

The Top 10 Labor and Employment Issues Keeping Retailers Up at Night in 2021

Article By:

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Now that the inauguration has passed and the Biden administration has begun its work, it is a good time for retailers to take stock of the labor and employment issues that are likely to assume prominence in 2021, and to consider preparing to meet the challenges each of these issues pose. In no particular order, below are the top 10 issues that are likely to keep retail employers up at night in 2021.

1. Changes to Federal Labor and Employment Policy

With the Democrats in control of the White House, U.S. Senate, and U.S. House of Representatives, federal labor and employment policy is sure to change in many respects. Some of the key changes that may affect retailers include changes to:

- [labor policy](#), including nominations for members of the National Labor Relations Board;
- [immigration policy](#);
- [workplace safety](#); and
- [wage and hour policy](#), including anticipated changes to the federal minimum wage, exempt salary requirements, and the definitions of independent contractor and joint employer under the Fair Labor Standards Act.

2. COVID-19 Compliance

2021 promises to bring the continued proliferation of ever-changing federal, state, and local statutes, ordinances, and executive orders, as well as local public health orders relating to COVID-19 and addressing issues such as:

- closures, capacity, social distancing, masks, etc.;
- employee and customer screening and protective measure requirements;

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- employee and customer positive test reporting;
 - work-from-home and remote work rules, policies, and procedures;
 - paid leave requirements; and
 - hazard pay requirements.

3. Diversity and Inclusion

Diversity and inclusion (D&I) will continue to be top of mind for retailers in the wake of the 2020 Black Lives Matter protests and other social justice movements in 2020. Many retailers significantly upped their game in 2020 by creating, implementing, and managing comprehensive D&I programs and training initiatives. This trend is expected to continue into 2021. In addition, President Biden may issue a proactive requirement on federal contractors to require D&I or implicit bias training and programs.

Given the [administration's new focus and emphasis on "equity,"](#) retailers may also want to consider including the concept of equity in their D&I efforts and incorporating initiatives to help support underserved communities. Some ideas for doing so include:

- creating training and development programs that embrace equity and D&I concepts;
- supporting inclusivity through policies regarding preferred pronoun use;
- updating design and signage for facility restrooms to promote inclusivity;
- ensuring that safety policies relating to COVID-19 utilize inclusive language; and
- promoting a culture of anti-hatred through policies on social media, dress, and respectful employee relations.

Another challenge for retailers in 2021 will be incorporating the many changes driven by the Supreme Court of the United States' decision in [Bostock v. Clayton County, Georgia](#). In that case, the Supreme Court held that, pursuant to Title VII of the Civil Rights Act of 1964, covered employers may not discriminate against applicants or employees on the basis of sexual orientation or gender identity. The decision contains [important implications for retailers](#) in their use of pronouns and honorifics, dress codes, and sex-segregated facilities.

4. Customer Face-Covering Issues

As long as health agencies are advising most members of the public to wear face masks—which could be into 2022—retailers likely will encounter some customers who refuse to wear them. Unfortunately, retailers that adopt a strict “no mask, no service” policy also may face legal challenges. Customer opposition to face masks can raise thorny [disability and religious accommodation issues](#), and can lead to litigation. However, retailers have had some success in defending these lawsuits in court. In October 2020, a Pennsylvania district court [denied](#) a plaintiff's request for a preliminary injunction to modify a grocery store chain's policy requiring all customers to wear face masks or other face

coverings, finding that the policy did not discriminate against the plaintiff based on his disabilities.

Customer challenges to face mask policies could take on a new twist once a significant proportion of the population is vaccinated. Customers may refuse to wear face masks on the grounds that they have been vaccinated. Whether public health guidance regarding wearing face masks changes in the future remains to be seen. Retailers may want to keep apprised of the latest public health guidance on that issue.

5. Disability Access Issues

Website accessibility claims have been vexing retailers for many years and will continue in the future until a case makes its way to the Supreme Court or the U.S. Department of Justice issues guidance. In the meantime, retailers will continue to navigate this evolving area of law without any direction from the judicial or legislative branches.

Retailers can also expect challenges to gift cards for visually impaired customers to continue in 2021. In 2020, a slew of lawsuits were filed arguing that retailers were required to offer Braille gift cards to visually impaired customers. In April 2020, a federal district court judge in the Southern District of New York issued a decision [dismissing](#) similar claims. That decision is now on appeal at the United States Court of Appeals for the Second Circuit.

6. COVID-19 Litigation

Although there have been COVID-19–related lawsuits filed, retailers have not been hard hit with litigation from customers claiming to have contracted COVID-19 in stores. However, as of February 2021, close to 200 COVID-19–related lawsuits have been filed against retailers around the country. The types of claims that are being pressed in those lawsuits include: disability discrimination, failure to provide and pay for sick and other leave benefits, failure to provide notice under the Worker Adjustment and Retraining Notification (WARN) Act, wrongful discharge, and retaliation. Lately, employees have been filing lawsuits claiming that their employers failed to comply with COVID-19 safety protocols, especially in California. The claims in those cases range from whistleblower claims to public nuisance claims.

7. COVID-19 Vaccinations

Many retailers are considering [mandating that their employees get vaccinated](#) against COVID-19. Other retailers have decided not to require that their employees get vaccinated and are instead hoping to be able to incentivize their employees to agree to being vaccinated against COVID-19. Some of the incentives retailers are considering offering include one-time bonuses, unpaid or paid time off, travel and childcare costs associated with obtaining the vaccine, and access to onsite clinics. Offering such incentives is not without risk, however, as the U.S. Equal Employment Opportunity Commission (EEOC) may find that such incentive programs run afoul of the Americans with Disabilities Act (ADA) and other laws enforced by the EEOC. The EEOC has not yet issued guidance on this topic, but multiple industry-specific employer groups, including retail, have been urging the federal agency to do so.

8. Complicated Leave Questions

Retailers used to think navigating the complex web of leave requirements under the ADA, Family and

Medical Leave Act (FMLA) and workers' compensation laws was complicated. With the addition of the [Families First Coronavirus Response Act \(FFCRA\)](#) and the proliferation of state and local laws governing leave related to COVID-19, navigating the complex web of overlapping leave requirements has become even more difficult. Unfortunately, there is no quick fix for retailers. Retailers may want to carefully consider all of the various state, local, and federal laws governing leave before making leave decisions.

9. Medical Marijuana Usage

Despite (or maybe because of) the pandemic, five states ([Arizona, Mississippi, Montana, New Jersey, and South Dakota](#)) recently legalized recreational and/or the medical use of marijuana. Marijuana legalization raises challenging workplace questions related to drug testing, disability accommodation, workplace safety, hiring, and employment termination, among other issues. Retailers may want to stay abreast of the changing state laws relating to marijuana as more and more states enact measures to legalize recreational and/or medical use of marijuana.

10. State and Local Law Changes

Finally, retailers may want to continue to keep an eye on state and local law changes in 2021. In 2020, several states (e.g., [Colorado](#) and [Virginia](#)) enacted sweeping changes in their laws relating to wage and hour issues, paid sick leave, and pay equity. In many other states, [minimum wage increases](#) went into effect at the beginning of 2021. As the political landscape continues to change and the pandemic becomes more controlled, retailers can expect a renewed focus on state and local changes. Hot topics for retailers are expected to include predictive scheduling, minimum wage, overtime, paid leave, and pay equity.

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