

2022 CALIFORNIA STATE HR

ADVOCACY & LEGISLATIVE CONFERENCE

COVID in the
Courtroom – Don't Be
Next!

Danielle H. Moore
Partner
Fisher Phillips

SHERATON GRAND HOTEL - SACRAMENTO

APRIL 20-22, 2022



CALIFORNIA
STATE COUNCIL OF SHRM

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SHRM[®]
BETTER WORKPLACES
BETTER WORLD™

TODAY'S ROADMAP

1. **Where We Are**
2. **Where We Are Headed**
3. **Areas to Watch:**
 1. **Remote Work**
 2. **Leave and Accommodation**
 3. **Retaliation / Safety**
 4. **Wage-Hour**
4. **Key Take Aways**

Total Cases

4,957

*from 1/30/2020 to 4/11/2022

Most New Cases Last 7 Days

Indiana - 3
New Jersey - 2
New York - 6

Most Common Case Type

Employment Discrimination

Most Common Industry

Healthcare

Case Type

All



Filing Date

1/30/2020 4/11/2022

Venue Type

Federal
 State

Plaintiff Type

Individual(s)
 Class

Total Cases

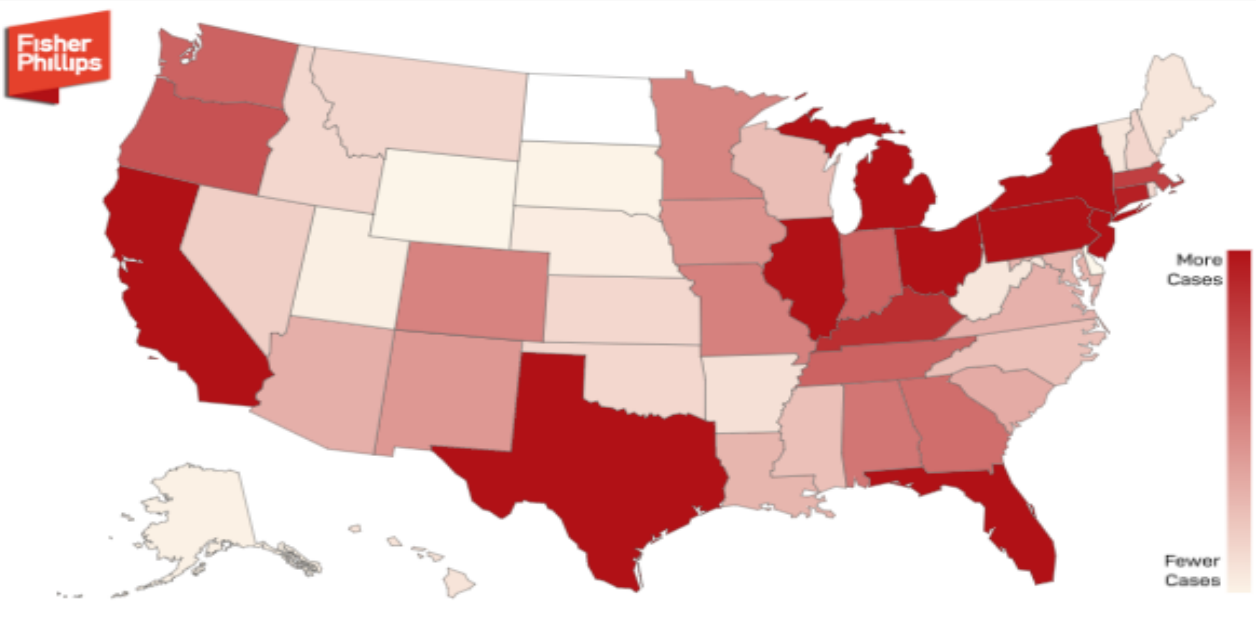
Cases by Population

Last Updated: April 15, 2022

State / Case Type

Case Type / State

Case Analysis →



State / Case Type

Cases

Cases by Population*

State / Case Type	Cases	Cases by Population*
Alabama	62	12.64
Alaska	4	5.47
Arizona	35	4.81
Arkansas	12	3.98
California	1,328	33.61
Colorado	56	9.72
Connecticut	103	28.89
Delaware	1	1.03
District of Columbia	22	31.17
Florida	312	14.53
Georgia	66	6.22
Hawaii	10	7.06
Idaho	16	8.95
Illinois	153	12.07
Indiana	71	10.55
Iowa	49	15.53
Kansas	16	5.49
Kentucky	26	21.40
Total	4,957	261.26

Industry / Case Type

Case Type / Industry

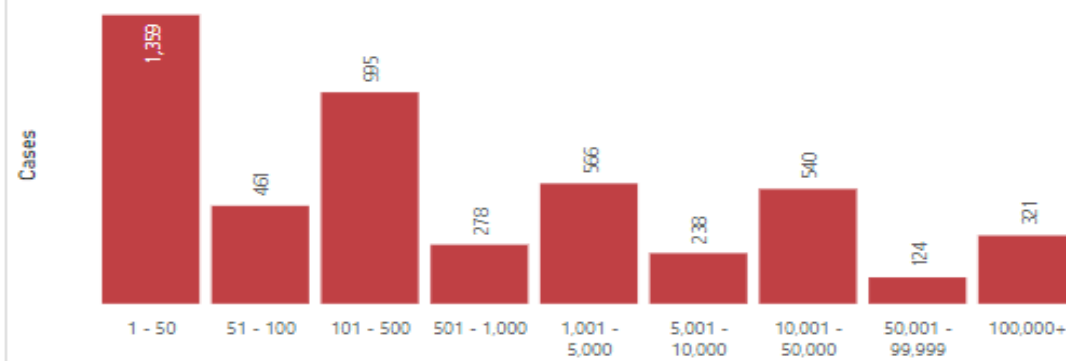
Industry / Case Type	Cases	% of Total Cases
Admin. and Support Services	67	1.4%
Agriculture and Food Production	125	2.6%
Arts, Entertainment, Sports, and Recreation	86	1.8%
Automotive	178	3.7%
Construction	222	4.6%
Education	272	5.6%
Energy	47	1.0%
Finance and Insurance	178	3.7%
Government	464	9.6%
Healthcare	1,028	21.3%
Hospitality	299	6.2%

Company Size

Size / Industry / Case Type

* per 1 million people

Cases by Company Size (# of Employees) ⓘ



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Where We Are

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Where We Are

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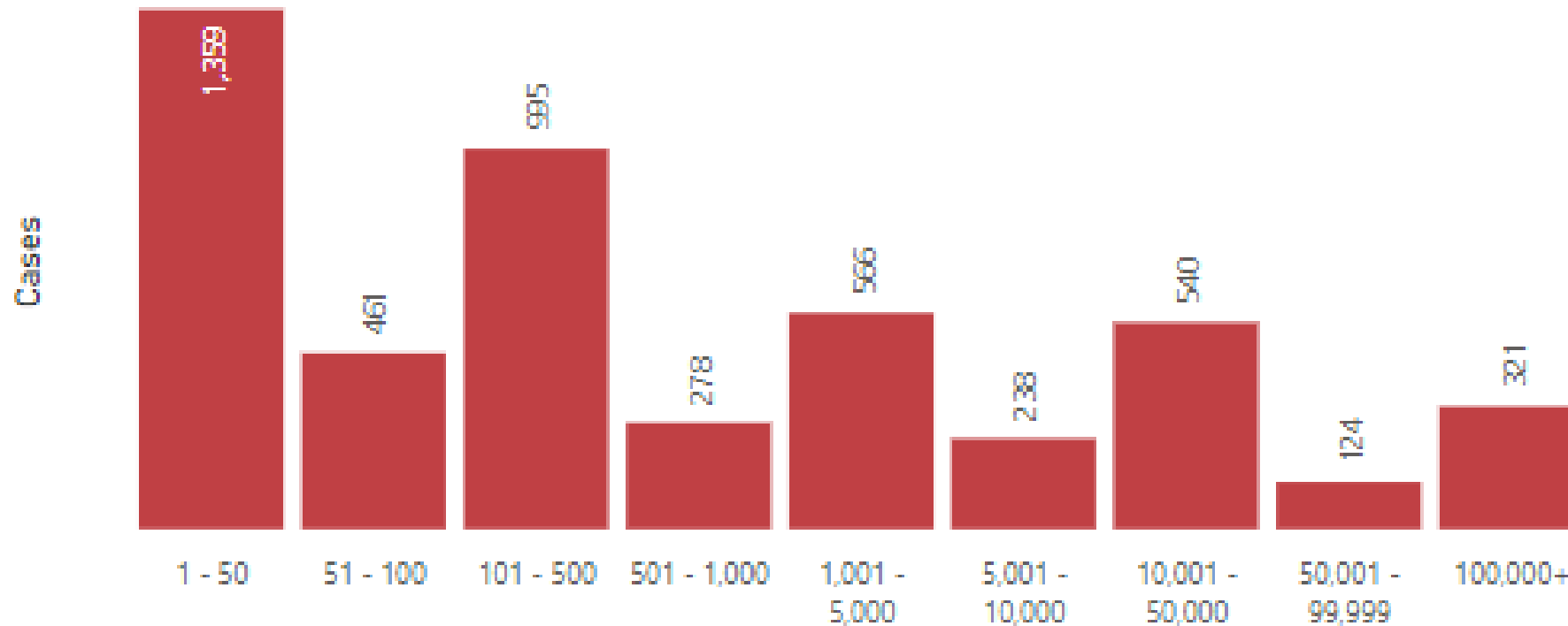
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* per 1 million people

Company Size

Size / Industry / Case Type

Cases by Company Size (# of Employees) ⓘ



Where Are We

Industry / Case Type Case Type / Industry

Industry / Case Type	Cases	% of Total Cases
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FP Flash Survey Reveals: West Coast Workplace Litigation Explosion May Soon Spread Across Country

Insights

4.06.22

West coast employers have been dealing with a new era of workplace litigation since the start of the pandemic, one that features increased claims, higher settlement demands, and more aggressive plaintiffs' counsel – and if past trends hold true, businesses across the country may soon also face the same fate. That's according to the results from the most recent FP Flash Survey, where nearly 350 employers across the country provided their insights to Fisher Phillips from March 10 to 18. Also notable from the survey: employers in the retail, hospitality, healthcare, and staffing fields have been more acutely impacted by what some fear may be the "new normal" in workplace litigation. [You can click through here to comb through the detailed findings on your own](#), but this Insight will summarize the five most intriguing conclusions gleaned from the survey results.

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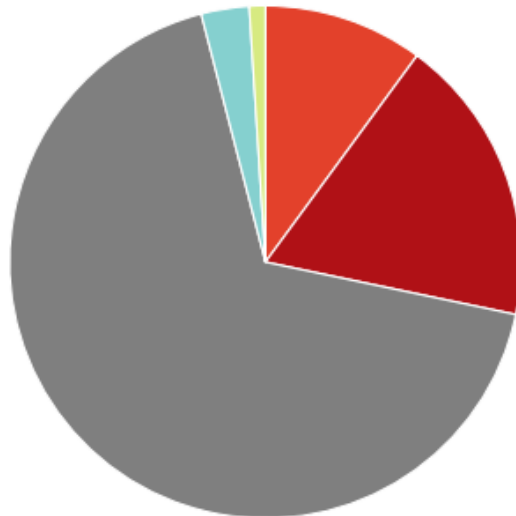
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Where Are We Headed?

1

What kind of change have you seen in the *number of workplace-related lawsuits* against your organization since the pandemic started?

28% of employers have seen a mild to significant increase



■ Significant increase	10%
■ Mild increase	18%
■ No real increase or decrease	67%
■ Mild decrease	3%
■ Significant decrease	1%

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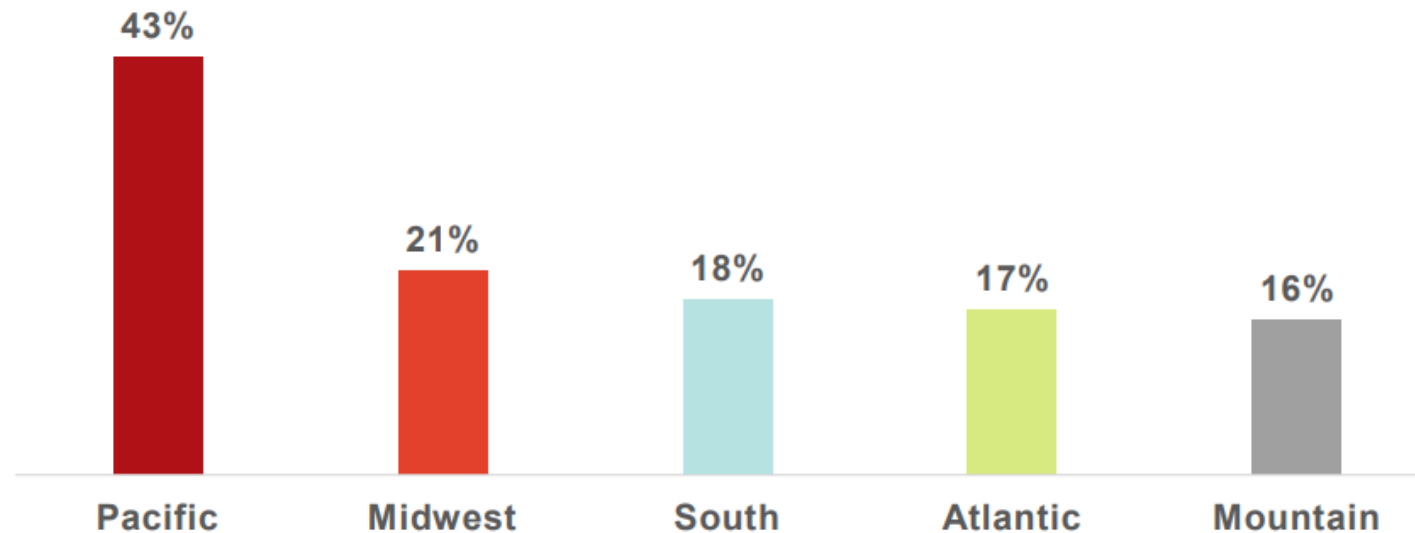
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Where Are We Headed?

1

What kind of change have you seen in the *number of workplace-related lawsuits* against your organization since the pandemic started?

By geography, employers that have seen a mild to significant increase



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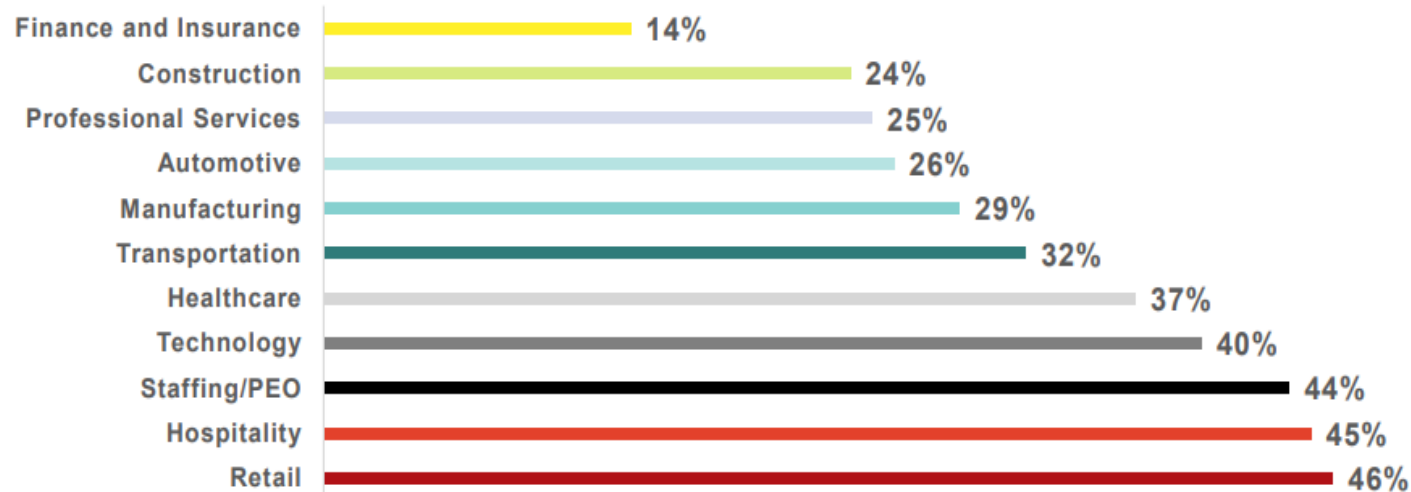
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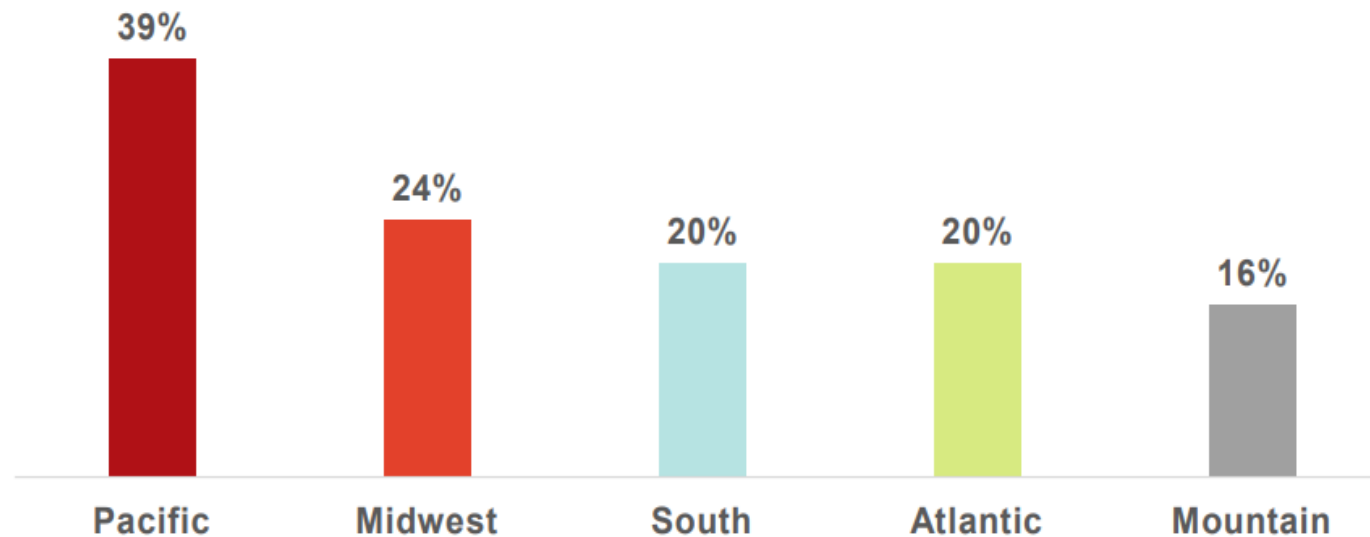
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Where Are We Headed?

2

How would you characterize the *amount of compensation sought in workplace-related lawsuits* against your organization since the pandemic started?

By geography, employers that have seen a mild to significant increase



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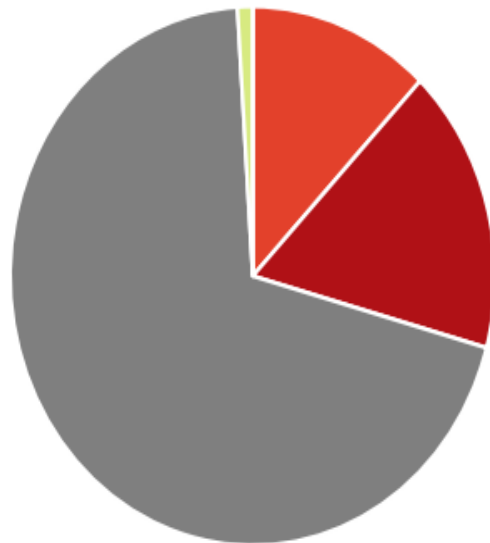
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Where Are We Headed?

3

What kind of change have you seen in terms of the *level of aggression* from plaintiffs' attorneys in workplace lawsuits since the pandemic started?

29% of employers have seen a mild to significant increase



■ Significant increase	12%
■ Mild increase	17%
■ No real increase or decrease	69%
■ Mild decrease	1%
■ Significant decrease	0%

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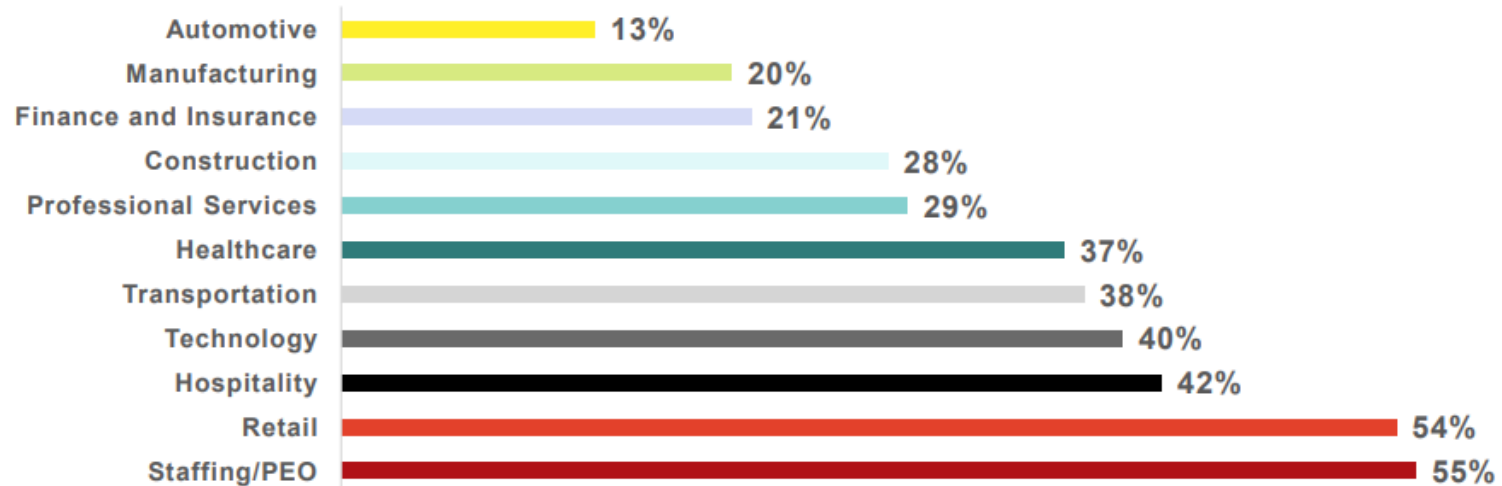
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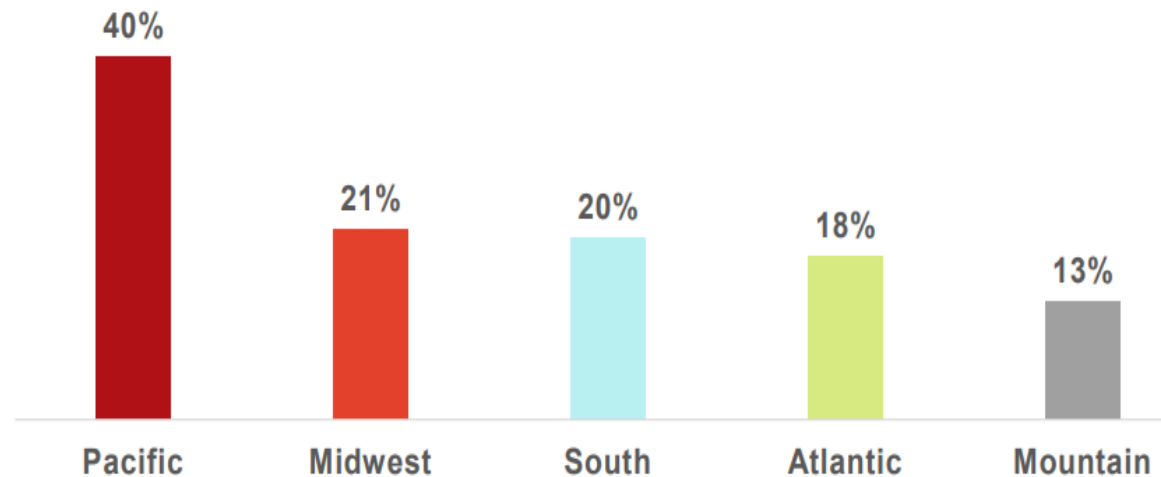


Where Are We Headed?

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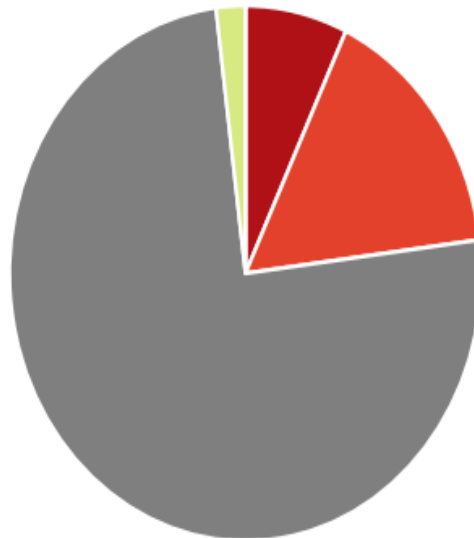
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Where Are We Headed?

4

How would you characterize the *final settlement amounts* you are reaching in workplace-related disputes against your organization since the pandemic started?

23% of employers have seen a mild to significant increase



■	Significant increase	7%
■	Mild increase	16%
■	No real increase or decrease	75%
■	Mild decrease	2%
■	Significant decrease	0%

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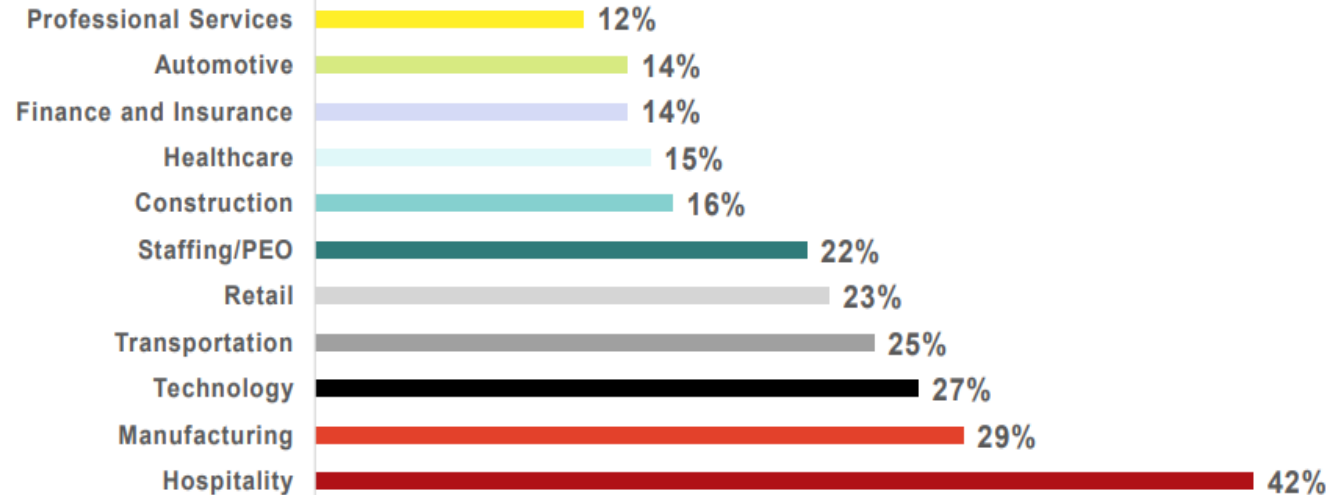
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Where Are We Headed?

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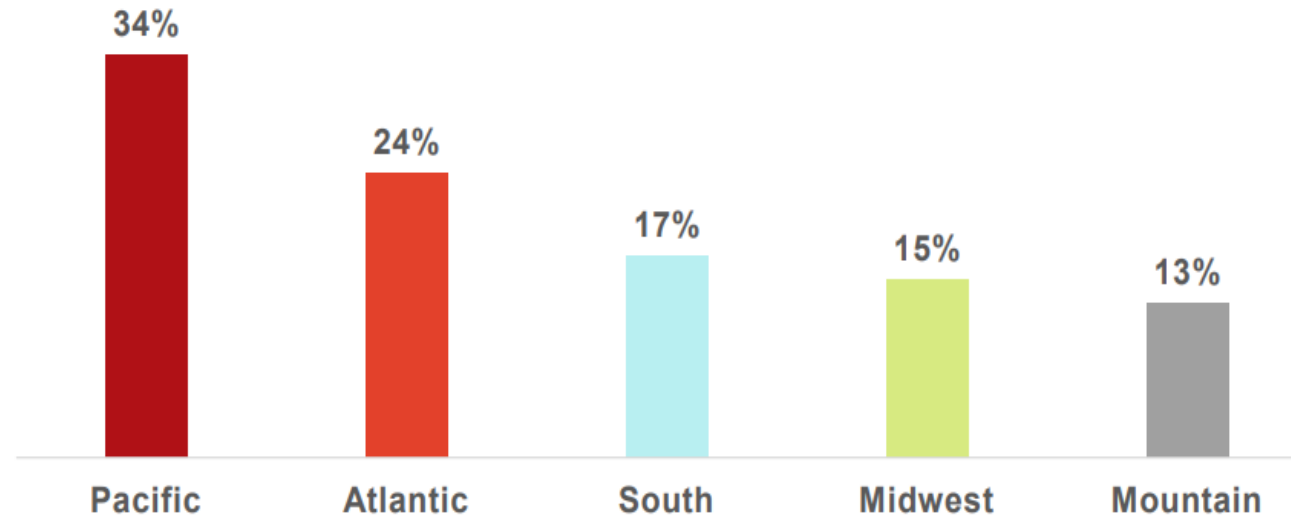
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Where Are We Headed?

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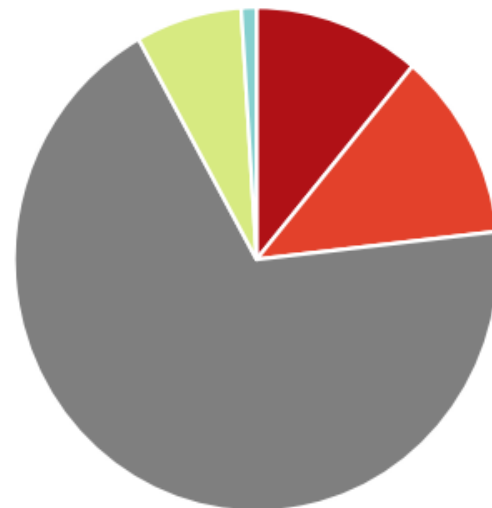
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Where Are We Headed?

5

How would you describe how the appetite of your organization to fight workplace-related lawsuits has changed overall since the pandemic started?

23% of employers are slightly to far more willing to fight



■ Far more willing to fight	11%
■ Slightly more willing to fight	12%
■ No change	68%
■ Slightly more inclined to settle	7%
■ Far more inclined to settle	1%

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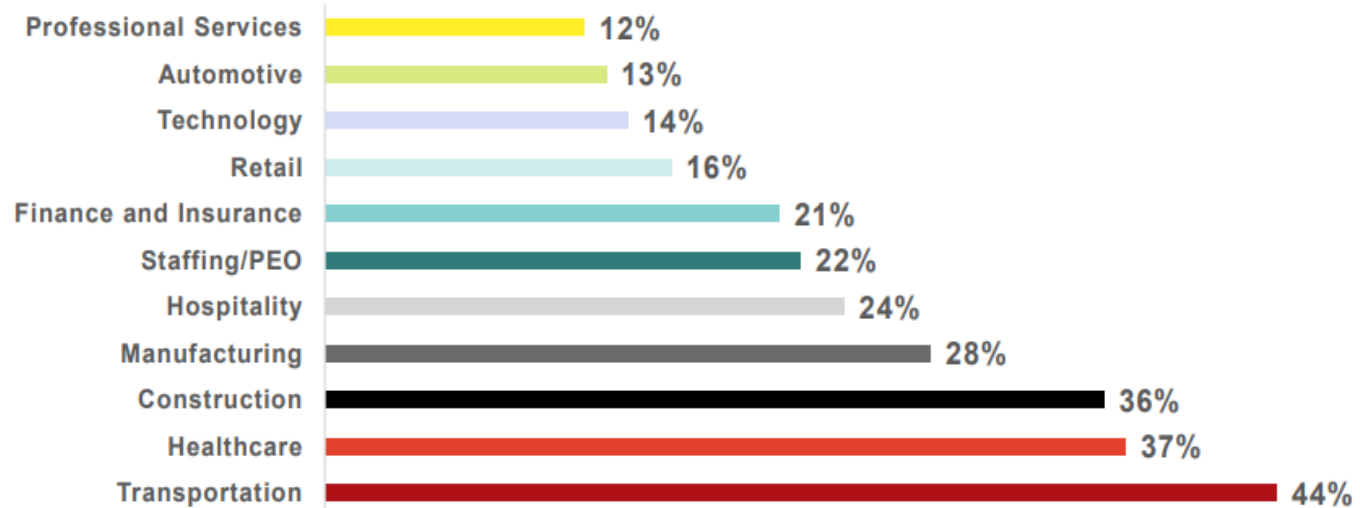
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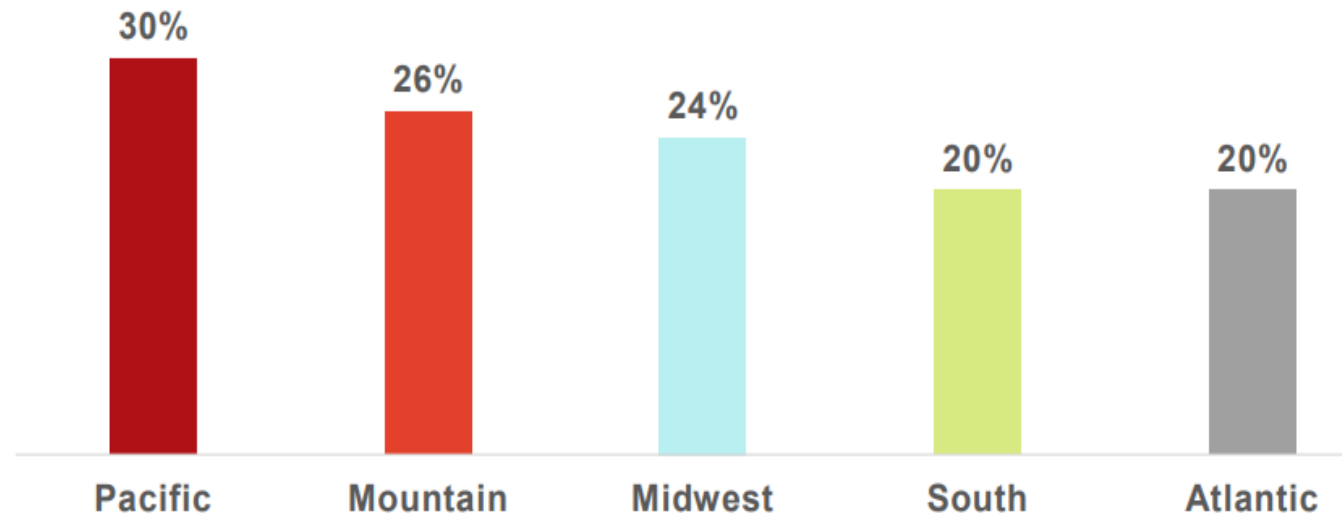
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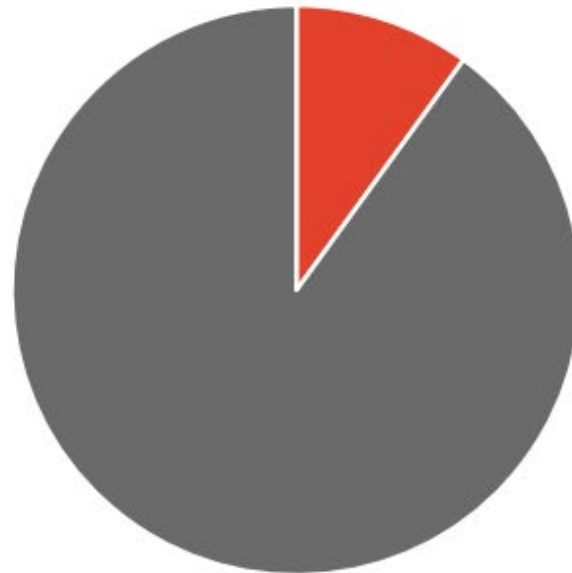
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Where Are We Headed?

6

Have you *faced a COVID-19-related workplace lawsuit or demand?*

10% of employers have faced a COVID-19-related workplace lawsuit or demand



■ Yes 10%
■ No 90%

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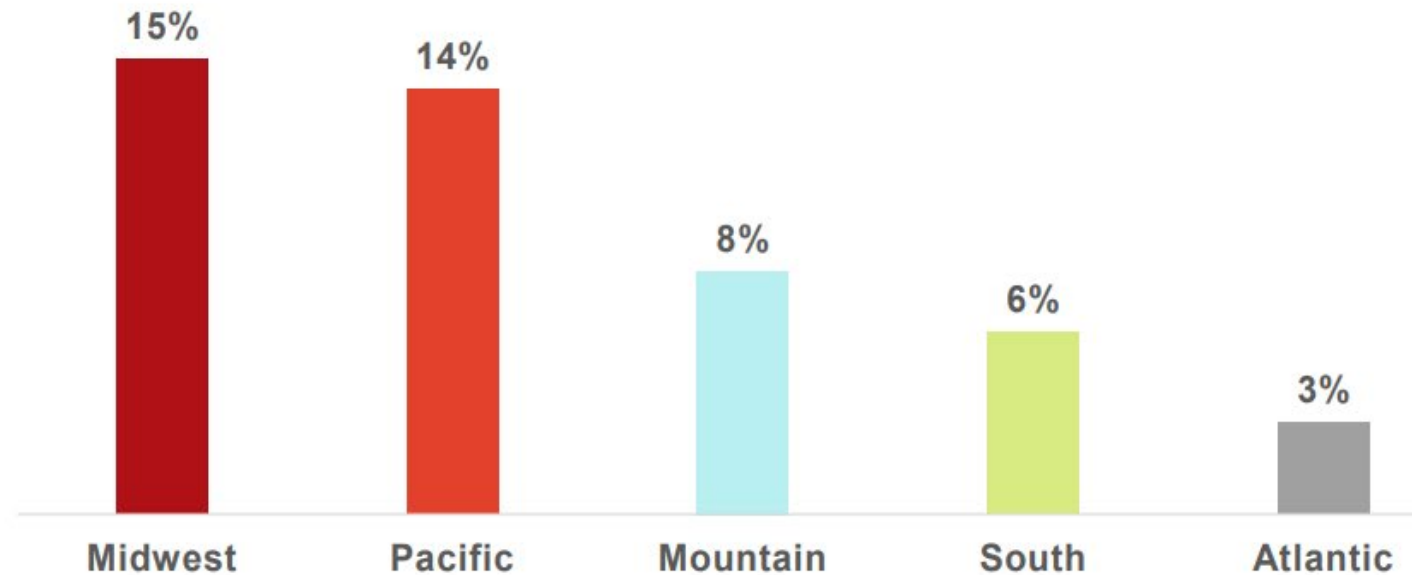
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Where Are We Headed?

6

Have you *faced a COVID-19-related workplace lawsuit or demand?*

By geography, employers that have faced a COVID-19-related workplace lawsuit or demand



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Where Are We Headed?

“With increased protections of employee rights under both state and federal laws – not to mention state and federal legislation to limit the enforceability of arbitration agreements – employers across the country should be prepared for more lawsuits over the next few years”

“These will include harassment and retaliation claims based on sex and disability, and wage claims as a result of decisions that employers made over the last few years due to COVID layoffs, remote work, and vaccine mandates.”

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Where Are We Headed?

“We are seeing unreasonably aggressive demands and irrational positions being taken by plaintiffs’ attorneys in litigation, and we fully expect that to continue.”

“It’s been disappointing and frustrating to also see an increase in the overall complete lack of professionalism and civility that has traditionally been expected amongst professionals and required by the rules of court. The sides are more polarized and eager to fight, and likely will be for the next several years.”

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Where Are We Headed?

“Healthcare employers have been in the eye of this storm since it began, and that trend shows no signs of changing. Vaccination mandates led to an unprecedented number of requests for religious and medical accommodations, and disputes over those certainly led to a spike in claims.

Moreover, widespread staffing shortages, evolving safety standards, and tight budgets tend to increase stress in an industry that was already under intense pressure. Such tensions and tough decisions are also fueling increased COVID-related litigation.”

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TODAY'S ROADMAP

1. Where We Are
2. Where We Are Headed
3. **Areas to Watch:**
 1. Remote Work
 2. Leave and Accommodation
 3. Retaliation / Safety
 4. Wage-Hour
4. Key Take Aways

What to Watch Out For

1. Remote Work
2. Leave and Accommodation
3. Retaliation / Safety
4. Wage-Hour
 1. Reimbursement
 2. Timekeeping / Compensable time
 3. Off-the-Clock Work
 4. Regular Rate
 5. Meal / Rest Periods



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Remote Work and Employee Leave

- Management difficulties and a lack of documentation
- Accommodation requests
- Wage Hour claims
- FFCRA or similar lawsuits
- Employee Privacy
- Employer Privacy



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Remote Work – Reimbursement

- Torres v. Fox Broadcasting Co. LLC (Los Angeles) – class action for home office expenses required for performing work-related duties during pandemic – including phones, internet and electricity.
- Orange County – class action alleges that Anyone Home, Inc. failed to provide reimbursement for her and other employees' home internet, home telephone, personal cell phone, personal computer, utility costs, office furniture, and insurance.

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Wage & Hour: Reimbursement

Employees must be reimbursed for all expenses

- Labor Code Sec. 2802 – requires employers to **reasonably** reimburse California employees for “all **necessary** business expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties.”

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Wage - Hour: Reimbursement

- *Cochran v. Schwan's Home Service, Inc.* – extended the expense reimbursement requirement to cover personal cell phone usage where the employer does not otherwise provide the equipment and/or a cellular plan.
- *Lawson v. PPG Architectural Finishes* – the court dismissed plaintiff's claim for reimbursement of his home internet where the evidence showed he had been provided with a company-owned mobile hot spot. The court rejected plaintiff's contention that the superior speed and convenience of his home internet plan created an obligation to reimburse.

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Wage & Hour: Reimbursement

The Traps in the COVID Era:

- Internet
- Cell phone use
- Personal Protective Equipment (PPE)
- Any other items or tools required by employees (power, desks, computers, printers)

Ask yourself:

- Is it necessary?
- How much is reasonable?
- How should you reimburse?

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Remote Work – Employees Who Moved



- What do you do when you are set to have employees return and someone tells you they moved?
- Out of State Issues
 - Local laws apply
 - Tax issues
- Pay Equity Concerns – location as bona fide factor?
- What about the nomadic workforce?

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Remote Work – What’s Compensable?

Commutate time as compensable?

- Any time a fully remote worker leaves their home, the time spent “commuting” may be compensable and the mileage is reimbursable
 - Can you limit the times the employee needs to come to the office and/or schedule meetings after this “commute?”



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Remote Work – What’s Compensable?

Hours Worked –California

The California Wage Orders define “hours worked” as:

*the time during which an employee is **subject to the control** of an employer or suffered or permitted to work, whether or not they are required to do so.*

**** Whether they are under your control is a much more difficult question when they are remote.**

**** Is the employee spending the time, or performing the task, for their own enjoyment or benefit? Does the Company benefit in any way?**

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Remote Work – What's Compensable?

Is someone under your control when:

- When they are unvaccinated and spend time on site every Friday getting their covid test?
- When they are standing spaced apart waiting for the time clock or bag check?
- When they are not working, but answer work emails at home?
- When they pause to throw a load of laundry in while in between calls?
- When they are on their lunch break even though sitting at their home desk?
- When they are getting the vaccine?
- What if they have a symptom and are sent home – do they get reporting time pay?

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Remote Work – Controlling the Work

Controlling Off-the-Clock Work:

- An off-the-clock claim exists for any non-exempt employee who is permitted to have e-mails and data routed to their personal or company device
 - Response: Can you geofence the Company phone?
- Managing Meal / Rest Periods; ensuring no interruption

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Remote Work – As an Accommodation

- Baker-Redman v. Premise Health Employer Solutions – alleged failure to accommodate claim based on employer's purported refusal to allow RN to work from home due to her asthma and her husband's medical conditions
- Schuler v. Axiom Solutions – failure to accommodate and wrongful termination claims based on employer's alleged refusal to grant plaintiff's repeated requests to work from home due to her auto-immune disorders

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Remote Work – As an Accommodation

- Remote work is a reasonable accommodation
- Is it an undue hardship?
- How do you say no when you have said yes for 2 years?



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Leave – As an Accommodation

- Blaise v. Regis Woods – LPN claims employer failed to accommodate her request not to work in COVID-19 unit due to chest pains, high blood pressure & diabetes
- Harbin v. First Care Management Company – alleged failure to accommodate a pregnant employee

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Leave Issues for Employees

- Crider v. Lute Supply – alleged retaliation for requesting intermittent leave to care for children due to Covid-related school closure
- Bowden v. Brinly-Hardy Company, Inc. – plaintiff alleges she was terminated for using FMLA when she began experiencing flu-like symptoms and was instructed to isolate by her doctor
- Colombe v. SGN – alleged failure to provide notices and pay for quarantine leave in violation of the FFCRA
- Redmon, et al. v. Advanced Electrical Systems – alleged failure to pay for time off to quarantine in violation of the FFCRA

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Retaliation / Safety –Unsafe Working Conditions

- Failure to provide PPE
- Non-compliance with COVID-19 safety protocols
- Avoiding claims/positioning the best defense
- Negligence / wrongful death



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Retaliation/Wrongful Termination

- King v. Trader Joe's – Plaintiff claims employer terminated his employment in retaliation for his complaints to management and in a private Facebook group chat about the store's alleged failure to implement appropriate safety protocols
- Boulton et al. v. DC Beckley – Plaintiffs claim employer wrongfully terminated their employment due to their refusal to re-open in person shopping at smoke shops in violation of executive orders
- Franklin v. The Prince Care Group – Plaintiff claims she was fired in retaliation for complaining about employer's alleged failure to comply with executive orders

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Retaliation / Discrimination

- Typical workplace discrimination with a COVID-19 context
- Pregnancy/disability accommodations
- COVID-19 as a disability
- Positioning yourself for the best defense
- Religious accommodation

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Same Old Plaintiffs' Bar ... New Tricks



- The California Labor Code hasn't changed much in the last few decades.
- But the plaintiffs' bar is pushing for new, more aggressive interpretations.
- Minor technical violations can be costly even if a violation is established through a new legal theory
- COVID has provided a new vehicle for those claims

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Wage - Hour Claims by Employees

1. Tack on wage-hour claims
2. Reimbursement claims - PPE
3. Timekeeping
4. Off-the-clock work claims
5. Exemptions
6. Regular Rate and Change in Pay
7. Meal and Rest Period Claims

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Wage - Hour: Tack On Claims

Aguayo v. Shield N Seal

Employee claims to have been exposed to people without masks early on. Employer offers remote work; he works remotely until September 21 when company requires that he return. He complains about prior/current lack of safety and the fact that he has asthma.

He Claims:

He was terminated same day in retaliation; and, Meal breaks interrupted with calls while working remotely, calls received at end of shift forced him to work off the clock; and reimbursement for work supplies, cell phone and home internet.

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Wage - Hour: Tack On Claims

Venta v. Kairos Management One

Employee claims that she tested positive for COVID-19 on May 5, and admits that her Orange County Employer provided medical leave for two weeks. However, she complains that after the two weeks, she was required to produce a negative test before returning. She claims couldn't get a negative test until June 4. When she finally provided it, Employer told her they had already hired new staff and did not have any availability for her.

She claims:

She was terminated in retaliation for taking COVID medical leave, AND

She was never told about or provided with rest breaks. She also claims that her meal periods were interrupted five days per week. Finally, she claims that she worked five overtime hours per week for two months, but was not paid time-and-a-half for those hours.

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Wage - Hour: Reimbursement

- **Merced** – PAGA action filed alleging that Foster Farms failed to provide and reimburse employees for the cost of personal protective equipment (PPE) – masks, gloves, and hand sanitizer without reimbursement.



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Wage - Hour: Timekeeping

Compensable time must be tracked:

- Labor Code requirement
- What should they track?
 - ✓ Start time
 - ✓ Lunch in/out
 - ✓ End time
- Make sure to capture all time – including meetings, pre-shift and post-shift work.
- Maintain accurate time records.
- This is MUCH more difficult for remote workers



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Wage - Hour : Off-The-Clock Work

- Evans, et al. v. Dart, et al. (Northern District of Illinois) – failure to pay for pre and post-shift time spent sanitizing uniforms
- Harwell-Payne, et al. v. Cudahy Place Senior Living, et al. (W.D. Wis.) – failure to pay for time spent getting temperature checks and completing symptom surveys
- Luna, et al. v. Penske, et al. (Sacramento) – failure to pay for time spent getting temperature checks

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Wage - Hour: Off-The-Clock Work

- We must pay for all hours worked, and “all hours worked” is taken *very literally*.

This means all time:

- Worked without your authorization;
- Nominal stints of time;
- Time that doesn't directly/immediately benefit you.

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Wage - Hour: Off-The-Clock Work

The biggest problems:

1. Preparatory activities (“get ready” time)
2. Concluding activities (“clean up” time)
3. Waiting time
4. Donning and doffing
5. Rounding
6. Technology
7. Managers who don’t understand the rules

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Wage - Hour: Worker Classification

Death of Salesman, an Outside Salesman:

- Assess classifications of outside salespeople
- In order for the exemption to apply, the employee must spend more than 50% of their time outside of a home or work office in sales-related tasks
- The law is not yet developed on whether video meetings, done from home or office, or calls done from home, following up on a meeting done at a client's business, counts towards the 50% under California law
- The pandemic significantly limiting travel and face-to-face meetings has blurred the potential application of this exemption

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Wage - Hour: Worker Classification

Lost Exemptions / Misclassification Claims:

Minimum Salary Threshold - Employers may not reduce the compensation for any exempt (salaried) employee below the minimum salary level threshold for the exemption.

Reclassifying Means Different Rules - Reclassifying an employee from exempt to non-exempt means the employer must maintain time records, compensate for weekly and daily overtime work, and provide meal and rest breaks. Reclassified employees are not used to clocking in/out and taking meal/rest periods and fail to do so.

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Wage - Hour: Regular Rate

Changing Compensation:

- To avoid layoffs, employers reduced employee pay, reduced employee hours or duties, and in some instances created incentives for more work (like healthcare).
- Employers also offered hazard pay, bonuses, extra PTO, and shift differentials to reward behavior and help recruit/retain



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Wage - Hour: Regular Rate

Incentive Pay:

Hazard Pay - Increases in pay were common for certain essential employers seeking employees to work during the pandemic, either via higher hourly rates or bonuses. This is permissible but must factor into the “regular rate” and OT – a “weighted average” for more than one rate.

Bonuses - Many types of bonus payments were paid out to provide assistance or incentivize certain behavior. But, most all bonuses must be included in the “regular rate” in calculating overtime pay for non-exempt employees.

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Wage - Hour: Regular Rate

Vaccine Bonus

A new, but well meaning General Manager wants to incentivize those members of the in the Warehouse to get the vaccine. So, he states that he will give a \$100 bonus to any employee who gets the first shot, and \$200 to anyone who gets the second shot. He has done something similar in the past to encourage attendance.

The GM pays the bonus out of his own pocket. He doesn't tell human resources and he doesn't include the bonus in the pay plan, and therefore withholdings are not taken out, nor is overtime paid on the bonus.

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Wage - Hour: Regular Rate

- Unless exempt, you must pay *1.5 times their “regular rate of pay”* for all time worked *in excess of 40 hours* in any workweek or *over 8 hours a day* (don’t forget double time too)
- Regular Rate of Pay =
 - ✓ Includes **all remuneration** for employment except PTO, vacation pay, sick pay, etc.
 - ✓ Otherwise, the regular rate must include commissions, salary, piece rate, nondiscretionary bonuses, and incentives.



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Wage - Hour: Wage Statement

- Watch multiple rates (like hazard pay rates / shift differentials) – displaying multiple and the resultant OT on paystubs properly can be difficult.
- The pandemic has ushered in a number of new sick leave laws. Some of those laws include paystub requirements, like our most recent California sick leave going into effect March 29, 2021.
- Make sure to create a separate pay category for these paid sick leaves, to track for compliance and tax credit purposes, as well as to display the available leave.

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Wage - Hour: Meal Periods

Meal period claims have been the most popular wage-hour claim for over a decade. That held true during the pandemic and is expected to increase:

1. Remote workers are harder to police and easier to interrupt
2. Meal period claims are easy “tack on” claims, and
3. Recent case law makes building a defense more difficult.



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Wage - Hour: Meal Periods

REMEMBER - Donohue v. AMN Services – Facts:

- Employers **cannot engage in the practice of rounding time punches** – that is, adjusting the hours that an employee has actually worked to the nearest preset time increment – in the meal period context; and
- Time records showing noncompliant meal periods raise a **rebuttable presumption of meal period violations**, including at summary judgment stage

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Wage - Hour: Meal Periods

Donohue v. AMN Services – What does the opinion mean practically?

For a Lawsuit:

- Fighting class certification and PAGA is more difficult
- Summary judgement is more difficult – we will need to make a more substantial showing
- Witness statements / declarations will be critical for the defense
- Data analytics will be necessary and essential – do the compliant records presumptively show no violations?
- Emboldened plaintiffs' lawyers

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Wage - Hour: Meal Periods

Donohue v. AMN Services – What does the opinion mean practically?

For Your Prevention – NO more rounding *and*,

- You need more than just a compliant policy. You need:
- Training and reminders (repeatedly in safety/monthly meetings, newsletters, and routine employee memos or postings),
- A procedure for paying premiums,
- A procedure for confirming the reason for violations,
- A pay period or daily attestation,
- Discipline and terminations of employees who refuse to comply,
- Use a correction or improper lunch reporting form,
- Periodic review and auditing of your system, and
- Holding managers accountable and potentially tying compliance to their performance or even incentive comp.

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Wage - Hour: Rest Periods

Rest Periods During COVID

- Harder to enforce
- Harder to follow up
- Often stacked
- *Must be able to leave*

Examples:

- Answering phones, emails, or pagers during rest breaks;
- Appointments or other scheduling that does not realistically allow for rest breaks;
- Employees not being permitted to leave the premises;
- Employees combining rest breaks;
- Simply failing to educate employees on rest breaks.



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TODAY'S ROADMAP

1. Where We Are
2. Where We Are Headed
3. Areas to Watch:
 1. Remote Work
 2. Leave and Accommodation
 3. Retaliation / Safety
 4. Wage-Hour
4. Key Take Aways

Key Take Aways

- Implement a solid remote work policy proactively addressing remote issues
- Reevaluate your reimbursements
- Ensure safety remains a priority
- Have a designated person to address accommodation and leave issues
- Reconsider bonuses, shift differentials and other incentive pay
- Ramp up your meal / rest period compliance
- Watch your off-the-clock and timekeeping issues
- Stay up to date!



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