

Key Developments From State Attorneys General in 2022

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For lawyers and observers of state attorneys general, 2022 brought a year full of advocacy, enforcement actions, settlements and politics. With such an eventful year in the rearview mirror, this article highlights some significant occurrences in 2022 and predicts what 2023 may hold by considering existing trends.

Some Republican Attorneys General Departed NAAG — Will They Return?

This year, three Republican attorneys general renounced their states’ membership in the National Association of Attorneys General, joining Alabama’s withdrawal from NAAG in 2020.

Founded in 1907, NAAG is a self-described nonpartisan forum for the country’s state attorneys general.

However, in May, the Texas, Missouri and Montana attorneys general chose to withdraw their states’ membership, taking fundamental issue with the “[a]ssociation’s leftward shift over the past half decade,” a shift the attorneys general described as intolerable in a letter posted to Montana Attorney General Austin Knudsen’s Facebook profile.

Nearly three weeks later, Kentucky Attorney General Daniel Cameron, joined by eight more Republican attorneys general, sent a letter expressing similar concerns about perceived partisanship. While Cameron did not threaten to withdraw immediately, the letter proposed several checks and balances as structural reforms to NAAG’s leadership and criticized NAAG’s expenditure of settlement funds.

Since May, no other Republican attorneys general have withdrawn, suggesting some members’ concerns may have been addressed, at least partly.

It is even possible — albeit unlikely — that departing members will rejoin NAAG in 2023, given new Executive Director Brian Kane’s attempts to address concerns, including placing David Yost, Ohio’s Republican attorney general, as NAAG president a year early when a Democrat was scheduled to be NAAG president.

As part of his role, Yost announced the 2023 presidential initiative will revolve around veterans’ issues and helping the veteran population. He also will host a summit on the matter in Columbus, Ohio.

Yost's top priorities for Ohio include addressing the opioid crisis and human trafficking; supporting law enforcement; and protecting consumers from predatory practices, including from large technology companies and medicine companies. Such focuses may inform his leadership and approach to the NAAG presidency.

State Attorneys General and the CFPB Got a Lot Closer

In May, the Consumer Financial Protection Bureau issued an interpretive rule^[1] inviting states to exercise their authority under Section 1042 of the Consumer Financial Protection Act to not only bring lawsuits in federal court for unfair and deceptive acts and practices, or UDAAP, that violate the CFPB, but to also bring federal actions for any violations of the enumerated consumer laws enforced by the CFPB.

The rule was promulgated because very few states had pursued non-UDAAP claims in their CFPB actions. In other words, the interpretive rule empowers state attorneys general to bring federal claims in federal court, thereby increasing attorney general enforcement powers.

In addition, in *Community Financial Services Association of America v. Consumer Financial Protection Bureau*, the U.S. Court of Appeals for the Fifth Circuit held^[2] in October that the CFPB's funding mechanism is unconstitutional, potentially stripping the agency of its enforcement powers.

The CFPB has sought expedited review with the U.S. Supreme Court this term. Since then, more than 30 attorneys general have urged^[3] the Supreme Court to decide the case expeditiously.

Twenty-two Democratic attorneys general filed one brief, arguing the Fifth Circuit committed error. Sixteen Republican attorneys general filed a separate brief, requesting the Supreme Court affirm the decision. The court will consider the petition at its conference on Jan. 6, 2023, and hear the case in April 2023. If upheld, the ruling could leave state attorneys general to fill the regulatory vacuum.

A Continued Focus on Public Health Crises

In 2022, opioid-oriented lawsuits dominated state attorneys general's enforcement efforts, resulting in billions of dollars in recovery through multistate settlements with opioid manufacturers, distributors and retailers.

While there is much work to do in 2023 to finalize these resolutions, state attorneys general are likely to shift their attention to the next public health crisis, and one is quietly looming on the horizon: the fentanyl epidemic.

Fentanyl, a synthetic opioid, is a cheap, abundant drug that is deadly in small amounts. In 2021, the Centers for Disease Control and Prevention reported that fentanyl killed 75,673 Americans out of the more than 100,000 Americans who died from opioids.

Critics allege that much of the illicit fentanyl that makes its way into the U.S. is manufactured abroad and smuggled through Mexico, making the drug's proliferation particularly difficult to stop.

The staggering numbers of fentanyl-related deaths have increasingly drawn state attorney general attention in recent years.

In September, a bipartisan coalition of 18 attorney general, led by Florida Attorney General Ashley Moody, called on the president to take immediate and decisive action to declare fentanyl a weapon of mass destruction. Such a declaration would allow the federal government to allocate more resources to address the issue.

Although state attorneys general are likely to dedicate more resources to solving the problem as fentanyl causes more deaths, they may find the principal actors behind the epidemic more challenging to prosecute than domestic pharmaceutical companies as fentanyl is manufactured internationally and smuggled in at the border.

Election Season Is Over — Well, Almost

Of the 43 states and Washington, D.C., where the attorney general is an elected position, 31 of those states held attorney general elections^[4] in 2022. Across states that held elections, incumbent attorneys general — *i.e.*, attorneys general who did not retire and were not term-limited or defeated in a primary — from both parties generally held off challengers.

In Idaho, Oklahoma and South Dakota, the incumbent attorney general candidates — or, in Oklahoma's case, the interim appointee — failed to secure renomination from their parties. In Guam, which has nonpartisan elections for attorney general, Leevin Camacho failed to win reelection.

In Idaho, Republican Attorney General-elect Raúl Labrador, a former congressman and chair of the Idaho Republican Party, defeated Idaho Attorney General Lawrence Wasden, the longest-serving attorney general in Idaho history, in the Republican primary. To date, the only election where a candidate from a different party beat an incumbent was in Iowa, where Republican Brenna Bird beat incumbent Democrat Tom Miller.

In states where the election featured newcomers or an interim appointee, the parties have retained their control in all races so far. However, in Arizona, candidates Kris Mayes, a Democrat, and Abe Hamadeh, a Republican, are engaged in a legal bid for the attorney general seat.

Hamadeh alleges a series of mistakes and illegal actions in the election resulted in votes not being counted, and votes that should have been counted for Hamadeh instead being counted for Mayes. A recount of the votes originally scheduled for Thursday has been postponed pending the Arizona Superior Court's trial of Hamadeh's challenge on Friday.

Bipartisan Issues in 2023

In 2023, state attorneys general will likely continue tackling bipartisan data privacy and consumer protection issues more broadly.

Data Privacy

While both federal and state regulators increasingly sound the alarm against tech companies violating consumer data privacy rights, states are accelerating past the federal government's efforts.

In September, Nancy Pelosi, D-Calif., rejected the American Data Privacy and Protection Act, preventing the

nation's first data privacy law from advancing to the U.S. House of Representatives floor for a vote.

Pelosi claims her opposition to the bill arose from concerns with the bill's preemption provisions, which would have prevented states like California from regulating data privacy under state law. Through this, Pelosi implicitly sent a clear signal from the highest level of government: State attorneys general will continue to lead the way in regulating emerging areas of the economy.

While California was the first state to pass a data privacy law, several states joined its ranks^[5] in 2022, including Colorado, Connecticut and Virginia. Many of these states' privacy statutes leave enforcement to the attorney general, who can sue a company over violations. As a result, states will continue to be the top enforcers in the privacy arena in 2023.

Consumer Protection

More broadly, state attorneys general will continue their roles as their states' top law enforcement officers, meaning a continued focus on protecting consumers.

To do so, state attorneys general will continue using traditional tools in the state attorney general toolbox, including UDAAP, antitrust, unfair competition and other consumer protection statutes. State attorneys general will likely continue to use such statutes to obtain settlements against consumer lenders, environmental polluters, technology companies, robocallers and countless others who take advantage of consumers.

Partisan Issues in 2023

With 15 Republican attorneys general and 15 Democratic attorneys general holding attorney general positions, most attorneys general will likely address their party's issues in 2023.

Key Issues for Republicans: Law Enforcement and ESG

It is perhaps axiomatic that continued support for law enforcement is a fundamental component of every Republican attorney general's tenure, as evidenced by nearly every Republican attorney general in 2022 running on the issue. Republican attorneys general are pledging to improve police-community relationships, bolster resources to specific departments and develop personal relationships with agencies in their state.

Republican attorneys general across the country also have begun pushing back^[6] on the environmental, social and governance, or ESG, movement by exploring legal challenges to businesses considering ESG metrics in their financial decision making.

They claim ESG investing, *i.e.*, investment in companies that score highly on ESG metrics, violates state consumer protection laws, state and federal laws governing investors' fiduciary duties, antitrust laws and state laws designed to protect the nation of Israel.

Given that some of the world's largest asset managers have adopted ESG measures for investment decision making, 2023 will be interesting for large institutional investors.

Key Issues for Democrats: Preventing Discrimination and Strengthening Environmental Protections

Democratic attorneys general are likely to continue leading efforts they claim will fight discrimination based on race and sexual orientation.

For example, in September, Washington, D.C., Attorney General Karl Racine gave testimony on the Stop Discrimination by Algorithm Act.

In addition, the California attorney general and 18 other attorneys general filed an amicus brief on Dec. 1 in the U.S. Court of Appeals for the Fourth Circuit pushing back on efforts to deny civil rights protections to LGBTQ individuals in the workplace in *Billard v. Charlotte Catholic High School*, a case revolving around a drama teacher claiming he was fired for announcing his engagement to a same-sex partner.

Similarly, New York Attorney General Letitia James recently led a coalition of 16 states in filing an amicus brief in *Fain v. Crouch* on Dec. 7, also in the Fourth Circuit, where the two plaintiffs are transgender individuals alleging they cannot obtain Medicaid coverage for gender-affirming surgical care in West Virginia.

These high-profile actions by Democratic attorneys general demonstrate the importance of alleged anti-discrimination measures for Democrats and are a clear indicator that such efforts will continue in 2023.

Democratic attorneys general also will likely continue to prioritize environmental protections. Calls by attorney general coalitions urging Congress to respond to the climate crisis are nothing new.[7] And in 2023, Democratic attorneys general are likely to continue pursuing settlements[8] against environmental polluters and fighting Republican efforts to combat measures implemented by the U.S. Environmental Protection Agency.

Perhaps most tellingly of what is to come, Vermont Attorney General-elect Charity Clark recently said, “The environment is just a core value. ... And protecting our environment is really important. It’s something that we do with the Attorney General’s office and with a special look to the Global Warming Solutions Act,” which she hinted will go to the Vermont Legislature in January.

[1] “CFPB Issues Interpretive Rule Bolstering Enforcement Efforts by States.”

[2] “Fifth Circuit Finds CFPB Funding Structure Unconstitutional.”

[3] “State Attorney General Calls on CFPB to Heed Fifth Circuit’s Ruling in Community Financial Services Association of America.”

[4] “Troutman Pepper State Attorneys General Election Tracker.”

[5] “Virginia’s Consumer Data Protection Act Is Not the Commonwealth’s Only Privacy and Data Protection Law

— Nor Is It the Nation's First.”

[6] “Texas AG Joins Wave of Investigations Into Credit Ratings Companies’ ESG Data Usage in Financial Decision-Making.”

[7] “Attorney General Raoul Calls on Congress to Address Climate Crisis, Environmental Justice.”

[8] “AG: Monsanto to pay \$698M for polluting Oregon’s people and environment for 90 years.”

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