

FOCUS



2022

Legislative Review/ Preview Report

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In the spring of 2022, we will be nearing two years of the COVID pandemic. The landscapes have changed on many fronts, and what we are facing in 2022 is a plethora of issues on how to return to “the new normal”. The many COVID-19 variants and continuing hesitations to receive the vaccine have led to fertile ground for legislation regarding vaccine mandates. During the pandemic lockdowns, alcohol commerce laws changed rapidly throughout the United States to meet the growing demand and a growing international crisis with recycling has begun to be felt locally. The taxing of digital advertising, as well as rising discussions about the fees streaming services offer and whether they should be considered cable providers, has led to many states filing suits against companies like Netflix and Disney. And data privacy legislation continues to be a subject with far-reaching effects for many, both personally and at the corporate level.

VACCINE MANDATES

The federal government is facing an unprecedented public health challenge with the continuous spread and mutation of the COVID-19 virus and nearly 800,000 deaths nationwide. A pivotal part of the Biden administration’s strategy for controlling the spread involves two federal mandates requiring millions of American workers to get vaccinated against COVID-19. This is the first time the federal government has mandated vaccinations, which has prompted a cascading outcry amongst Republican-led states who have been quick to respond by holding special sessions, passing laws and effectively filing lawsuits. Such display of emergency federal power is new and the question of legality will be played out, as has already begun, in the courts.

The [first mandate](#) came in September when the Department of Labor’s Occupational Safety and Health Administration (OSHA) issued a requirement for companies with 100 workers or more to require their employees to be vaccinated or tested for COVID-19 on a weekly basis. The [second mandate](#) came in early November when the Centers for Medicare & Medicaid Services (CMS) issued a requirement for health care workers participating in Medicare and Medicaid to be fully vaccinated. As of November 30, both of these federal mandates were blocked by the U.S. appeals court, reports [Reuters](#).

Outside of the courts, legislation has been passed in Alabama, Kansas, Nevada, North Dakota, Ohio, Tennessee and Utah.

U.S. District Judge Matthew Schelp of Missouri, a Trump appointee, issued an [injunction](#) on November 29 to block the CMS requirement. According to the [National Law Review](#), Judge Schlep found that CMS lacked authority to implement the requirement on an emergency basis and that the Biden administration likely violated administrative law in issuing it



without prior public comment. The injunction applies to the 10 states that challenged the vaccine mandate in court: **Alaska, Arkansas, Iowa, Kansas, Missouri, Nebraska, New Hampshire, North Dakota, South Dakota and Wyoming**. Following this ruling, U.S. District Judge Terry Doughty of **Louisiana**, a fellow Trump appointee, issued a similar [injunction](#) on November 30, also citing a lack of authority to implement the mandate. Although the lawsuit was brought by 14 states – **Alabama, Arizona, Georgia, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Montana, Ohio, Oklahoma, South Carolina, Utah and West Virginia** – Judge Doughty imposed the injunction nationwide.

A third [injunction](#) blocking the administration from enforcing a mandate for all federal contractors to receive a COVID-19 vaccine by next year was issued by U.S. District Judge Gregory Van Tatenhove of **Kentucky** on November 30. Judge Van Tatenhove once again cited the overstep of congressional authority. The decision applies to **Kentucky, Ohio and Tennessee** who filed the lawsuit.

However, not all of the court decisions during this surge of litigation have been made in favor of blocking vaccine mandates. **Florida** filed a separate lawsuit targeting the CMS mandate for contracted employees, requesting a temporary restraining order or preliminary injunction, but was [shut down](#) by the courts. The U.S. Supreme Court also denied requests by healthcare workers in **Maine** and **Massachusetts** who sought religious exemptions from vaccine mandates and declined to take up a case challenging a vaccine mandate at **Indiana University**, reports [Forbes](#). The budding trend is that when it comes to the private sector or individual states and cities, the courts will support and uphold vaccine mandates. This is due to the legal precedent set in the 1905 Supreme Court ruling to uphold a Cambridge City law requiring smallpox vaccination in [Jacobson vs. Massachusetts](#).

Outside of the courts, legislation has been passed in **Alabama, Kansas, Nevada, North Dakota, Ohio, Tennessee and Utah** that provides religious and other exemptions for vaccine mandates in their respective states. **Iowa** passed [HF 902](#), which does not include requirements that medical exemptions be granted by a medical professional. **Florida** passed the “keep Florida free” agenda, [HB 1B](#), [SB 2B](#), [HB 3B](#) and [SB 4B](#), which gives additional opt-outs for vaccine exemptions including medically-suspect claims of “immunity” and “anticipated pregnancy” as reasons for not getting vaccinated. Furthermore, fines of \$50,000 for larger companies and \$10,000 for smaller firms will be imposed for those businesses that don’t allow an employee to opt-out. **Wyoming** has enacted [HB 1002](#) that appropriates \$4 million to Republican Gov. Mike Gordon’s office for future litigation related to fighting the federal COVID-19 vaccine mandate. The bill also features a resolution stating Wyoming’s right to defy the mandate, as well as providing legal standing to do so. Other states, like **Idaho** and **Oklahoma**, used special sessions to introduce legislation against the vaccine mandate that were not passed.

Federal vaccine requirements will continue to be a contentious issue nationwide during the 2022 session, especially considering the emergence of new and contagious variants like Delta and Omicron, ongoing legal enigmas between state law and federal mandates, as well as looming supply chain issues and effects on state economies. It is evident that the Supreme Court will need to weigh in on what constitutes the scope of the federal



government in regard to vaccine mandates as states continue to wage legal battles fighting them.

ALCOHOL LAWS

While access to alcoholic beverages has been a popular issue for state lawmakers for some time, the COVID-19 pandemic made alcohol a priority for virtually every state in 2021. [ABC News](#) reports that of 39 states that had provided special provisions that had allowed restaurants and bars to deliver alcohol directly to consumers, all but 11 of those states have kept their alcohol to-go rules in place following the end of their respective governors' emergency orders. Bills relating to direct shipping increased exponentially during the last year, with over 300 related bills introduced across 49 states versus less than half before the onset of the pandemic. A recently adopted law, [Alabama SB 126/Act 2021-188](#), serves as an example of this expansion of direct-to-consumer shipping and delivery, as this law will create a licensing process that will ultimately allow liquor, beer and spirits sold at retailers to be delivered to the home. This includes access to increasingly popular services such as Shipt, Instacart or DoorDash. With the expansion of direct-to-consumer alcohol sales, there is destined to be an increase of attention on e-commerce alcohol sales in general. As the e-commerce alcohol field continues to expand, regulators will be pressed to keep up with a changing marketplace. This is evident in states like [Iowa](#), who for the first time now has access to alcohol delivery through various retail outlets through the passage of [HF 766](#), which became effective on July 1, 2021.

28 states have kept in place special provisions allowing restaurants and bars to deliver alcohol directly to consumers.

Other issues of importance that are bound to make an appearance this session include privatization attempts in a number of different states. In a move that would remove control of alcohol channels from the state and privatize the process, both [Alabama](#) and [Mississippi](#) introduced legislation during the last session that would at least partially privatize alcohol control through bills [SB 287](#) and [HB 997](#), respectively. For the 17 “control states” in the nation, where the state directly controls the distribution and regulation of alcoholic beverages, these proposed bills are always a high priority for impacted parties and are likely to make more appearances in 2022.

FOCUS anticipates that direct-to-consumer alcohol shipping, e-commerce alcohol sales and privatization attempts will continue to be priority issues for lawmakers for the upcoming legislative session. It is undeniable that the COVID-19 pandemic has opened new



pathways for alcohol accessibility for consumers. This is a trend that is unlikely to slow down anytime soon, especially since the expanded access to alcohol sales offered many restaurants and bars an economic lifeline when they were experiencing customer lulls during the last couple years from lockdowns and capacity restrictions nationwide.

EXTENDED PRODUCER RESPONSIBILITY

Since 2017, China has been increasingly reluctant to accept U.S. recyclables. According to [Forbes](#), in January 2021 they stopped taking in the trash of the U.S. and Europe altogether. This was a severe setback for the Biden administration's environmental aspirations, but most of the impact was felt by local recycling programs that now have nowhere to store or send all of the trash normally absorbed by China, reports [Bloomberg](#). Part of the pressure has been shifted to producers by extending the responsibility of consumer waste onto them.

The push for extended producer responsibility (EPR) has been prevalent in 26 states this past year with **California** running away with the most pieces of passed legislation (11). California's EPR headlines culminated in a \$1.1 million settlement between The Carpet America Recovery Effort (CARE) and the California Department of Resources Recycling and Recovery (CalRecycle). CARE was ruled to not have been demonstrating meaningful increases in carpet recycling rates as required by state EPR laws, reports [Resource Recycling](#).

Maine had an active year for EPR legislation with Democratic Gov. Janet Mills signing [LD 1541/Chapter 455](#). This act establishes a stewardship program for packaging requiring producers to pay into a fund based on the amount and recyclability of their packaging. The funds are then used to fund municipal recycling and waste management programs and public awareness campaigns, reports the [Maine Environmental Protection Department](#).

As public discourse on recycling has taken off in the U.S., EPR seems to be among the issues that lawmakers and businesses will consider. With its preliminary successes in Maine, according to [PBS](#), other states may look to employ EPR as one of many potential policies to deal with plastic waste. **Massachusetts** and **New Hampshire** have already prefiled a number of EPR bills for their respective upcoming sessions, now even targeting e-waste in some capacity. **California, Hawaii, Maine, Michigan, New Jersey, New York** and **Pennsylvania** are also states to keep an eye on in the upcoming sessions for EPR legislation since many of their bills were left unaddressed this past year.



DIGITAL SPACE - TAXES AND FEES

DIGITAL ADVERTISING TAXES

An arguably unpopular tax scheme that has been gaining traction across the states recently is imposing taxes on digital advertising services; while the potential new revenue would be desirable for state budgets and [proponents](#) see it as a way to “make companies pay their ‘fair share,’” at least one downside is the patchwork requirements and thresholds as there is currently no uniform digital service tax roadmap for states to follow. [Opponents](#) describe them as “bad taxes” because they are “nontransparent and nonneutral” and digital advertising profits are already subject to ordinary business taxes. In 2021, states that at least considered measures that would impose taxes on digital advertising include **Arkansas, Connecticut, Indiana, Louisiana, Maryland, Massachusetts, Montana, New York, Texas and West Virginia**. Maryland is the only state to enact such a tax so far, and it is currently undergoing litigation.

On May 7, 2020, Maryland Republican Gov. Larry Hogan vetoed HB 732, [stating](#) that “it would be unconscionable to raise taxes and fees” during a global pandemic and economic crash. However, the issue was supported by Democrats in the state’s legislature, who hold

a supermajority in both chambers and had the power to override the governor’s veto. The House voted to override the veto on February 11, 2021, and the Senate also overrode the veto the following day. [HB 732/Chapter 37](#) imposes a tax on the gross revenues derived from digital advertising services in the state, with a rate ranging from 2.5 percent to 10 percent, based on the assessable base of a person’s global annual gross revenues.

In 2021, at least 10 states considered digital advertising taxes, though only Maryland enacted one.

Arkansas introduced legislation in this session but it did not advance out of the Senate Revenue and Tax Committee and was instead recommended for study in the interim. It is unclear if the bill will be refiled in 2022. Legislation also failed in Connecticut, Montana, Texas and West Virginia. Massachusetts saw the filing of a handful of bills regarding taxes on digital advertising in 2021 that are pending in the Joint Revenue Committee, all of which will carry over into 2022. New York will also see legislation carryover in 2022; though similar bills considered during the prior session failed to move before adjournment, it remains to be seen if these bills will face a similar fate by the end of 2022.

According to [Bloomberg Tax](#), “[s]tates will be looking at Maryland as the fiscal canary and will undoubtedly adjust their proposals to avoid similar pitfalls. The question for



businesses moving forward isn't whether digital taxes will become a reality, but rather when and how." A related angle that some states have or are looking at in 2021 and into 2022 is to tax the sales of consumer data specifically. Such proposals have appeared in states including **Indiana, New York, Oregon, Washington and West Virginia.**

STREAMING TAXES & FRANCHISE FEES

As the number of online streaming services continues to grow, an increasing number of consumers are opting out of traditional cable subscriptions and signing up for a la carte streaming choices that are more cost effective and convenient. However, these transitions have a detrimental effect to local tax revenue. Cable TV companies have historically been charged state and local franchise fees for the use of their infrastructure and public rights-of-way. With the lost franchise fees, compounded with the economic stress of the COVID-19 pandemic, states and localities are looking to capitalize upon the ever growing online streaming industry by proposing changes to franchise and other tax laws, filing lawsuits or both.

In the past year we have seen a growing number of cities file suit against streaming services seeking cable franchise fees. In August, [Fort Scott, Kansas](#) took action against Netflix and Hulu, stating that the streaming networks failed to get authorization to use public rights-of-way, such as internet facilities, and therefore owe a franchise payment equal to five percent of gross revenues from the provision of services in the city. Similar lawsuits that have been filed in other states include [Kenner, Louisiana](#); [Longport and Irvington, New Jersey](#); and [Dallas, Frisco and Plano, Texas](#). Attorneys acting on behalf of the streaming providers argue that the laws do not apply to them, that imposition of franchise fees would violate the First Amendment, is preempted by federal law and would conflict with the Internet Tax Freedom Act which bans discriminatory treatment of e-commerce. Netflix also claims it isn't a "video service provider" and therefore isn't subject to rules meant for cable operators.

A [video streaming bill](#) introduced in **Maine** proposed to expand franchise fees to "video service providers" defined as any person that sells access to video, audio or computer-augmented entertainment and delivers the services via digital or analog infrastructure through facilities located in the public rights-of-way. Democratic Gov. Janet Mills vetoed the bill on June 25 and in her veto message, said there was a possibility that it could increase costs for consumers and erode local control by granting more oversight of video service providers to the Public Utilities Commission. A [similar bill](#) in **Massachusetts** sits in the Joint Advanced Information Technology, the Internet and Cybersecurity Committee and will carry over into 2022.

The outcomes of these lawsuits and legislation could drastically change how streaming providers operate and could result in much higher subscription costs for users if passed. We can expect to see more lawsuits and legislation being proposed around this topic in the year to come.



OMNIBUS DATA PRIVACY

While numerous states considered omnibus privacy legislation last session only **Colorado** and **Virginia** were successful in joining **California** as the only states to pass the legislation. In the face of continued federal inaction, omnibus privacy legislation will continue to remain a hot button issue across the country in 2022. **Washington** will once again attempt to pass legislation after previous iterations of its proposed Washington Privacy Act failed after disagreements over whether to include a private right of action. In **Florida**, which nearly passed legislation last session, lawmakers have vowed to reintroduce legislation that had the backing of Republican Gov. Ron DeSantis.

Other governors have similarly endorsed privacy proposals, including **Alaska** Republican Gov. Mike Dunleavy who [introduced](#) legislation back in March and **Ohio** Republican Gov. Mike DeWine who has [endorsed](#) legislation currently pending in the House. **Vermont** Democratic Attorney General TJ Donovan will be supporting privacy legislation this session but it may not be an omnibus bill but instead rather similar to the **Illinois** [Biometric Information Privacy Act](#). Other states that are looking at privacy include **Tennessee**, which recently held hearings in November to discuss potential privacy legislation. Similarly, **Massachusetts** has recently held hearings in the Joint Advanced Information Technology, the Internet and Cybersecurity Committee for legislation that will carry over into 2022.

In **Oklahoma**, lawmakers have [filed](#) additional privacy legislation, which along with carryover bills, is likely to get serious consideration next year. The **District of Columbia** Council will also be considering privacy after introducing legislation based on the [Uniform Personal Data Protection Act](#), which was adopted by the Uniform Law Commission earlier this year. All told it looks like 2022 will be another active year for data privacy legislation.



A	K	P
Alabama 1, 2, 3	Kansas 1, 2, 6	Pennsylvania 4
Alaska 2, 7	Kentucky 2	
Arizona 2		S
Arkansas 2, 5	L	South Carolina 2
	Louisiana 2, 5, 6	South Dakota 2
C		
California 4, 7	M	T
Colorado 7	Maine 2, 4, 6	Tennessee 1, 2, 7
Connecticut 5	Maryland 5	Texas 5, 6
	Massachusetts 2, 4, 5, 6, 7	
D	Michigan 4	U
District of Columbia 7	Mississippi 2, 3	Utah 1, 2
	Missouri 1, 2	
F	Montana 2, 5	
Florida 2, 7		V
	N	Vermont 7
G	Nebraska 2	Virginia 7
Georgia 2	Nevada 1, 2	
	New Hampshire 2, 4	W
H	New Jersey 4, 6	Washington 6, 7
Hawaii 4	New York 4, 5, 6	West Virginia 2, 5, 6
	North Dakota 1, 2	Wyoming 2
I	O	
Idaho 2	Ohio 1, 2, 7	
Illinois 7	Oklahoma 2, 7	
Indiana 2, 5, 6	Oregon 6	
Iowa 2, 3		