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Issues on the Horizon at the US Supreme Court: 2022 and Beyond

Contributing Partner

Shay Dvoretzky / Washington, D.C.

Associate

Emily J. Kennedy / Washington, D.C.

Takeaways

- Litigants will ask the Court to rule on an array of matters growing out of the COVID-19 pandemic, beyond challenges to the Biden administration's vaccine policies.
- The preemption of state employment laws by industry-specific federal labor laws is already before the Court, and more cases may follow.
- Decisions about the degree to which the federal Communications Decency Act protects social media platforms from state law claims could clarify an uncertain area of the law.
- If crowdfunding of cases designed to make new law catches on, the Court could face any number of novel issues in the coming years.

The Supreme Court's 2021 term is shaping up to be another blockbuster, with guns, abortion, religion and a host of other headline-grabbing issues on the agenda. Although this term has only just begun, it won't be long before the justices start filling next term's docket. And while it's never easy to predict which cases the Court will decide to hear, some key issues percolating in the lower courts may capture the justices' attention. We discuss several areas of the law that might shape headlines for the Court's 2022 term and beyond.

COVID-19 Litigation

The pandemic has spawned no shortage of lawsuits, with nearly 2,100 COVID-related cases filed since March 2020. Most recently, litigation over the Biden administration's vaccine policies has dominated headlines. The Court held oral argument on January 7, 2022, on stay applications in two cases — one challenging the Occupational Safety and Health Administration's COVID-19 Vaccination and Testing Emergency Temporary Standard (ETS), which requires employees of large employers to be vaccinated or regularly tested; and another challenging the Department of Health and Human Services' (HHS) regulation requiring health care workers to be vaccinated against COVID.

Less than a week later, on January 13, 2022, the Court issued its decisions, staying OSHA's ETS but allowing HHS' mandate to take effect for now. But both sharply divided decisions pertain only to the preliminary injunction stage, and the Court will likely be asked to weigh in again on the merits. In the meantime, lower courts are grappling with other COVID-related questions that also may be destined for the Supreme Court.

One issue to watch is whether and how the Worker Adjustment and Retraining Notification (WARN) Act of 1988 applies to pandemic-induced layoffs. The WARN Act bars employers from terminating more than 50 workers en masse without at least two months' notice, except where the layoffs are caused by natural disasters or unforeseen business circumstances. Plaintiffs have filed dozens of WARN Act cases challenging COVID-related layoffs and their claims hinge on the scope of those two exceptions. Several of those cases are now on appeal and, depending on how lower courts rule, may ultimately head to the Supreme Court.

The Supreme Court also may face questions about the meaning and scope of the Public Readiness and Emergency Preparedness (PREP) Act. The PREP Act immunizes from liability manufacturers, distributors and other "covered

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One Manhattan West
New York, NY 10001
212.735.3000

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person[s]" who implement public health "countermeasures." The sole exception to this immunity is for serious injuries or deaths caused by willful misconduct, and the PREP Act requires those claims to be brought in federal court. Nursing homes across the country are facing state law claims brought by the estates of deceased residents alleging that the facilities were negligent in handling COVID-19.

Several nursing homes have sought to remove those suits from state to federal court. They argue that federal jurisdiction is proper because the PREP Act preempts state tort law (such that the plaintiffs' negligence claims can "arise under" only federal law) and, in any event, insulates them from liability. So far, most courts have been skeptical of removal. The Third Circuit recently rejected jurisdiction and remanded a suit for the state court to decide the scope of PREP Act immunity. With similar cases pending nationwide, however, the Supreme Court may be asked to weigh in.

Finally, the pandemic has given rise to hundreds of insurance coverage disputes, with restaurants, retailers, hotels and even sports teams suing over denied claims. But because these cases ultimately hinge on contract interpretation — questions of state law — most are unlikely to make their way to the Supreme Court.

Federal Preemption of State Employment Law

The Supreme Court is already considering whether to hear several questions about whether federal law preempts state employment regulations, including break rules and sick-leave laws. In November, the Court invited the solicitor general to express the United States' views on a petition Skadden filed on behalf of Alaska Airlines and Virgin America (which Alaska Airlines acquired). Alaska and Virgin are urging the Court to hold that the Airline Deregulation Act (ADA) preempts California's meal-and-rest-break laws with respect to flight attendants.

Enacted to preserve free-market forces in the airline industry, the ADA broadly preempts state laws that have a significant impact on airline prices, routes or services. Completely relieving flight attendants of all duties every few hours, as California law requires, would have just such a forbidden impact by disrupting carefully choreographed flight schedules and casting air traffic nationwide into disarray. The United States (which supported Alaska and Virgin in the Ninth Circuit) likely will file its brief on this issue in the Supreme Court by the end of May 2022.

Other pending cert petitions present similar questions, including whether the ADA preempts Washington's paid-sick-leave law. And in the railroad context, the Ninth Circuit will soon consider whether the federal Railroad Unemployment Insurance Act preempts California's sick-leave rules. Meanwhile, the Court recently denied a petition urging it to consider whether per diem allowances for traveling expenses must be included when calculating overtime pay under the Fair Labor Standards Act.

Social Media Liability

In the internet arena, questions are percolating about the extent of liability under the Communications Decency Act (CDA). Section 230 of the CDA provides that social media companies and other web hosts are not liable for content that third parties post on their platforms. But the statute allows states to enforce laws "consistent with" Section 230. And Congress also has clarified that the section does not limit any law "pertaining to intellectual property." Lower courts are wrestling with the interplay between these provisions, which affect the scope and potential liability of web hosts for the content and use of their sites.

A pending cert petition asks the Supreme Court to consider whether Section 230 shields Facebook from state law claims arising from an alleged sex trafficker's use of the social media platform to contact victims. And the Third Circuit recently held that Section 230 does not bar a newscaster's claim that Facebook's and Reddit's sites used her image without consent, reasoning that the claim pertains to intellectual property. If the Supreme Court decides to weigh in on these or other questions about the section's scope, it could provide valuable guidance to web hosts and their users.

Litigation Crowdfunding

In looking at issues that may reach the Supreme Court, it's useful to consider the pipeline of potential lawsuits. One recent phenomenon that could fuel cases destined for the Court is litigation crowdfunding.

Third-party litigation funding has long sparked controversy, and enterprising plaintiffs are devising new tactics in this arena. In a case pending before the Eastern District of California, a hemp grower alleged it lost $1 billion when California unconstitutionally seized its harvest. To finance its suit, the plaintiff announced an "initial litigation offering" — a campaign to raise money from individual investors. The plan works like this: Investors buy crypto-tokens from the plaintiff, which gets 20% of the proceeds up front. The rest is held in escrow. If the case is dismissed with prejudice, the balance is refunded to investors; if it moves to discovery, the balance goes to the plaintiff. And if the plaintiff wins or the case settles, investors could realize up to 350% returns.

If this model gains traction, it could generate more test cases designed to reach the Supreme Court and shape the law. Small-scale investors may be willing to back lawsuits that professional financiers and other traditional gatekeepers find too dubious, risky or unpalatable. Those investors might also be more motivated by particular causes and personal views on key issues, further fueling the possibility of test cases.

While all eyes are currently on the blockbuster cases before the Court in the 2021 term, the justices will have no shortage of important questions to consider in 2022 and beyond. From COVID-19 issues to preemption and social media platforms, there is ample fodder for next term's headlines.