that race often shapes how Black employees experience the workplace
2. Identify DEI challenges and develop a strategic plan that addresses these challenges and other DEI goals
3. Develop a narrative around DEI data that authentically represents the voices and experiences of your workforce
4. Do not overcommit
5. Do not give up on DEI-related goals

Read more

<https://www.jacksonlewis.com/publication/new-year-tools-employers-renew-and-enhance-commitments-racial-equity-workplace>

## Are You Bound by Pay Transparency Laws?

The push for pay equity has moved beyond prohibiting pay discrimination and into requiring employers encourage pay transparency for applicants and employees.

### At the federal level

- The National Labor Relations Act can protect discussions involving compensation as concerted activity.
- The OFCCP prohibits policies that discourage pay transparency for federal contractors.

### At the state level

- **California** requires an employer must disclose the pay range for a position if an applicant asks for it after an interview.
- **Maryland, Rhode Island and Washington** also require employers to disclose the pay range to applicants upon request.
- **Rhode Island** entitles employees to pay range disclosures upon hire, when changing jobs and upon request.
- **Washington** also requires that employers provide the salary range to employees who are changing roles upon request.
- **Nevada** requires employers to provide the wage or salary range to applicants who have completed an interview—even without a request. But employees still must request the range to require transparency.
- **Connecticut** requires employers to provide the salary range to applicants (1) upon request and (2) by the time it extends an offer of compensation (if the applicant did not request it). It also requires disclosure to employees upon hire, when changing roles and when the employee requests it.
- **Colorado** requires an employer with even one employee in Colorado that is recruiting for a job in Colorado (or that is remote) must include (1) the wage rate or range for the role, (2) a general description of other compensation available for the role and (3) a general description of benefits for the role in the job posting. Colorado also requires “opportunity transparency.”

Read more

<https://www.payequityadvisor.com/2021/08/the-emerging-trend-in-state-pay-transparency-laws/>

# Industry Forecast



The evolving nature of COVID-19 introduced obstacles to return-to-office plans. New virus variants brought vaccine, testing and mask mandates to the forefront, along with trickle-down impacts like labor shortages and an increase in accommodation requests. George Floyd's death ignited a global response that further fueled the momentum of social forces and moved legislatures and organizations to respond. California led the charge in requiring diverse representation on boards of directors. In the financial industry, we also saw the Nasdaq and other institutions require women and minorities to be included on boards. Add to that a new administration and executive agency leadership with distinctly different policy agendas than their predecessors, and we find ourselves facing an incredibly challenging year in 2022.

## Key Points

### New Ways to Work

COVID-19 has forced businesses to find new ways to work. In both the healthcare and manufacturing spaces, labor shortages and emerging technologies are having a direct impact on how employees perform their jobs and deliver products and services.

### Employee Engagement

Union activity and organizing are on the rise as social forces coincide with increased remote

work options stemming from the pandemic and a supportive legislative and regulatory environment. Employers should seek feedback from employees to identify and address areas of concern early to mitigate future issues.

### Addressing Labor Shortages

Employers across all industries struggling with a shortage of skilled laborers are increasingly relying on immigration, turning to third parties and looking to internal resources to train current employees for new roles to fill gaps.

The following is a Q&A discussion of the legislation, regulation, litigation and trends impacting the manufacturing, healthcare, retail and technology industries.

## Manufacturing

### What is the single greatest impact that COVID-19 had on the manufacturing industry in 2021 that will continue into 2022?

COVID-19 forced manufacturers to look for new ways to produce their products, deliver the services associated with those products and close the gaps or disruptions in the supply chain caused by the dislocation of labor.

New technologies evolving in the manufacturing industry make it clear that there will be an urgent need going forward for tech skills in the new 4.0 environment, where digital technologies and artificial intelligence will directly impact how and where employees perform their jobs.

### What types of incentives are manufacturing employers offering to address the labor shortages and the challenges they face as a result of COVID-19?

There has been a heavy reliance on immigration with respect to obtaining the skills necessary to operate in a digital environment, which is where manufacturing is headed. One response to address this phenomenon is found in the Infrastructure Investment and Jobs Act, which President Biden signed into law last November. The \$1.2 trillion infrastructure bill includes incentives to enhance the skills and reliability of the supply chain.

These two factors require employers to look at their existing talent and capabilities because flexibility in how products are produced will only be strengthened.

### In light of labor shortages, do you see most manufacturing clients implementing vaccine mandates at this point?



Although some have done so, those who have had success in maintaining a safe workplace throughout the pandemic have avoided mandates or have more freely granted exemptions in order to maintain and in some cases increase the available labor pool.

### What actions can manufacturers take in response to calls for social change?

In order to enhance retention and recruiting of personnel, a growing number of manufacturers have (and should) become vocal with respect to where they stand on social issues that are important to their employees; as well as become more intentional with respect to fostering cultural and policy changes that encourage employees to “speak up”, foster empathy and engagement and eliminate barriers to achieving their diversity, equity and inclusion goals.

As the events surrounding George Floyd’s death unfolded last year, the concept of equity was amplified. Manufacturers are not waiting for disruption in their supply chains to implement strategies to ensure the skills of their workforce. They are turning to data to assess where they stand in regard to their supply

chains, C-suites and organizational structures. Artificial intelligence and data are increasingly driving hiring decisions and performance management. This trend will continue as manufacturers seek to upskill their workforce to implement those training programs.

Manufacturers are also facing calls to use data and technology to manage performance with tools such as body sensors. Although these kinds of technologies are crucial to close supply chain gaps and deal with workforce fluctuations, they also challenge employers from a fair employment practices standpoint. Employers must ensure these policies and how they select employees for discipline or advancement are consistent with a nondiscriminatory, data-backed approach.



## Healthcare

### When we think about the evolution of COVID-19 over the past two years, what should employers in the healthcare industry prepare for?

A few industry-specific factors are driving a staffing crisis in healthcare: vaccination mandates, employee burnout, the escalating retirement of direct-care providers and the lack of new providers, to name a few. Employers in the healthcare industry must

evaluate the specific circumstances driving these staffing shortages and consider the use of travelers, locum tenens and other temporary employees to help manage the issues unique to their operations.

Healthcare employers will have to look beyond what traditionally has been an in-person, brick-and-mortar patient care experience and evaluate their ability to provide care through telehealth and other online tools. There should be a real focus on additional investments and employee training to facilitate this growth area.

As some in the industry expand their footprint via remote workers, a host of employment, taxation and other implications follows. Similarly, the flurry of mergers and acquisition activity in the healthcare industry poses an array of employment and labor issues and liabilities that may emerge as a result. Lastly, increased union activity and organizing efforts are direct results of the demands of the pandemic and will require employers to engage with employees to identify and address issues early.

### How are additional compliance measures related to COVID-19 impacting labor shortages in the healthcare industry?

Vaccine mandates have dominated the healthcare industry since the summer of 2021. Whether through voluntary efforts or requirements, both large and small healthcare organizations are being forced to address federal, state and local COVID-19 mandates and testing options.

These mandates indirectly implicate many other industries and organizations that support mandate-covered healthcare providers. As a result, we are going to see increased compliance and staffing challenges for healthcare providers and others who serve healthcare providers.



## Retail

### What is driving the increase in union activity and organizing efforts in the retail and other industries?

There are quite a few drivers of increased union activity and organizing. From the retail perspective, employee safety issues were at the forefront with the onset of COVID-19 because retailers employed frontline workers. The retail employee experience became front-page news, and the public got behind their cause. Employment practices were front and center and there were frequent conversations and publicity about taking care of employees because they supported everyone during the pandemic. Unions took this opportunity to become vocal in the media and to advocate for workers' rights.

Many employees were engaging in protected concerted activity, even in the nonunion environment. Media outlets widely publicized walkouts over employees being required to work extra hours, vaccine mandates and more. Compounded with the onset of the George Floyd protests and the ongoing pandemic, there was an increase in social awareness among the public, which drove calls for change.

**Several pieces of federal legislation with significant impacts on employers are making their way through Congress. Spurred by the change in administration, there have been sweeping regulatory**

### **changes at the NLRB, EEOC and OSHA. Where do you see opportunities and potential liabilities in the retail industry?**

Shortly after taking office, President Biden removed a Trump-appointed general counsel, which paved the way for a new appointee aligned with the administration's policy agenda. The White House established a task force specifically commissioned with the goal of increasing union membership across the United States and has engaged in public outreach to both union and nonunion workforces. The House passed the PRO Act, and it is pending in the Senate. The bill includes broad changes that strengthen unions, make it easier to organize and imposes increased penalties for unfair labor practices. The bill also includes a provision that would allow individual employees to file civil claims for unfair labor practices and imposes individual personal liability on officers and directors found in violation.

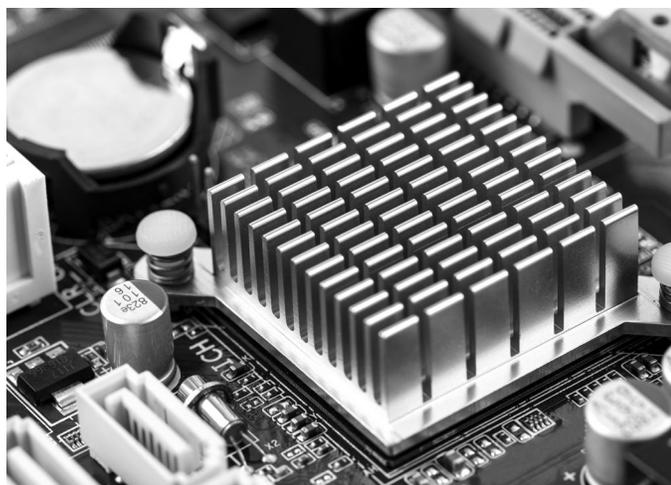
The PRO Act's fate is uncertain; however, there are alternative mechanisms to accomplish its intent. For example, the Build Back Better Act includes labor relations provisions echoed in the PRO Act that add severe penalties and fines, not to exceed \$50,000 for each violation. If the violation is found to be a discharge or results in serious economic harm, then that amount can be doubled. The bill also includes personal liability provisions for officers and directors.

NLRB General Counsel Jennifer Abruzzo has indicated a proactive approach to her agency's agenda. Through enforcement guidance, she announced multiple initiatives that would affect not only retail but also all employers, including making organizing easier, scrutinizing handbook policies and expanding the definition and protection of protected concerted activities—especially in nonunion organizations.

Complaints and petitions from employees unhappy about working conditions are on the rise. Members of management often have difficulty recognizing what is considered protected concerted activity, which potentially exposes them to liability. In the current environment, an employee engaging in unprofessional or inappropriate behavior could still have protection under the National Labor Relations Act.

Union organizing and potential protected concerted activity with heightened penalties require employers to educate themselves on what is deemed protected concerted activity, conduct vulnerability assessments to determine potentially present issues and improve employee relations in the organization before issues arise.

Preventive steps available to employers now include conducting a wage and benefit analysis, educating and training managers on how to respond to complaints from employees or union demands and reviewing handbook policies while acknowledging those policies could change. Given the uptick in the influence of social movements, preparing for increased attention—whether through demonstrations or nationally publicized petitions—should be a priority.



## Technology

**What are the pressing areas that employers in the technology industry need to address to foster an inclusive environment? What preventive steps should tech employers take to address calls for meaningful social change?**

The technology industry has long been the focus of social awareness and diversity-related initiatives. Far before the events unfolding over the past

several years, social awareness and diversity-related initiatives resulted in organizations making commitments. Although well intentioned, many of those initiatives did not produce the called-for change in the desired time frame.

Pair that dynamic with the current environment, and we can see the issue of diversity and inclusion has been brought under a bright spotlight. There is an increased demand for transparency and measurable change.

Dialogue between employers and employees has come with increased visibility as organizations respond to demand from external pressures regarding the demographic composition of various organizational tiers. In the technology industry, there are more calls for quantitative analyses of workforce data and trends.

When a tech employer tries to foster an inclusive environment, they must consider a number of factors. First, they must identify the reasons and interests that have prevented the desired change from occurring in the past. Second, they should use quantitative analysis to identify issues in the workplace, set reasonable thresholds and try to quantify those issues as much as possible using data and benchmarking. Third, they should seek feedback from their employees. This may prove difficult because many tech industry employees work remotely, and this distance can strain employer-employee engagement. Finally, employers should be creative with respect to fostering diversity and inclusion while managing a largely remote workforce; surveys and climate assessments can prove helpful in this regard.

# Our Contributors



**Stephanie Lewis**  
Office Managing Principal

Greenville • (864) 672-8048 • [Stephanie.Lewis@jacksonlewis.com](mailto:Stephanie.Lewis@jacksonlewis.com)

Stephanie Lewis serves on the firm's Board of Directors. She is also the co-leader of the Litigation practice group and Pay Equity resource group. She represents employers in employment litigation and advises businesses on practices and policies to foster employee engagement and avoid litigation.



**Eric J. Felsberg**  
Principal

New York Metro, Long Island • (631) 247-4640 • [Eric.Felsberg@jacksonlewis.com](mailto:Eric.Felsberg@jacksonlewis.com)

Eric Felsberg is the co-leader of the Technology industry group and the national director of the firm's Data Analytics group. He leads a team of multidisciplinary lawyers, statisticians, data scientists and analysts with decades of experience managing the interplay of data analytics and law.



**Maurice G. Jenkins**  
Principal

Detroit • (248) 936-1921 • [Maurice.Jenkins@jacksonlewis.com](mailto:Maurice.Jenkins@jacksonlewis.com)

Maurice Jenkins is the co-leader of the Manufacturing industry group. He advises and represents employers with respect to strategic labor relations matters, collective bargaining and NLRB litigation.



**Michael T. Mortensen**  
Principal

Dallas • (972) 728-3284 • [Michael.Mortensen@jacksonlewis.com](mailto:Michael.Mortensen@jacksonlewis.com)

Michael Mortensen is the co-leader of the Retail industry group. He focuses his practice on traditional labor relations, workplace law and preventive advice and counseling.



**Sarah R. Skubas**  
Principal

Hartford • (860) 522-0404 • [Sarah.Skubas@jacksonlewis.com](mailto:Sarah.Skubas@jacksonlewis.com)

Sarah Skubas is the co-leader of the firm's Healthcare industry group. Her practice is focused on employment litigation, preventive counseling and labor relations.

# Resources

## The Unlikely Marriage of Unions and Tech Employees

Unions are successfully targeting workers in the technology industry, even as employees transition to a more remote workplace during the pandemic.

Tech unionization has been on the rise since 2016.

Triggers for increased union formation in the industry include:

1. The current political climate;
2. An increasingly remote workforce;
3. Unions' effective utilization of digital outreach; and
4. An increase in the number of tech workers.

Employers need to adapt in terms of how they think of unions, how unions fit in their workspace and how to address employee concerns that might otherwise result in organized activity.

Here is how.

1. Good management, training at all levels.
2. Constant assessment of the culture.

Polling employees is a great vehicle to collect information, so long as you take the polling into account and adapt to the responses, employers have to be willing to address answers and make changes accordingly.

**Listen**

<https://www.jacksonlewis.com/podcast/unlikely-marriage-unions-and-tech-employees>



## How Has the Tech Workplace Changed?

Employers in the technology industry continue to face numerous workplace management and compliance challenges in our ever-changing world.

Hear from in-house counsel as they discuss how emerging issues such as artificial intelligence, COVID-19 and return to the workplace, pay equity, privacy and diversity initiatives are challenging and impacting their businesses.

**Watch**

<https://www.jacksonlewis.com/webinar/new-tech-workplace-insights-technology-industry-leaders-navigating-emerging-trends-employment-law>



## Compliance Checklist For Construction Industry Employers

For many in the construction industry, compliance issues often get pushed to the back burner. Delaying compliance can create risk in the employment law arena.

These areas should be on your employment law compliance to-do list for 2022 as a construction industry employer:

1. Update handbooks;
2. Train supervisors; and
3. Review and audit pay practices and classifications.



## How Can Restaurants Build Service Teams in the Current Labor Market?

The restaurant industry continues its slow, but steady recovery from the impacts of COVID-19. One of the most critical issues facing employers is attracting and retaining talent in the face of increasing difficulties to do so.

Increased wages and other monetary incentives are one way to attract employees. Employers should ensure they are including the appropriate monetary incentives in the regular rate of pay for purposes of calculating overtime.

### Non-monetary incentives should also be considered

- Creating a path to promotion, so restaurant work is viewed as a career, not just a job.
- Reimbursing education or job-related training.
- Establishing mentorship programs.
- Providing management training.
- Displaying flexibility in scheduling to accommodate school and other non-work activities.
- Encouraging and providing unpaid, childcare, personal, educational and other leaves. Health and safety protocols allow employers to create a sense of community and care.
- Employers can consider offering 401K plans to encourage employees to stay for the long term.

### Listen

<https://www.jacksonlewis.com/podcast/restaurant-rebound-how-employers-can-build-and-keep-top-notch-service-teams>



# The Regulatory Landscape

Large-scale pieces of legislation have become law or are moving through Congress with obvious and not-so-obvious implications for employers. Coupled with a shift in leadership and policy at influential regulatory bodies like the EEOC and NLRB, employers will face challenges on a variety of fronts.

## Key Points

### Contractor Requirements

Companies new to government contracting need to be aware of the copious reporting and compliance obligations that come with the designation as they seek federal contracts stemming from the proposed legislation.

### Data and Privacy

Privacy and cybersecurity have become a focal point for the federal government. Contractors can expect scrutiny of these practices in future contracts and should prepare accordingly with a thorough review of policies, protocols and vendor agreements.

### Agency Priorities

The EEOC will likely zero in on arbitration agreements and utilize class action lawsuits in disparate impact claims because it enforces federal employment discrimination laws. The NLRB will continue its aggressive enforcement through increased investigations and steep penalties for violations. Funding sources will dictate how OSHA pursues complaints and investigations in 2022. Tenfold increases in penalties for OSHA violations are included in the BBBA and could go into effect with the legislation's passage.

# Infrastructure Investment and Jobs Act

The Infrastructure Investment and Jobs Act (IIJA) has been called the New Deal of 2022. This sweeping bipartisan legislation, signed into law on November 15, 2021, is focused on expanding industry-specific grant programs. It is a budgetary bill, infusing money into the economy with a focus on the transportation, energy efficiency and climate control industries. The bill foreshadows an increase in federal contracts, jobs and the need for a ready workforce.

Although the IIJA does not impose additional obligations on employers, the federal contractor designation does. Many companies new to federal contracting will see this influx of infrastructure money and pursue the opportunities stemming from the legislation. Employers stepping into this arena need to be aware of certain obligations specific to federal contractors like OFCCP compliance and affirmative action reporting that apply. The same contractor considerations apply to work under the Service Contract Act.

## Workforce

We are in the midst of what is being called the “Great Resignation.” Labor shortages present a challenge for employers as they struggle to find employees in industries across the board. Companies bidding for federal contracts need to be prepared to staff projects. Employers should focus on recruiting but also on retention, keeping employees happy to be able to fulfill the terms of the contract. Human resources will play an important part in these efforts.

## Data Privacy and Cybersecurity

There is a focus on data privacy and cybersecurity inside the IIJA. Included in the law is the requirement that contractors working on these specific contracts have mechanisms in place for cybersecurity and data privacy protection. These requirements extend beyond the contractor to their vendors and clients. A review of the policies and contracts should be included in annual compliance audits.

## Retention Tax Removal

The employee retention tax credit allowed in the CARES Act was removed from the IIJA to help fund the bill. Employers will see fewer savings on that front.

## Build Back Better Act

The Build Back Better Act (BBBA) will have a significant impact on employers should it pass the Senate and be signed into law. The BBBA encompasses many opportunities and obligations for employers.

## Universal Paid Family and Medical Leave

Provides four weeks of guaranteed government-paid family and medical leave (maximum benefit of approximately \$800 per week).

## Affordable Care Act Amendments

Modifies the affordability threshold for employer-sponsored health coverage under the Affordable Care Act for an employer that has at least 50 full-time employees (including full-time equivalent employees).

## Immigration Reform

Makes possible that undocumented individuals could receive provisional grants of work permits under a process known as parole, which allows people to stay in the U.S. for five years with an option to extend for another five years thereafter.

## National Labor Relations Act

Proposes to add civil penalties against an employer who engages in unfair labor practices (ULPs), up to six figures per violation in some instances. It would also add potential personal liability for company directors and officers for ULPs.

## Retirement Savings Plans

Prohibits “backdoor” Roth conversions (conversion of employee after-tax contributions to Roth

contributions) in qualified plans and individual retirement accounts for all individuals regardless of income level (beginning in 2022).

## Wage and Hour

Increases civil penalties for violations of the Fair Labor Standards Act.

## Workplace Safety

Increases certain penalties under the Occupational Safety and Health Act. The bill increases penalties for “willful” violations from \$70,000 to \$700,000. The current inflation-corrected penalty is \$136,653.

## Universal Preschool and Child Care Tax Credits

Expands paid access for “high-quality” preschool of a parent’s choice for three-year-old and four-year-old children.

## Major Investment and Incentives for Clean Energy Manufacturing

Provides support through \$320 billion in tax credits to companies and individuals that manufacture and install solar-powered panels, improve energy efficiency of work environments and advance residential clean energy transmission and storage.

Senator Joe Manchin (D, W.Va.) has emerged as a key and deciding figure for the BBBA, wielding significant influence on issues important to employers.

### Universal paid family leave

- Senator Manchin has said he will not support a paid family leave law
- Employers should stay focused on the compliance requirements that may already be in place by local and/or state paid family leave ordinances

### Provisions related to organized labor

- Senator Manchin is a supporter of pro-labor initiatives like the PRO Act
- Regardless of the BBBA’s passage, the senator has expressed his intention to work with the Senate and the House to introduce a labor bill

# The National Labor Relations Board

The current National Labor Relations Act (NLRA) has not been amended since the 1940s, making it an outdated law that employers feel does not fit into the modern-day workplace. The National Labor Relations Board (NLRB) and Congress would like to amend the law to give it more teeth, and it will likely see activity in 2022.

Damages provisions will be a focal point. Under the current law, damages include reinstatement and back pay, compound interest and a posting. Proponents of amending the damages provisions argue that the current provisions do not incentivize employers to follow the law. Possible amendments include new civil penalties, not to exceed \$50,000 for each violation of the act. Oftentimes, people making charges will file multiple allegations and violations. Conceivably, each one of those could be \$50,000. And up to a double the penalty not to exceed the \$100,000 for an employer that is for example, discriminating against union activity.

Crucially, the NLRA applies to both union and nonunion employers. As the labor market and employees increasingly call for change, labor activity and organizing are on the rise, particularly among young workers. Nonunionized workforces need to understand what the rules are under the NLRA and how they apply to them because if there are violations, these penalties will apply to them too. In 2022, anticipate a focus on protected concerted activity of nonunionized workforces with violation claims ensuing.

Further illustrating the intent of the legislation, the current BBBA includes provisions for officer and director liability, or personal liability, for employers. It also continues to have \$350 million in additional funding to carry out the board’s mission.

# Equal Employment Opportunity Commission

Like the NLRB, the Equal Employment Opportunity Commission (EEOC) will see an increase in funding for enforcement initiatives, as seen in White House

budget proposals and a focus on hiring enforcement attorneys at the agency.

## Legislative Alternatives

With the fate of the BBBA uncertain, there are smaller pieces of legislation that Congress can pass before the midterm elections that will affect employers.

- The Paycheck Fairness Act focuses on equal pay issues.
- The Older Worker Protection Against Discrimination Act would change the causation standard under the ADEA, making it a “motivating factor” rather than a “but for” standard.

But like all regulatory agencies, the EEOC does not need new legislation to make changes that affect employers. The following are areas to watch, regardless of what happens with the legislation.

## New Personnel

The EEOC is a commission comprised of a panel of five presidentially appointed, Senate-confirmed commissioners. And by statute, it is a bipartisan commission. There cannot be more than three commissioners of the same political party on a commission at one time, ensuring minority representation.

Currently, the EEOC has a majority of three Republican commissioners and a minority of two Democrat commissioners. Even though the chair of the EEOC, Charlotte Burrows, is a Democrat, she has to get majority support to make changes to regulations. Commissioner approval is also required for the dissemination of guidance documents and for almost every case the EEOC files. This dynamic is dictating much of what the EEOC can do now. Although there are areas where the commission can move forward on a bipartisan basis, most of the Biden administration priorities that could be implemented through the EEOC will come once the commission’s political makeup changes in July. At that time, President Biden will have an opportunity to appoint a new commissioner, flipping the commission to a Democrat majority and making it easier for the chairwoman and the administration to advance programs and priorities. The current acting general counsel will likely also be replaced by a new appointee in 2022.

## What to Expect

Expect a more aggressive EEOC litigation program. Litigation is the EEOC’s main mechanism to enforce federal employment discrimination laws. EEOC commissioners approve the agency’s litigation, so we can expect to see more activity when the commission’s political majority changes. Keep an eye on novel theories, class action and systemic discrimination cases.

## Class Actions

The EEOC has tremendous authority to bring class actions because it does not have to go through class certification under the federal rules. The EEOC can take one charge by a single employee and turn it into a class investigation and eventually a class lawsuit. Essentially, if the EEOC finds an issue, it can bring a class claim the next day, and suddenly, a respondent is facing a lawsuit with thousands of potential claimants when nothing more than a single charge was filed. Given the ease of the process and systemic discrimination cases aligned with the priorities of both the current EEOC chair and the Biden administration, this area will see a lot of activity in 2022.

Cases start with an investigation. If your organization is faced with an EEOC charge and the EEOC investigator starts asking for very broad information about different locations not associated with the original charge, for policies, etc., engage counsel. Charges should be taken seriously and addressed early on.

Other areas for increased litigation activity include ADA claims, pregnancy discrimination, race and equity and disparate impact claims.

The EEOC issues its enforcement priorities every four or five years, last published in 2016. A review of those priorities gives a preview of what to expect, even today as they remain largely the same. Employers should be aware that new guidance may be issued in 2022.

## Arbitration Agreements

Arbitration agreements and other types of waivers became an EEOC focus, and this resulted in some of the more creative and novel cases that the EEOC has filed in recent years. The agency argued that certain arbitration agreements violated Title VII under a theory of resistance under Section 707 of the act. Although the

agency did not have much success, it is anticipated to return to those types of novel arguments as it takes aim at arbitration agreements and other types of waivers.

The BBBA contained a nonenforcement provision directed at arbitration agreements that barred certain waivers that are commonly used in those agreements, but that provision was taken out of the Senate version of the bill. Employers maintaining arbitration agreements would be well served to review them against federal, state and local laws to ensure enforceability.

## Pay Data Collection

Reinstatement of pay data collection under the EEO-1 process and what ended up being called Component 2 is expected when the commission's majority changes later this year.

## National Labor Relations Board

Under the current NLRB chair, the general counsel and regional attorneys have taken a dramatically different approach to the law. This goes beyond a return to policies from the Obama administration, resulting in an escalation of enforcement activities and stiffer penalties.

Lauren McFerran became chair of the NLRB in January of 2021, after serving on the board as a member since 2014. Since then, she has commented publicly about her views of the NLRA and its needs for repair. To date, she has taken an expansive view and is looking for the NLRA to cover gig workers, focusing on protected concerted activity and expanding those protections to all employees. Employers can expect the NLRB to reinstitute many of the high-profile Obama decisions rolled back by the Trump administration on issues including the:

- Joint-employer standard;
- Clear and unmistakable waiver standard; and
- Use of electronic and email systems by unions.

NLRB General Counsel Jennifer Abruzzo is focused on changing the landscape and reach of the agency. She issued a series of memos focusing on remedies that provide a good overview of what the board is looking to litigate, including the:

- Expansion of *Weingarten* rights, with a focus on 10(j) injunctions; and
- Introduction of remedies, including:
  - Eliminating nonadmissions clauses in agreements;
  - Requiring board approval of private settlements;
  - Requiring at least 80 percent of back pay be made available; and
  - Setting the number of hours for meetings to six hours per session.

Other damages, including front pay, letters of apology and more, are also under review.

## Considerations For Employers

- Evolution will be constant in 2022 requiring employers to be up to date on changes to governing laws and regulations and to take appropriate preventive steps to mitigate risk.
- Changes in the composition of the NLRB and the appointment of a new general counsel have made cases more difficult to settle and have dramatically increased enforcement activities, remedies and damages.
- Review the NLRB rules in place during the Obama administration to maintain compliance and anticipate what may come from the agency next.
- Expect a flurry of activity from the EEOC in the second half of the year. Watch for novel theories the EEOC may advance in litigation.
  - Review policies.
  - Ensure compliance.
  - Address EEOC charges as they come in; watch for attempts by investigators to expand the charge and be prepared to answer.
- Undergo a thorough review of:
  - Wage and hour practices;
  - Data and cybersecurity practices of your organization as well as those of vendors and clients; and
  - Workplace safety protocols to ensure standard compliance.
- Nonunionized employers should check in with employees to gauge morale and make preventive adjustments to avoid organizing activity.

# Our Contributors



## Andrew F. Maunz

**Of Counsel**

Pittsburgh • (412) 338-5144 • [Andrew.Maunz@jacksonlewis.com](mailto:Andrew.Maunz@jacksonlewis.com)

Andrew Maunz recently joined Jackson Lewis after a distinguished career at the EEOC, serving as the agency's chief in-house lawyer.



## Laura A. Pierson-Scheinberg

**Principal**

San Francisco • (415) 796-5408 • [Laura.PiersonScheinberg@jacksonlewis.com](mailto:Laura.PiersonScheinberg@jacksonlewis.com)

Laura Pierson-Scheinberg represents employers in labor and employment matters with a particular focus on traditional labor issues, union elections and unfair labor practice charges. Before entering private practice, Laura served as an intern staff attorney to NLRB Member Sarah M. Fox.



## John J. Porta

**Principal**

New York Metro, New York City • (212) 545-4043 • [John.Porta@jacksonlewis.com](mailto:John.Porta@jacksonlewis.com)

John Porta is a strategic advisor who manages national, regional and local client relationships. He advises management teams on their most sensitive and important matters.

# Resources

## How Will the Build Back Better Act Impact Your Organization?

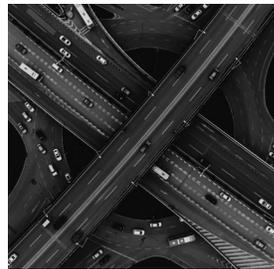
The Build Back Better Act proposes \$1.75 trillion in government spending, with an emphasis on social and climate goals. Within the bill's 2,400-plus pages are opportunities and obligations for employers. There are nine key areas in the bill for employers to note.

1. Provides four weeks of guaranteed government-paid family and medical leave (maximum benefit of approximately \$800 per week).
2. Modifies the affordability threshold for employer-sponsored health coverage under the Affordable Care Act for an employer that has at least 50 full-time employees (including full-time equivalent employees).
3. Allows the possibility that undocumented individuals could receive provisional grants of work permits under a process known as parole, which allows people to stay in the U.S. for five years with an option to extend for another five years thereafter.
4. Proposes to add civil penalties against an employer who engages in unfair labor practices (ULPs), up to six figures per violation in some instances. It would also add potential personal liability for company directors and officers for ULPs.
5. Prohibits “backdoor” Roth conversions (conversion of employee after-tax contributions to Roth contributions) in qualified plans and individual retirement accounts for all individuals regardless of income level (beginning in 2022).
6. Increases civil penalties for violations of the Fair Labor Standards Act.
7. Increases certain penalties under the Occupational Safety and Health Act; the bill increases penalties for “willful” violations from \$70,000 to \$700,000; the current inflation-corrected penalty is \$136,653.

8. Would expand paid access for “high-quality” preschool of a parent’s choice for three-year-old and four-year-old children.
9. Provides support through \$320 billion in tax credits to companies and individuals that manufacture and install solar-powered panels, improve the energy efficiency of work environments, and advance residential clean energy transmission and storage.

Track the bill’s progress

<https://www.jacksonlewis.com/practice/build-back-better-act>



## Seeking Opportunities in the IIJA?

The Infrastructure Investment and Jobs Act (IIJA) allocates \$1.2 trillion

in investments for various transportation, water, power and energy, environmental remediation, cybersecurity and broadband initiatives.

The increased funding will likely lead to more companies being classified as government contractors, involving increased compliance issues as well as wage and hour considerations at the state and federal levels. Key areas for employers include:

1. Revenue-generating opportunities;
2. Specific wage/labor provisions; and
3. Workforce development.

Read more

<https://www.jacksonlewis.com/publication/infrastructure-investment-and-jobs-act-key-takeaways-employers>

## What Can Employers Expect from the NLRB?

Employers should be ready for an aggressive expansion of remedies that the NLRB will seek in unfair labor practices litigation, including:

1. Consequential damages, front pay for discharged employees;
2. Expanded union access;
3. Reimbursement of union organizing costs;
4. Damages based on speculative contract terms;
5. Public publishing of remedial notices in newspapers, on websites and on social media;
6. Hiring individuals selected by the union;
7. Regional oversight of bargaining; and
8. Increased remedies and protections for undocumented workers.

Read more

<https://www.laborandcollectivebargaining.com/2021/09/articles/nlra/nlrb-general-counsel-instructs-regions-to-seek-enhanced-penalties-now/>

## What Does the NLRB General Counsel's Agenda Foreshadow?

While one of organized labor's most important legislative priorities, the Protecting the Right to Organize Act, languishes with a seemingly limited chance at becoming law, employers still must brace for substantial pronouncement changes to labor law. Recent developments at the National Labor Relations Board (NLRB) have clarified some significant avenues the NLRB may pursue.

### Initiatives that could radically change NLRB case law

1. Expanding damages for unfair labor practices
2. Backdoor card check

### Reversal of Trump board and older precedents

1. Scrutinizing employee handbooks
2. Raising the bar for independent contractor status

3. Strike replacement restrictions
4. Undermining employer confidentiality interests
5. Protecting employee misconduct during the course of protected concerted activity

Read more

<https://www.jacksonlewis.com/publication/back-door-pro-act-nlrb-general-counsel-s-aggressive-agenda-raises-new-risks-employers>



## Is Your Organization Complying with State and Federal Biometrics Laws?

Biometric technologies are fast becoming valuable tools serving a wide range of different applications, including identifying individuals to confirm time worked and to allow them access to their computers and workplaces.

A report released by Global Market Insights Inc. estimates that the global market valuation for voice recognition technology, for example, will reach approximately \$7 billion by 2026, in main part due to the surge of AI and machine learning across a wide array of devices, including smartphones, healthcare apps and banking apps, just to name a few.

For businesses that want to deploy these technologies, which inevitably require the collection, storage, and/or disclosure of biometric information, there are a number of privacy and security compliance obligations to consider.

Visit Jackson Lewis' Biometrics Law Map

<https://www.jacksonlewis.com/biometrics-law-map>

## Minimum Wage Increases Effective in 2022

The following state minimum wage increases went into effect as of January 1st. States marked with an asterisk (\*) also have city or other local minimum wage increases for 2022.

<b>Arizona*</b>	\$12.80
<b>California*</b>	\$15.00 (26+ employees) \$14.00 (1-25 employees)
<b>Colorado*</b>	\$12.56
<b>Connecticut</b>	\$14.00 (July 1)
<b>Delaware</b>	\$10.50
<b>Dist. of Columbia</b>	TBD (July 1)
<b>Florida</b>	\$11.00 (Sept. 30)
<b>Illinois*</b>	\$12.00 (std.)/\$9.50 (youth)
<b>Maine*</b>	\$12.75
<b>Maryland*</b>	\$12.50 (15+ employees) \$12.20 (1-14 employees)
<b>Massachusetts</b>	\$14.25
<b>Michigan</b>	\$9.87
<b>Minnesota*</b>	\$10.33 (“Large” employers) \$8.42 (“Small” employers/90-Day Training Wage/Youth Wage)
<b>Missouri</b>	\$11.15
<b>Montana</b>	\$9.20
<b>Nevada</b>	\$10.50 (w/o health benefits) \$9.50 (with benefits) (July 1)
<b>New Jersey</b>	\$13.00
<b>New Mexico*</b>	\$11.50
<b>New York</b>	Outside NYC and Nassau, Suffolk & Westchester Counties: \$13.20 (generally); \$15.00 all others (generally) (Dec. 31, 2021)

<b>Ohio</b>	\$9.30
<b>Oregon</b>	\$12.50 (“Nonurban” counties) \$13.50 (“standard” counties) \$14.75 (Portland Metro) (July 1)
<b>Puerto Rico</b>	\$8.50
<b>Rhode Island</b>	\$12.25
<b>South Dakota</b>	\$9.95
<b>Vermont</b>	\$12.55
<b>Virginia</b>	\$11.00
<b>Washington*</b>	\$14.49 (most employees) \$12.32 (employees aged 14-15)

[Read more](#)

[https://www.jacksonlewis.com/sites/default/files/docs/JL\\_Wage\\_Hour\\_Year\\_In\\_Review\\_2021.pdf](https://www.jacksonlewis.com/sites/default/files/docs/JL_Wage_Hour_Year_In_Review_2021.pdf)

## Do You Need to Use Project Labor and Community Workforce Agreements?

Traditional labor law will face significant change in the wake of the new \$1.2 trillion Infrastructure Investment and Jobs Act recently signed into law.

Prioritization of project labor and community workforce agreements is one such noteworthy change.

Project Labor Agreements require an employer to become a unionized employer on that particular project.

Community Workforce Agreements require employers to give priority in hiring to local workers in the community where the particular project is being performed.

The 2009 Executive Order 13502 signed by President Obama is still in effect, requiring that federal agencies and all parts of the federal government encourage the use of Project Labor Agreements in connection with large scale construction projects.

[Listen](#)

<https://www.jacksonlewis.com/podcast/traditional-labor-practice-effects-new-infrastructure-law>

## Substantial Amendments To the CCPA Go Into Effect January 2023, Be Prepared

These FAQs highlight critical CCPA and CPRA compliance requirements. They should help businesses determine whether they are subject to the CCPA/CPRA, and if so, learn more about the obligations they may have and strategies for implementing policies and procedures to comply.

[Read more](#)

<https://www.jacksonlewis.com/publication/california-consumer-privacy-act-california-privacy-rights-act-faqs-covered-businesses>



## International Regulatory Activity

Regulatory Activity Outside of the U.S. Impacts Employers.

### Outsourcing

- Mexico

### Privacy

- Brazil
- China
- India

### Remote Work

- Latin America
- “Right to Disconnect”
- Special remote work visas and related programs to facilitate and regulate cross-border remote work

### Sexual Harassment

- Asia

Stay up to date on workplace trends around the world with our international alliance partner, L&E Global.

[Read more](#)

<https://knowledge.leglobal.org/subjects/articles/>



**Sign up for Jackson Lewis content. Receive updates and invites on the topics impacting your business.**

<https://interact.jacksonlewis.com/6/2002/campaign-forms/2022-the-year-ahead-new-contact.asp>

# Thank you for your interest in the **2022: The Year Ahead for Employers.**

Focused on labor and employment law since 1958, Jackson Lewis P.C.'s 950+ attorneys located in major cities nationwide consistently identify and respond to new ways workplace law intersects with business. We help employers develop proactive strategies, strong policies and business-oriented solutions to cultivate high-functioning workforces that are engaged, stable and diverse, and we share our clients' goals to emphasize inclusivity and respect for the contribution of every employee.

Should you want to discuss how items contained in this report could impact your organization, please contact the Jackson Lewis attorney with whom you regularly work, or visit us at [jacksonlewis.com](http://jacksonlewis.com) to find out how we can partner with you.

©2022 Jackson Lewis P.C. 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. Recipients should consult with counsel before taking any actions based on the information contained within this material. This material may be considered attorney advertising in some jurisdictions. Prior results do not guarantee a similar outcome. Reproduction of this material in whole or in part is prohibited without the express prior written consent of Jackson Lewis P.C., a law firm focused on labor and employment law since 1958. Our 950+ attorneys located in major cities nationwide help employers develop proactive strategies, strong policies and business-oriented solutions to cultivate high-functioning workforces that are engaged, stable and diverse.

[jacksonlewis.com](http://jacksonlewis.com)