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### Trends From 2016-21

An analysis of Large Loss Reports from 2016 through 2021 shows troubling trends for K-12 schools and higher education institutions.

#### Damage Awards and Settlement Trends

Year	2016	2017	2018	2019	2020	2021
Number of awards/settlements	19	22	28	30	40	46

The number of publicly reported awards or settlements of at least \$250,000 has risen each year, from 19 in 2016 to 46 in 2021. When compiling this year's report, UE identified 31 awards or settlements of at least \$1 million. That's far more major damage awards and settlements than in prior years.

Of the 31 awards or settlements reported in 2021:

- 11 involved **sexual abuse and molestation**, with awards and settlements ranging from \$149 million to \$73 million
- Four involved **retirement plans** (\$5.8 million to \$117.5 million)
- Four involved **accidents or crimes resulting in death** (\$2 million to \$8 million)
- Four involved **false claims or grant-related issues** (\$1 million to \$4.8 million)
- Two involved **discrimination** (\$1 million to \$1.46 million)

This demonstrates that higher awards and settlements are becoming increasingly common.

## Meta-Trends

1. Expectations: IHEs seemingly do not/cannot say “no”
2. Era of judicial & political deference is on life support (at best)
3. Culture wars are intense & IHEs are in the middle of them
4. The vehicle for significant policy change (esp. at the federal level) is rarely time-consuming lawmaking

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## OSHA – Emergency Temporary Standard

### Sweeping new vaccine mandates for 100 million Americans

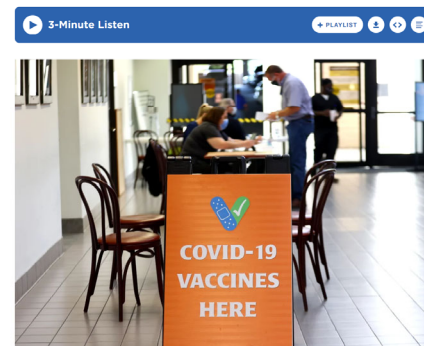
By ZEKE MILLER September 9, 2021



### A big job for small government agency. Enforce vaccine mandate for 80 million workers

October 5, 2021 7:10 AM ET  
Heard on Weekend Edition Sunday

ANDREA HSU



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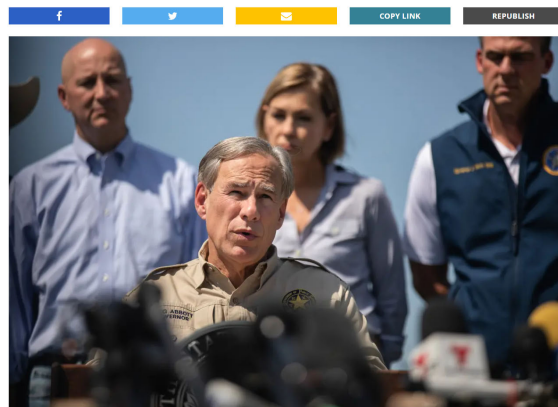
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## Not To Be Outdone . . .

### Texas Gov. Greg Abbott bans any COVID-19 vaccine mandates — including for private employers

Abbott also called on the Legislature to pass a law expanding the ban on vaccine mandates.

BY REBEKAH ALLEN OCT. 11, 2021 UPDATED: 9 PM CENTRAL



- Title VII and the ADA permit employees to receive exemptions based upon either sincerely held religious beliefs or medical conditions
- EO-40 seems to broaden the scope of permissible objections substantially. It forbids entities from compelling vaccination for individuals that object on three different bases:
  1. for any reason of **personal conscience**;
  2. based on a religious belief, or
  3. for medical reasons, **including prior recovery from Covid-19**.

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Thought Leadership

## Kentucky Court Blocks Federal Contractor Vaccine Mandate

**Published:**  
December 02, 2021

Alerts



**Related Services:**

COVID-19/Coronavirus

Government Contracts

Labor & Employment

**Related Area:**

COVID-19 Employment & Employee Benefits

On November 30, 2021, the United States District Court for the Eastern District of Kentucky, in *Kentucky v. Biden, et al.*, No. 3:21-cv-00055, granted a preliminary injunction limiting the enforcement of the federal vaccine mandate for some federal contractors and subcontractors. The preliminary injunction was requested by the Commonwealth of Kentucky, the State of Ohio, and the State of Tennessee. As a result, the court enjoined the federal government "from enforcing the vaccine mandate for federal contractors and subcontractors in all covered contracts in Kentucky, Ohio, and

**Professionals:**



**Michael Schrier**  
Partner



**Brian P. Waagner**  
Partner

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A person works from home during the Covid-19 pandemic.  
Photographer: Daniel Acker/Bloomberg via Getty Images

## EEOC Brings Its First Covid-Telework Suit Under Disability Law

Sept. 8, 2021, 9:23 AM

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## EEOC v. ISS Facility Services, Inc.

- In March 2020, requested an accommodation to work from home two days a week as an accommodation for her chronic obstructive lung disease and hypertension.
- ISS placed its staff on modified work schedules where employees worked from home four days per week.
- However, in June 2020, ISS required all staff to return to in-person work at its facility five days per week.
- Provided ISS with documentation indicating that her history of heart conditions increased her COVID-19 risk. The EEOC further alleges that her job duties generally required her to be in close contact with other employees and that other employees had been allowed to work from home following the June 2020 return-to-work.
- **EEOC attempts to use an employers' previous remote working arrangements during the COVID-19 pandemic as evidence that employees should have been permitted to continue to accomplish the essential functions of their employment in a remote capacity.**

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[Home](#) • Sexual Orientation and Gender Identity (SOGI) Discrimination





An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.

## Sexual Orientation and Gender Identity (SOGI) Discrimination

In *Bostock v. Clayton County, Georgia*, No. 17-1618 (S. Ct. June 15, 2020),<sup>[1]</sup> the Supreme Court held that firing individuals because of their sexual orientation or transgender status violates Title VII's prohibition on discrimination because of sex. The Court reached its holding by focusing on the plain text of Title VII. As the Court explained, "discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second." For example, if an employer fires an employee because she is a woman who is married to a woman, but would not do the same to a man married to a woman, the employer is taking an action because of the employee's sex because the action would not have taken place but for the employee being a woman. Similarly, if an employer fires an employee because that person was identified as male at birth but uses feminine pronouns and identifies as a female, the employer is taking action against the individual because of sex since the action would not have been taken but for the fact the employee was originally identified as male.

The Court also noted that its decision did not address various religious liberty issues, such as the First Amendment, Religious Freedom Restoration Act, and exemptions Title VII provides for religious employers.

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## Key Takeaways

1. No harassment based on sexual orientation or gender identity, **including** harassment by customers or clients. **This may include intentionally and repeatedly using the wrong name and pronouns to refer to a transgender employee.**
2. Cannot use customer preference to fire, refuse to hire, or assign work.
3. Cannot discriminate because an individual does not conform to a sex-based stereotype about feminine or masculine behavior.
4. **Cannot require a transgender employee to dress or use a bathroom in accordance with the employee's sex assigned at birth.**

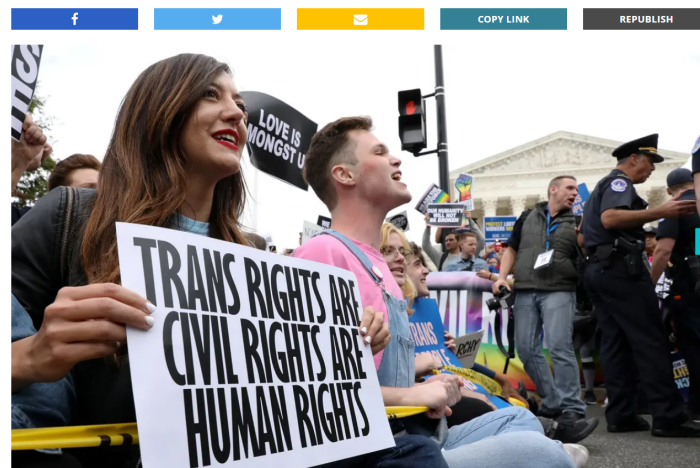
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### Texas sues Biden administration over guidance saying transgender workers can use bathroom of their choice

A federal document also says that misusing a person's preferred pronouns could be considered harassment in some instances. Texas Republican officials have tried to pass state laws targeting transgender people's access to bathrooms and school sports teams.

BY ALLYSON WALLER    SEPT. 20, 2021    4 PM CENTRAL



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NEWS

## Shawnee State professor's lawsuit could have ramifications for preferred pronoun use and more

**Megan Henry** The Columbus Dispatch  
Published 6:02 a.m. ET April 12, 2021 | Updated 10:27 a.m. ET April 12, 2021

[View Comments](#) [f](#) [t](#) [e](#) [r](#)

A lawsuit filed by a [Shawnee State University](#) professor could potentially have consequences for students' preferred pronouns on college campuses.

And it could potentially lead to discrimination in the classroom beyond preferred pronoun use, according to a constitutional law expert and the head of a nonprofit group that advocates for equality for the LGBTQ community.

"If this case were to come out poorly, the implications are devastating, honestly, for young people on college campuses," said Siobhan Boyd-Nelson, Equality Ohio's director of development and external relations.



Nicholas Meriwether, a philosophy professor at Shawnee State University reprimanded for calling a student "sir" instead of her preferred pronoun, has won a ruling from U.S. 6th Circuit Court of Appeals that the college's decision infringed on his First Amendment rights. *Shawnee State University*

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## Meriwether v. Shawnee State Univ. (6<sup>th</sup> Cir. 2021)

- Philosophy professor and a devout Christian who believes that sex assigned at birth by God cannot be changed, brought 1<sup>st</sup> Amendment after he received a warning for refusing to address students by their preferred gender pronouns in accordance with the University's nondiscrimination policy.
- Finding that the matter concerned classroom speech, thus foreclosing defendant's *Garcetti* defense ("the academic-freedom exception to *Garcetti* covers all classroom speech related to matters of public concern, whether that speech is germane to the contents of the lecture or not"), the court determined that speech related to "race, gender, and power conflicts" addresses matters of public concern and that plaintiff's interests in academic freedom, coupled with his core religious and philosophical beliefs, outweighed the University's interest in stopping discrimination against transgender students.
- The court characterized the University's interests as comparatively "weak" in-part because the University had rejected a proposed compromise where plaintiff would refer to transgender students without any identifying pronoun.

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## President Joe Biden rescinds Donald Trump ban on diversity training about systemic racism

Jessica Guynn USA TODAY

Published 6:34 p.m. ET Jan. 20, 2021 | Updated 4:10 p.m. ET Jan. 26, 2021



### Biden signs new executive orders, says 'now's the time to act' on racial equity

President Joe Biden signed four new executive orders, building on steps taken as part of his campaign promise to create a more equitable society. Associated Press, USA TODAY

## Legislating Against Critical Race Theory

More than a dozen states considered or passed legislation targeting critical race theory this year. How has this academic concept become so politicized?

By Colleen Flaherty // June 9, 2021



GETTY IMAGES PLUS/HYEJIN KANG

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## Supreme Court defers decision on reviewing admissions case



High court asks U.S. solicitor general to weigh in on appeal of lower court rulings in Harvard's favor

## Harvard says defense costs top \$25 million in affirmative action case

3 minute read

By Nate Raymond



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## Another Slap on the Wrist?

U New Mexico says it's reopening an investigation into a professor suspended over sexual harassment findings and who was about to return to his duties -- after new reports emerge about the professor's conduct.

By Colleen Flaherty // August 9, 2016

The University of New Mexico will reopen its investigation into a professor who was sanctioned previously for sexual harassment -- after it initially agreed to welcome him back to campus following a suspension.

"Following recent media reports about a university investigation into claims of sexual harassment in [the] anthropology department, new information has surfaced that we feel must be considered," President Robert Frank said in an emailed statement. "In light of these additional reports, we will thoroughly review the full case again along with any new material that we obtain. As we carefully consider all of the evidence, we promise to take appropriate actions as warranted. ... Let me assure you this issue has our full attention."



Cristobal Valencia

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## Valencia v. University of New Mexico (10th Cir. April 2021)

- Plaintiff, an untenured professor at the University of New Mexico, brought due process, discrimination, and retaliation claims against the Board of Regents and several individual defendants, after he was terminated for cause based on internal findings that he had sexually harassed students, drunkenly assaulted 2 employees, and engaged in other misconduct.
- In disposing of plaintiff's procedural due process claim, the court found that plaintiff's pretermination proceedings satisfied constitutional due process requirements insofar as plaintiff received adequate notice, an explanation of the employer's evidence, and an opportunity to present his side of the story, during which he was accompanied by an attorney.
- The court also affirmed judgment for the defendant on plaintiff's Title VII discrimination and retaliation claims, finding that plaintiff neither satisfied his burden of showing pretext nor demonstrated a causal nexus between a protected activity and an adverse employment action.

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## Freyd v. Univ. of Or. (9th Cir. 2021)

- Plaintiff alleged that the University discriminated against her based on her sex by paying her less than her male colleagues in violation of EPA, Title VII, and Title IX.
- Specifically, plaintiff alleged that “**retention raises**” for faculty considering moving to a different institution are less likely to go to female professors than male professors.
- Regarding plaintiff’s EPA claim, the court held that a reasonable jury could find that plaintiff’s proffered comparators performed substantially equal work because they all perform “common core of tasks” such as research, teaching, advising, and committee service.
- There also remained an issue of material fact regarding plaintiff’s Title VII disparate impact claim because plaintiff alleged statistical evidence that, when viewed in the light most favorable to plaintiff, shows that there is gender bias in the availability of retention raises.

### UO settles equal pay case with retired professor Jennifer Freyd for \$450,000

Jordyn Brown Register-Guard  
Published 4:10 p.m. PT July 16, 2021 | Updated 10:20 a.m. PT July 17, 2021



The University of Oregon and Pioneer Cemetery seen on July 12. Jeremy Williams/The Register-Guard

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The Google logo is seen Jan. 8, 2020, at the 2020 Consumer Electronics Show in Las Vegas.

Photographer: ROBYN BECK/AFP via Getty Images

### Google Settles Hiring, Pay Bias Claims for 5,500 Workers (3)

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## NCAA v. Alston SCOTUS Decision

June 21, 2021 – Upheld certain NCAA rules violated Section 1 of the Sherman Antitrust Act

- Limited issue related to NCAA rules limiting “education-related benefits” with huge implications
- NCAA can no longer rely on NCAA v. Board of Regents of the University of Oklahoma (1984) dicta to support antitrust protection
- Judge Kavanaugh concurring opinion suggests all NCAA compensation rules (e.g., scholarship limits) “raise serious questions under antitrust laws

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## Alston: Practical Impact

- Contractual agreements with student athletes
- Tax/Employment Issues – Are student athletes beginning to look more and more like employees?
- Title IX Implications
- Litigation Damages
- International Student Visas – would compensation impact student visa
- Budgetary Issues – most significant impact of Alston may be re-distribution of economic benefits of athletics from administrators/coaches to athletes – **in a changing economic landscape, be wary of long-term commitments**

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## Contract Negotiation

### ESPN THE BOOM OF DEAD MONEY IN COLLEGE SPORTS



- According to an ESPN analysis of financial records of athletics departments at public universities, FBS programs spent more than \$533.6 million in dead money in an 11-year period from Jan. 1, 2010, to Jan. 31, 2021.
- Remarkably, the dead money total is actually much more than that. The financial records did not include payments for many of the coaches who were fired during or after the 2020 football and 2020-21 basketball seasons. In football alone, FBS schools committed another \$107.6 million in severance pay before mitigation to fired coaches and their staffs in 2020.

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## Classifying college athletes as employees, NLRB memo sets stage for further NCAA destabilization

The NCAA's power continues to diminish as athletes earn more rights and opportunities

By [Dennis Dodd](#) Sep 29, 2021 at 5:52 pm ET • 6 min read



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- Begins by explicitly stating that university students playing sports should not be misclassified as “mere student athletes” but instead as employees. Such misclassification, leading the students to believe that they do not have statutory protections, is a violation of Section 8(a)(1) of the Act according to the NLRB’s General Counsel.
- Citing “contemporaneous societal shifts” and “a dramatic increase in collective action among players,” the General Counsel opines that “certain Players at Academic Institutions are employees under the Act and are entitled to be protected from retaliation when exercising their Section 7 rights.”
- Because these players “perform services” for their schools “in return for compensation,” and because their services are largely subject to their school’s control, the players are employees. Specifically, the opinion applies to “the scholarship football players at issue in Northwestern University, and similarly situated players.”

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A Villanova Wildcats wide receiver catches a pass in a Sept. 9, 2017, game against the Temple Owls.  
Photo by Mitchell Leff/Getty Images

## NCAA Hit With Another Lawsuit Seeking Pay for Athlete’s Play (3)

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## Johnson v. NCAA (E.D. Pa. Aug.2021)

- Memorandum Decision denying Defendants' Motion to Dismiss.
- Plaintiffs, student athletes at 5 Division 1 colleges and universities, brought a class action lawsuit against the NCAA and 25 colleges and universities, alleging that defendants violated their rights under the Fair Labor Standards Act and attendant state laws by refusing to categorize them as employees for wage and compensation purposes.
- Department of Labor regulations did not foreclose the possibility that student athletes might be employees because the complaint plausibly alleged that (1) Division 1 sports were not conducted primarily for the benefit of student athletes but rather for defendants' monetary benefit; (2) interscholastic athletics are distinct from the educational opportunities and interfered with student athletes' ability to derive maximum benefit from their education; and (3) interscholastic athletics are not among the types of activities that the Department of Labor expressly exempted from the employer-employee relationship.

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The campus of Northwestern University in Evanston, Ill.

Photographer: Chris Walker/Chicago Tribune/TNS via Getty Images

## Certainty Sought From Justices in Northwestern Retirement Fight

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## Cummings v. Premier Rehab Keller

### Court to consider emotional distress damages under anti-discrimination laws



By Rachel Bayefsky

on Nov 29, 2021 at 2:13 pm

[f](#) [in](#) [t](#) [e](#) [m](#) [s](#) [h](#) [a](#) [r](#) [e](#)



**Cummings v. Premier Rehab Keller, P.L.L.C.**, which the Supreme Court will hear on Tuesday, is about the types of remedies that plaintiffs may recover when they prove violations of certain federal anti-discrimination laws — in particular, whether such plaintiffs may recover damages for emotional distress. The facts of *Cummings* involve emotional distress damages for discrimination based on disability under the Rehabilitation Act of 1973 and the Affordable Care Act. From a practical

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## Predictions for 2022? Where to Focus Now?



1. The L&E cycle (fewer concerns about hiring/firing, more on terms and conditions/pay equity)
2. 50-year anniversary of Title IX
3. DEI work but with more nuance
4. Athletics
5. Risk management concerns with a workforce that likely will not return to work

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