

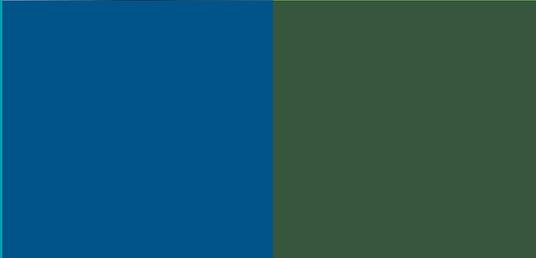
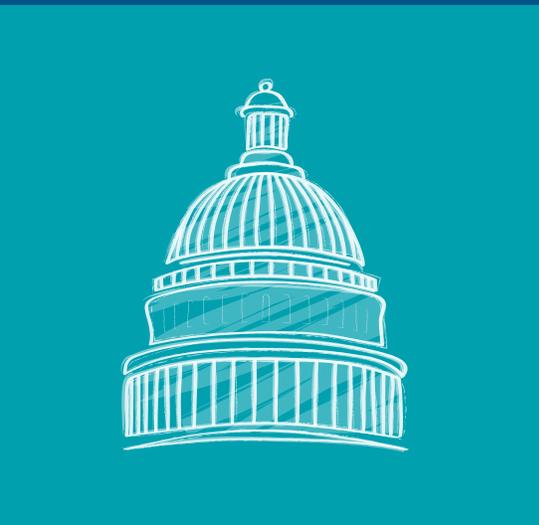
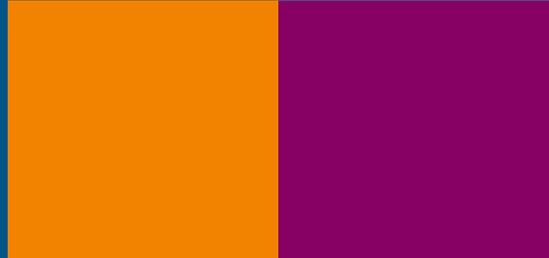
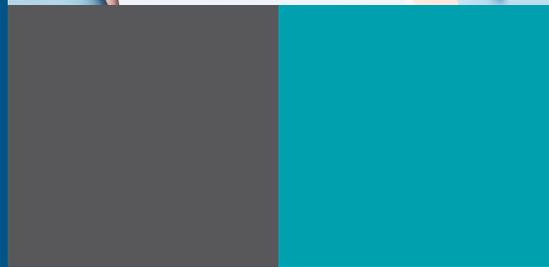
WPI Labor Day Report

2022

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Introduction

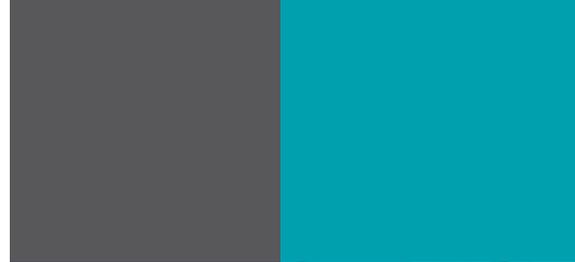
Four years ago, Littler Workplace Policy Institute (WPI) issued its first Labor Day Report, analyzing the state of the U.S. workforce, the regulatory and logistical hurdles employers faced, and the challenges that lay ahead. At the time, the country was nearly two years into a new presidential administration, the U.S. labor market enjoyed a historically low unemployment rate yet a relatively low labor market participation rate, and the growing skills gap was becoming more apparent. Four years, a new administration, and a global pandemic later, the issues confronting employers and the U.S. economy are both familiar yet markedly different.

As inflation rises, national and global unrest grows, and the threat of a recession looms, the economy has become more turbulent than ever. Moreover, while many employers and employees continue to recover from the devastating effects of COVID-19, the rate and extent of recovery varies significantly by industry, level of education, and worker demographics. In certain sectors, a sizable gap persists between the number of job openings and the level of unemployment.

This Labor Day Report examines the various reasons for this disparity, how the Biden administration and state and local legislatures have shaped employment policy, the challenges presented by the evolving nature of work, and the urgent need for federal policy reforms.

Key points include:

- The U.S. jobs level has finally recovered from the hit it took from the pandemic, although the hospitality and service industries are lagging in their recovery. The leisure and hospitality industry is down over 1.2 million jobs since February 2020, even though the economy added over 96,000 jobs in this sector in July 2022.
- The labor force participation rate is 1.3 percentage points below the pre-pandemic level. Had the labor force participation rate remained at the February 2020 level, there would be 3.4 million more workers in the labor force at this time.
- There are approximately 5.2 million more job openings than unemployed workers.
- Workers are putting in more hours, yet output is falling. The decrease in productivity combined with an increase in hourly compensation has resulted in a 10.8% increase in unit labor costs.
- The Democrats' slim majority in Congress over the past two years has largely prevented either side of the aisle from advancing employment-related legislation. Federal agencies and state legislatures, therefore, have become the main drivers of employment policy.



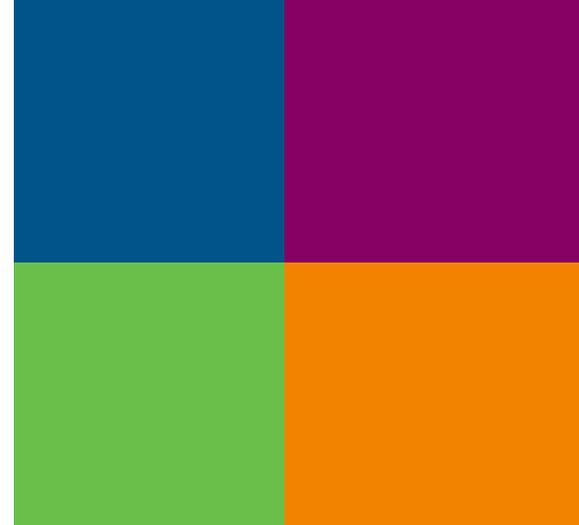
- The pandemic exacerbated job displacement, which is creating employee demand for new ways of working, skillsets, and approaches to improving workplace policies. Understanding the complex dynamics of the current U.S. labor market is key to identifying in-demand jobs and skills, guiding investments in education and training and, ultimately, the nation's economic recovery.

Part I of this Report looks at the state of the workforce and what factors are steering employee and employer behavior.

Part II provides an overview of how federal, state, and local government decision-making is affecting labor and employment law.

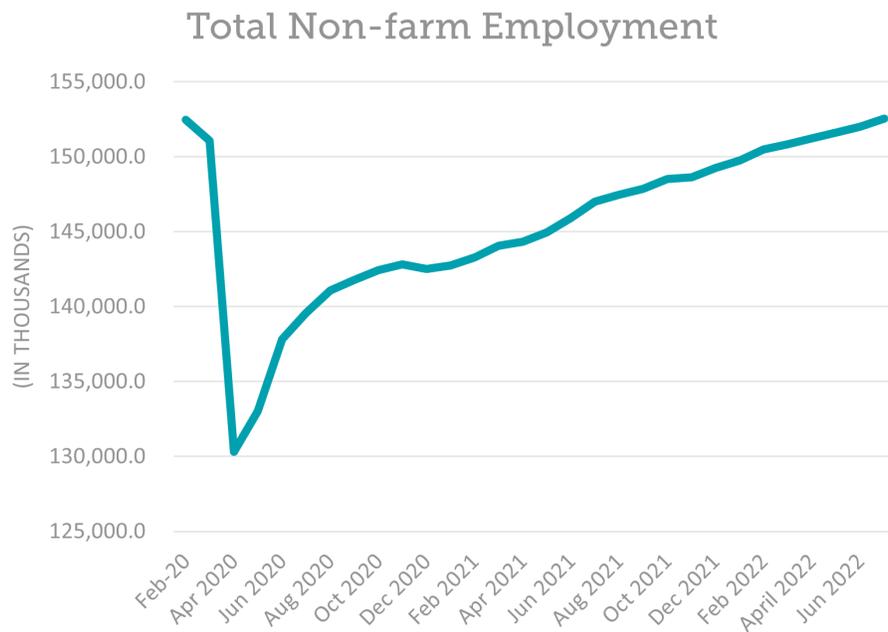
Part III outlines steps policy makers can take to address the employment challenges stemming from the historic transformation of the U.S. workforce.

Curtis Dubay, the Chief Economist of the US Chamber of Commerce, contributed to our Labor Day report with great insight and expertise. We are indebted to him and to the US Chamber for his contribution and friendship.



I. The State of the U.S. Workforce

In the early months of the pandemic, jobs declined by a staggering 22.2 million. The good news is that jobs recovery has been on the rise since February 2020. In July, the number of U.S. jobs finally reached and slightly surpassed the pre-pandemic level, with over 32,000 more Americans employed than in February 2020.¹ After around 2.5 years, the jobs gap is completely gone, which is faster than it took to recover from the Great Recession. It took six years, from January 2008 to July 2014, for the labor market to recover from that financial crisis.



The less-sanguine news is that this resurgence is not even across all industry sectors, and there remains a sizable disparity between job openings and unemployed workers.



¹ The economy added 528,000 jobs in July, 398,000 in June, and 386,000 in May. See U.S. Bureau of Labor Statistics, [Employment Situation Report – July 2022](#) (Aug. 5, 2022).

By Industry

Manufacturing and other industries that do not require as much personal contact between employees and/or with customers rebounded relatively quickly. The fastest growing industry as of July 2022 is warehousing and storage. Notably, while retail in general took a hit during the pandemic, nonstore retailers have seen an 18% increase in employment since February 2020.

Growing Industries by Net Change in Employment

(>100,000 net employment growth since Feb 2020)

	Total Employment (July 2022) (thousands)	Change since Feb 2020 (thousands)	% Change since Feb 2020
Warehousing and storage	1,793.30	585.5	48.0%
General merchandise stores, including warehouse clubs and supercenters except department stores	2,262.40	294.1	15.0%
Couriers and messengers	1110.1	262.3	31.0%
Temporary help services	3149.9	210.1	7.0%
Management and technical consulting services	1767.1	206.0	13.0%
Computer systems design and related services	2432.9	180.2	8.0%
Scientific research and development services	895.30	145.8	19.0%
Residential construction special trade contractors	2,267.20	142.5	7.0%
Offices of physicians	2836.8	113.9	4.0%
Individual and family services (non-govt)	2811.6	111.7	4.0%
Offices of other health practitioners	1096.3	108.5	11.0%
Architectural and engineering services	1643.7	103.9	7.0%
Nonstore retailers	652.2	101.0	18.0%

Source: U.S. Bureau of Labor Statistics

In contrast, the service and hospitality sectors are still struggling. For example, the leisure and hospitality industry is still down over 1.2 million jobs since February 2020, even though the economy added over 96,000 jobs in this sector in July.



Source: U.S. Bureau of Labor Statistics

Restaurant, hotel, and other tourism-related sectors have similarly declined since the onset of COVID-19, as have certain components of the retail industry and nursing care.

Shrinking Industries by Net Change in Employment

(>100,000 net employment loss since Feb 2020)

	Total Employment (July 2022) (thousands)	Change since Feb 2020 (thousands)	% change since Feb 2020
Food services and drinking places	11,726.00	-577.1	-5.0%
Accommodation	1,714.30	-376.7	-18.0%
Local government education	7,765.80	-276.2	-3.0%
Local government, excluding education	6,387.00	-249.8	-4.0%
Nursing care facilities	1,361.10	-231.1	-15.0%
Clothing and clothing accessories stores	1,074.30	-214.8	-17.0%
Membership associations and organizations	2,811.90	-213.7	-7.0%
Amusements, gambling, and recreation	1,657.10	-128.4	-7.0%
Department stores	965.5	-113.0	-10.0%
Transit and ground passenger transportation	407.50	-100.7	-20.0%

Source: U.S. Bureau of Labor Statistics

Labor Force Participation

Despite strong job growth overall, labor participation continues to lag. There are about 623,000 fewer workers in the labor force (*i.e.*, those who are working in addition to those actively looking for work) than in February 2020. The labor force participation rate is about 1.3 percentage points below the pre-pandemic level. Stated differently, if the U.S. had continued at the pre-pandemic labor force participation rate, there would be 3.4 million more workers in the labor force today. Using the employment-population ratio as another gauge, the current ratio is 1.2 percentage points below the pre-pandemic level, meaning if the February 2020 rate were still in play, there would be about 3.2 million more workers employed at this point.

At the same time, workers are putting in more hours and output is falling. This means productivity in the nonfarm business sector declined—4.6% in the second quarter of this year, after dropping 7.7% in the beginning of 2022.² This decrease in productivity combined with an increase in hourly compensation resulted in a 10.8% increase in unit labor costs.³ Such factors could contribute to inflation.⁴ By contrast, in the manufacturing sector, labor productivity increased 5.5% in the second quarter of 2022 and output increased by 4.3%. Hours worked decreased slightly (1.1%) during this period.⁵ This sector is prone to automation, which can lead to increased productivity and declining workforce. The growth in employment means jobs are growing along with productivity right now.

Meanwhile, the employment cost index for U.S. businesses has soared as companies scramble to return to normal activity levels following the COVID economic shutdown.

Employment Cost Index

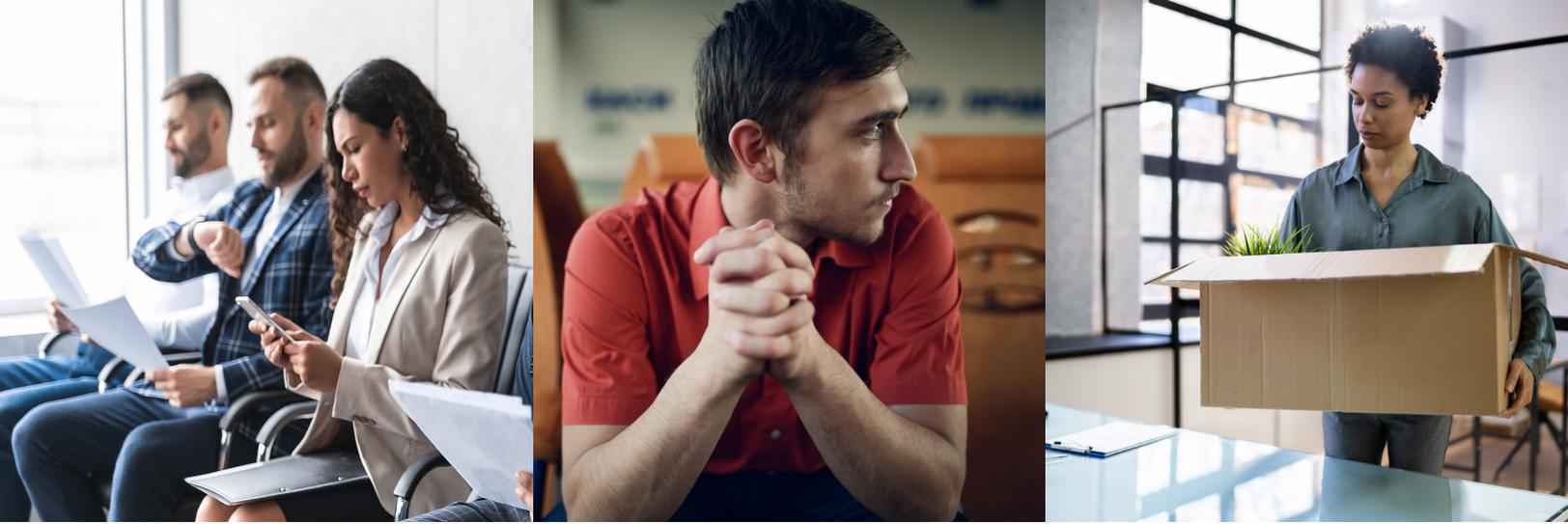


2 U.S. Bureau of Labor Statistics, News Release, [Productivity and Costs, Second Quarter 2022, Preliminary](#) (Aug. 9, 2022).

3 *Id.*

4 See, e.g., Neil Irwin and Courtenay Brown, *Axios Macro* (Aug. 9, 2022).

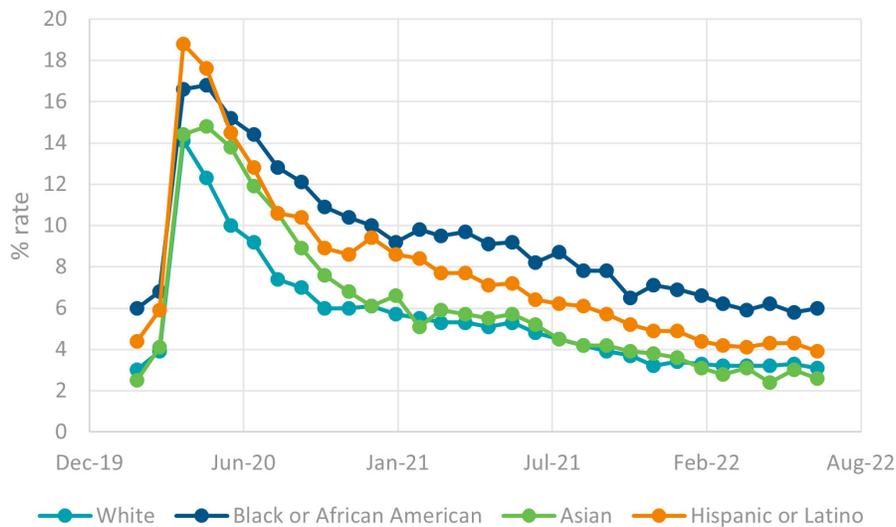
5 BLS news release, *supra* note 2.



Demographics of those Most Impacted

During a panel discussion of the U.S. labor market conducted earlier this year, speakers indicated that women, minorities, and less-educated workers suffered from the greatest job losses during the COVID recession, and have shown less progress during the recovery period.⁶ In addition, Black and Hispanic workers, workers without a high school diploma and young adults (ages 16-24) were found more likely to change jobs.⁷ And although the unemployment rate has decreased across the board, Black and Hispanic individuals still have a higher rate of unemployment as compared to white and Asian workers.

Unemployment Rate by Race



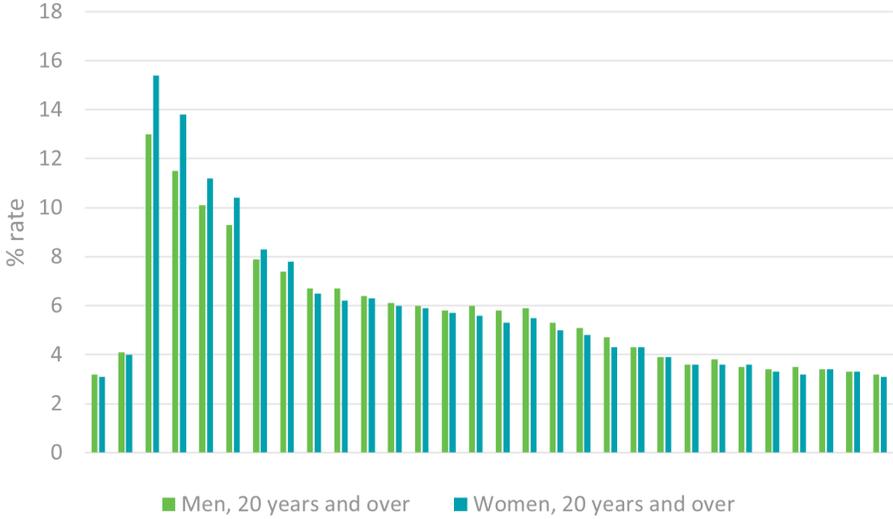
Source: U.S. Bureau of Labor Statistics

⁶ Michael Horrigan et al., *Is there a labor shortage?*, National Association for Business Economics 2021 (Jan. 20, 2022).

⁷ Rakesh Kochhar, Kim Parker and Ruth Igielnik, *Majority of U.S. Workers Changing Jobs Are Seeing Real Wage Gains*, Pew Research Center (July 28, 2022).

At the outset of the pandemic, women were disproportionately affected, in large part because they shouldered the lion's share of caregiving responsibilities. Over time, the unemployment rate has evened out, although this does not account for those who left the workforce entirely.

Unemployment Rate by Sex

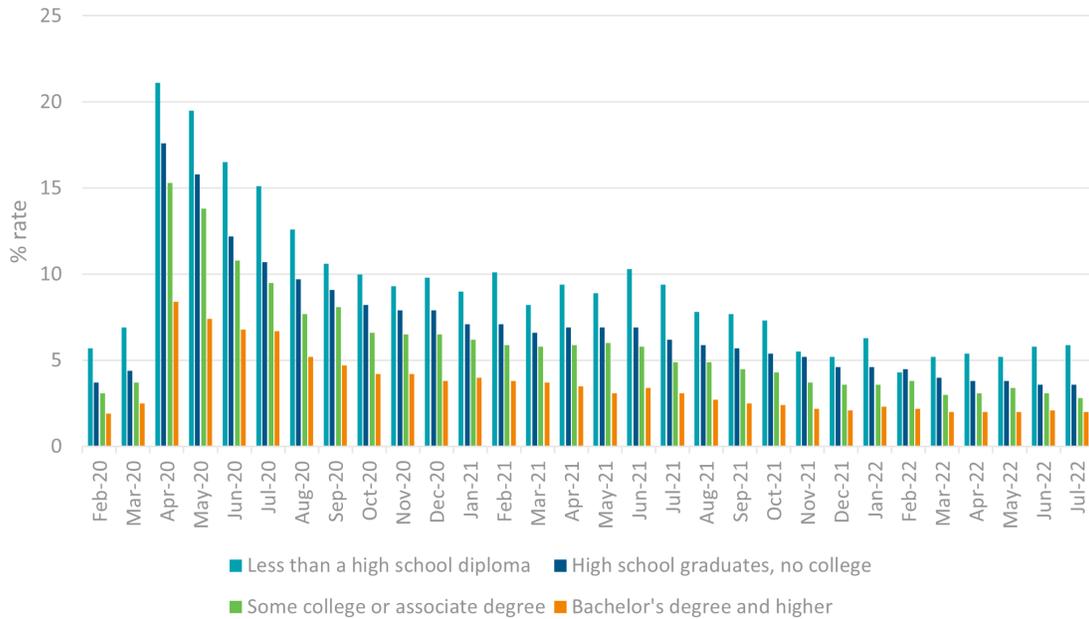


Source: U.S. Bureau of Labor Statistics



As expected, those with higher levels of education experienced less unemployment.

Unemployment Rate by Education Level



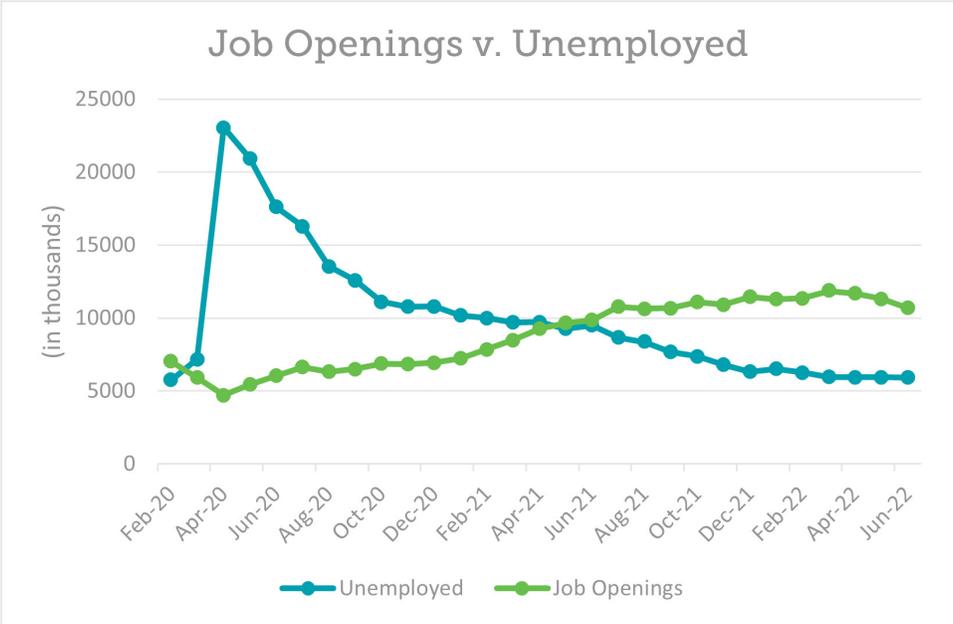
Source: U.S. Bureau of Labor Statistics

This is indicative of the widening skills gap. Estimates of future job demands indicate that a quarter of jobs are likely to require a four-year college degree. Another 40 to 50% will be middle-skill jobs requiring some post-high school education or training. In addition, it is projected that 30-40% of adult workers will need reskilling every decade to keep up with in-demand jobs.



Job Openings versus Unemployment

While the cooling economy is causing some businesses to cut back on their job postings, employers are still hiring at a healthy clip. At the end of June 2022, there were 10.7 million job openings; at the end of July, this number rose to 11.2 million. In July there were 5.2 million more job openings than unemployed workers.



Source: U.S. Bureau of Labor Statistics



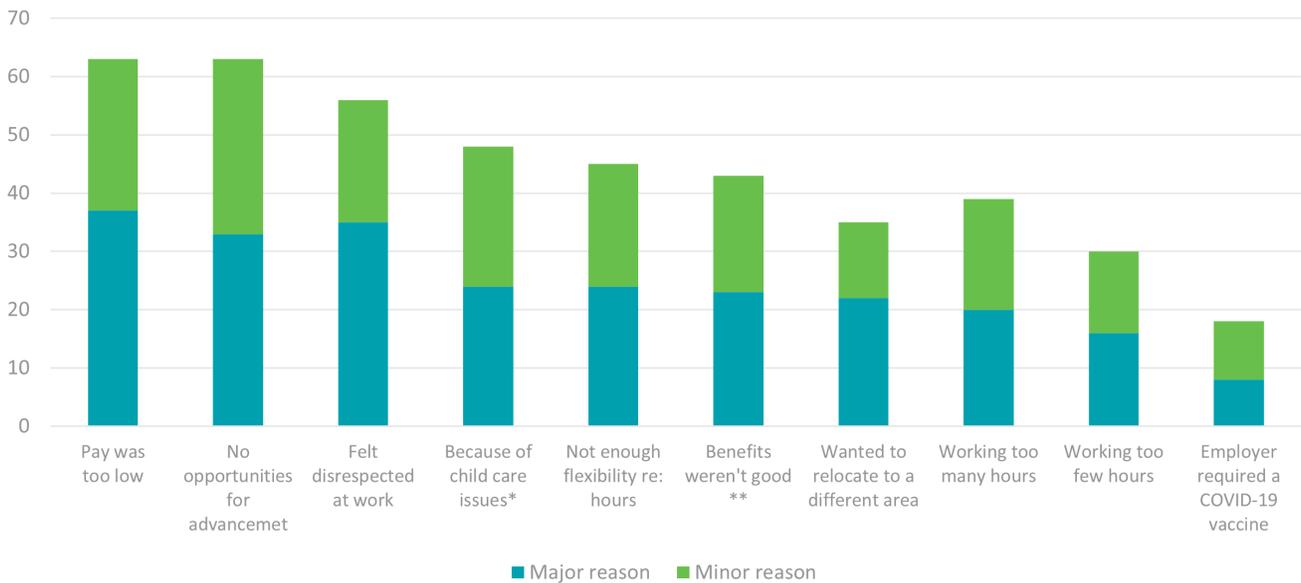
What is causing this disparity?

For starters, there was a significant upswing in voluntary quits starting in late 2020, particularly in the retail and hospitality industries, otherwise known as the “Great Resignation.” Reports indicate that from January through May 2022, approximately 20 million people quit their jobs in the United States, about twice the number of those who quit 10 years ago.⁸ In June, the quit rate was 2.8% (4.2 million people), just below the all-time high rate of 3% (4.45 million people) in March 2022.

There are many reasons why workers are quitting.⁹ Some took stock of their lives during the pandemic and decided to change course. Others left to seek better opportunities within their job field. Pandemic-related government benefits and savings provided some employees with a financial cushion while they reassessed their job opportunities or stayed home due to coronavirus-related concerns and/or to care for family members. Some took early retirement.

According to a Pew Research survey released in March, the top five reasons people gave for quitting in 2021 were low pay, feeling disrespected at work, no opportunities for advancement, childcare issues, and not having enough flexibility to choose when to work.¹⁰ With increased job openings and options, employers are more willing to address these issues.

Top Reasons for Quitting



*Among those with children younger than 18 living in the household
 **Question provided health insurance and paid time off as examples
 Source: Survey of U.S. adults conducted Feb. 7-13, 2022, Pew Research Center

8 Pablo Fernandez Cras and Cagan Koc, *Great Resignation Is Slowing Amid High Inflation, Randstad Says*, Bloomberg Government (July 27, 2022).
 9 Littler has available a video for employers ready to explore what might grow from today’s chrysalis of challenges, and strategies for building and sustaining employment relationships that meet the needs of employees and employers alike. See Claire B. Deason, [Finding Beauty in Change: The Metamorphosis of Work](#).
 10 Kim Parker and Juliana Menasce Horowitz, [Majority of workers who quit a job in 2021 cite low pay, no opportunities for advancement, feeling disrespected](#), Pew Research Center (Mar. 9, 2022).

In terms of employee pay, wages in July rose 0.5% from June, 5.2% annually from July 2021. Because inflation is above this level, real wages are generally declining. Those employees who switched jobs, however, did see some pay benefits. The majority (60%) of those who changed jobs from April 2021 to March 2022 are earning more, even factoring in inflation.¹¹ At the same time, only 47% of those who stayed with their same employer saw an increase in their real wages.¹²

A separate Pew Research Center survey indicates more than one in five workers are very or somewhat likely to look for a new job in the coming months.¹³ Nearly half of those workers changing employers from 2019 to 2021 switched industries (48%) or occupations (49.5%).¹⁴

Yet the rate of resignations appears to be slowing. Inflation, rising housing and transportation costs, and general uncertainty are likely driving people back to work. Individuals are starting to dip into their savings, which have fallen below pre-pandemic levels.¹⁵

Meanwhile, small business optimism has declined, falling below the 48-year average every month so far this year. The net percentage of small business owners expecting conditions to be better over the next 6 months was -61%. That is the lowest level ever.¹⁶

The biggest reason cited was inflation at 34% (versus 13% last year), followed by the quality of the labor pool (23%) and taxes (11%). While 60% of small business indicated they are hiring, half of business owners reported they have job openings they could not fill. Sixty percent (94% of those hiring or trying to hire) say they had few or no qualified applicants to fill needed positions. Nearly half (net 48%) increased compensation over the last three months.¹⁷



11 Rakesh Kochhar et al., *supra* note 7.

12 *Id.*

13 *Id.*

14 *Id.*

15 Total savings is about \$5.4 trillion since March 2020, almost \$2.6 trillion over what we would normally save. This accumulation of savings is only now starting to be spent, in large part because of inflation. *Bureau of Economic Analysis*.

16 William C. Dunkelberg and Holly Wade, *Small Business Economic Trends*, NFIB, p. 3 (June 2022).

17 *Id.* p. 4.

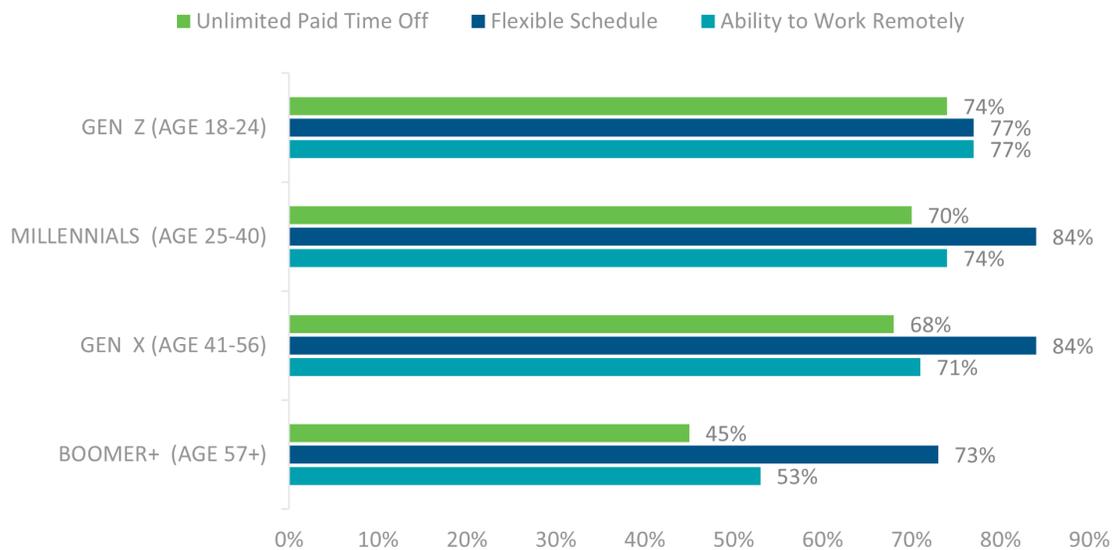
Impact of Remote Work

Although the percentage of remote workers has declined as workplaces reopen, a significant number of employees who can work from home continue to do so at least part of the time. Some remain remote for safety reasons related to COVID-19. According to the Bureau of Labor Statistics Employment Situation Report, in July 2022, 7.1% of workers teleworked because of the pandemic, a number that remained unchanged from the prior month.¹⁸ Others prefer working remotely because they enjoy the flexibility and lower stress working from home offers. In this tight labor market, the ability to work remotely can be seen as an additional perk.

According to a recent Harris Poll, the ability to work remotely was among the top five benefits that would most influence a worker to consider a job with an employer, second only to the ability to work a flexible schedule.¹⁹ The other top benefits were employer retirement contributions, unlimited paid time off, and offering a health and wellness stipend.

The younger the worker, the more desirable they considered the benefit of working remotely.²⁰

Desired Benefits by Age



Source: The Harris Poll, As Reported in Fortune (Feb. 2022)

¹⁸ U.S. Department of Labor, Bureau of Labor Statistics, [The Employment Situation – July 2022](#), p. 2 (Aug. 5, 2022).

¹⁹ Harris Poll COVID-19 Tracker Wave 104 ([Week 104](#)) fielded Feb. 18- 20, 2022.

²⁰ See Megan Leonhardt, [Employers are upping pay and benefits to keep workers from resigning. Here are the perks workers want most](#), Fortune (Feb. 23, 2022). Data based on survey of 2,019 U.S. adults fielded February 11-13, 2022, via The Harris Poll.



Yet many employers—by necessity or design—are taking steps to bring employees back to the physical office. Littler’s Annual Employer Survey Report indicates that more than half of surveyed employers had instituted a formal policy for returning employees who can work remotely to in-person and/or on-site work (either full-time or on a hybrid schedule). At the same time, the vast majority of employers stated they had offered or considered offering more flexibility or remote work options to attract and retain employees. When asked to what extent their organization has offered, or is considering offering, more flexibility or remote work options to help attract and retain employees, nearly half (47%) said they have to a great extent and only 16% said “very little” (13%) or “not at all” (3%).²¹

Meanwhile, as more positions are capable of being performed remotely and employers are having a harder time filling those jobs, recruiting has expanded geographically. No longer are job searches limited to certain cities or even states. This has presented some thorny administrative, employment benefits, and tax issues. Add the use of artificial intelligence to aid in recruiting and hiring into the mix, and employers face even more challenges.

²¹ [Littler Annual Employer Survey Report](#), p. 14.



Disengagement is High

Employees are feeling disengaged from work. A recent Gallup poll found that the level of employees who felt engaged with their work dropped during the pandemic for the first time in a decade, and continues to fall. In 2020, 36% of employees felt connected with their work, which dropped to 34% in 2021, and currently stands at about 32%, while approximately 17% are actively disengaged.²² The study assessed several workplace factors, including employees' understanding of their job expectations, opportunities for development and feelings of being heard. Notably, those employees who worked remotely or in hybrid format reported a higher level of engagement than who worked exclusively onsite.²³

Safety Concerns Remain

COVID-19 remains a persistent, but not as significant, factor in why individuals are not working. Over 2 million participants to a recent Household Pulse Survey conducted by the U.S. Census Bureau indicated that the reason they were unemployed was concern about getting or spreading the coronavirus. Over 3.8 million claimed they were out of work because they were caring for someone or sick themselves with coronavirus symptoms.²⁴

In July of this year, only .6% of those who had left the labor force entirely reported they had not looked for work within the past four weeks for COVID-related reasons. In May 2020, this number was over 9.5%.

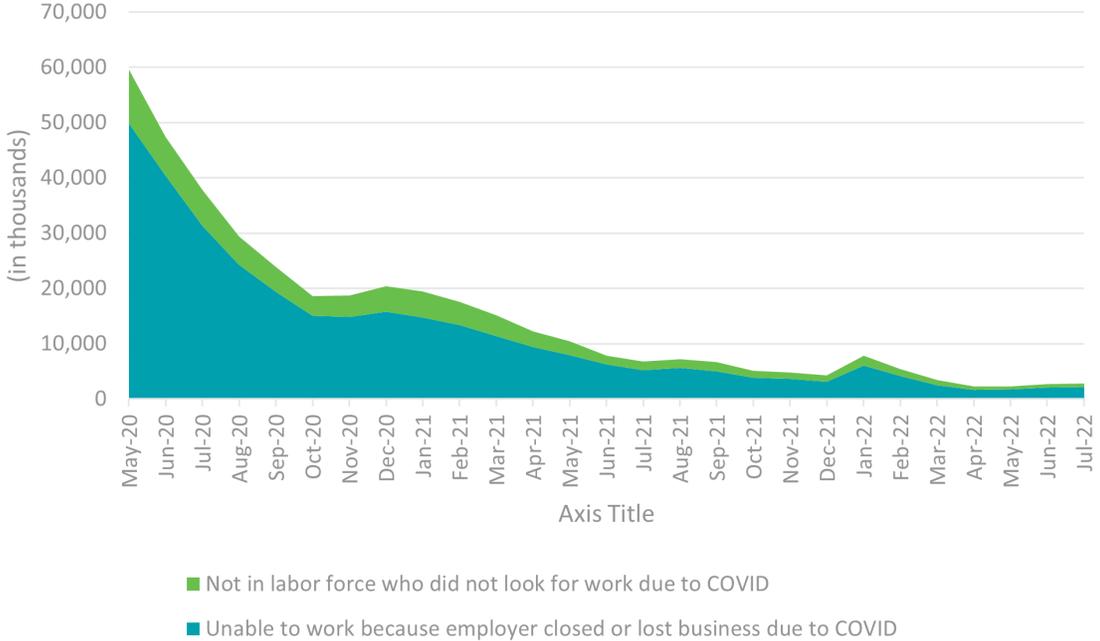
The number of workers who reported that at some point during the past four weeks they were out of work because their employer closed or lost business because of the pandemic had been steadily declining, but started to inch up slightly since May. In July, 2.2 million individuals (.8% of workers ages 16 or older) claimed they were not employed for this reason, down from the pandemic high of 19.2% in May 2020.

²² Jim Harter, [U.S. Employee Engagement Slump Continues](#), Gallup (Apr. 25, 2022).

²³ *Id.*

²⁴ U.S. Census Bureau, Week 47 Household Pulse Survey: June 29-July 11, 2022, Table 3. Educational Attainment for Adults Not Working at Time of Survey, by Main Reason for Not Working and Source Used to Meet Spending Needs ([xls](#)).

Waning Impact of COVID-19



Source: U.S. Bureau of Labor Statistics

Although the overall impact of the pandemic on employment participation has lessened over time, the lingering effects of long COVID are still being measured. According to recent results from the Census Bureau’s Household Pulse Survey, 1 in 13 adults in the United States are experiencing long COVID symptoms.²⁵ The U.S. Equal Employment Opportunity Commission has recognized that certain chronic, COVID-related symptoms could amount to a disability under the Americans with Disabilities Act.²⁶

25 See CDC, News Release, [Nearly One in Five American Adults Who Have Had COVID-19 Still Have “Long COVID”](#) (last reviewed June 22, 2022).

26 EEOC, [What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws](#), (last updated July 12, 2022).

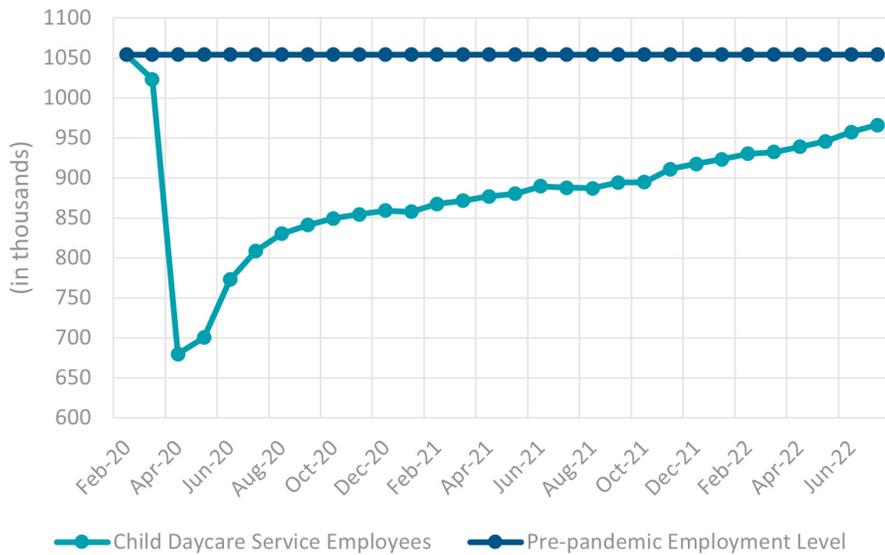


Lack of Caregivers

Many parents of young children likely left the labor force due, in part, to the lack of childcare providers. More than 6.13 million U.S. adults were not working between June 29 and July 11, 2022, because they were caring for a child not in school or daycare, according to the U.S. Census Bureau.²⁷ Another 2.31 million were not working because they were caring for an elderly person.

Although the number of childcare workers has steadily increased post-pandemic, the level is still significantly short of the February 2020 level.

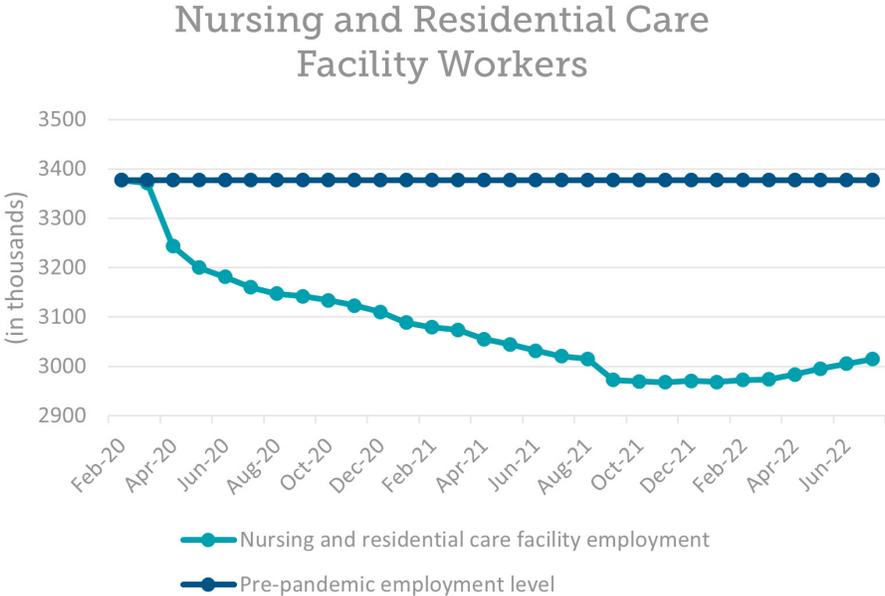
Child Daycare Service Workers



Source: U.S. Bureau of Labor Statistics

²⁷ U.S. Census Bureau, Week 47 Household Pulse Survey: June 29-July 11, 2022, available at <https://www.census.gov/data/tables/2022/demo/hhp/hhp47.html>.

Similarly, the number of employees working in nursing and residential care facilities, including care for the elderly, has also declined precipitously since the pandemic started.



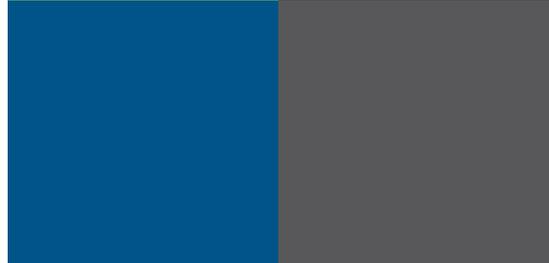
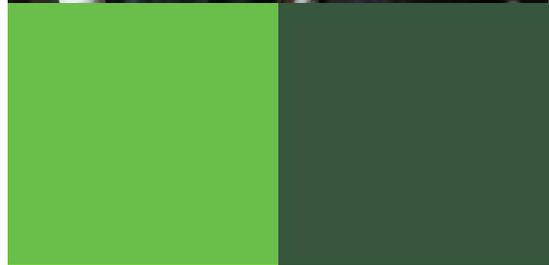
Source: U.S. Bureau of Labor Statistics



Outlook

Although employers are raising wages and providing more flexible work options, rising inflation and a slowing economy mean employers may start gaining more leverage in the coming months. If the economy slows to the extent that layoffs become necessary, employers will be better able to require return to the physical office if desired. This is predicated, of course, on the assumption the various COVID surges remain manageable.

At the same time, more proactive steps are needed to encourage those who have left the labor force entirely to return to work, and to better equip those with lower levels of education for positions employers need filled. This may include better apprenticeship programs, flexible work schedules, paid leave and more childcare options. Part III of this Report will address these policy recommendations in further detail.





II. Federal and State Overview

The Democrats' slim majority in Congress over the past two years has largely prevented either side of the aisle from advancing employment-related legislation. Federal agencies and state legislatures, therefore, have become the main drivers of employment policy. The following section discusses some key developments and what employers can expect in the coming months.

Labor-Management Relations

When Joe Biden was running for president, he made clear that he intended to be the most union-friendly president in U.S. history. Throughout the course of the last year, we have seen a push by Biden appointees, in particular, National Labor Relations Board General Counsel (GC) Jennifer A. Abruzzo, to overhaul our nation's labor laws.

Currently, the Board comprises a 3-2 Democratic majority. At the helm of the Board is Chair Lauren McFerran, originally appointed by former President Barack Obama, renominated by President Donald Trump, and later tapped by President Biden to serve as the chair. Also in the Democratic majority are President Biden's two appointees—Gwynne A. Wilcox and David M. Prouty. Member Wilcox's term will expire in August 2023, while Member Prouty's term will last until August 2026. Both Member Wilcox and Member Prouty come to the Board after having served as counsel to two of the largest Service Employees International Union (SEIU) locals in the country—1199 and 32BJ, respectively. Together, they bring decades of experience fighting on behalf of labor organizations.

On the other side are two Republican appointees—Members John F. Ring and Marvin E. Kaplan. While Member Kaplan's term does not expire until August 27, 2025, Member Ring's term is set to expire on December 16, 2022. With Member Ring's departure in December, the Board will then comprise a 3-1 Democrat to Republican membership. With a commanding 3-1 Democratic Board majority and the continued push by GC Abruzzo to rework U.S. labor law, we are on the cusp of witnessing what has the potential to be one of the most pro-union eras in modern history.

In anticipation of imminent changes in labor policy emanating from the Board and its general counsel, union organizing efforts have surged during 2022. As was reported by the NLRB in July of this year, "during the first nine months of Fiscal Year 2022 (October 1–June 30), representation petitions filed at the NLRB have increased 58%—up to 1,892 from 1,197

during the first three quarters of FY2021. By May 25, FY2022 petitions exceeded the total number of petitions filed in all of FY 2021. At the same time, unfair labor practice charges have increased 16%—from 11,082 to 12,819.”²⁸

Rewriting Labor Law – General Counsel Abruzzo’s Continued Push to Create a More Union-Friendly Environment

During a general counsel’s tenure they may publish memoranda setting forth policy guidance for Regions across the country to follow when handling cases. Since September 2021, GC Abruzzo has published nine new memos, each of which advocates significant changes in processing unfair labor practice complaints or representation proceedings. Several are particularly noteworthy given the practical effect they have on all employers.

- *Memorandum 22-04: The Right to Refrain from Captive Audience and other Mandatory Meetings*²⁹ – In this memorandum, GC Abruzzo sets forth her position that she will urge the Board to hold that so-called “captive audience” meetings are unlawful and doing so is “necessary to ensure full protection of employees’ statutory labor rights.” Relatedly, GC Abruzzo also states she will work to ensure that employees understand that their attendance at employer meetings is “truly voluntary.” Since the 1947 Taft-Hartley Amendments added Section 8(c) to the NLRA to protect the right of employers to freedom of speech on the subject of unions, employers have been found by the Board to be entitled to speak to their employees in a non-coercive manner on company time. Indeed, the Board has consistently upheld the right of employers to require employees to attend meetings on company time to hear the employers’ views opposing unionization, since the 1948 decision in *Babcock & Wilcox Co.* According to General Counsel Abruzzo, however, the *Board in Babcock & Wilcox Co.* “incorrectly concluded that an employer does not violate the Act by compelling its employees to attend meetings in which it makes speeches urging them to reject union representation.”³⁰
- *Memorandum 22-02: Seeking 10(j) Injunctions in Response to Unlawful Threats or Other Coercion During Union Organizing Campaigns*³¹ – Section 10(j) of the NLRA authorizes the Board to seek temporary injunctions against employers and labor organizations in federal court to halt unfair labor practices while a case is pending before an ALJ or the Board. In earlier memoranda, GC Abruzzo established her intent to reverse the Board’s position in a number of key policy areas and aggressively seek 10(j) injunctions against employers. Memo 22-02 furthers that position by laying out policies and procedures to be used in determining whether the general counsel’s office will pursue 10(j) injunctions during organizing campaigns, and when threats or other coercion may lead to irreparable harm to employees’ rights, even before threats are carried out. Additionally, Abruzzo indicates that she wants Regions to prioritize investigations into Section 8(a)(1) violations involving threats or other coercion and *immediately* submit those cases for consideration of 10(j) relief. In short, this memorandum represents a desire to pursue potential violations by an employer in a more expedited and aggressive fashion.

28 NLRB, Office of Public Affairs, [Correction: First Three Quarters’ Union Election Petitions Up 58%, Exceeding All FY21 Petitions Filed](#) (July 15, 2022).

29 NLRB, Office of the General Counsel, Memorandum GC 22-04, [The Right to Refrain from Captive Audience and other Mandatory Meetings](#) (Apr. 7, 2022).

30 See Michael J. Lotito, Maury Baskin, and David S. Ostern, [NLRB General Counsel Abruzzo Seeks to Limit Long-Standing Employer Free Speech Right](#), Littler ASAP (Apr. 7, 2022).

31 NLRB, Office of the General Counsel, Memorandum 22-02, [Seeking 10\(j\) Injunctions in Response to Unlawful Threats or Other Coercion During Union Organizing Campaigns](#) (Feb. 1, 2022).

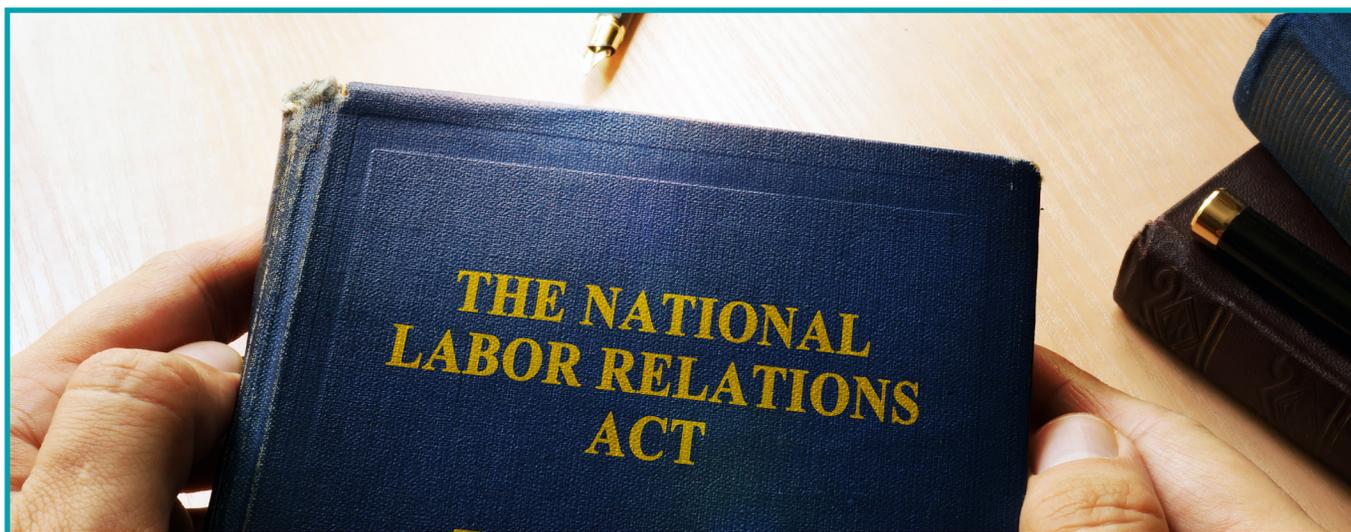
- *Memorandum 21-06: Seeking Full Remedies*³² – This memorandum represents a desire to make serious changes in the remedial nature of federal labor law. The memorandum urges the Regions to “explore a new make-whole remedy” of “consequential damages” against employers that are found to violate the Act. It articulates the type of punitive actions that the GC believes should be considered in a variety of situations, for example:
 - **Unlawful firings:** front pay, liquidated backpay, compensation for credit card late fees incurred for the loss of a home or car that an employee purportedly incurs as a result of an unlawful discharge, and employer sponsorship of work authorizations for the firing of undocumented workers;
 - **Unlawful conduct during organizing campaign:** increased union access to employee contact information and employer facilities to address employees, reimbursement of organizational costs, publication of notice of rights in the newspaper and other public media forums, including social media, visitorial and subpoena power to the Board to monitor compliance, training of employees on their right to organize, allowing the union to choose who the employer hires where a discharged discriminatee is unable to return to work, and cease and desist orders; and
 - **Unlawful failure to bargain:** make-whole compensatory remedies for losses sustained by employees (which the Board has previously declined to order), bargaining schedules (e.g., requiring an employer to bargain not less than twice a week, at least six hours per session until an agreement or impasse is reached), submission of periodic, detailed progress reports to the Board, reinstatement of proposals that the Board finds to have been unlawfully withdrawn, reimbursement of collective bargaining expenses, the reinstatement of a one-year contract bar, and cease and desist orders.
- *Memorandum 21-07: Full Remedies in Settlement Agreements*³³ – Coming on the heels of Memorandum 21-06, Memorandum 21-07 sets forth remedies that GC Abruzzo states are “likely to be implicated more frequently in settlement negotiations.” Some of these remedies include, but are not limited to: (i) remedies for non-backpay economic harm (e.g., compensation for damages caused to an employee’s credit rating following an unlawful firing, and compensation for financial losses suffered by an unlawfully fired employee from having to liquidate a personal savings account to cover living expenses); (ii) backpay and front pay, specifically, encouraging Regions to include front pay as part of their settlement calculations where reinstatement will not occur; and (iii) other non-monetary remedies such as letters of apology and notices to employees that are distributed in a way that is more effective to employees (e.g., text message or email).

³² NLRB, Office of the General Counsel, Memorandum 21-06, [Seeking Full Remedies](#) (Sept. 8, 2021).

³³ NLRB, Office of the General Counsel, Memorandum 21-07, [Full Remedies in Settlement Agreements](#) (Sept. 15, 2021).

- *Memorandum 21-08: Statutory Rights of Players at Academic Institutions (Student-Athletes) Under the National Labor Relations Act*³⁴ – On September 29, 2021, GC Abruzzo released a nine-page memorandum taking the unequivocal position that “certain Players at Academic Institutions” are employees under Section 2(3) of the National Labor Relations Act (NLRA). Refusing to call such players “student athletes,” Abruzzo asserts in the memorandum that “*the law fully supports a finding that scholarship football players at Division 1 . . . private colleges and universities, and other similarly situated Players at Academic Institutions, are employees under the NLRA.*”³⁵ The consequences of such employee status are not fully described in the memorandum, but could include the protected right to strike, picket and engage in other concerted activity, as well as to form labor unions. It is significant that Abruzzo’s recent memorandum does not employ the historically utilized, and almost universally accepted, term “*student-athletes.*” Instead, GC 21-08 claims that using the “*student-athlete*” term is pejorative and that the “*student-athlete*” label was created to deprive individuals of workplace protections. Abruzzo’s message is that, under her direction, she “*will allege that misclassifying such employees as mere ‘student-athletes,’ and leading them to believe that they do not have statutory protections is a violation of Section 8(a)(1) of the [NLRA].*”³⁶

Although General Counsel Abruzzo’s memoranda do not have the force of law—only the Board itself can set labor policy under the NLRA—the general counsel has sought to achieve her desired policy changes by issuing complaints against employer conduct which is lawful under extant Board decisions. As a result, numerous employers have been forced to defend themselves against prosecution of complaints and remedies that are contrary to previously settled law as determined by the Board. The GC’s actions have been challenged as exceeding her jurisdiction, but she has continued to maintain her position in the face of such challenges, notwithstanding the chilling effect of her actions on protected rights of employers.³⁷



³⁴ See Tedd J. Kochman and David S. Ostern, [Pencils, Paper, and Now NLRA Legal Protections – New General Counsel Memorandum Provides College Student Athletes with a Very Significant New “School Supply”](#), Littler Insight (Oct. 1, 2021).

³⁵ NLRB, Office of the General Counsel, Memorandum GC 21-08, [Statutory Rights of Players at Academic Institutions \(Student-Athletes\)³ Under the National Labor Relations Act](#) (Sept. 29, 2021).

³⁶ *Id.*

³⁷ See, e.g., *Burnett Specialists v. Abruzzo*, 22-cv-00605 (E.D. Tex.) (pending)

Board Cases to Watch

To date, the Board has not ruled on many of the policy changes advocated by the general counsel; but overruling of significant precedents, to the detriment of employers, is widely viewed as imminent. There are multiple pending cases that employers are closely monitoring, including the following cases in which the Board announced it is considering major changes in Board policies and invited comments from the regulated community.³⁸

- 371 NLRB No. 45 (2021) – The Board invited interested parties to file briefs on the question of whether it should overrule the standard for “independent contractor” status applied in *SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019).³⁹ *SuperShuttle* applied the common-law agency test for employee/independent contractor status, giving weight to the individual’s “entrepreneurial opportunity.” Reversal of this decision could have a major impact on employers that rely on independent contractors as part of their business model, potentially reclassifying contractors as employees covered by the NLRA and eligible to form and join unions.
- 371 NLRB No. 50 (2021) – The Board on January 18, 2022 announced it is seeking input on whether it should adopt a new legal standard for determining whether confidentiality requirements in mandatory arbitration agreements violate the NLRA.⁴⁰
- 371 NLRB No. 48 (2021) – The Board is seeking input on whether it should adopt a new legal standard to determine whether employer work rules violate Section 8(a)(1) of the NLRA.⁴¹
- 371 NLRB No. 41 (2021) – The Board is seeking input on whether it should reconsider its standard for determining if a petitioned-for bargaining unit is an appropriate unit.⁴²
- 371 NLRB No. 37 (2021) – The Board is seeking input on whether it should expand its traditional make-whole remedy for employees who are discharged, laid off, or otherwise discriminated against to more fully account for their actual economic losses.⁴³ The Board will consider whether to establish a practice of awarding a fuller accounting of “consequential damages,” in addition to loss of earnings and benefits, to employees who suffer unfair labor practices.

³⁸ Littler WPI submitted briefs in all of the cases on this list.

³⁹ NLRB, News & Publications, [NLRB Invites Briefs Regarding Independent Contractor Standard](#) (Dec. 27, 2021).

⁴⁰ NLRB, News & Publications, [NLRB Invites Briefs on Mandatory Arbitration Clauses](#) (Jan. 18, 2022).

⁴¹ NLRB, News & Publications, [NLRB Invites Briefs Regarding Work Rules Standard](#) (Jan. 6, 2022).

⁴² NLRB, News & Publications, [NLRB Invites Briefs Regarding Appropriate Bargaining Units](#) (Dec. 7, 2021).

⁴³ NLRB, News & Publications, [NLRB Invites Briefs Regarding Consequential Damages Remedy for Employees](#) (Nov. 10, 2021).



- No. 18-CA-273796 (2022) – The employer in this case instituted a dress code policy that prohibited employees from displaying causes or political messages unrelated to workplace matters on their uniforms, which primarily consist of an apron. This policy, while it does not state explicitly, extends to individuals who seek to display messages related to “Black Lives Matter” or “BLM” on their uniforms. In response, an unfair labor practice charge was filed alleging the employer violated Section 8(a)(1) of the Act; subsequently, the director of Region 18 issued a complaint. An ALJ found that the general counsel failed to meet “its burden of showing that the Employer’s nationwide interpretation of its dress code violated Section 8(a)(1) by interfering with employees Section 7 right to engage in concerted activity”⁴⁴ The significance of this case is that it sets up the possibility for the Board to find that social and political messages, and expressing such, are protected concerted activity. In an era where social and political messages are often spilling over into the workplace, employers should continue to monitor this case and any matter in which there is a possibility to see an expansion in what constitutes protected concerted activity.
- No. 28-RC-232059 (2022) – At least one case highlights the potential changes that are on the horizon. On April 11, 2022, the GC’s Office filed a brief in this case urging the Board to make two dramatic changes in current law under the NLRA. First, the general counsel sought to overturn the Board’s 52-year-old standard for obtaining a representation election, and to expand the ability of the Board to order an employer to bargain with a union even without its winning such an election.⁴⁵ Second, she urged the Board to reverse decades of precedent and find that so-called “captive audience speeches” by employers violate the Act.⁴⁶

⁴⁴ In another recent dress code decision, the Board held that when an employer interferes in any way with its employees’ right to display union insignia, the restriction is presumptively unlawful and the employer has the burden to prove “special circumstances” justifying the interference. 371 NLRB No. 131 (Aug. 29, 2022).

⁴⁵ *Linden Lumber Div., Sumner & Co.*, 190 NLRB 718 (1974), *rev’d sub nom. Truck Drivers Union Local No. 413*, 487 F.2d 1099 (1973), *rev’d*, 419 U.S. 301 (1974); the General Counsel is seeking to reinstate the discredited doctrine of *Joy Silk Mills*, 85 NLRB 1263 (1949).

⁴⁶ *Babcock & Wilcox*, 77 NLRB 577 (1948); See also Jim Paretti, Michell L. Devlin, and Michael J. Lotito, [NLRB General Counsel Aggressively Seeks to Expand Unions’ Right to Demand Recognition; Restrict Employer Speech](#), Littler ASAP (Apr. 12, 2022) (discussing additional precedents which the General Counsel sought to overrule in the *Cemex* brief.

Regulations and Inter-agency Coordination

Regulatory Agenda

In addition to GC memos and pending decisions, the NLRB has been engaged in other regulatory activities. In the administration's Spring 2022 Unified Agenda of Regulatory and Deregulatory Actions, which outlines federal regulatory goals, the NLRB announced it expects to "engage in rulemaking on the standard for determining whether two employers, as defined in Section 2(2) of the National Labor Relations Act (Act), are a joint employer under the Act." We expect the Board will either amend or rescind the current "direct and immediate" standard and replace it with a broader standard that would expand joint employment liability. It bears noting that this rulemaking will come on the heels of the D.C. Circuit's July 29, 2022 decision ordering the Board to reevaluate its decision in *Browning-Ferris*,⁴⁷ in which it determined two entities were not joint employers under the NLRA, as the purported joint employer did not exercise direct and immediate control over the other entities' workers.⁴⁸

In addition, the Board plans to revise its representation election procedures, "with a focus on the amendments issued on April 1, 2020." In that proposal, the Board's Republican majority amended policies relating to blocking charges, the voluntary recognition bar, and the contract bar, which is specific to the construction industry. The estimated issue date for these proposed rules is September, although such dates tend to be aspirational.

Memorandum of Understanding

On July 19, the NLRB announced GC Abruzzo and Federal Trade Commission (FTC) Chair Lina Khan had executed into a Memorandum of Understanding (MOU) to "promote fair competition and advance workers' rights."⁴⁹ According to the MOU,

Issues of common regulatory interest include labor market developments relating to the "gig economy" and other alternative work arrangements; claims and disclosures about earnings and costs associated with gig and other work; the imposition of one-sided and restrictive contract provisions, such as noncompete and nondisclosure provisions; the extent and impact of labor market concentration; the impact of algorithmic decision-making on workers; the ability of workers to act collectively; and the classification and treatment of workers.⁵⁰

The purpose of the MOU is to promote and facilitate information sharing and cross-agency consultations on these issues, cross-agency training, and coordinated outreach and education. Many of these topics are also of interest to agencies such as the Department of Labor and EEOC.

⁴⁷ *Browning-Ferris Indus. of Cal., Inc.*, 369 NLRB No. 139 (2020).

⁴⁸ *Sanitary Truck Drivers and Helpers Local 350 v. NLRB*, No. 21-1093 (D.C. Cir. July 29, 2022).

⁴⁹ NLRB, Office of Public Affairs, [National Labor Relations Board and Federal Trade Commission Forge New Partnership to Protect Workers from Anticompetitive and Unfair Labor Practices](#) (July 19, 2022). See also Miguel A. Lopez and Andrew M. Spurchise, [FTC and NLRB Announce Interagency Cooperation in the "Gig Economy"](#), Littler ASAP (July 29, 2022).

⁵⁰ NLRB and FTC, *Memorandum of Understanding Between the Federal Trade Commission (FTC) and the National Labor Relations Board (NLRB) Regarding Information Sharing, Cross-Agency Training, and Outreach in Areas of Common Regulatory Interest* (July 19, 2022), available at [ftcnlr-b-mou-71922.pdf](#).

Looking Ahead

Over the last year, there has been a shift in how people are organizing together to petition for representation. What was once a top-down approach, whereby the union would seek out a group of individuals, has flipped entirely. Now, individuals are banding together to form grassroots organizing movements where individual employees are the ones to invite the labor organization to assist them in their pursuit to be represented. And traditional “handbilling” or informational picketing has been replaced by various social media platforms. At the same time, knowing what lawful steps employers can take in response to these activities is becoming less clear.

The current Board is extremely active and not afraid to make significant changes to long-standing labor policy. Littler WPI and others in the business community are pushing back against the Board’s changes and a number of court challenges are anticipated. Nevertheless, employers are encouraged to anticipate these changes and closely monitor Board decisions to determine how they change what is deemed unlawful conduct under the Act. In addition, management training (and retraining) to deal with the new labor law requirements will become more important than ever in the current administration.



EEOC Agency and Regulatory-related Developments

EEOC Leadership

Almost 20 months into the Biden administration, the composition of the five-member Commission remains unchanged. Currently, the Commission is chaired by Democratic Commissioner Charlotte A. Burrows, whose term expires in July 2023. Jocelyn Samuels, also a Democrat, serves as vice chair; on July 24, 2021, she was confirmed for a second term, which will expire in July 2026. The remaining three commissioners are Republican former Chair Janet Dhillon, whose term expired on July 1, 2022, but who remains on the Commission in holdover status pending the confirmation of President Biden's nomination of Kalpana Kotagal⁵¹ to replace her. Rounding out the Commission are Republican Commissioner Keith Sonderling, whose term expires in July 2024, and Republican Commissioner Andrea R. Lucas, whose term expires in July 2025.

The general counsel's position has remained unfilled since former General Counsel Sharon Fast Gustafson was removed from the position by the White House in March 2021; career Associate General Counsel Gwendolyn Reams served as acting general counsel from March 2021 until her term in that position expired on December 30, 2021. Deputy General Counsel Christopher Lage now oversees operation of the Office of General Counsel, and in the absence of a designated acting officer, any authority vested solely within the general counsel may be exercised by the chair. In June of this year, President Biden nominated Karla Gilbride, a senior attorney at the legal advocacy non-profit firm Public Justice, to serve as general counsel. Her nomination is currently pending in committee in the Senate.

The chair of the Commission exercises significant control over the administration and operations of the agency and its 53 offices around the country. The vast majority of day-to-day operations of the Commission and its field staff largely proceed apace, irrespective of which party holds the chair. The chair also has broad discretion in setting the Commission's agenda—what items the agency will consider and vote upon, and which it will not, as well as scheduling meetings of the Commission to examine issues or vote on disputed matters (the agency has held a number of telephonic public meetings throughout the course of the COVID-19 pandemic). Significant policy changes, however, require the approval of the full Commission. Chair Burrows has not had a Democratic majority on the Commission since assuming her position. As a practical matter, this means that the agency has been limited in its ability to revisit policies from the prior administration, or to move forward on substantive policies in line with the Biden administration's agenda. When the Commission has a Democratic majority, we expect the agency to begin to move aggressively on new policy priorities of the chair and the administration more broadly.

51 On May 25, 2022, the U.S. Senate Committee on Health, Education, Labor, and Pensions failed to approve Ms. Kotagal's nomination on an 11-11 vote. Her nomination may still be brought to the Senate floor if a majority of the Senate votes to advance the nomination. While her nomination is pending, Commissioner Dhillon remains on the Commission in holdover status, until either her successor's nomination is approved, or the end of this current Senate session in late 2022 or early 2023 if it is not. Ms. Kotagal is a partner in a Washington, D.C. law firm, where she is a member of the firm's Civil Rights & Employment Practice. According to the firm's [website](#), "A highly-acclaimed employment and civil rights plaintiffs' litigator, Ms. Kotagal represents women and other disenfranchised people in employment and civil rights class actions, involving often cutting-edge issues related to the Title VII, Equal Pay Act, the Americans with Disabilities Act, Family Medical Leave Act, as well as wage and hour issues."

Delegation of Litigation Authority

One important policy that remains in effect (at least until a Democratic-controlled Commission repeals or modifies it) is the limitation adopted in January 2021 on the general counsel's authority to file suit without the approval of the Commission. The delegation of authority now provides that the full Commission must vote to approve all:

- cases involving an allegation of systemic discrimination or a pattern or practice of discrimination;
- cases expected to involve a major expenditure of agency resources, including staffing and staff time, or expenses associated with extensive discovery or expert witnesses;
- cases presenting issues on which the Commission has taken a position contrary to precedent in the circuit in which the case will be filed;
- cases presenting issues on which the general counsel proposes to take a position contrary to precedent in the circuit in which the case will be filed;
- other cases reasonably believed to be appropriate for Commission approval in the judgment of the general counsel, including but not limited to, cases that implicate areas of the law that are not settled and cases that are likely to generate public controversy; and
- all recommendations in favor of Commission participation as *amicus curiae*.

Perhaps more notable, even where cases do not fall within the above criteria, the revised delegation provides that before filing any case, the general counsel must circulate it to all commissioners for a period of five business days. If during that period a majority of the commissioners notifies the general counsel and the other commissioners that the case should be submitted to the Commission for a vote, the litigation may not be filed without approval of the majority of the Commission. This means, as a practical matter, that any bloc of three commissioners can effectively "veto" the filing of a case (first by requiring that it be presented for a Commission vote, then by voting to disapprove the recommendation to file suit).

Employers facing potential litigation by the EEOC (e.g., after a failed conciliation) should consult with counsel to determine if these new procedures may provide an opportunity to avert litigation. Commission votes on litigation (and other matters that come before the Commission for consideration) are made publicly available on the agency's website.⁵²

52 U.S. EEOC, Commission Votes, <https://www.eeoc.gov/commission-votes>.

Conciliation Procedures

Where the Commission has been unable to act on prior administration policy, Congress has stepped in to fill the void. One notable example was the Commission’s final regulations updating its conciliation procedures issued at the end of the Trump administration (by way of background, “conciliation” refers to the statutory requirement that, after the EEOC has found reasonable cause to believe discrimination occurs, the agency must “endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion” prior to filing suit).⁵³ The regulations were designed to ensure that employers were provided a minimum amount of baseline information regarding the Commission’s findings and proposed conciliation offer so as to meaningfully be able to assess and respond to the Commission’s proposal, and were widely well-received by employers. With Democratic control of both chambers of Congress, these regulations were repealed pursuant to the Congressional Review Act in June of 2021. Having been repealed in this fashion, the Commission is prohibited from adopting “substantially similar” regulations without explicit congressional approval. That said, it seems unlikely that a Democratic administration would seek to regulate conciliation in any manner more favorable to employers.



⁵³ EEOC, [Update of Commission’s Conciliation Procedures](#), 86 Fed. Reg. 2974-2986 (Jan. 14, 2021).

EEOC and COVID-19

a) COVID-19 Technical Assistance

EEOC has, throughout the pandemic, maintained updated guidance as to employers' and employees' rights and responsibilities with respect to the pandemic and federal civil rights laws prohibiting discrimination on the basis of disability, religion, genetic information, and pregnancy.⁵⁴ In the spring of 2021, the agency updated its FAQs regarding vaccinations, making clear that an employer's merely asking for proof of vaccination is not a "medical examination" and does not implicate Americans with Disabilities Act (ADA) concerns (employers should be aware, however, that asking why an employee is not vaccinated—or engaging in pre-vaccination questions where the employer or a third party with whom it contracts is vaccinating workers—likely do implicate the ADA insofar as they are questions that are likely to elicit information about a disability). In October 2021, it provided additional guidance regarding the rights of employees requesting accommodation of sincerely held religious beliefs or practices with respect to COVID vaccination requirements, and in November 2021, updated its FAQs to clarify the circumstances under which an employee's COVID-related activity (such as requesting an accommodation) may be protected under statutory non-retaliation provisions.

In December of last year, the agency provided guidance on whether and when COVID-19 may constitute a protected disability under the ADA. It explained that where an employee has an asymptomatic case of COVID, or where an individual experiences only mild symptoms (congestion, fever, headaches that resolve within weeks), that will generally *not* be perceived as a disability under the ADA. In contrast, significant symptoms such as respiratory disorders or heart palpitations that last for several months likely indicate a protected disability under the statute. The EEOC also indicated that "long COVID"—a condition where symptoms such as intestinal pain, vomiting, or nausea linger for many months—may well be a covered "disability" under the law.

On March 14, 2022, the EEOC issued a technical assistance document providing guidance on COVID-19 pandemic and caregiver discrimination under federal employment discrimination laws.⁵⁵ The EEOC also updated its COVID-related FAQs to include a discussion of discrimination against employees and job seekers with family caregiving responsibilities.⁵⁶



54 EEOC, [What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws](#), last updated July 12, 2022 (EEOC COVID-19 Guidance).

55 EEOC, [The COVID-19 Pandemic and Caregiver Discrimination Under Federal Employment Discrimination Laws](#), EEOC-NVTA-2022-1 (Mar. 14, 2022).

56 EEOC COVID-19 Guidance, *supra* note 54.

The Commission most recently updated its COVID guidance in July, publishing updated FAQs regarding employer testing of employees for the COVID-19 virus.⁵⁷ Most notably, with respect to requiring employees to be tested for COVID as a condition of returning to or remaining at work, the EEOC's updated guidance makes clear that an employer's ability to require such a test is not unlimited. Rather, an employer can require such testing only where it is "job-related and consistent with business necessity" under the ADA. Specifically, the agency's updated guidance with respect to testing provides:

A COVID-19 viral test is a medical examination within the meaning of the ADA. Therefore, if an employer implements screening protocols that include COVID-19 viral testing, the ADA requires that any mandatory medical test of employees be "job-related and consistent with business necessity." *Employer use of a COVID-19 viral test to screen employees who are or will be in the workplace will meet the "business necessity" standard when it is consistent with guidance from Centers for Disease Control and Prevention (CDC), Food and Drug Administration (FDA), and/or state/local public health authorities that is current at the time of testing.*

...

If an employer seeks to implement screening testing for employees such testing must meet the "business necessity" standard based on relevant facts. *Possible considerations in making the "business necessity" assessment may include the level of community transmission, the vaccination status of employees, the accuracy and speed of processing for different types of COVID-19 viral tests, the degree to which breakthrough infections are possible for employees who are "up to date" on vaccinations, the ease of transmissibility of the current variant(s), the possible severity of illness from the current variant, what types of contacts employees may have with others in the workplace or elsewhere that they are required to work (e.g., working with medically vulnerable individuals), and the potential impact on operations if an employee enters the workplace with COVID-19.* In making these assessments, employers should check the latest CDC guidance (and any other relevant sources) to determine whether screening testing is appropriate for these employees.⁵⁸

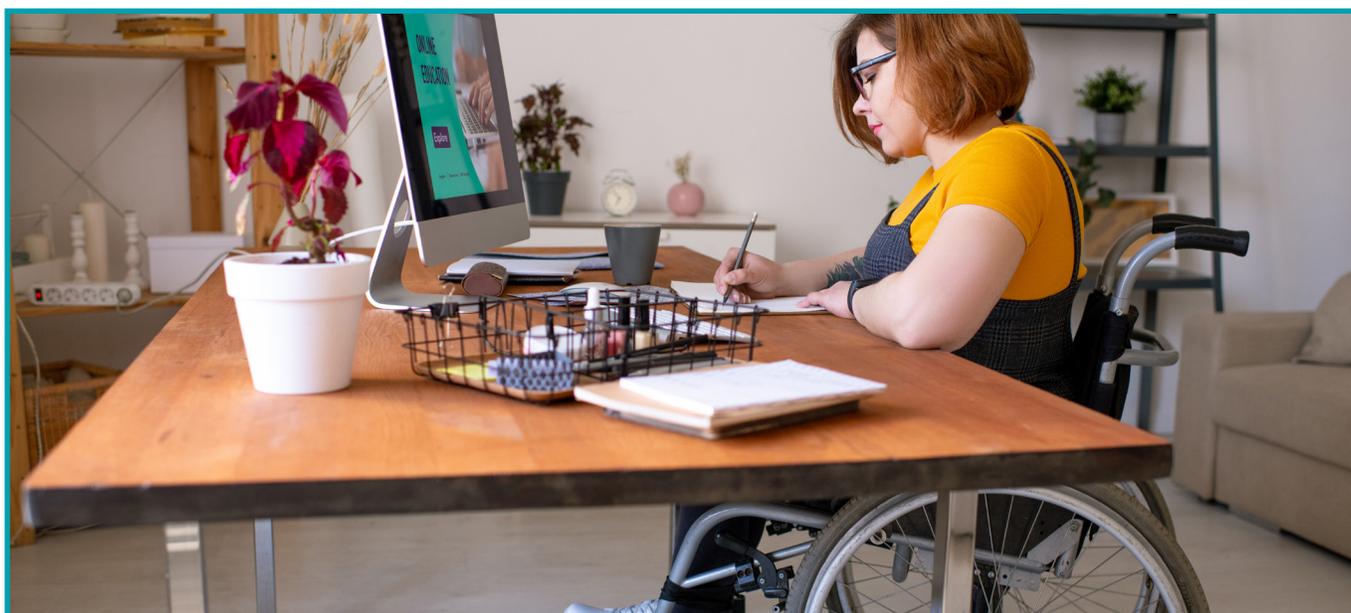
Based on this update, it appears that the EEOC plans to take the position that a COVID-19 screening test for employees entering the workplace is not *per se* or presumed permissible. Rather, an employer must be able to demonstrate that such a test is necessary for the safety of the workplace, and consistent with the job in question. However, the EEOC also advises employers to keep current with CDC recommendations regarding COVID exposure and infection, as well as those of state and local public health authorities.

That said, it is not clear what, if any, immediate practical impact this updated guidance will have in light of current rates of COVID-19 community transmission. On the same date that the EEOC's update was issued, the CDC's Community Tracker⁵⁹ indicated high or substantial rates of COVID-19 transmission throughout almost all of the United States. Moreover, only days after the EEOC published its guidance suggesting that testing may be limited in some circumstances, the U.S. Department of Health and Human Services (HHS) announced that it would again extend this declaration and provide at least 60 days' notice before ending the public health emergency. Plainly, HHS views the pandemic as still very much a public health crisis, suggesting employers that base decisions on the most up-to-date guidance from the CDC and other public health authorities will have strong arguments that their testing programs are justified as a matter of public health.

57 See Jim Paretti and Devjani Mishra, [EEOC Updates COVID-19 Guidance, Potentially Limiting Employers' Ability to Screen Employees for COVID-19](#), Littler Insight (July 14, 2022).

58 EEOC COVID-19 Guidance, *supra* note 54 (emphasis added).

59 Centers for Disease Control and Prevention, [CDC COVID Data Tracker: County View](#).



b) EEOC COVID-19 Litigation

On the litigation front, last September, in the context of COVID, the EEOC brought its first case alleging that an employer violated the ADA by failing to accommodate an employee by allowing her to continue to work remotely. The agency brought suit in the Northern District of Georgia, alleging that the employer terminated the employment of a health and safety manager who requested to work remotely.⁶⁰ By way of background, from March through June 2020, the company required all employees to telework four days a week. In June 2020, when the company re-opened its worksite, the employee requested that, because of an underlying pulmonary condition that made breathing difficult and placed her at heightened risk of COVID-19, she be allowed to continue to work remotely two days each week and take breaks when working onsite. EEOC's complaint alleges that while other employees were permitted to work from home, this manager's request was denied, and her employment was terminated shortly thereafter. The case is currently pending in the district court.

The issue of remote work clearly is one the EEOC is continuing to revisit, as shown by a pre-COVID claim filed on behalf of an individual charging party who suffered from anxiety and depression and was denied requested remote work. The EEOC filed a lawsuit on behalf of the charging party against the employer in the District of Maryland on August 20, 2020.⁶¹ Therein, the employee who worked as a sales administrator had job duties that included using a computer to research new projects, reviewing online applications for employment, and conducting telephone interviews of job applicants. The employee requested to telework one day a week for three to four weeks, which was denied, despite the claim that it was possible for her to complete her duties remotely. Other employees also allegedly were allowed to work remotely. The charging party's employment was thereafter terminated. While the lawsuit was based on an individual claim, the consent decree, which included broad-based injunctive relief, included a finding that the "(d)efendant...and all others acting on its behalf...are enjoined from refusing to allow qualified individuals with disabilities from teleworking when telework is a reasonable accommodation for the employer's disability."⁶²

⁶⁰ *EEOC v. ISS Facility Services, Inc.*, No. 1:21-cv-03708 (N.D. Ga.) (Filed: Sept. 7, 2021); EEOC, Press Release, [EEOC Sues ISS Facility Services for Disability Discrimination](#) (Sept. 7, 2021).

⁶¹ See *EEOC v. Design & Integration, Inc.* Case No. 1:20-cv-02350 (D. Md., Baltimore Division) (Filed: Aug. 14, 2020).

⁶² *Id.*, Docket No. 13 (Filed: Apr. 22, 2021).



While it is too early to tell how far EEOC will push the envelope with respect to employees requesting telework as a reasonable accommodation in light of COVID-19 (and each case will turn on its own facts), employers should be aware that the agency has started down this road. While courts came to differing conclusions as to whether “physical attendance” was an essential requirement of some jobs prior to the pandemic, it is likely that they will be more sympathetic to employee requests for remote work, particularly where they and others were able to telework successfully during the pandemic.

Relatedly, the agency has also brought lawsuits alleging ADA violations where an employee with asthma was not permitted to wear a mask at work, and harassed for doing so, and where employees with disabilities were not permitted to return to work until a COVID-19 vaccine was developed, notwithstanding that they were ready and willing to work.⁶³ We have not yet seen the EEOC file a case alleging discrimination in violation of Title VII for an employer’s failure to grant a COVID-related accommodation to an employee’s sincerely held religious belief or practice—but we can report that employees are filing charges,⁶⁴ and we can expect that at some point in the near future, the agency will bring suit (perhaps shedding some light on how it views “sincerely held religious objections” to COVID-19 vaccination, testing, and masking, and/or what it views as “unreasonable hardship” for employers asked to accommodate these requests.

c) *Civil Rights Impact of COVID-19*

Although it is hoped the instances of infection will continue to decline, the impact of the pandemic on civil rights in the workplace will likely linger. To that end, the EEOC in its FY 2023 Congressional Budget Justification describes various initiatives launched in FY 2021 it plans to continue, one of which addressing the civil rights impact COVID-19 has had on individuals. According to the agency, the pandemic “has proved to be a civil rights crisis in addition to a public health crisis and economic crisis. COVID-19 and its economic fallout have disproportionately impacted people of color, women, older workers, individuals with disabilities, and other vulnerable workers.”⁶⁵ The agency held a virtual public hearing on this topic last year and will continue to “provide numerous resources to assist employers and employees as they grapple with pandemic-related issues.”⁶⁶

63 See EEOC, Press Release, [EEOC Files Disability Lawsuits in El Paso and Ft. Worth Based on COVID Related Discrimination](#) (Sept. 24, 2021).

64 See [COVID-19 Labor & Employment Litigation Tracker](#), Littler Insight (last updated Apr. 1, 2022).

65 [FY 2023 EEOC Congressional Budget Justification](#), (FY 2023 Budget) p. 3.

66 *Id.*, pp. 3-4.

New Agency Priorities

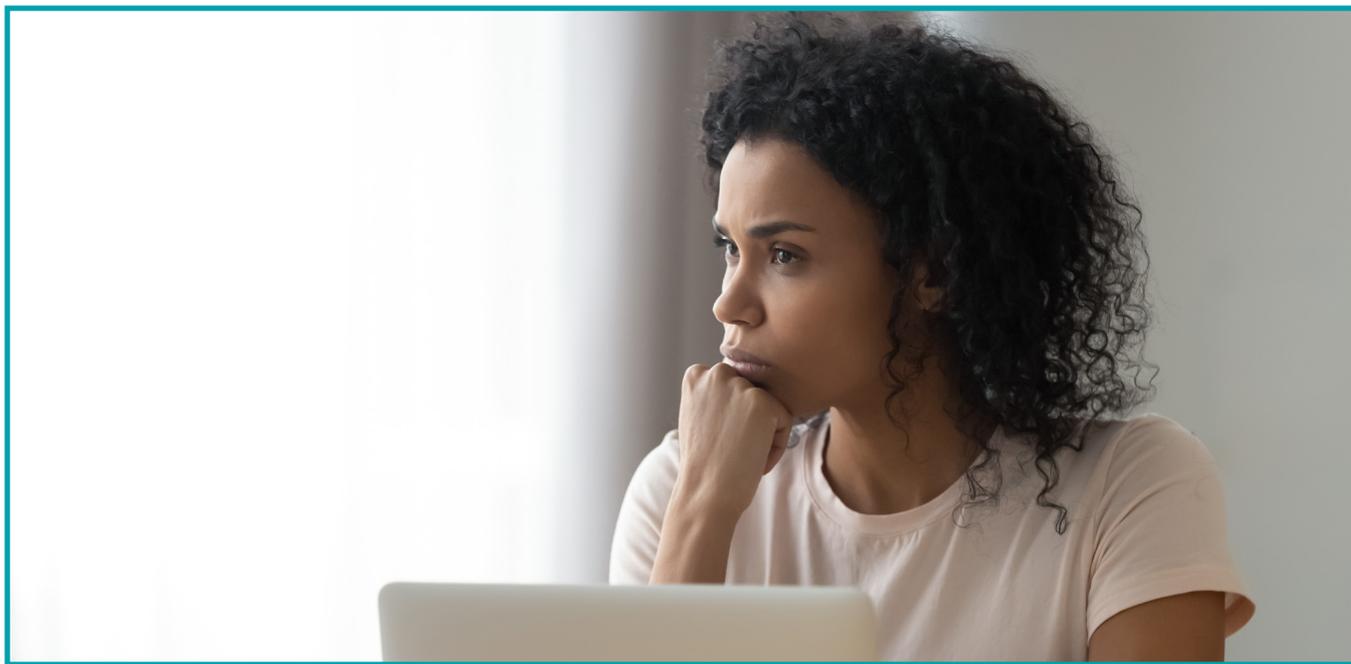
As the agency contemplates a Democratic majority, we expect activity around a number of items the new chair and administration have articulated as priorities.

a) *Hiring Initiative to Reimagine Equity (HIRE)*

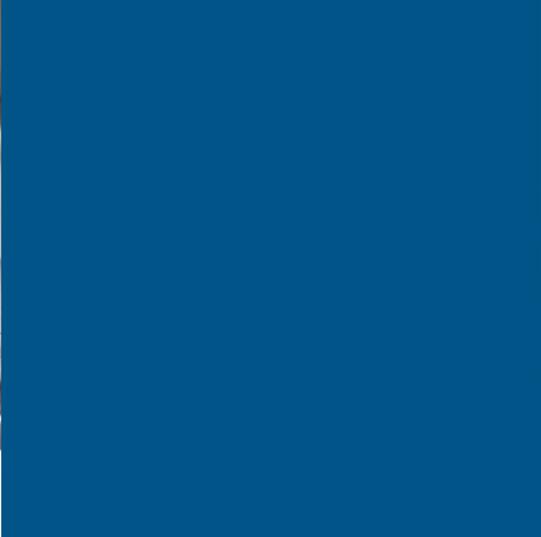
A joint effort with the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP), the Hiring Initiative to Reimagine Equity (HIRE) remains a Commission priority for the coming year. HIRE is a multi-year collaboration between the two agencies that will:

- Host a series of roundtables, meetings, and public forums on promoting organizational policies and practices that enhance diversity, equity, inclusion, and accessibility as well as reimagine equity and expand opportunities in hiring;
- Identify strategies to remove unnecessary hiring barriers as well as promote effective, job-related hiring and recruitment practices to cultivate diverse pools of qualified applicants;
- Promote equity in the use of technology-based hiring systems; and
- Develop resources to promote adoption of innovative and evidence-based, recruiting and hiring practices that advance equity.⁶⁷

This initiative will likely dovetail with both the EEOC's renewed focus on systemic racial discrimination, as well as its examination of the use of artificial intelligence in hiring and employment decision-making, discussed further below.



⁶⁷ Available at <https://www.eeoc.gov/hiring-initiative-reimagine-equity-hire-fact-sheet> (last visited Aug. 11, 2022).



b) Racial Justice and Systemic Discrimination

As a complement to its HIRE efforts, the EEOC has renewed its attention to tackling systemic employment discrimination in all forms and on all bases, including race discrimination. According to the Commission, over the past five fiscal years, “nearly a third of all charges filed with the agency have alleged some form of racial discrimination. The focus on systemic discrimination while also investigating individual charges will help address the long-standing problem of discrimination based on race more effectively than a focus on individual charges alone.”⁶⁸

As to advancing racial justice and equity initiatives, the Commission indicates that it successfully resolved 21 lawsuits that had allegations of race or national origin discrimination during the last fiscal year. The Commission obtained approximately \$15 million in monetary relief from these resolutions. Race was also the predominant protected category that appears in its systemic litigation filings—9 of the 13 systemic case filings alleged race discrimination.⁶⁹

The EEOC also conducted 261 outreach sessions that focused specifically on issues relating to race.⁷⁰ In particular, the Commission noted in several places in both its latest Agency Financial Report and Annual Performance Report that it has made concerted efforts to respond to the spike in violence and harassment against the Asian American and Pacific Islander (AAPI) communities during the COVID-19 pandemic.⁷¹ The Commission also noted its collaboration with the Federal COVID-19 and Civil Rights Interagency Work Group hosted by the Department of Justice, the White House Initiative on Asian Americans, Native Hawaiians, and Pacific Islanders (WHIAANHPI), and the White House Office of Public Engagement in response to the rise in hate crimes and incidents against AAPIs around the nation.

As noted in its FY 2023 Budget Justification, addressing these issues will continue to be an agency focus.

c) Strengthening the Agency

The Commission intends to make it a priority to “rebuild and strengthen the agency,”⁷² increasing its headcount by approximately 450 new hires, most of whom are front-line staff (investigators, mediators, attorneys, and administrative staff). Chair Burrows stated, “[t]he addition of these new employees in mission-critical positions is a down payment on what I hope will be a long-term investment to ensure that the EEOC has resources commensurate with its task.”⁷³

⁶⁸ FY 2023 Budget, p. 3.

⁶⁹ EEOC, FY 2021 [Annual Performance Report](#) (APR), p. 10.

⁷⁰ *Id.* at 10-11, 33-34

⁷¹ EEOC, FY 2021 [Agency Financial Report](#) (AFR), pp. 21, 23-24; FY 2021 APR, pp. 11, 30, 39-41.

⁷² FY 2023 Budget, p. 4.

⁷³ FY 2023 Budget, p. 4.

d) *Pay Equity*

Narrowing the pay gap continues to be a key EEOC priority. In its Budget Justification, the EEOC claimed it would “continue to use all of the tools at its disposal, including outreach and education, enforcement and, where necessary, litigation to address pay discrimination and unjustified wage gaps.”⁷⁴

Compensation data collection appears to be one way in which the EEOC intends to help advance pay equity and combat pay discrimination. During the Obama administration, the EEOC revised its Form EEO-1 to require employers to report detailed information about employee compensation and hours worked, broken out by race, ethnicity, and gender. The Trump administration discontinued this collection (although a federal court ultimately found the suspension of the collection unlawful and ordered the agency to collect two years of pay data).

A National Academy of Sciences (NAS) panel evaluated the compensation data collected by the EEOC to determine its utility and in July published its report analyzing the EEOC’s previous pay data collection effort.⁷⁵ Chair Burrows emphasized the NAS’s findings that, done properly, pay data collection could assist the agency in rooting out pay discrimination. In response, Republican Commissioner Janet Dhillon highlighted a number of flaws NAS discussed in its analysis of the agency’s prior effort, NAS’s conclusions that the EEOC’s pay data collection had used a faulty measure of pay measurement, outdated job categories, and pay bands that were overly broad and limited the collection’s utility. Commissioner Keith Sonderling likewise noted the NAS’s conclusions that the EEOC had used flawed methodology, failed to conduct a pilot program, and had issues with the quality of the data collected.

The EEOC had previously suspended collection of EEO-1 data in 2020 in light of the pandemic; in 2021, it collected compensation data for calendar years 2019 and 2020, and in 2022, the agency resumed its normal collection of data for the year prior. We predict it is likely that the Biden EEOC will attempt again to require employers to submit employee compensation data to the agency in a future, revised iteration of the EEO-1; whether the collection mirrors what was previously done or adopts a different approach that takes into account NAS recommendations, remains to be seen. Again, this policy is unlikely to be implemented so long as Republicans hold a majority of seats on the Commission.



⁷⁴ *Id.*, p. 3.

⁷⁵ EEOC, Press Release, [EEOC Announces Independent Study Confirming Pay Data Collection is a Key Tool to Fight Discrimination](#) (July 28, 2022).

e) *Artificial Intelligence in Employment Decision-Making*

In October 2021, the EEOC launched an initiative relating to the use of artificial intelligence (AI) in employment decision-making.⁷⁶ As stated by the EEOC, the initiative is intended to examine how technology impacts the way employment decisions are made, and give applicants, employees, employers, and technology vendors guidance to ensure that these technologies are used lawfully under federal equal employment opportunity laws. In its rollout of the initiative, the EEOC indicated that the agency plans to:

- Establish an internal working group to coordinate the agency's work on the initiative;
 - Launch a series of listening sessions with key stakeholders about algorithmic tools and their employment ramifications;
 - Gather information about the adoption, design, and impact of hiring and other employment-related technologies;
 - Identify promising practices; and
 - Issue technical assistance to provide guidance on algorithmic fairness and the use of AI in employment decisions.
- In 2016, the EEOC held a public hearing on the equal employment opportunity implications of big data in the workplace, and the EEOC intends to build on that work. Focus areas of that hearing included potential discrimination, privacy concerns, and the possibility that disabled applicants or employees may be disadvantaged.⁷⁷
- The EEOC's initiative further underscores the interest in such systems, and that care must be taken when deploying such systems to avoid running afoul of anti-discrimination laws.⁷⁸ Based on the announcement on March 28, 2022 of its FY 2021 Performance Report and FY 2023 Budget Justification, EEOC Chair Charlotte Burrows underscored that the proposed budget would be used, in relevant part, to advance the EEOC initiative launched in 2021 "to ensure that employment-related artificial intelligence and algorithmic decision-making tools comply with federal civil rights laws."⁷⁹
- Most recently, the agency published "technical assistance"⁸⁰ relating to compliance with Americans with Disabilities Act requirements when using AI and other software to hire and assess employees. The agency also published a short "Tips for Workers"⁸¹ summary of this guidance. Neither of these documents has the force or effect of law, nor are they binding on employers; as the accompanying press release notes, this guidance is meant to be educational, "so that people with disabilities know their rights and employers can take action to avoid

76 EEOC, Press Release, [EEOC Launches Initiative on Artificial Intelligence and Algorithmic Fairness](#) (Oct. 28, 2021).

77 Among the Commissioners, EEOC Commissioner Keith Sonderling has taken the most significant leadership role on this issue. See, e.g., Lisbeth Perez, [EEOC Commissioner: Companies Must Mitigate the Use of AI for Employment Decisions](#), MeriTalk (Oct. 19, 2021); [Employment Law Now V-108 - EEOC Commissioner Sonderling on Artificial Intelligence in the Workplace](#) (podcast), JDSupra (Dec. 10, 2021).

78 Of importance to global employers, earlier this year the European Union published a proposed regulation aimed at creating a regulatory framework for the use of AI. In the hierarchy discussed in the EU's proposed regulation, AI systems that are implemented in the recruitment and management of talent should be classified as high-risk. Given that classification, among other requirements, employers or vendors using such systems would be required to develop a risk management system, maintain technical documentation, adopt appropriate data governance measures, meet transparency requirements, maintain human oversight, and meet registration requirements. It remains to be seen how U.S. regulators may utilize the tenets set forth in the EU's proposed regulation.

79 See EEOC, Press Release, [EEOC Releases Fiscal Year 2021 Performance Report and Fiscal Year 2023 Budget Justification](#) (Mar. 28, 2022); EEOC, [Artificial Intelligence and Algorithmic Fairness Initiative](#).

80 EEOC, EEOC-NVTA-2022-2, [The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees](#) (May 12, 2022); see also Jim Paretti, Niloy Ray, and Marko Mrkonich, [EEOC Issues Guidance on Artificial Intelligence and Americans with Disabilities Act Considerations](#), Littler Insight (May 18, 2022).

81 EEOC, [Tips for Workers: The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence](#) (May 12, 2022).

discrimination.”⁸² Nevertheless, we see several take-aways regarding the Commission’s likely expectations and areas of focus when regulating the use of such tools in hiring or assessing employees:

- **Accessibility:** Employers should account for the fact that on-line/interactive tools may not be easily accessed or used by those with visual, auditory or other impairment.
- **Accommodation:** Barring undue hardship, employers should provide alternatives to the use or application of these tools if an individual’s disability renders the use of the tool more difficult or the accuracy of the tool’s assessment less reliable.
- **Accommodation II:** Beyond providing reasonable accommodations in accessing/using these tools, employers should ensure that the tools assess an individual in the context of any reasonable accommodation they are likely to be given when performing their job.
- **ADA vs. Title VII:** The EEOC stresses that disability bias requires different design and testing criteria than does Title VII discrimination, such as access considerations and the potential for inadvertent disability-related inquiries or medical examinations.
- **Promising Practices:** Noting that employers are responsible for ADA-violating outcomes even when a software tool is created or used by a third-party vendor or agent, the Commission provides examples of so-called “Promising Practices” that employers can engage in to demonstrate good-faith efforts to meet ADA requirements.

While it is not yet clear what the Commission’s next steps in this area may be, we expect this to be a matter of continued focus and attention, particularly when the balance of power on the Commission shifts to a Democratic majority.



82 EEOC, Press Release, [U.S. EEOC and U.S. Department of Justice Warn against Disability Discrimination](#) (May 12, 2022).



f) *LGBTQ Issues and Gender Identity*

In June 2021, the agency updated its website’s landing page,⁸³ and issued a “technical assistance document” regarding issues relating to LGBTQ workers, and what the EEOC is now terming “SOGI (Sexual Orientation/Gender Identity) Discrimination.”⁸⁴ This was the first substantive update of EEOC guidance in this area since the Supreme Court’s decision in *Bostock v. Clayton County*, in which the Court held that Title VII’s prohibition on sex discrimination extends to include discrimination on the basis of sexual orientation and gender identity. Most notably, the document makes clear the EEOC’s position that where an employer maintains separate restrooms for men and women, Title VII requires employers to allow employees to use the facility that corresponds to their gender identity, rather than assigned sex at birth. Employers navigating these issues in their workplaces should consult with counsel to ensure that legal and practical considerations are adequately met.

In addition, on March 31, 2022, the EEOC announced that it had revised its discrimination charge intake process to include a non-binary gender option.⁸⁵ This again is an area where we may expect to see more robust guidance from the agency as the balance of its political composition shifts.

g) *Anti-Retaliation*

Finally, signaling the resolve of the Biden administration to enforce workers’ rights collaboratively across the government (and its emphasis on unlawful retaliation), the EEOC, U.S. Department of Labor, and National Labor Relations Board announced in November 2021 that the three agencies were embarking upon a joint initiative to “raise awareness” about retaliation issues when workers exercise protected employment-law rights.⁸⁶ As indicated in the tri-agency rollout, the initiative “will include collaboration among these civil law enforcement agencies to protect workers on issues of unlawful retaliatory conduct, educate the public and engage with employers, business organizations, labor organizations and civil rights groups in the coming year.” The announcement of the effort was quickly followed by a virtual dialogue with employer stakeholders regarding workplace retaliation. Whether the initiative results in any substantive change to enforcement policy or is meant more to “signal” the agencies’ enforcement priorities, is not yet clear.

⁸³ EEOC, [Sexual Orientation and Gender Identity \(SOGI\) Discrimination](#).

⁸⁴ EEOC, OLC Control No. NVTA-2021-1, [Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity](#) (June 15, 2021).

⁸⁵ EEOC, Press Release, [EEOC to Add Non-Binary Gender Option to Discrimination Charge Intake Process](#) (Mar. 31, 2022).

⁸⁶ EEOC, Press Release, [U.S. Department of Labor, National Labor Relations Board, U.S. Equal Employment Opportunity Commission Align to End Retaliation, Promote Workers’ Rights](#) (Nov. 10, 2021).

The Months Ahead

The era of a restrained EEOC may soon come to an end, and as the balance of political power at the agency shifts, we likely can expect more aggressive regulation and enforcement for the balance of the Biden administration. Depending on the outcome of midterm elections, a shift in control of Congress could potentially put the breaks on this charge, and at a minimum, is likely to increase oversight of the agency. Additionally, as the thousands of charges of discrimination arising out of the COVID-19 pandemic, vaccination mandates, and return-to-work requirements are investigated and processed administratively, we will be monitoring to see trends in litigation (both EEOC-instituted and brought by private parties), as well as how the courts now deal with the thorny legal questions raised by nearly three years of a pandemic that has reshaped much of the employment landscape.





Wage and Hour

Senate Rejects David Weil's Nomination as Wage and Hour Administrator

The Department of Labor's Wage and Hour Division (WHD) is still without an administrator. In June 2021, President Biden nominated Dr. David Weil for this position. Weil had served as the WHD administrator during the Obama administration as is known for his strong opposition to classifying workers as independent contractors. Based upon his positions on these issues, his nomination faced significant opposition from the business community and a vote on his nomination was delayed until March of this year. By a vote of 47-53, three Democrats joined the Republican Senate caucus to vote down his nomination.

On July 27, 2022, President Biden announced his intention to nominate Jessica Looman, who has been the acting administrator since June 21, 2021, to serve as the administrator in a permanent capacity. Prior to joining the DOL, Looman worked as Executive Director of the Minnesota State Building and Construction Trades Council. No confirmation hearing has been set for this nomination.

The WHD has not been rudderless without a permanent administrator. Over the past year, it has engaged in some significant rulemaking, discussed below.

Independent Contractor Rule Reinstated

Although the standard governing who qualifies as an independent contractor remains somewhat in flux, the U.S. District Court for the Eastern District of Texas delivered a victory to businesses that utilize independent contractors when, on March 14, 2022, it held that the Department of Labor's delay and ultimate withdrawal of regulations governing independent contractor status under the Fair Labor Standards Act (FLSA) (the "IC Rule") promulgated by the Trump administration was unlawful.⁸⁷

The IC Rule was initially published by the Department of Labor on January 7, 2021, and clarified the relevant factors that the DOL would use to determine whether workers are independent contractors or employees under the FLSA. Refining the seven factors composing the economic reality test that the DOL and most courts historically have considered when analyzing work relationships, the IC Rule clarified that the two core factors that should be used to determine employment status are: (1) the nature and degree of control over the work; and (2) the worker's opportunity for profit or loss.

⁸⁷ See Maury Baskin, Jim Paretto, Rob Friedman, Sean McCrory, and Michael Lotito, [Federal Court Decision Protects Independent Contractor Status](#), Litter ASAP (Mar. 15, 2022).

Following the inauguration of President Biden, the Department of Labor initially announced that the IC Rule would be delayed until March 4, 2021, and ultimately withdrew the rule on May 6, 2021, stating the Department's belief that it was inconsistent with text and purpose of the FLSA. By vacating the Biden Labor Department's decisions on these issues, however, the court determined that the prior IC Rule would be reinstated under its original effective date of March 8, 2021.

The DOL subsequently appealed the court's decision reinstating the IC Rule. The DOL also announced its intent to engage in rulemaking to review and revise the standards upon which independent contractor status is determined.⁸⁸ There is concern that a rule that would result in fewer workers classified as independent contractors "would deprive workers of the benefits of flexible, part-time employment that enables them to monetize unused portions of their days and to combine work with other pursuits . . ."⁸⁹ A proposed rule on this issue can be expected by the Department as early as this fall.

Updates to the FLSA's Overtime Rules

As part of its 2022 Spring Regulatory Agenda, the Biden administration announced that the DOL is currently reviewing regulations implementing the exemption of bona fide executive, administrative, and professional employees from the FLSA's minimum wage and overtime requirements. While the Department has not specified what changes it is considering, it is anticipated that the minimum salary level required for an employee to qualify for an exemption will be revisited. The current salary level is set at \$684 per week (\$35,568 per year). This amount went into effect on January 1, 2020, after previous rulemaking by the Obama administration increasing the minimum salary threshold to \$913 per week (\$47,476 per year) was struck down by a federal court. The January 2020 rule also increased salary requirements for employees who may qualify for the highly compensated employee exemption to \$107,432 per year.

Many advocacy groups are encouraging the Department to reinstate the \$913 per week—or higher—minimum salary amount, and to revisit the possibility of implementing annual indexing or increases to the amount. Several states, including California, New York, and Washington, have state salary requirements that currently exceed the federal amount.

Although proposed increases to the minimum salary levels are likely, the Department may also look to modify its guidance as it relates to the duties tests required to qualify for FLSA exemption. The Department has held several industry stakeholder calls to gather information and has, more recently, been conducting regional listening sessions around the country with the regulated community. A proposed rule on this issue is expected shortly.

88 DOL blog, [Misclassification of Employees as Independent Contractors Under the Fair Labor Standards Act](#) (June 3, 2022).

89 Diana Furchtgott-Roth, *Antitrust and Modern U.S. Labor Markets: An Economics Perspective*, Harv. J. L. & Pub. Pol'y Per Cur., No. 19 (Summer 2022).

Proposed Revisions to the Davis-Bacon Act

On March 18, 2022, the DOL published a notice of proposed rulemaking calling for the most sweeping revisions to the rules governing Davis-Bacon Act (DBA) enforcement since 1982.⁹⁰ The DBA requires the payment of locally prevailing wages and fringe benefits to workers on construction and public works contracts with federal agencies and the District of Columbia, such as work to be performed on the recent \$1.2 trillion Infrastructure Investment and Jobs Act.

The key changes proposed by the DOL to the DBA are the methodology used to calculate the prevailing wage rate in an area and occupation, the insertion of an onerous conformance process to classify positions not contained on the wage determination, and the expansion of the definition of the site of work to include work locations previously excluded.

Many government construction contractors and industry groups filed comments expressing concern that the Department's proposed return to policies of the 1970s will result in inflated wage rates that are inconsistent with the DBA and will exacerbate the current inflation of in the U.S. economy. The Department plans to issue a final rule in December 2022.



⁹⁰ DOL, [Updating the Davis-Bacon and Related Acts Regulations](#), 87 Fed. Reg. 15698 (Mar. 18, 2022). For a comprehensive discussion of the proposed rule, see Maury Baskin and Jim Paretti, [USDOL's Proposed Rewrite of Davis-Bacon Enforcement Rules: Back to the 1970s](#), Littler Insight (Apr. 18, 2022).

Current Immigration Policies and Procedures are Impacting U.S. Employers

As all employers are aware, it is becoming harder and harder to hire employees to fill vacant positions. As discussed in Part I of this Report, there are several reasons for this. Workers have dropped out of the labor market for health reasons, lack of childcare options, desire to switch jobs entirely, among others. In addition, as discussed in Part III of this Report, many workers lack the skills needed to perform certain jobs.

Many employers want to turn to foreign nationals to fill these positions. However, the U.S. Citizenship and Immigration Services (USCIS) slow processing times, the Immigration & Nationality Act (INA), and E-Verify are creating barriers to utilizing foreign nationals. Non-immigrant visas and Employment Authorization Documents (EADs) have expiration dates, whereby in many cases an employer cannot continue to employ foreign nationals after the expiration date.

USCIS VISA Processing Backlog

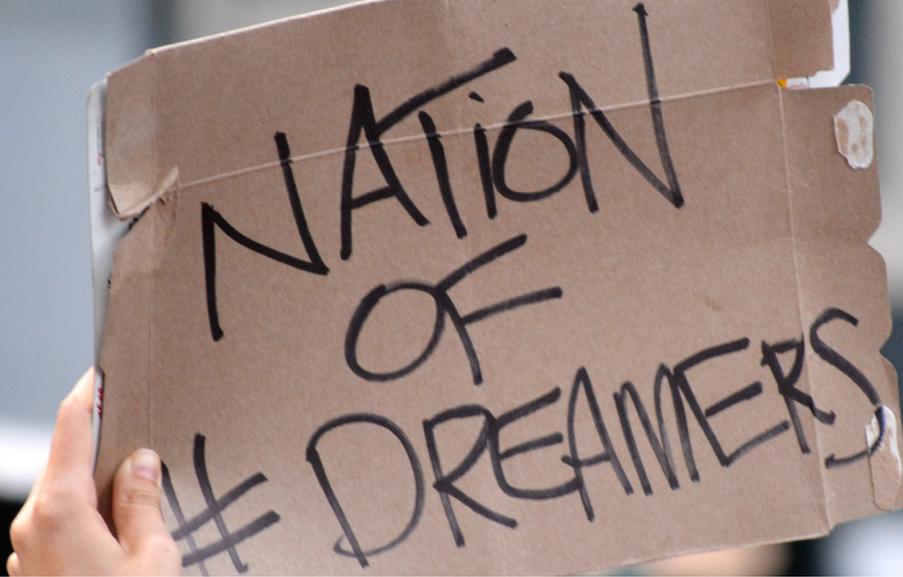
Recently, the USCIS took a positive step in responding to the incredibly slow USCIS processing times. On May 4, 2022, the USCIS changed an automatic extension for certain timely filed renewals of non-immigrant visas and EADs from 180 days to 540 days. Beforehand, too many foreign nationals were becoming ineligible to lawfully work because their USCIS applications were taking longer than 180 days to adjudicate.

To qualify for an automatic extension, an applicant must:

- Have properly filed Form I-765 for a renewal of the employment authorization and/or EAD before the current EAD expired;
- Ensure the category on their current EAD matches the category listed on their Receipt Notice; and
- Ensure their renewal application is under a category that is eligible for an automatic extension. Common categories eligible for the extension are:
 - Asylee or asylum application pending
 - Adjustment of Status (I-485) pending
 - TPS granted
 - Spouse of principal E nonimmigrant with an unexpired I-94 showing E nonimmigrant status
 - Spouse of principal L-1 Nonimmigrant with an unexpired I-94 showing L-2 nonimmigrant status
 - Spouses of certain H-1B principal nonimmigrants with an unexpired I-94 showing H-4 nonimmigrant status; and
 - VAWA Self-Petitioners.

In late December 2021, USCIS created a method to expedite renewal of work authorizations for healthcare workers. If one is a healthcare worker with a pending I-765 renewal application and the EAD expires in 30 days or less or has already expired, one can request expedited processing of the EAD application. To determine whether an applicant is a qualifying healthcare worker, they should be prepared to provide evidence of their profession or current employment as a healthcare worker.

An example of an employee who is being negatively impacted by the incredibly slow USCIS processing times is a foreign national who has received an EAD through DACA (Deferred Action for Childhood Arrivals). A DACA recipient



receives a two-year EAD, which can be renewed as long as the program continues to exist and the foreign national has not committed a disqualifying act, such as a DUI or domestic assault. Since DACA is not an employment-based work authorization, it is incumbent on the DACA recipient to timely file for renewal of DACA and the EAD. Five to ten years ago, a DACA recipient could file within 90 days of the EAD expiration date and timely receive a new EAD before the current one expired. Now an individual cannot be assured of such if they file 90 days before the EAD expiration date. Instead, often it is advisable to file up to six months before the EAD expiration date. However, often an employer does not take a pro-active position by reminding the worker of the pending EAD expiration date.

Immigration & Nationality Act Limitations

Additionally, the INA is preventing many employers from hiring temporary foreign national workers. Specifically, the H-2B visa provides foreign national workers the ability to be employed on a temporary basis in a non-agricultural/unskilled position. Over the last two years, numerous employers, such as manufacturers and fast-food restaurants, have wanted to utilize the H-2B visa to supplement their workforce because they cannot hire and retain enough employees. Unfortunately, the qualifications for the H-2B visa are nearly impossible to meet outside of landscaping and a handful of other industries because the employer must show a temporary, peak load, or seasonal need and for which there is a shortage of U.S. workers. Due to the nature of the test, it is usually impossible for employers to qualify for H-2B visas because the fact that they cannot hire enough workers is insufficient to prove a temporary, peak load, or seasonal need.

E-Verify Challenges

An additional barrier for some employers is E-Verify. In the eight states with mandatory E-Verify, employers find it harder to hire and retain workers because undocumented workers are aware that they cannot be found to be work-authorized by E-Verify. Although employers should hire and employ only work-authorized workers, employers do not have to be document experts. Thus, if an employee provides documentation that appears genuine and relating to the person, an employer should accept it. If the employer utilizes E-Verify, that system should determine whether the documentation is fraudulent and cause the employee to contest the finding with the applicable federal agency or decline to do so causing the employer to terminate the worker.

Answers to these problems are not easy. Immigration attorneys are hopeful that the USCIS can return to faster processing of applications and petitions. Given current conditions, however, many are not optimistic. Reform of the country's immigration system to facilitate employment where it is desperately needed should be a legislative priority.

Occupational Safety and Health Administration Pivots from COVID-19

The Biden Occupational Safety and Health Administration (OSHA) received a significant blow earlier this year when the Supreme Court held that the agency's vaccine mandate exceeded the congressional authority granted by the Occupational Safety and Health (OSH) Act.⁹¹ OSHA has bounced back, however, with more resources and ramped-up enforcement efforts both nationwide and in certain areas. OSHA has also announced plans to continue to pursue regulatory changes to promote its vision of worker safety and health, and has several far-reaching regulatory proposals planned.

Injury and Illness Tracking Expansion Rule

On March 30th of this year, OSHA proposed a regulatory amendment to the OSHA injury and illness log reporting requirements.⁹² Currently, establishments with 250 or more employees must submit information from their Form 300A Injury and Illness Logs electronically, and only certain types of establishments (*e.g.*, construction, manufacturing, department stores, warehouses) with 20 to 249 employees are required to submit such data to OSHA in this fashion.

Under the auspices of increased efficiency, this rule would expand the electronic reporting requirement to establishments in certain industries with more than 100 employees, and for establishments with 20-99 employees in additional industries as determined by criteria outlined in the proposed regulation. This increased data reporting will assuredly result in inspections in areas or establishments with high injury and illness rates, potentially subjecting employers in certain industries to additional inspections and regulatory scrutiny.

The extended comment period for this proposed rule ended on June 30, 2022, and action on the regulation is expected by the end of the year. If the rule is adopted in its current form, employers will need to exercise the utmost care in completing their OSHA recordkeeping forms as such information will be available to both OSHA inspectors, as well as potentially members of the public under the Freedom of Information Act.

Heat Safety Rules in the Forecast

OSHA continued its enforcement focus on heat-related complaints and hazards through a National Emphasis Plan adopted on April 8, 2022.⁹³ This plan expanded OSHA's heat-related injury program by prioritizing enforcement and inspections on days when the heat index is higher than 80 degrees. Citing to increased fatality levels due to heat, while noting its belief that many such fatalities go unreported, OSHA offices have been instructed to prioritize heat-related complaints received on days in which the heat index exceeds 80 degrees to enable OSHA to intervene and prevent illness or injury.⁹⁴

While several states, including California, Minnesota, and Washington, have adopted rules or standards for heat safety, no OSHA standard on heat safety yet exists and enforcement is currently limited to the General Duty Clause, which does not impose any specific standard or requirements for employers to follow. In late 2021, OSHA signaled its intent to adopt a heat safety standard and published an Advance Notice of Proposed Rulemaking soliciting input on hazardous heat in

91 See Jim Paretto, Devjani Mishra, and Alka Ramchandani-Raj, [Supreme Court Stays OSHA "Vaccinate or Test" Emergency Temporary Standard](#), Littler ASAP (Jan. 13, 2022); Melissa Peters, Chuck Trowbridge, and Sarah Martin, [Federal OSHA Withdraws its Vaccine-or-Test ETS: What's Next?](#), Littler ASAP (Jan. 26, 2022).

92 OSHA, [Improve Tracking of Workplace Injuries and Illnesses](#), 87 Fed. Reg. 18528-18558 (Mar. 30, 2022); see also Alka Ramchandani Raj and Karen Charlson, [OSHA Issues Proposed Rule on Improved Tracking of Workplace Injuries and Illnesses](#), Littler ASAP (Apr. 4, 2022).

93 OSHA, [National Emphasis Plan – Outdoor and Indoor Heat-Related Hazards](#), CPL 03-00-024 (Apr. 8, 2022).

94 See, Sarah Martin, Lauren Bridenbaugh, Brad Hammock, and Alka Ramchandani-Raj, [OSHA Announces Increased Focus on Heat-Related Hazards](#), Littler ASAP (Sept. 21, 2021).

the workplace.⁹⁵ This proposed rule clears the way for OSHA to eventually issue a heat safety standard, which we expect to see in the coming months, and has the potential to have a significant impact on a number of industries. Employers should remain cognizant of the dangers of heat and should consider a plan to address heat safety and reduce the risks to employees.

Time for OSHA's Infectious Disease Standard?

OSHA has announced plans to resuscitate a rulemaking that started in the early years of the Obama administration which would impose standards for the protection against airborne infectious diseases, including SARS, MRSA, tuberculosis, and COVID-19, among others. The rulemaking process began in May of 2010, and had been largely inactive since December of 2014, until the Department of Labor announced its intent to publish a Notice of Proposed Rulemaking by the middle of next year.

This rule has critical importance and may contain the Biden administration's vision for infectious disease prevention for COVID-19 and beyond. The scope of the rule is not currently known but is expected to be related specifically to the workplace hazards posed by infectious diseases to avoid a similar result to that reached earlier this year in *National Federation of Independent Business v. Department of Labor*,⁹⁶ in which the Supreme Court struck down OSHA's vaccine mandate as exceeding its authority. In that decision, the Court held that "[p]ermitting OSHA to regulate the hazards of daily life—simply because most Americans have jobs and face those same risks while on the clock—would significantly expand OSHA's regulatory authority without clear congressional authorization."



⁹⁵ OSHA, [Heat Injury and Illness Prevention in Outdoor and Indoor Work Settings](#), 86 Fed. Reg. 59309-59326 (Oct. 27, 2021).

⁹⁶ 595 U.S. 1033 (2022).



Other Regulatory Items on OSHA's Agenda

In addition to the rulemakings discussed above, throughout the past year OSHA has continued to announce news relating to regulatory changes being proposed and considered. For example, the agency announced that it is considering amendments to the 2016 Walking Working Surfaces rule that affects a wide range of workers under Part 1910 of the OSH Act standards and includes requirements to address slip, trip, and fall hazards.

Additionally, OSHA's spring regulatory agenda includes a previous rulemaking from the end of 2016, "Preventing Workplace Violence in Healthcare and Social Assistance."⁹⁷ OSHA is expected to once again take preliminary steps toward crafting a rule on this topic before the end of the year. According to agenda, OSHA may move to the Small Business Advocacy Review Panel stage of the rulemaking in early fall 2022. It is too soon to determine whether and when OSHA will advance this rulemaking beyond this early stage.

⁹⁷ See [OSHA Issues Updated Guidelines for Preventing Workplace Violence in Healthcare and Social Service Settings](#), Littler ASAP (Apr. 8, 2015).

State of the States

Over 400 bills and regulations have been enacted in states and large municipalities since last Labor Day. About a quarter of those measures are COVID-related. While many states responded early in the pandemic with laws and ordinances governing COVID-related leaves, health and safety measures, and unemployment matters, over the past year many states took aim at vaccination mandates. A couple of states—Montana and Tennessee—enacted laws to ban such mandates entirely. Other jurisdictions enacted laws that might not preclude private employers from requiring employee vaccinations but, rather, impose specific limitations on any such programs. For example, several states enacted laws that require private employers to offer expanded exemption options for employees who do not wish to be vaccinated for various reasons, including religious objections. At least 15 states have laws banning or limiting COVID-19 vaccine mandates.⁹⁸

Some jurisdictions focused their health and safety-related energy on specific industries, particularly hospitality. In California, for example, this past year a number of large cities enacted ordinances regulating the workload of hotel employees, requiring hotels to provide “panic buttons” to staff, providing certain “rights of recall,” and instituting new training requirements for these workers.⁹⁹ These ordinances demonstrate how the regulation of the workplace is becoming more local.

The following addresses other notable state-level trends that have emerged over the past year.

Reproductive Health

The U.S. Supreme Court decision in *Dobbs v. Jackson Women’s Health Organization*, which overturned *Roe v. Wade*, has left employers that want to assist employees with their reproductive choices scrambling.¹⁰⁰ There are myriad employment and potentially criminal law issues that will inform an employer’s next steps, which are beyond the scope of this Report.

Moreover, various and conflicting state laws complicate matters. A handful of jurisdictions already have laws on the books making it an unlawful practice for an employer to discriminate against an employee based on their reproductive health decisions, which can include decisions related to the use or intended use of contraception or the planned or intended initiation or termination of a pregnancy. Since the issuance of the *Dobbs* opinion, at least two states and two cities (Seattle and Austin) have enacted laws reaffirming an individual’s right to make decisions about their own reproductive health care or providing protections for those receiving reproductive health care services, and in at least eight states and the District of Columbia bills have been introduced seeking to protect an individual’s reproductive health decisions in some shape or form. Further, at least four state constitutional amendments have been proposed on this issue, although one (in Kansas) was recently defeated.

Some states, however, have enacted laws that prohibit individuals and entities from providing financial assistance to individuals seeking abortion. Additionally, there are other laws that have “aiding and abetting” clauses that may create liability for employers. The area of law surrounding reproductive rights and the scope of benefits employers can provide will continue to evolve, and employers are strongly urged to consult with both civil and criminal counsel as they navigate compliance in this highly sensitive area.

98 See [Take That Shot and Shove It! Some States Continue to Push Vaccine Exemptions](#), Littler Insight (updated regularly).

99 See, e.g., Joy C. Rosenquist, Bruce Sarchet, and Michael J. Lotito, [Glendale, CA Institutes Hotel Worker Protections](#), Littler Insight (July 25, 2022); [Panic Buttons and Workload Limits: Los Angeles Hotel Workers Get New Protections](#), Littler Insight (July 8, 2022); Bruce Sarchet, [West Hollywood, California Adopts Comprehensive Hotel Worker Ordinance with Right to Recall](#), Littler Insight (Aug. 5, 2021).

100 See Anne Sanchez LaWer, [Impacts of the Dobbs Decision on Employer Benefit Plans](#), Littler ASAP (June 24, 2022).

Noncompete Agreements

While employers are seeking ways to improve job retention, several state lawmakers have recently scrutinized noncompete and nonsolicitation agreements, imposing greater restrictions on employers seeking to use them.

In June, Colorado enacted HB 22-1317, which renders most noncompetes void unless the agreement is with a “highly compensated” worker, is necessary to protect trade secrets, and is narrowly tailored to protect those trade secrets.¹⁰¹ A separate measure enacted earlier in the year includes a criminal penalty for violations of Colorado’s restrictive covenant statute.¹⁰²

Last year, the District of Columbia enacted the Ban on Non-Compete Agreements Amendment Act of 2020, which prohibits employers from requiring or requesting that an employee performing work in the District sign an agreement that includes a non-compete provision. On July 27, 2022, the DC Council passed the Non-Compete Clarification Amendment Act of 2022 to narrow these provisions in response to feedback from the business community. The Act’s requirements will apply beginning October 1, 2022, although the bill must still pass a 30-day congressional review period and be published in the DC Register.

In Illinois, the state’s Freedom to Work Act was amended through the passage of SB672.¹⁰³ As of January 1, 2022, non-compete agreements between employers and employees are void if the employee earns \$75,000 per year or less. This threshold increases to \$80,000 in 2027, and will increase by \$5,000 every five years until 2037. Non-solicitation agreements are void for employees earning \$45,000 or less per year. This threshold increases by \$2,500 every five years until 2037.

Oregon also passed an amendment to its non-compete statute.¹⁰⁴ For all agreements entered into on or after January 1, 2022, non-competition agreements that do not satisfy the statutory requirements are void as a matter of law, not merely voidable. In addition, the minimum salary threshold for employees who may be subject to non-competition agreements must exceed \$100,533, adjusted annually for inflation, and non-competition agreements that restrict an employee in excess of 12 months are unenforceable.



101 See Steve Baumann and Tom Carroll, [HB 22-1317: A New, More Restrictive Era for Restrictive Covenants in Colorado](#), Littler Insight (May 16, 2022).

102 See Steve Baumann and Tom Carroll, [Colorado Criminalizes Certain Restrictive Covenants](#), Littler ASAP (Jan. 6, 2022).

103 See James Witz, Melissa McDonagh, and Colton Long, [The Trend Continues: Illinois Imposes Additional Prerequisites and Restrictions on Employers’ Use of Restrictive Covenants](#), Littler Insight (Aug. 18, 2021).

104 See Megan Crowhurst, Christine Sargent, and Isaiah Hardy, [Employment Highlights from Oregon’s Active 2021 Legislative Session](#), Littler Insight (July 12, 2021).



Nevada Assembly Bill 47 stipulates that starting October 1, 2022, courts must blue pencil a noncomplete covenant that is supported by valuable consideration but contains limitations as to time, geographical area or scope of activity that are unreasonable, impose a greater restraint than is necessary for the protection of the employer, or impose undue hardship on the employee. The requirement to strike offending clauses applies regardless of whether the employer or employee initiated the action.¹⁰⁵

A handful of states either ban noncompetes outright or consider them void except in very limited circumstances. The majority of states, however, allows courts to enforce noncompetes, provided they are limited in scope, designed to protect an employer's legitimate interests, and supported by adequate consideration.

At the federal level, the Federal Trade Commission is expected to consider rulemaking to restrict the use of noncompete agreements, although the parameters of such rulemaking are not yet clear, nor is there a definitive timeline for doing so. Although President Biden issued an executive order in July 2021 which, among other things, "encouraged" the FTC chair "to curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility,"¹⁰⁶ the FTC did not include possible rulemaking on this issue in its latest spring 2022 regulatory agenda.¹⁰⁷

Pay Transparency

In an effort to ensure pay equity, some jurisdictions are requiring employers to provide pay scales or salary ranges in their job postings or upon request to job applicants and current employees. At least seven states and a few large cities require certain types of wage disclosures.¹⁰⁸ The most stringent laws require employers to include wage and benefit information in their job postings. Such mandates are in place in Washington,¹⁰⁹ Colorado,¹¹⁰ Jersey City, New Jersey, New York City,¹¹¹ Ithaca, New York, and Westchester County, New York. New York State has also advanced a law (Senate Bill 9427), which would require employers to include a salary range and position description in each job advertisement.¹¹² California, meanwhile, is considering its own pay transparency law (SB 1162), which would not only require employers with 15 or more employees to post salary ranges for jobs in any job postings, but also would expand compensation reporting requirements for employers with 100 or more employees, including making employer's pay data publicly available.

¹⁰⁵ See Montgomery Y. Paek and Diana G. Dickinson, [Nevada Modifies Statute Governing Noncompetition Agreements](#), Littler ASAP (June 4, 2021).

¹⁰⁶ Executive Order 14036 of July 9, 2021, [Promoting Competition in the American Economy](#), 86 Fed. Reg. 36987 (July 14, 2021).

¹⁰⁷ FTC, [Agency Rule List – Spring 2022](#), Reginfo.gov.

¹⁰⁸ See Denise M. Visconti and Thelma Akpan, [Wage Transparency: How Can Multi-State Employers Manage the Compliance Minefield of Wage Disclosure Laws Nationwide?](#), Littler Insight (Jan. 26, 2022).

¹⁰⁹ See Breanne Martell, [Washington Becomes Third Jurisdiction to Require Wage Disclosures in Job Postings](#), Littler ASAP (May 2, 2022).

¹¹⁰ See Josh Kirkpatrick and Jennifer Harpole, [Colorado Issues Final Rules on Equal Pay for Equal Work Act with Significant Job Posting Requirements for All Employers with Colorado Workers](#), Littler Insight (Nov. 13, 2020).

¹¹¹ See Eli Z. Freedberg and Thelma Akpan, [NYC Amends Wage Transparency Law](#), Littler ASAP (Apr. 29, 2022).

¹¹² See Thelma Akpan and Maureen Lavery, [Pay Transparency Laws Proliferate in New York](#), Littler Insight (June 9, 2022).

These types of laws can be challenging for employers in today's "work from anywhere" era. Whether the salary-posting requirement applies extraterritorially in some instances is unclear. As previously discussed, the EEOC still considers pay equity a priority, so expect states to similarly pay attention to this issue.

"Anti-Woke" Laws

One of the first executive orders President Biden signed upon his entering office was rescinding the prior administration's Executive Order 13950, which sought to limit federal contractors and the recipients of federal grants from discussing "divisive" topics in workplace trainings on issues of diversity, equity, and inclusion (DEI), including what that order called "stereotyping" and "scapegoating" on the basis of race or sex. The order generated significant controversy in the federal contractor community, and confusion for those employers that wish to pursue D&I initiatives. In December 2020, a federal district court enjoined the order nationally, finding key provisions of the rule unconstitutional restrictions on free speech, as well as impermissibly vague.

Likely in reaction to this move, on April 22, 2022, Florida Governor Ron DeSantis signed into law so-called "anti-woke" legislation (HB 7) that appears to be based on the rescinded rule.¹¹³ The new law, named the Individual Freedom Act (IFA) or the so-called "Stop-WOKE" law (the state's acronym for "Stop Wrongs to Our Kids and Employees"), amends the Florida Civil Rights Act, potentially limiting the ability of employers to include discussions of "implicit bias" or systemic racism in workplace training relating to diversity, non-discrimination, and non-harassment.

Under the legislation, it is unlawful for any covered employer (generally, those with employees in Florida and employing 15 or more employees company-wide) to subject any individual working in Florida, as a condition of employment, to training or instruction that "espouses or promotes" such individual to believe that certain enumerated concepts constitute discrimination based on race, color, sex, or national origin. On August 18, 2022, however, the IFA was partially enjoined on free speech grounds.¹¹⁴ Specifically, the court order prohibits the Florida Commission on Human Relations (FCHR) and the Florida Attorney General from enforcing the IFA's provisions as they apply to employers, until otherwise ordered. Notably, this order does not and cannot prohibit private citizens from pursuing a private cause of action based on this law, which remains in effect for now. Further, it is expected the defendants will file an appeal very shortly. Therefore, the matter remains in flux. The final fate of the IFA could determine whether similar laws are enacted in other states.



113 See Jim Paretti, Cindy-Ann Thomas, and Nancy Johnson, [Florida Limits Permissible Workplace Training on Diversity, Implicit Bias, and Systemic Racism](#), Littler ASAP (Apr. 22, 2022); Nancy A. Johnson and Cindy-Ann Thomas, [First Lawsuit Against Florida's "Stop WOKE" Bill Filed](#), Littler ASAP (Apr. 26, 2022); Jim Paretti, Nancy A. Johnson, Cindy-Ann L. Thomas, [Down But Not Out: U.S. District Court Denies Preliminary Injunction Against Florida "Stop-WOKE" Law](#), Littler Insight (June 28, 2022).

114 *Honeyfund.com, Inc. v. DeSantis*, No. 4:22-cv-00227 (N.D. Fla. filed June 22, 2022).



Protected, Paid, and Family and Medical Insurance Leaves

The patchwork of local protected paid leave ordinances has long vexed many a multi-state employer. Paid sick leave ordinances generally allow employees to accrue and use a specific amount of leave each year for a covered purpose. Primarily, these purposes may include absences related to injuries, illnesses, or health conditions—*sick leave*—and/or domestic violence, sexual assault or stalking—*safe leave*. More laws, however, are allowing employees to use leave for various other reasons as well, including, but not limited to, bereavement, organ donation, and weather events. Additionally, under newer mandatory paid time off laws, employees can use leave for *any* reason.

This past year, a handful of jurisdictions added to this complex system of leaves. In the Golden State, San Francisco enacted a permanent public health emergency leave ordinance. The ordinance provides protected time off that is in addition to paid leave (including San Francisco paid sick leave). Paid leave is now available for a declared local or statewide health emergency (such as those related to any contagious, infectious, or communicable disease declared by San Francisco or California health officials), or an air quality emergency when the Bay Area Air Quality Management District issues a Spare the Air Alert.¹¹⁵

Similarly, on March 21, 2022, the Oregon Bureau of Labor and Industries (BOLI) adopted a permanent rule, effective April 1, 2022, that expands the reasons employees can use leave under Oregon’s paid sick and safe leave law during a public health emergency.¹¹⁶ Specifically, protected leave can now be taken when public officials issue an emergency evacuation order or determine that air quality or heat could jeopardize an employee’s health.

Back East, Philadelphia, Pennsylvania requires covered employers to provide paid “COVID-19 Leave” through December 31, 2023.

Another locality, Bloomington, Minnesota, recently passed an Earned Sick and Safe Leave Ordinance, joining its local counterparts Minneapolis, St. Paul, and Duluth to provide paid sick and safe time to employees. This new law will not take effect until July 1, 2023. The Bloomington ordinance generally requires employers to provide certain employees in Bloomington with up to 48 hours of paid sick and safe time per year.¹¹⁷

¹¹⁵ See Sebastian Chilco and Adam Fiss, [San Francisco’s Newest \(and Permanent\) Public Health Emergency Leave Ordinance](#), Littler Insight (June 9, 2022).

¹¹⁶ See Megan Crowhurst and Cristin Casey, [Oregon Rule Expands Reasons Employees Can Take Emergency Paid Leave](#),

¹¹⁷ See Stephanie Mills-Gallan and Meg Karnig, [Firing on All Four Cylinders: Bloomington, Minnesota Becomes the Fourth Minnesota City to Mandate Paid Sick and Safe Time](#), Littler Insight (June 13, 2022).

In May, Delaware enacted the Healthy Delaware Families Act, creating a statewide paid family and medical leave insurance program funded through employer and employee contributions. Paid family and medical leave contributions will begin to be required in 2025, and covered employees will be able to access benefits in 2026.

A growing number of states have enacted such a paid family and/or medical leave requirement. As of August 2022, active paid family leave programs exist in seven states – California, Connecticut,¹¹⁸ Massachusetts, New Jersey, New York, Rhode Island, and Washington State – plus San Francisco, California and the District of Columbia. Four states – Colorado,¹¹⁹ Delaware, Maryland,¹²⁰ and Oregon – have enacted paid family leave programs that are not yet in effect. Similarly, in New Hampshire, the enacted but not yet operative paid family leave program will allow private employers and employees to voluntarily participate.

Restaurant and Hospitality Industry

As noted earlier in this report, the restaurant and hospitality industries have faced numerous business challenges in the post-pandemic recovery. At the same time, several localities have rushed to implement worker protections for this sector. Los Angeles and Glendale, California are the latest jurisdictions to enact local ordinances governing hotel workers. Glendale's ordinance, enacted on June 28, 2022, sets a minimum wage for hotel workers of \$17.64 per hour or the hourly rate for hotel workers under the Los Angeles Municipal Code, whichever is greater; prohibits employees from working more than 10 hours in a workday without the worker's voluntary consent; limits a worker's room cleaning workload; and requires that workers be provided a panic button plus associated training on its use.¹²¹



118 See Lindsay M. Rinehart, [Connecticut Department of Labor Issues Final Proposed Connecticut Family and Medical Leave Act Regulations](#), Littler ASAP (Apr. 18, 2022).

119 See David Gartenberg and Carolyn Theis, [Colorado Issues First Round of Regulations and Guidance on its Paid Family and Medical Leave Insurance \(FAMLI\) Program](#), Littler Insight (May 16, 2022).

120 See Libby Henninger, Steven Kaplan, and Camellia Mokri, [Maryland Enacts a Paid Family and Medical Leave Program](#), Littler ASAP (Apr. 19, 2022).

121 See Joy C. Rosenquist, Bruce Sarchet, and Michael J. Lotito, [Glendale, CA Institutes Hotel Worker Protections](#), Littler Insight July 25, 2022.



In early July, Los Angeles enacted a similar measure, requiring panic buttons, setting new workload and compensation rules, and imposing a three-year records retention requirement, among other provisions.¹²² Laws regulating the workload of housekeeping staff were already in place in Santa Monica and Oakland, California. Hotel panic button laws were already in effect in such locations as Washington State; Chicago, Illinois; Miami Beach, Florida; Long Beach, California; and Oakland, California.

A measure awaiting the governor's signature aimed at California's restaurant industry is groundbreaking in scope. The Fast Food Accountability and Standards (FAST) Recovery Act (AB 257)¹²³ would establish a Fast-Food Sector Council to set employment standards for the industry, create strict liability between the franchisor and franchise for employment violations, and permit lawsuits against the franchisor if the franchise cannot meet labor standards requirements due to franchisor requirements. The bill's proponents have cited workplace violations as a key reason to advance the bill, although a recent report issued by the Employment Policies Institute and International Franchise Association (IFA) found that California Department of Industrial Relations data does not show a higher rate of workplace violations in fast-food restaurants.¹²⁴

On August 11, 2022, the California Senate appropriations committee voted to advance the measure, even though the state Department of Finance announced opposition to it the week prior, stating "it is not clear that this bill will accomplish its goal, as it attempts to address delayed enforcement by creating stricter standards for certain sectors, which could exacerbate existing delays." The Department also noted that the legislation would create significant ongoing costs for the California Department of Industrial Relations and could lead to a "fragmented regulatory and legal environment for employers and raise long-term costs across industries." The California Senate approved the bill on August 29.

Health Care Industry

In southern California, SEIU is supporting signature-gathering efforts for petitions to increase to \$25 per hour the minimum wage for healthcare employees of private employers. In many cities, when the City Council is presented with such a petition, it has the option of either enacting an ordinance, or sending the matter to the voters.

Signatures sufficient to qualify such a measure for the ballot were provided to the Los Angeles City Council, which in turn enacted a minimum wage ordinance itself. Although this wage hike was set to take effect on August 13, it has been put on hold after a coalition of hospital employers submitted a referendum petition to send the matter back to the voters.

Similar efforts to increase healthcare worker wages are underway in several other Southern California cities, including Long Beach, Downey, Inglewood, Duarte, Monterey Park, Lynwood, Culver City and Baldwin Park.

Employers can expect legislative activity at the local level to continue.

¹²² See Joy C. Rosenquist, Bruce Sarchet, and Michael J. Lotito, [Panic Buttons and Workload Limits: Los Angeles Hotel Workers Get New Protections](#), Littler Insight (July 8, 2022).

¹²³ AB-257 Food facilities and employment (2021-2022), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB257

¹²⁴ [Not So FAST: Analyzing Labor Law Compliance at California Fast Food Restaurant](#), Employment Policies Institute (Aug. 2022).

III. Looking Ahead: Historic Transformation of the American Workforce

Our country is in the midst of a historic workforce transformation. It is the most critical issue facing the American business community today and perhaps the top competitiveness issue of our time. As the post-pandemic workplace takes shape and policies continue to evolve, employers must navigate new workforce challenges that include the continuing labor shortage, which was created by a confluence of factors exacerbated by the lingering effects of COVID-19 and its variants, the widening skills gap that is prohibiting employers from filling key positions, and an accelerated digital transformation as automation, artificial intelligence and robotics are perfected.

Littler WPI is committed to finding solutions that will benefit employers and the workforce to ensure a more prosperous future. As such, WPI is generating momentum by taking a multi-faceted approach to help employers address these challenges, as more detailed below.



Release of Workforce Study – a 50-State Scan of Business Efforts to Address the National Workforce Challenge

On August 31, 2022, Littler WPI, together with the National Association of State Chambers, released a national study on workforce development practices.¹²⁵ The report, a first of its kind, is a 50-state scan of business efforts to address the national workforce challenges, along with strategies to enhance workforce programs.

The report confirms that the current national employment landscape is daunting. As economic activity is rebounding after the pandemic-induced shutdown, both workforce availability and skill challenges are immense, inhibiting company growth, expansion, and success. As discussed in Part I of this Report, there are a record number of job openings, yet labor force participation is down. Meanwhile, the employment cost index is soaring.

Because these workforce challenges are varied and complex, there is no “silver bullet” solution. The report, however, highlights the need for specific federal policy reforms on the issues listed below:

- **Comprehensive Immigration Reform.** Immigration reform needs to be addressed in a holistic manner, covering all skills levels and responsive to labor market demands. The visa worker programs are in need of an overhaul, including a sufficient supply and timely process for highly educated foreign workers to obtain H-1B visas and an improved H-2 guest worker program. There should also be a fair and efficient employment verification program with legal protections for employers that rely on the government’s system in good faith. Reform should also include legal protections for DACA recipients; a pathway to citizenship for those immigrants who are contributing to our economy and paying taxes; and a path for refugee resettlement and streamlined occupational licensing for immigrants with professional backgrounds.
- **Apprenticeship Reforms.** To build on the success of registered apprenticeships, efficiencies are needed to increase speed, flexibility, and nimbleness in the program to make the process less cumbersome for employers. Additionally, the program should be more responsive to market needs and embrace a wide variety of occupations not traditionally associated with apprenticeship training.
- **Workforce Innovation and Opportunity Act (WIOA) Reauthorization.** Given that the authorization expired in 2020, there should be bipartisan priority given to WIOA reauthorization that includes sufficient funding and flexibility to encourage training innovation.
- **Career Awareness.** A national-level career awareness initiative is needed that highlights the importance of technical careers and other career paths that do not require a four-year college degree. The jobs of the future require us to incentivize skill attainment over degree attainment.
- **Childcare and Housing.** To encourage labor force participation, the availability of and quality of childcare, as well as the availability and affordability of housing is key. Measures have passed in several state legislatures to spur government, private sector, and non-profit solutions. Congress should consider new incentives for the private sector to increase the supply of quality childcare and housing.

¹²⁵ For additional information and to learn more on the array of thoughtful, aggressive actions the states are taking to address workforce development, please read our report, [WORKFORCE: A Throttle on American Growth, A 50-State Scan of Business Efforts to Address the National Workforce Challenge](#), National Association of State Chambers (Aug. 2022).

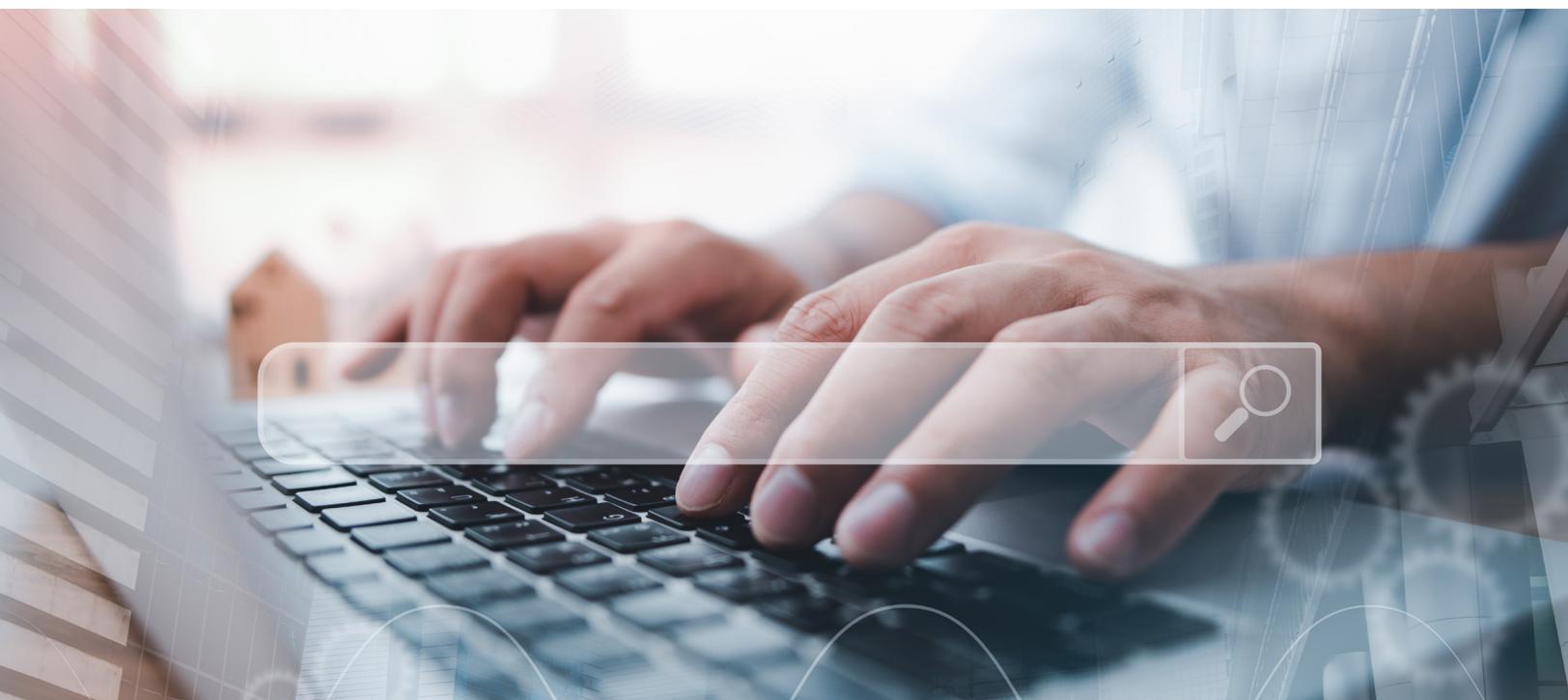
Modernize Labor Market Reporting Data

As referenced about, the advances in technology, combined with the seismic shift in how employers operate as a result of the COVID-19 pandemic, are creating a rapidly changing and unpredictable work environment. The pandemic exacerbated job displacement, which is creating employee demand for new ways of working, the need for new skillsets in the workplace, and new approaches to improving workplace policies. Understanding the complex dynamics of the U.S. labor market, which has been upended by the impacts of the COVID-19 pandemic and its displacement of workers, is, therefore, key to identifying in-demand jobs and skills, guiding investments in education and training and, ultimately, the nation's economic recovery.

Effective use of labor market information and research is critical for lawmakers, employers, educators, and others to make informed decisions, guide resource allocation, and achieve better employment outcomes. As the pandemic lingers and technological advances are made, the workplace and workforce will continue to transform rapidly. Employers need the ability to leverage real-time and current data to inform better strategies and mitigate associated risks. The requisite data, however, is not there to respond to the labor situation and a federal solution is badly needed. Specifically, the traditional sources of labor market data from federal and state agencies and/or employer surveys are not timely and are lacking in specifics needed to guide program and skills development.

Given that there is a growing digitization of labor markets—which includes social media sites, social networks, internet job posting and resume sites—there is a constant source of new and current data that the federal government could capture and harness to provide more timely details of occupational demand including skills and certifications sought. From these sources of real-time labor market information and accompanying analytics, lawmakers, employers, educators, and others could better shape employment strategies, program development, and guide resource allocation to achieve better employment outcomes.

Modernizing the data is a critical first step towards improving workforce development programs. As such, WPI is developing a federal legislative proposal that would improve labor market data reporting in real time to support the identification of economy-wide trends in emerging roles and skills needed for in-demand jobs.



Partner to “Critical Labor Coalition”

WPI is a partner to and actively engaged in the “Critical Labor Coalition,” which was formed to address the labor shortage in our country. The CLC is a Washington, D.C.-based coalition made up of prominent trade organizations and business groups focusing on promoting legislation that incentivizes specific demographics to begin or return to work, including retirees, caregivers, second-chance hires and refugees, among others. The CLC works in a bipartisan manner with non-profit organizations, academia, and other interested parties to educate members of Congress on federal solutions to the worker shortage crisis.

For example, the Coalition is advocating for an expansion of the Earned Income Tax Credit (EITC) to workers between 18 and 64 who are otherwise eligible for the tax credit. A permanent expansion of EITC to include those 18 and older would incentivize young adults and retirees to enter or reenter the workforce. If passed into law, this proposal would benefit approximately 5 million workers ages 18-24 and over 2 million ages 64 and older. While the amount of the credit and income limits would remain, expanding the number of workers eligible for the credit would lift many from poverty and reduce the number pushed deeper into poverty by federal taxes. This would incentivize people to join the workforce, stimulate the economy and reduce the crippling labor shortage currently plaguing U.S. employers.



Leverage the Emma “Future of Work” Coalition to Advance Workforce Solutions

The Emma Coalition, founded by Littler WPI, is the first and only employer-focused, non-partisan, non-profit organization dedicated to preparing American businesses and government for TIDE (technology induced displacement of employment).¹²⁶ The founders understand that preparing for the enormous impact of these transformative technologies requires the participation of a diverse set of stakeholders in the public and private sectors.

The Emma Coalition seeks to organize a nationwide effort and partnership among small and large American businesses and the organizations that represent them; representatives of organized labor; and nonprofit, research, and academic institutions. Its work focuses on preparing the workforce for the coming TIDE through engagement with policymakers, education to increase public awareness of TIDE and the urgency of addressing it, and the creation of programs to retrain workers to compete in the post-TIDE economy.

A nonpartisan approach is needed to implement a national workforce plan that includes the following:

- Identification of job skills that are abating, those skills employer need right now, and those that will be needed in the future;
- Allocation of WIOA money on the basis of skills development;
- Reformation of the country’s education system to teach not only the “3 Rs” but also the “3 Cs”—communication, collaboration and creativity;
- Providing life-long learning for all, as skills are constantly evolving;
- Embracing apprenticeships as part of the solution;
- Putting an end to the notion that college degrees are necessary for every job;
- Immediate immigration reform; and
- Promotion of worker flexibility and giving workers tools like child care and paid leave to help them work and prosper.



¹²⁶ To further review the activities of the Emma Coalition and the significant steps taken to raise awareness of TIDE and to prepare companies, governments, communities, educators and workers for its impact, please visit the website: www.EmmaCoalition.com.

IV. Conclusion

The challenges the U.S. workforce continues to face this Labor Day are myriad and varied. The pandemic, global unrest and uncertainty, and severe weather events have changed workplace logistics, and shone a spotlight on the need for greater flexibility. In addition to COVID-19, changing consumer behavior and an increase in automation have severely impacted certain business sectors. As the economy struggles to right itself and the evolving nature of work becomes more apparent, both employers and employees are reassessing their needs, both personal and professional.

Adding to this instability are new federal, state, and local rules and laws, which have created a disparate assortment of employment requirements, but have thus far failed to address the more systemic workplace issues in need of repair.

To this end, employers, workers, lawmakers, and educators will need to be proactive in assessing and tackling the reasons employees are leaving the workforce and employers cannot fill needed positions. Unless and until progress can be made toward viable solutions, business will be anything but usual.

Littler WPI is committed to addressing the workforce challenges referenced above. We welcome the opportunity to learn from you and collaborate on new strategies and projects.

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At Littler, we understand that workplace issues can't wait. With access to more than 1,700 employment attorneys in more than 100 offices around the world, our clients don't have to. We aim to go beyond best practices, creating solutions that help clients navigate a complex business world. What's distinct about our approach? With deep experience and resources that are local, everywhere, we are fully focused on your business. With a diverse team of the brightest minds, we foster a culture that celebrates original thinking. And with powerful proprietary technology, we disrupt the status quo – delivering groundbreaking innovation that prepares employers not just for what's happening today, but for what's likely to happen tomorrow. For 80 years, our firm has harnessed these strengths to offer fresh perspectives on each matter we advise, litigate, mediate, and negotiate. Because at Littler, we're fueled by ingenuity and inspired by you.