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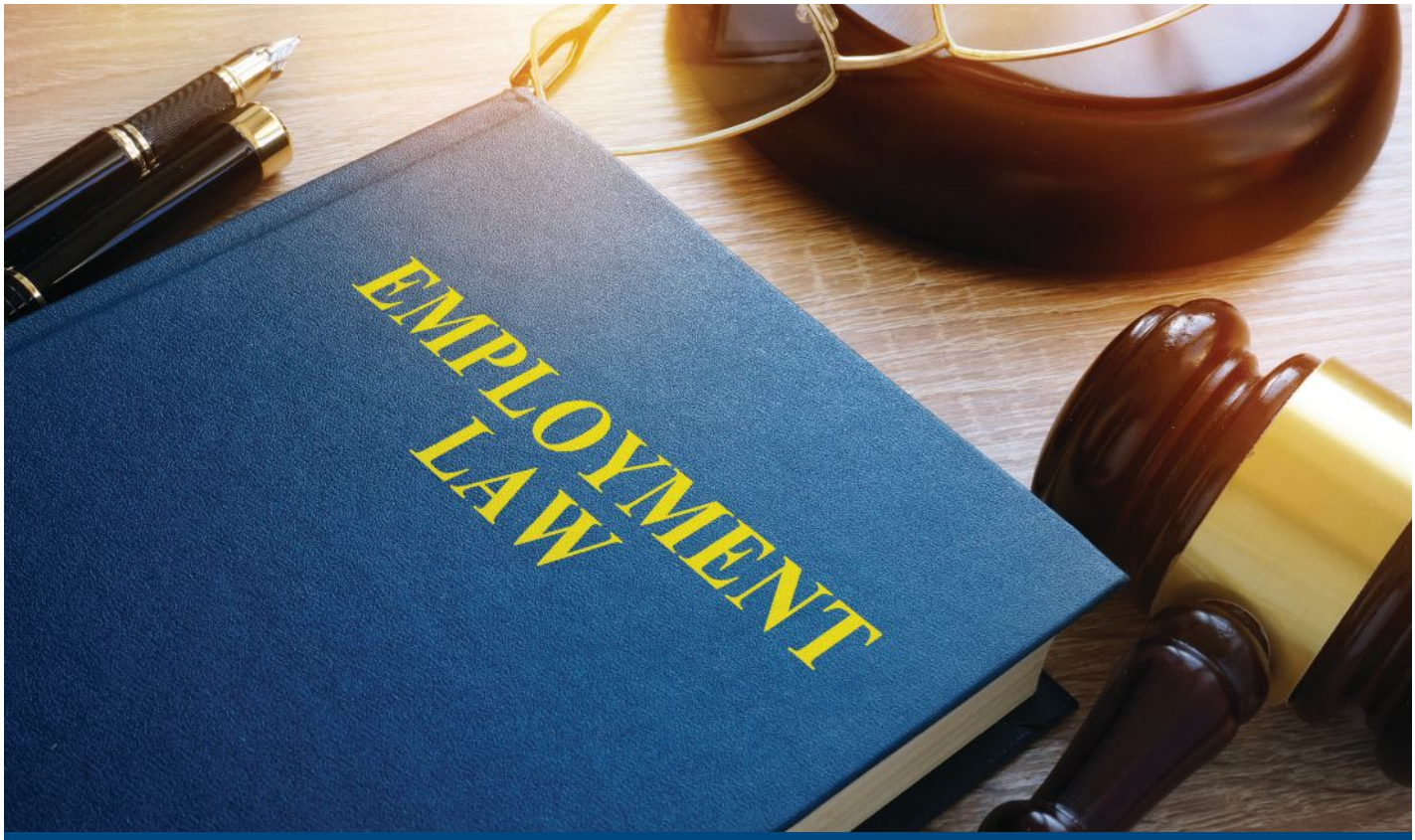
## 2021 YEAR IN REVIEW:
## Employment Law Roundup

## SLAYING THE 'MINI-TRIALS' BOGEYMAN:
## Reexamining Other-Acts Evidence

## Legal Issues to Consider with Remote-Work Policies




# 2021 YEAR IN REVIEW: Employment Law Roundup

By Elizabeth A. Favaro

To say the year 2021 kept employment law attorneys busy would be an understatement. From ever-changing COVID policies to new regulations stemming from a transfer of power in the White House, some employers have found understanding the evolving employment law landscape overwhelming. This article identifies what, in this author's opinion, were the top three employment law issues employers faced in 2021. This is not a typo. This article covers only three issues. Too much has changed in the last year, particularly given developments resulting from the COVID-19 pandemic, to publish a "Top Five" list, as *Laches* only contains so much real estate. But this list is nevertheless a doozy, in part because of the complexity of these issues, which all remain in flux and unsettled. If this article does nothing else, it will hopefully at least cause attorneys to take note of issues to pay close attention to as we look ahead to 2022, because the law is likely to change in all three areas listed below, yet again.

While other attorneys' "Top Three" lists might look different than mine, these are the issues that burned up my telephone line and email in 2021:

## 1. COVID: SICK LEAVE, MASKS, AND VACCINES (OH MY!)

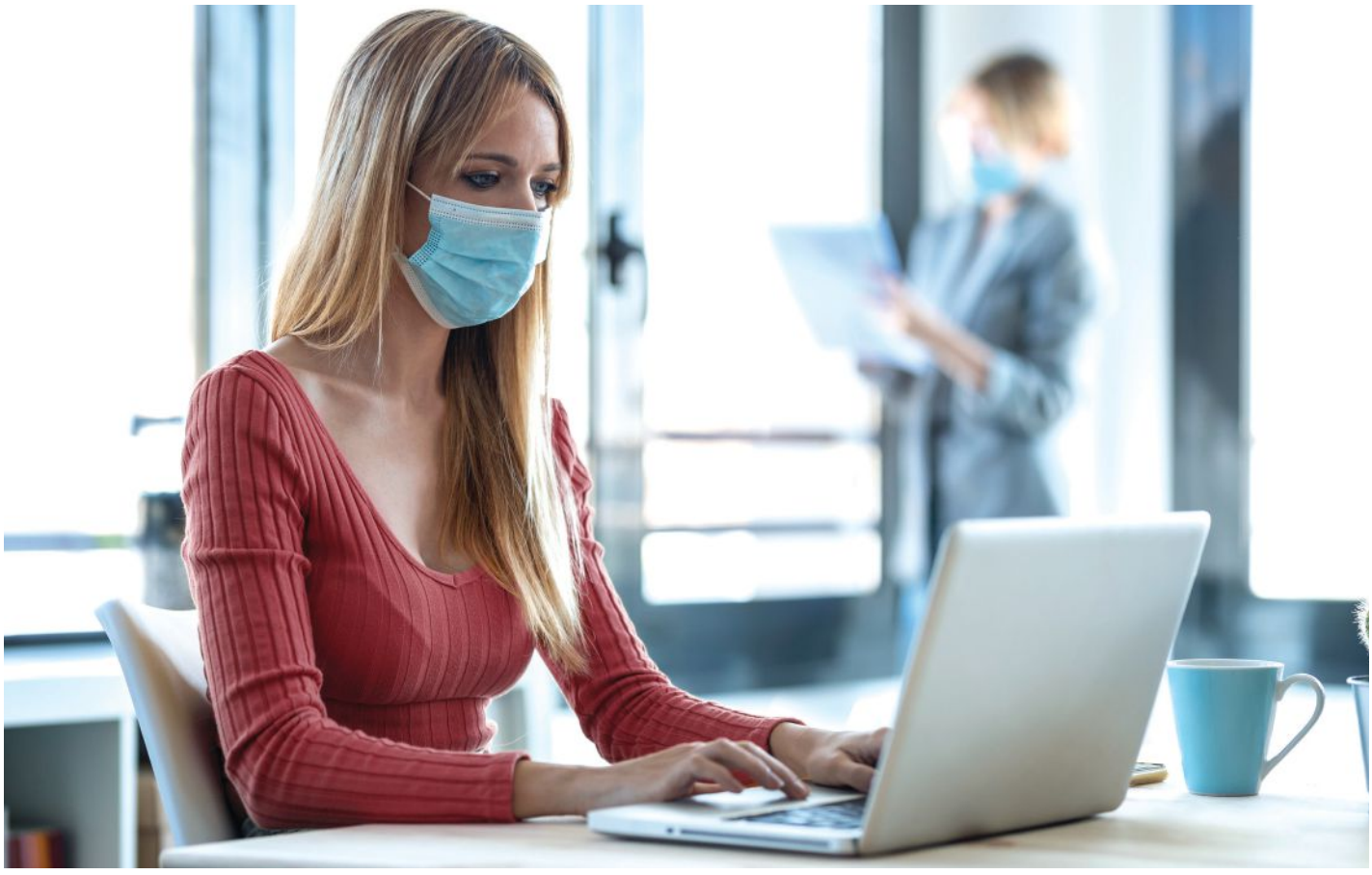
There is so much talk about COVID and the workplace, and this issue lands in the top spot due to its wide-ranging impact.

In the early part of the year, employers were still focused on COVID response and mask policies, and with good reason: There was no vaccine available for public distribution, and Michigan's COVID case counts were hovering at around 3,000 per week.[1] At the same time, the paid sick leave requirements under the Families First Coronavirus Response Act had expired, even though payroll tax exemptions remained available for employers that voluntarily paid for COVID-related sick leave through the end of September.[2] Expansions to state unemployment benefits were extended into April,[3] and federal unemployment expansions continued into September.[4]

Just as employers (and their lawyers) appeared to have a handle on this patchwork of state and federal laws, employers began inquiring about the legality of vaccine mandates. The Equal Employment Opportunity Commission (EEOC) released technical assistance midyear, which provided that employers could require employees physically entering the workplace to be vaccinated for COVID-19, so long as they complied with the reasonable accommodation provisions of the Americans with Disabilities Act (ADA) and Title VII of the Civil Rights Act.[5] The EEOC also clarified that, among other things, employers could (1) offer any type of incentive to employees to voluntarily obtain vaccinations from third parties (not the employer), such as pharmacies, personal health care providers, or public clinics, and (2) offer noncoercive incentives to employees to voluntarily obtain vaccinations administered by employers.[6]

Employers thus began asking this question: If it is legal, does that mean we should do it? From both a risk management and a business perspective, employers were faced with the choice of not mandating vaccines (and potentially increasing risk within the workplace) or mandating vaccines and potentially losing portions of their workforce. It was at that point that I began having weekly "COVID conversations" with my clients.

A common question many employers had as they weighed these options concerned the obligation to record adverse vaccine reactions under the federal Occupational Safety and Health Administration's (OSHA) regulations. Because OSHA generally requires employers to record certain work-related injuries and illnesses,[7] it initially said employers *did* have to record adverse reactions to COVID vaccines if they required the shot, but not if they simply recommended it. This directive caused confusion about what were required versus recommended vaccinations, and it created hesitancy among employers to mandate the shot, since an increase in recordable events could negatively impact a company's ability to attract and retain business. Citing a desire to avoid "any appearance of discouraging workers from receiving COVID-19 vaccination" and "disincentiviz[ing] employers' vaccination efforts," OSHA changed its position.[8] It removed its



prior guidance from its website requiring employers to record adverse reactions from mandated vaccines, and replaced it with guidance indicating that it would not enforce its usual recording requirements when an employee had an adverse reaction to a mandatory vaccine, at least through May 2022.

Another common concern of employers was managing employee fears of returning to the physical workplace after not working at all or working remotely during the better part of 2020. This issue is particularly difficult when employees continuing to recover from long-term effects of COVID or at high risk of contracting COVID are concerned about returning to the workplace where vaccine mandates are not in place. Requests for remote work arrangements increased, and some employees asked for them as an accommodation under the ADA. Not surprisingly, the denial of such accommodation requests can lead to lawsuits, as a company in Georgia recently discovered. The EEOC filed the first-of-its-kind remote-work-bias suit in September 2021,[9] alleging that despite an employee's documented history of a pulmonary condition that increased her risk of contracting COVID, the employer refused to allow the employee to work remotely and then fired her for performance-related issues. While the employer's vaccine policy is not in question in the lawsuit, this legal proceeding highlights the challenges employers have faced with concerns over workplace safety and finding methods of addressing employee health risks.

Other common COVID-related questions included MIOSHA's suspension of all prior emergency rules to track OSHA regulations,[10] the development and implementation of mask policies (particularly in industries that serve the public), the changing guidance from the Centers for Disease Control and Prevention, and enhanced sick-leave policies to assist workers who contracted COVID-19 or required time off to recover from the vaccine.

The lesson from 2021? There is no one-size-fits-all approach as it relates to employers' methods of managing the ongoing pandemic. What makes a workplace safe depends on many factors, including the nature of an employer's business, the amount of interaction employees have with each other and the public, the level of herd immunity achieved by employees within a particular workplace, etc. And these safety considerations must be balanced against employees' constitutional rights and each employer's specific business interests. One could argue that OSHA's Emergency Temporary Standard (ETS) mandating COVID vaccines or mandatory testing and masking requirements for private businesses employing 100 or more people[11] gives employers some certainty as it relates to mandating vaccines. But the ETS, which was released at the beginning of November 2021, is facing legal challenges: It was stayed by the Fifth Circuit, the stay was dissolved by the Sixth Circuit, and at the time this article was submitted for publication, an application for stay was under consideration by the United States Supreme Court.[12] If the Supreme Court enacts a stay, employers will continue to make choices for themselves on matters such as vaccines, testing, and masking, guided by what at least right now is an unsettled legal framework.

## 2. JOINT EMPLOYER RULE RESCINDED

This development received little fanfare, but it takes the No. 2 spot because of its importance in the wage/hour arena, as well as the number of potentially impacted employers. Joint employer situations arise in a variety of contexts, but perhaps one of the most common scenarios is when an employee is placed with a business by a staffing agency. By some accounts, staffing is a $174 billion industry, and it is also one of the fastest growing, with more than 20,000 staffing companies in the United States.[13]

The joint employer doctrine recognizes that under certain circumstances, more than one business can be deemed responsible for wage and hour violations pertaining to a single employee under the Fair Labor Standards Act (FLSA). The definition of "joint employer" is critical to providing employers certainty from a liability perspective, since under the joint employer doctrine, joint employers are jointly and severally liable for damages for FLSA violations.

The Trump administration's Department of Labor attempted to make things easier for employers by announcing a new "Joint Employer Rule" — a four-part balancing test that evaluated which employer hired the employee, supervised and controlled the employee's employment conditions, determined the employee's rate and method of payment, and maintained the employee's employment records.[14] This rule not only offered clarity, but it also permitted employers to exercise control over nonemployees without risking liability for wage and hour violations. However, the rule was widely considered to be too narrow, as it tended to ignore other features of an employee's relationship with entities that did not sign the employee's paycheck but that maintained control over the employee's workday.

The Trump administration's Joint Employer Rule was short-lived. In addition to legal challenges, particularly in the Southern District of New York, which not only criticized its narrow scope but also found that it conflicted with the text and purposes of the FLSA,[15] the Biden administration's Department of Labor rescinded the rule altogether. The final rule, which was released on July 29, 2021, and became effective on October 5, 2021, does not specifically define "joint employer." Instead, the determination of joint employer status will likely require, at least for now, application of the prior "economic realities test," which balanced six factors focused on which employer exercised greater control over employees and strived to avoid misclassification of workers as independent contractors. Attorneys who represent clients involved in staffing relationships, or any other joint employer arrangement, would do well to pay attention to this issue until the law becomes more certain.

## 3. DRUG TESTING POLICIES: HOW TO TREAT MARIJUANA?

This issue earns a spot on this list because of the number of employers that operate in other states and the changing landscape concerning legalizing marijuana, which is trending strongly nationwide and in Michigan toward protecting workers who use marijuana both medicinally and recreationally. The federal House Judiciary Committee approved a bill in September 2021 to decriminalize marijuana and eliminate its status as a Schedule I drug. In Michigan, marijuana is legal for use medicinally and recreationally, yet there are a number of states that have not yet legalized marijuana at all, or at least not for recreational use.

Due to these developments and others, a big question in 2021 from employers centered on whether preemployment and other testing for marijuana use was legal and necessary. Whether to continue zero-tolerance drug policies or to relax them to, for example, eliminate preemployment tests for marijuana is largely a function of the type of work employees perform. If an employer's business involves individuals who drive commercial vehicles such that they are covered by the federal Department of Trans-

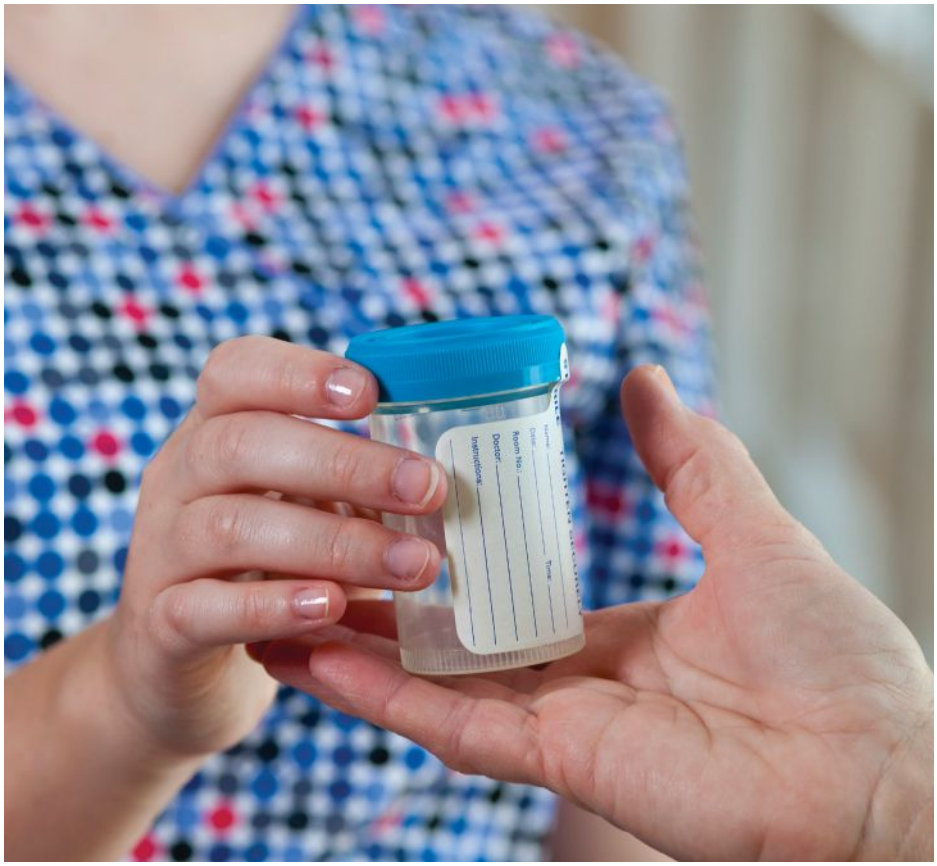
portation's (DOT) jurisdiction,[16] then DOT standards apply. Businesses employing individuals working high-risk jobs; jobs in the construction or manufacturing industries; or jobs that require the use of heavy machinery or equipment, working a distance from the ground, or engaging in other manual labor tend to err on the side of maintaining strict drug-free workplace policies. There is currently no law on the books in Michigan preventing employers engaged in such businesses from implementing and enforcing such policies.

But outside of businesses operating in these categories, many employers have opted to treat marijuana like alcohol: no prescreening for marijuana and ignoring off-hours marijuana use. Employers that take this position have also appropriately maintained prohibitions against coming to work under the influence. Under Michigan law, such policies are permissible and employees who violate them may be lawfully fired. Michigan law also does not protect employees from discrimination on the basis of medical use of marijuana, and employers can lawfully deny accommodations to employees who request one to use medical marijuana while on the job.

One important note: Employers who choose to terminate employees for off-duty marijuana use may soon learn that such employees will be eligible for unemployment benefits. The Michigan Unemployment Insurance Appeals Commission is set to determine if a positive drug screen for the use of marijuana not while on the job should automatically disqualify an employee from receiving unemployment benefits. If the Commission finds that off-duty marijuana use is not disqualifying, employers will still retain the ability to fire "at-will" employees, but employers may wish to consider updating their drug testing policies.[17]

## CLOSING THOUGHTS

If reading this article felt a little bit like "drinking from a fire hose," welcome to the life of a modern-day employment law attorney! The law is changing so quickly and dramatically that by the time this article is published, some of the things written here (in November 2021) may be out of date already. The key to being a successful employment law attorney in 2022 will not only be vigilance in keeping up with and understanding legal developments, but also remembering to alert clients when changes arise, as they inevitably will.



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Footnotes:

1. *nytimes.com/interactive/2021/us/michigan-covid-cases.html.*
2. *dol.gov/agencies/whd/fmla/pandemic.*
3. *michigan.gov/coronavirus/0,9753,7-406-98158-556904--,00.html.*
4. *michigan.gov/leo/0,5863,7-336-94422_97241_89982_92608_63224_104811---,00.html.*
5. *eeoc.gov/newsroom/eeoc-issues-updated-covid-19-technical-assistance.*
6. *Id.*
7. 29 CFR § 1904.
8. *osha.gov/coronavirus/faqs#vaccine.*
9. *EEOC v. ISS Facility Services, Inc.*, Case No. 1:21-cv-3708 (N.D. Ga.).
10. *osha.gov/sites/default/files/covid-19-healthcare-ets-reg-text.pdf.*
11. *federalregister.gov/documents/2021/11/05/2021-23643/covid-19-vaccination-and-testing-emergency-temporary-standard.*
12. *supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/21a250.html.*
13. See *murrayresources.com/10-staffing-industry-facts-you-probably-didnt-know.*
14. 29 CFR § 791.2(a)(1)(i)-(iv).
15. *New York v. Scalia,* 490 F Supp 3d 748, 761 (S.D. N.Y., 2020).
16. Employees are covered by DOT regulations if they drive a commercial motor vehicle that (1) has a gross vehicle weight rating of 26,001 or more pounds, (2) is designed to transport 16 or more occupants, or (3) is of any size and is used in the transport of hazardous materials that require the vehicle to be placarded. 49 CFR § 382.
17. The amicus brief filed by Michigan's attorney general — an interesting read — is available here: *michigan.gov/documents/leo/AG_Amicus_Curiae_in_Support_of_Claimants_732249_7.pdf.*