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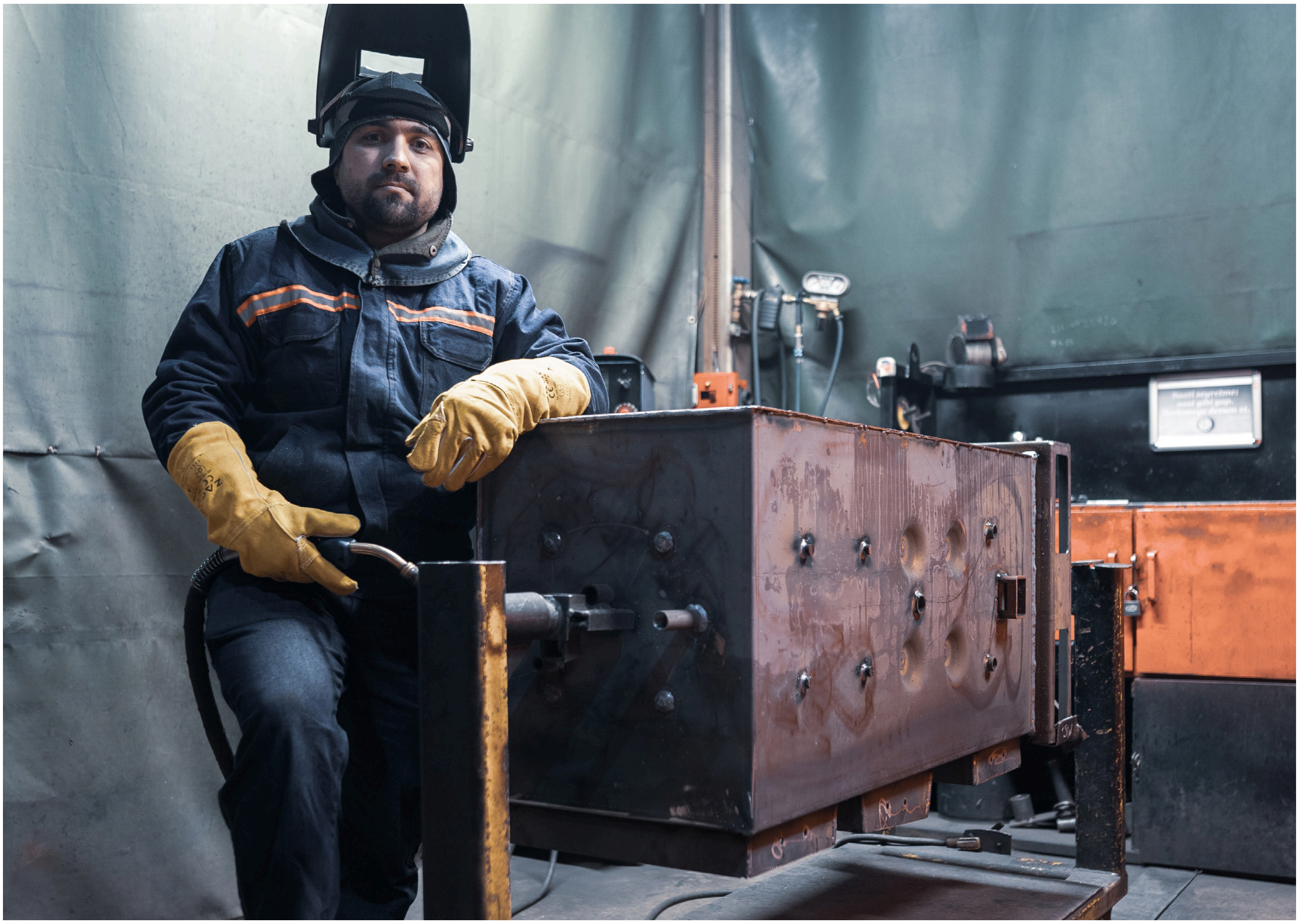

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RELIEF FOR PENSION PLANS UNDER THE AMERICAN RESCUE PLAN ACT STARTS TO ROLL OUT

On March 11, 2021, President Biden signed the $1.9 trillion American Rescue Plan Act of 2021 (ARPA) to provide financial relief in the wake of COVID-19 pandemic. The bill sought to speed the United States' recovery by addressing both the health and economic impacts of COVID-19. In addition to provisions like direct checks to individuals, an expanded Child Tax Credit, and enhanced unemployment benefits, ARPA also included relief for eligible multiemployer pension plans. This is through the Special Financial Assistance (SFA) program which provides an estimated $100 billion in funding to severely underfunded multiemployer pension plans.

Aside from the direct monetary relief discussed *supra*, ARPA includes the following types of relief for multiemployer defined benefit pension plans:

- Funding Status—Multiemployer defined benefit pension plans may retain 2019 plan funding status for 2020 and 2021.
- Extended Rehabilitation Periods—Multiemployer defined benefit pension plans currently in endangered, critical, or critical and declining status have the option to extend funding periods for improvement or rehabilitation for 2020 and 2021.
- Easing of Funding Standard Account Rules—Multiemployer defined benefit pension plans can effectively use pre-COVID funding standard account assessment results.
- Special Financial Assistance—ARPA offers a lump sum cash payment to "severely distressed" multiemployer defined benefit pension plans that are underfunded. The intent is to help plans pay participant benefits through 2051.

In addition, ARPA increased Multiemployer Pension Plan PBGC Premium Rates.

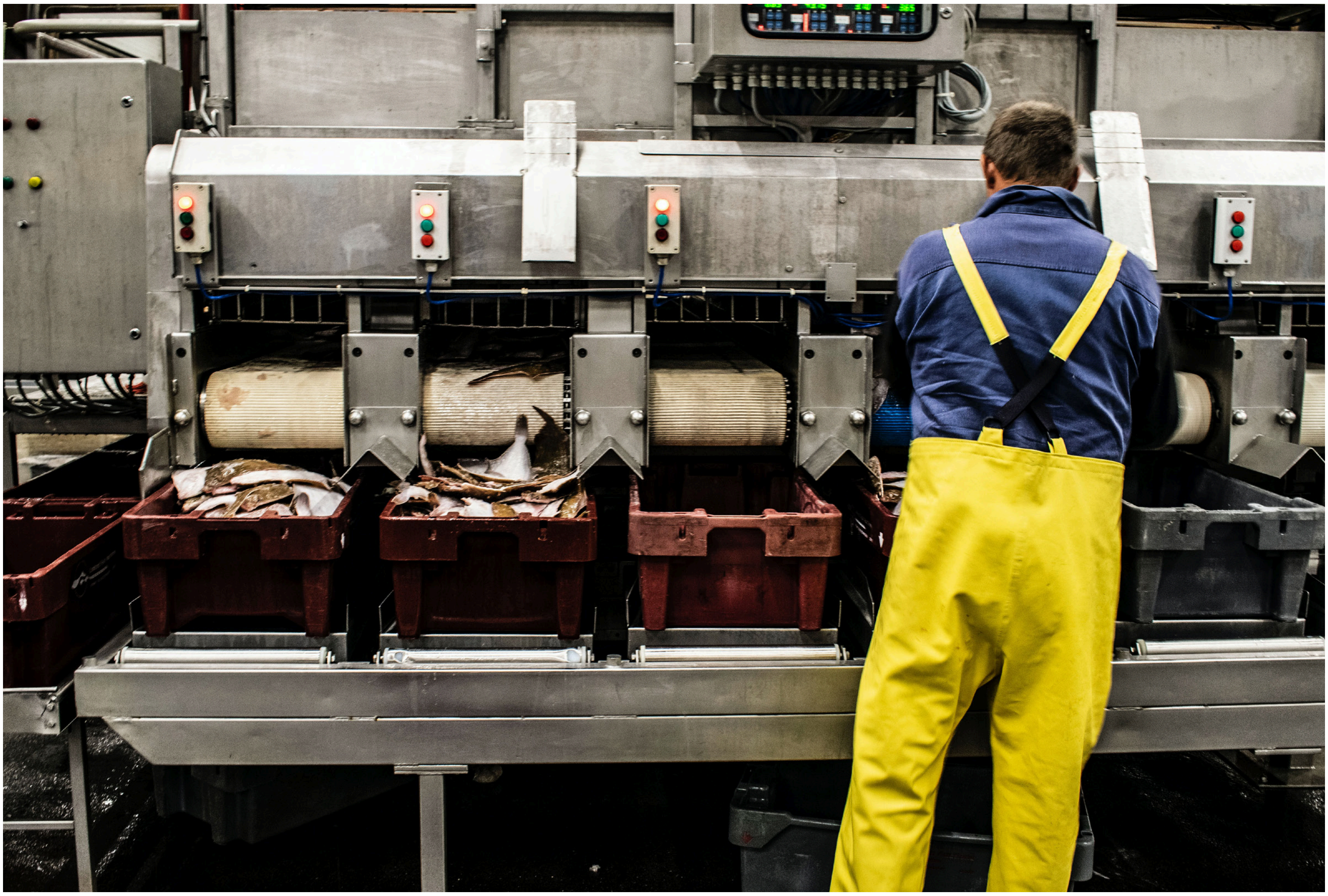
The SFA program contains direct monetary relief to plans meeting the specified criteria. It requires plans to demonstrate eligibility for SFA and to calculate the amount of assistance pursuant to ARP and Pension Benefit Guarantee Corporation's ("PBGC") regulations. SFA and earnings thereon must be segregated from other plan assets, and plans are not obligated to repay SFA to the PBGC. Plans receiving SFA are also subject to certain terms, conditions and reporting requirements, including an annual statement documenting compliance with the terms and conditions. PBGC is authorized to conduct periodic audits of multiemployer plans that receive SFA.

Since the application process began, close to seventy pension plans have applied for relief. A full list of the applicants and amounts sought can be found at https://www.pbgc.gov/arp-sfa/sfa-applications. Claims as high as 35 billion dollars from the Teamsters Central States Pension have been approved, which will have substantial effects. Estimates are that the Teamsters Central States Pension has moved from being 18% funded in 2021 to 78% funded because of this relief. The money from this program is starting to reach those plans that have applied.

However, SFA fund recipients need to be aware of the investment restrictions on these funds. On July 6th, 2022, the PBGC issued its Final Rule, clarifying SFA provisions and investment restrictions, which are summarized as follows:

- Permissible Investments—The Final Rule allows plans to invest up to 33% of SFA funds in return-seeking investments. This includes stocks, 144A securities, and high-yield corporates (that were investment-grade at time of purchase). A minimum of 67% must be invested in investment-grade bonds, such as Treasuries, municipals, fixed-rate dollar denominated bonds, and dollar-denominated emerging market bonds. Leveraged loans, converts, preferred stock, and private credit are not allowed.
- Interest Rate Assumption—The PBGC adjusted the interest rate assumption for calculating eligible SFA amounts, effectively making the investment hurdle rate more feasible for a typical plan. The rate was lowered from 5.3%, over the 3rd segment corporate bond rate (which is similar to a twenty-five (25) year corporate bond rate), to roughly 3.1%, over the average of the 1st, 2nd, and 3rd segment corporate bond rate.

Some commentators have noted that multiemployer plans will likely need to utilize active management to efficiently invest any grants received. Active management will allow plans to create custom solutions that align with their unique situation while remaining compliant with the Final Rule's investment restrictions. Additionally, actively managed portfolios can access permissible sectors that are not represented in many passive funds, such as taxable municipal bonds and non-index securitized issues. However managed, the recipients of these funds will need to be aware of the investment restrictions that go along with the receipt of these monies.



NLRB EXPANDS REMEDIES FOR UNFAIR LABOR PRACTICE VIOLATIONS TO INCLUDE CONSEQUENTIAL DAMAGES

On December 13, 2022, the National Labor Relations Board ("NLRB" or "Board") issued its decision in *Thryv, Inc. and International Brotherhood of Electrical Workers, Local 1269* (372 NLRB No. 22), expanding the available universe of remedies for violations of the National Labor Relations Act ("NLRA"). On November 10, 2021, the Board solicited amicus briefs inviting "parties and amici to submit briefs addressing whether the Board should expand its traditional make-whole remedy for employees who are discharged, laid off, or otherwise discriminated against to more fully account for their actual losses."[1] Section 10(c) of the NLRA empowers the Board to seek make whole remedies. NLRB General Counsel, Jennifer Abruzzo, made her intention clear that she wanted an expanded definition of these remedies.

The *Thryv* Decision was a 3-2 Decision split down party lines, with the three Democratic appointees, Chairman McFerran, Wilcox, and Prouty voting in favor and the two Republican appointees, Kaplan and Ring, voting against. The Board held that Thryv, Inc., a marketing and software company that sold Yellow Pages advertising, unlawfully laid off bargaining unit employees without bargaining to legal impasse with the Union, IBEW Local 1269. The Board found that the Company presented the layoffs as a *fait accompli* and violated the duty to "refrain from making unilateral changes during the pendency of bargaining a successor agreement." *Thryv*, at pg. *4.[2] But the important takeaway from the Decision was the Board's pronouncement that: "We conclude that in all cases in which our standard remedy would include an order for make-whole relief, the Board will expressly order that the respondent compensate affected employees for *all direct or foreseeable pecuniary harms* suffered as a result of the respondent's unfair labor practice." *Id.* at *6.

Some examples of direct and foreseeable pecuniary harms, commonly referred to as "consequential damages" are:

- Restoration of health insurance, and reimbursement for out-of-pocket medical costs that would have been covered by insurance;
- Compensation for any tax liabilities or other penalties that were incurred if an individual was forced to withdraw money from a retirement account;
- Educational costs for job training or coursework;
- Compensation for expenses related to housing or loss of housing, transportation and childcare.

These are merely examples, not an exhaustive list. While the *Thryv* Decision made this official, General Counsel Jennifer Abruzzo had previously issued a memo to Regional Directors to include these types of remedies in Board settlements. The Board did clarify that it will be the General Counsel's burden to establish these remedies are appropriate, but that such remedies were not to be considered "extraordinary" but rather part of its traditional "make-whole" remedy.

[1] Press Release, Office of Public Affairs, NLRB, last viewed at: https://www.nlrb.gov/news-outreach/news-story/nlrb-invites-briefs-regarding-consequential-damages-remedy-for-employees

[2] The Board also took particular exception with the Company's failure to respond to the Union's information requests, the Company relied on financial information to justify the layoffs, which it refused to share with the Union to formulate bargaining proposals.

PAID LEAVE FOR ALL WORKERS ACT OF ILLINOIS

On January 10, 2023, the Illinois Legislature passed the Paid Leave for All Workers Act (the "Act"), which states that, beginning on January 1, 2024, an employee who works in Illinois is entitled to earn and use up to a minimum of forty (40) hours (i.e., five (5) days) of paid leave for any purpose during a 12-month period.[1] Currently, the only other states in the U.S. with similar laws are Maine and Nevada.[2]

WHAT *EMPLOYEES* DOES THE ACT APPLY TO?

With few exceptions, the Act applies to all employees working in Illinois (i.e., full time, part time, temporary, short term, exempt, non-exempt). However, it appears that the Act will also apply to out-of-state employers with employees who visit Illinois on business and work in Illinois for more than forty (40) hours over a 12-month period. In addition, the Act appears to apply to Illinois company employees that work more than forty (40) hours outside of Illinois. For example, an Illinois-based employer with a satellite office in Indianapolis would be required to provide its out-of-state employees the same paid leave benefits as its in-state employees.

The Act does not apply to temporary college or university student-employees, or to employees who are covered by a collective bargaining agreement (CBA) already in effect on January 1, 2024. For CBAs entered into after January 1, 2024, the parties may agree to waive the requirements set forth in the Act, but only if the waiver is set forth in clear and unambiguous terms. The Act further clarifies that its terms specifically do not apply to any employee working in the construction industry[3] and is covered by a bona fide CBA, or to employees covered under a bona fide CBA with employers who provide pickup and delivery services or transport parcels, documents, and freight either nationally or internationally.

WHAT *EMPLOYERS* DOES THE ACT APPLY TO?

The Act applies to private sector employers regardless of size, as well as the state, units of local governments, and any state or local governmental agency. However, Illinois school districts organized under the Illinois School Code and Illinois park districts organized under the Illinois Park District Code are not subject to the terms of the Act.

In addition, the Act does not preempt the Chicago Minimum Wage and Paid Sick Leave Ordinance or the Cook County Earned Sick Leave Ordinance. Instead, the Act states that its terms "shall not apply to any employer that is covered by a municipal or county ordinance that is in effect on the effective date of [the] Act that requires employers to give any form of paid leave to their employees, including paid sick leave or paid leave." In other words, employers located in Chicago who are subject to the Chicago Paid Sick Leave Ordinance will be exempt from the Act. Similarly, employers located in suburban Cook County municipalities that provide paid sick leave in compliance with the Cook County Earned Sick Leave Ordinance will be exempt from the Act. Employers who are not covered by these ordinances to provide paid leave will be required to comply with the Act.

LOGISTICS OF PAID LEAVE

Employees will begin to accrue one (1) hour of paid leave for every forty (40) hours worked upon the later of their date of hire or January 1, 2024. Employees can accrue up to forty (40) hours in a twelve (12) month period, which employers can designate as any twelve (12) month period in writing at the time of hire. Employees may roll over up to forty (40) hours of paid leave from one twelve (12) month period to the next.

Alternatively, employers can decide to grant forty (40) hours of paid leave on the first day of the twelve (12) month period. In that case, the Act does not require carryover from year to year, and any unused paid leave will be forfeited at the end of the twelve (12) month period. Under no circumstances may an employer credit an employee with less paid leave than the employee would have been entitled to prior to the passage of the Act.

If an employer elects to use a type of vacation bank to comply with the terms of the Act, per the requirements of the Illinois Wage Payment and Collection Act, any unused leave must be paid out upon an employee's separation from employment. In contrast, the Act does not require employers to pay employees for unused accrued paid leave upon the employee's termination, resignation, retirement, or other separation from employment (or at the end of the designated twelve (12) month period). Finally, if an employee is rehired within twelve (12) months of the separation by the same employer, his or her previously accrued paid leave must be restored.

Regardless of whether an employer chooses to use the accrual or frontloading method to comply with the terms of the Act, accurate records for each employee must be maintained for a minimum of three (3) years. Such records must be available for inspection by the Illinois Department of Labor and must reflect the hours worked, paid leave accrued and used, and remaining paid leave for each employee. The Act does not require that an employee's paid leave accruals be reported on a paystub, but employers must provide this information to an employee upon request.

Employers may set a reasonable minimum increment of no less than two (2) hours per day. When using paid leave, employees must receive their hourly rate of pay (not including commissions or gratuities). However, the Act forbids an employee's hourly rate of pay for paid leave from dropping below the applicable minimum wage.

NOTICE REQUIREMENTS

Employees cannot use their paid leave until (a) they have completed ninety (90) calendar days of employment; or (b) March 31, 2024. Employers may require up to seven (7) days' notice of a foreseeable need for paid leave. The notice may be oral or in writing. If the need for leave is unforeseeable, employees are only required to provide notice as soon as practicable. Employers are expressly prohibited from requiring documentation or certification to support an employee's need for leave.

ENSURING COMPLIANCE

Employers with existing policies in place that meet the minimum amount of required paid leave and permit employees to take paid leave for any reason are not required to modify their policies. The Illinois Department of Labor will provide employers with a notice reflecting the requirements of the Act, which employers will be obligated to conspicuously post on the premises and include in either a written document, or written employee manual or policy.

FINAL THOUGHTS

Expect additional guidance from the Illinois Department of Labor in the coming months for clarification on any lingering questions. However, now is a great time for employers to begin reviewing their handbooks and begin to analyze what steps, if any, will need to be taken to comply with the terms of the Act. For more information, please contact our office.

[1] SB0208, filed January 10, 2023.
[2] *See* Paid Sick Leave Laws By State for 2023, PAYCOR (Jan. 1, 2023) https://www.paycor.com/resource-center/articles/paid-sick-leave-laws-by-state/ (stating that, while Arizona, California, Colorado, Connecticut, Maryland, Massachusetts, Michigan, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington, Washington, D.C. have passed mandatory paid sick leave laws to date, Maine and Nevada are the only states other than Illinois who have passed laws which require that accrued paid time off is *not limited* to sick time.)
[3] *See* Act, § 10 ("Construction industry" means any constructing, altering, reconstructing, repairing, rehabilitating, refinishing, refurbishing, remodeling, remediating, renovating, custom fabricating, maintenance, landscaping, improving, wrecking, painting, decorating, demolishing, or adding to or subtracting from any building, structure, highway, roadway, street, bridge, alley, sewer, ditch, sewage disposal plant, waterworks, parking facility, railroad, excavation or other structure, project, development, real property, or improvement, or to do any part thereof, whether or not the performance of the work herein described involves the addition to or fabrication into, any structure, project, development, real property, or improvement herein described of any material or article of merchandise. "Construction industry" also includes moving construction related materials on the job site or to or from the job site, snow plowing, snow removal, and refuse collection.)

"Currently, the only other states in the U.S. with similar laws are Maine and Nevada."

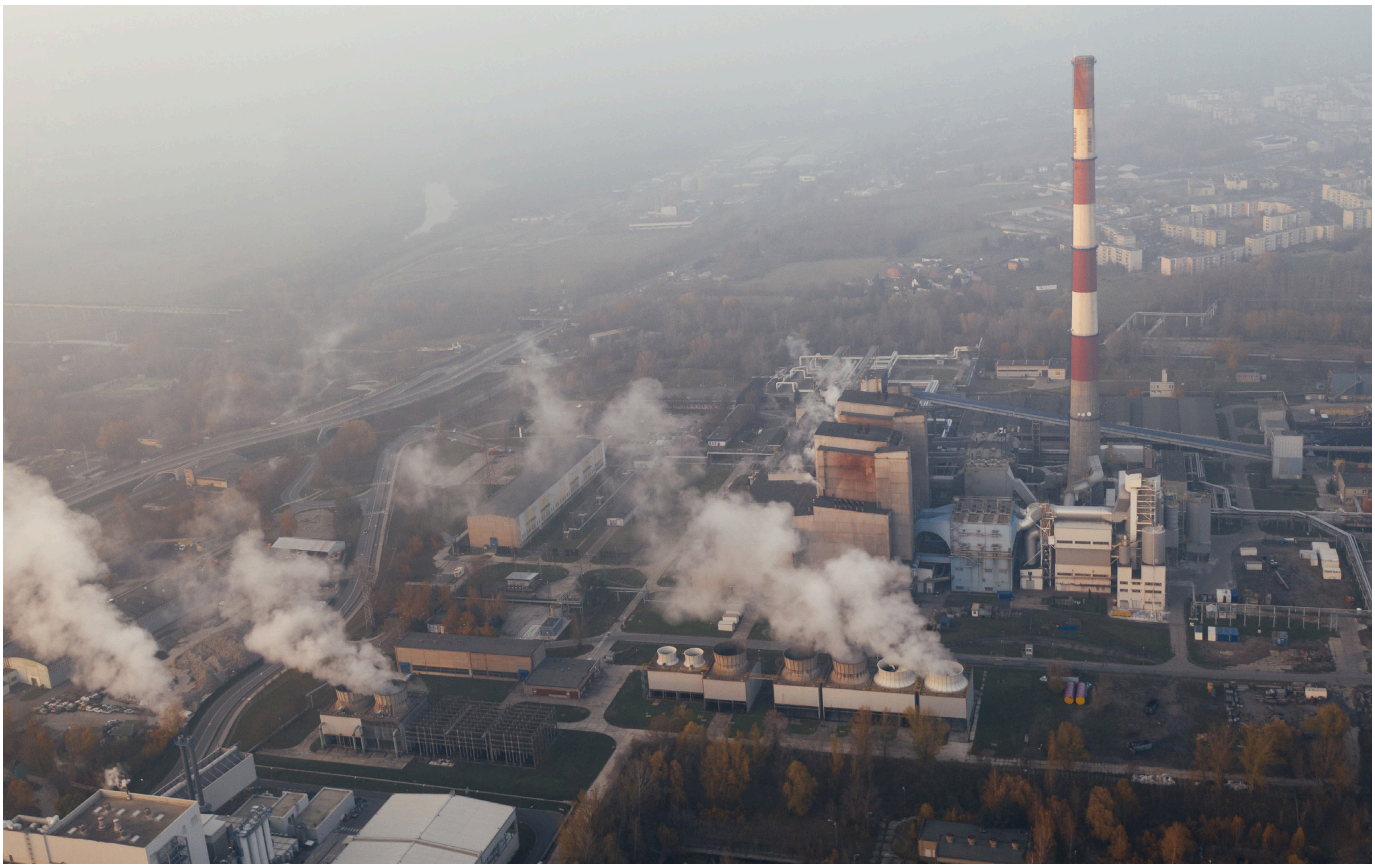
ERISA FIDUCIARIES AND THE COMPLEX WORLD OF SOCIALLY CONSCIOUS INVESTMENTS

Before the Final Rule, whether a particular investment has an environmental or social impact was not considered an appropriate factor in analyzing and selecting prudent investment options.

On December 1, 2022, the Employee Benefits Security Administration (EBSA) of the U.S. Department of Labor (DOL) issued a Final Rule which clarifies how and when fiduciaries of retirement plans can make investment decisions that foster environmental, social or governance (ESG) goals.

What are ESG investments? ESG funds invest in companies that meet the manager's criteria for environmental stewardship, social justice and fund governance. Some exclude the stock of fossil fuel, tobacco, firearm and defense companies. Some also exclude firms that are opposed to union organizing or that pay excessive compensation to its executives. ESG funds often prioritize companies that use renewable resources and are committed to equality.[1]

As background, ERISA fiduciaries are bound to several duties, including but not limited to, the duty to act prudently and diversify the plan's investments in order to minimize the risk of large losses. ERISA fiduciaries must exercise reasonable care when selecting plan investments and these selections must be in the best interest of plan participants and beneficiaries. To comport to these obligations, fiduciaries must engage in a complex analysis of potential investments. Historically, this involved examining the past investment returns of a particular investment, whether the fees were reasonable and if better performing and less costly alternatives existed.[2] In the event a fiduciary were required to select between two investment options, the fiduciary's duty of loyalty prevented fiduciaries from considering collateral factors (meaning benefits other than investment returns, such as ESG goals) in making investment decisions unless the two investment options were "economically indistinguishable"—this is oftentimes referred to as the "tiebreaker test." Before the Final Rule, whether a particular investment has an environmental or



social impact was not considered an appropriate factor in analyzing and selecting prudent investment options.

The Final Rule, called "*Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights,*" follows Executive Order 14030, which was signed by President Biden on May 20, 2021. The order directed the federal government to identify and assess policies to protect the pensions of America's workers from the threats of climate-related financial risk. The DOL concluded that previous regulations unnecessarily restrained fiduciaries' ability to weigh ESG factors when choosing investments.

The Final Rule removes restrictions that made it challenging for retirement plans to include ESG funds in the list of investment options available to participants. It clarifies that a fiduciary's duty of prudence must be based on factors that the fiduciary reasonable determines are relevant to a risk and return analysis and that such factors may include the economic effects of climate change and other ESG considerations on the particular investment.[3] ESG factors, while not required in the analysis of investments, are now considered to be economically significant factors that are part of a prudent evaluation of investment risk and return.

The Final Rule also replaced the above-referenced "tiebreaker test" with a standard that instead requires that a fiduciary prudently conclude that competing investments or courses of action equally serve the financial interests of the plan over the appropriate time horizon. In such cases, the fiduciary is not prohibited from selecting the investment or investment course of action based on collateral benefits. Notwithstanding, the Final Rule kept the longstanding principle that the fiduciary may not accept reduced returns or greater risks to secure collateral benefits.

Although the DOL has given a metaphorical "green light" to fiduciaries to engage in ESG funds, it is important for fiduciaries to identify and understand other issues that should be taken into consideration when selecting these types of investments. First, ESG investments are actively managed strategies, which generally means that the fees for ESG-marketed funds are higher. According to YCharts, which conducted an analysis of MSCI data for nearly 4,900 mutual funds and ETFs, funds with an asset class with higher-than-average ESG ratings charged an average of 25 basis points, compared to the asset-weighted average for all US equity funds, which was 12 bps.[4]

Second, the ratings which underlie ESG fund selection are unregulated and are built on comparative rankings of industry peers, not on universal standards.[5] According to the Harvard Business Review, fossil fuel companies can have better ESG ratings than makers of electric vehicles. Moreover, the data underlying the ratings are not complete, unaudited and out of date.[6] There have been ongoing efforts to standardize ESG reporting, however, none have been established yet.

Third, there is no evidence that ESG investing delivers higher returns. No research to date has proven that ESG causes higher returns and recent research has called into question the link between ESG and outperformance.[7] Further, there is also no link that can be established between ESG investments and ESG results.

Although the Final Rule has made it easier for plan fiduciaries to engage in ESG investment options, fiduciaries should be aware of the investment realities of these types of investments and discuss their options thoroughly with their investment consultants.

[1] Miller, Stephen. *DOL Final Rule Rolls Back Restrictions on Retirement Plans' Use of ESG Factors.* Shrm.org. November 23, 2022.
[2] Kaercher, Rachel P. *DOL Issues Final Rule for ERISA Fiduciaries Considering Socially Conscious Investments.* December 12, 2022.
[3] See 29 CFR 2550.404(a)-5.
[4] https://get.ycharts.com/esg-mutual-funds-etfs-fees-expense-ratios.
[5] Pucker, Kenneth P. and Andrew King. *ESG Investing Isn't Designed to Save the Planet. Harvard Business Review.* August 1, 2022.
[6] *Id.*
[7] *Id.* (See also Berchicci, Luca and Kind, Andrew A. Corporate Sustainability: A Model Uncertainty Analysis of Materiality (May 18, 2021).: https://ssrn.com/abstract=3848664.

> *"At this point, the unfair labor practice charges against USC, the Pac-12, and the NCAA still remain at the initial stages."*

NLRB TO PURSUE UNFAIR LABOR PRACTICE CHARGES AGAINST USC, PAC-12 CONFERENCE, AND NCAA

In February 2022, the National College Players Association (NCPA) filed unfair labor practice charges against the University of Southern California (USC), the Pac-12 Conference, and the National Collegiate Athletics Association (NCAA). In the charges, the NCPA alleges that members of USC's men's and women's basketball teams and the football team should be considered employees and not "student-athletes."

In December 2022, the National Labor Relations Board's (NLRB) regional office in Los Angeles found that the NCPA's charges had merit and should be pursued. Jennifer Abruzzo, General Counsel for the NLRB, issued a statement that "USC, the Pac-12, and the NCAA, as joint employers, have maintained unlawful rules and unlawfully misclassified scholarship basketball and football players as mere 'student-athletes' rather than employees entitled to protections under our law." Ms. Abruzzo previously made her stance on this exact issue clear when she issued a memorandum in September 2021 to all NLRB field offices providing updated guidance that student athletes should be considered employees under the National Labor Relations Act (NLRA) and afforded all statutory protections.

Ms. Abruzzo has held firm in her stance that college athletes should be considered employees. The charges she has agreed to pursue against USC, the Pac-12, and the NCAA are an expansion of her position in that she has stated that the school, athletic conference, and the governing body for collegiate athletics should be considered joint employers. Should the NLRB find that a joint-employment relationship exists, athletes at publicly funded schools, who otherwise might be exempt from coverage under the NLRA, could be considered employees of their school's athletic conference and therefore subject to protections of the NLRA. Furthermore, a joint-employment relationship finding could also lead to the establishment of unions that are composed of athletes from multiple schools.

This issue sits at the intersection of another hotly contested issue: the standard for determining joint-employer status. The standard for determining joint-employer status under the NLRA is a contested issue before the NLRB. After much back and forth between presidential administrations, the current existence of a joint employer relationship is determined by whether the alleged joint employer exercises "direct and immediate" control over one or more essential terms or conditions of employment. *Airborne Express*, 338 NLRB 597, 597, n.1 (2002). Under this standard, indirect control, contractually reserved control that has never been exercised, or control that is limited and routine are insufficient to establish a joint-employer relationship. However, the NLRB recently proposed a new rule that would deem entities joint employers if they share or codetermine those matters governing employees' essential terms and conditions of employment (e.g., wages, benefits, scheduling, and hiring and discharge).

At this point, the unfair labor practice charges against USC, the Pac-12, and the NCAA still remain at the initial stages. If no settlement is reached, the case will be heard by an administrative law judge (ALJ). No matter what ruling the ALJ makes in this matter, his or her decision is likely to be followed by extensive appellate litigation due to the potential impact it could have on other college athletes, collegiate athletic programs, and joint employers in general.

ONLINE TRACKING TECHNOLOGIES VS. HIPAA: ARE YOU COMPLIANT?

The HHS Bulletin distinguishes between tracking on user-authenticated webpages, unauthenticated webpages, and mobile apps.

On December 1, 2022, the Office for Civil Rights (OCR) at the U.S. Department of Health and Human Services (HHS) issued a Bulletin highlighting the obligations of HIPAA-covered entities and business associates under the HIPAA Privacy, Security and Breach Notification Rules when using online tracking technologies. The key takeaway is bolded in the Bulletin -- **"Regulated entities are not permitted to use tracking technologies in a manner that would result in impermissible disclosures of PHI to tracking technology vendors or any other violations of the HIPAA Rules."**

The Bulletin warns that some HIPAA-regulated entities may not realize they are routinely sharing electronic protected health information (PHI) with online tracking technology vendors through their webpages or mobile apps in violation of HIPAA. PHI includes individually identifiable health information, including an individual's medical record number, home or email address, appointment dates, as well as an individual's IP address or geolocation, medical device ID or any unique online or mobile identifying code.

What does this mean for covered entities, such health and welfare plans? This article summarizes the Bulletin by providing an overview on tracking technology, addressing how the HIPAA rules apply to covered entities' use of tracking technologies, and outlining their HIPAA compliance obligations.

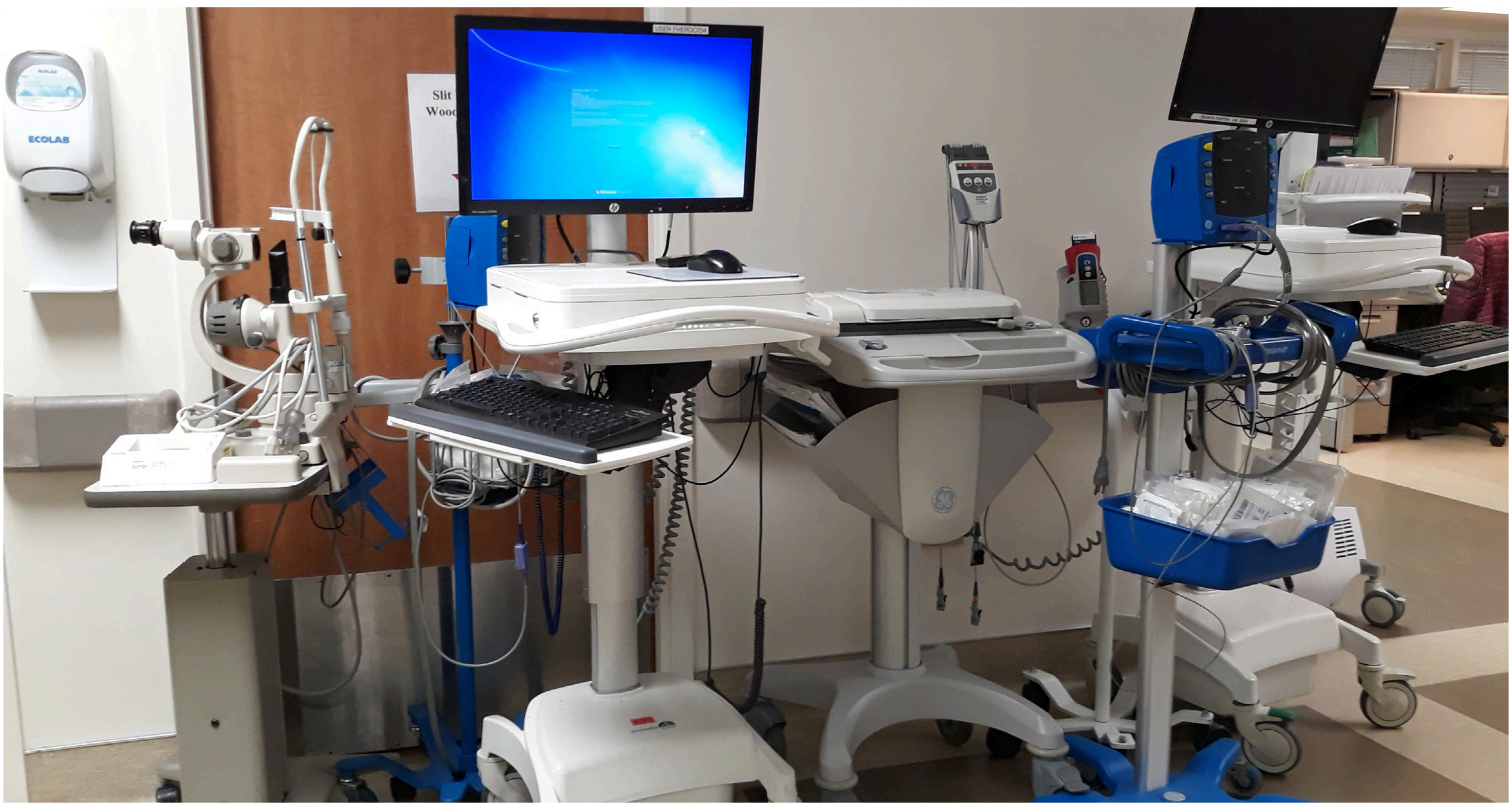
WHAT IS TRACKING TECHNOLOGY?

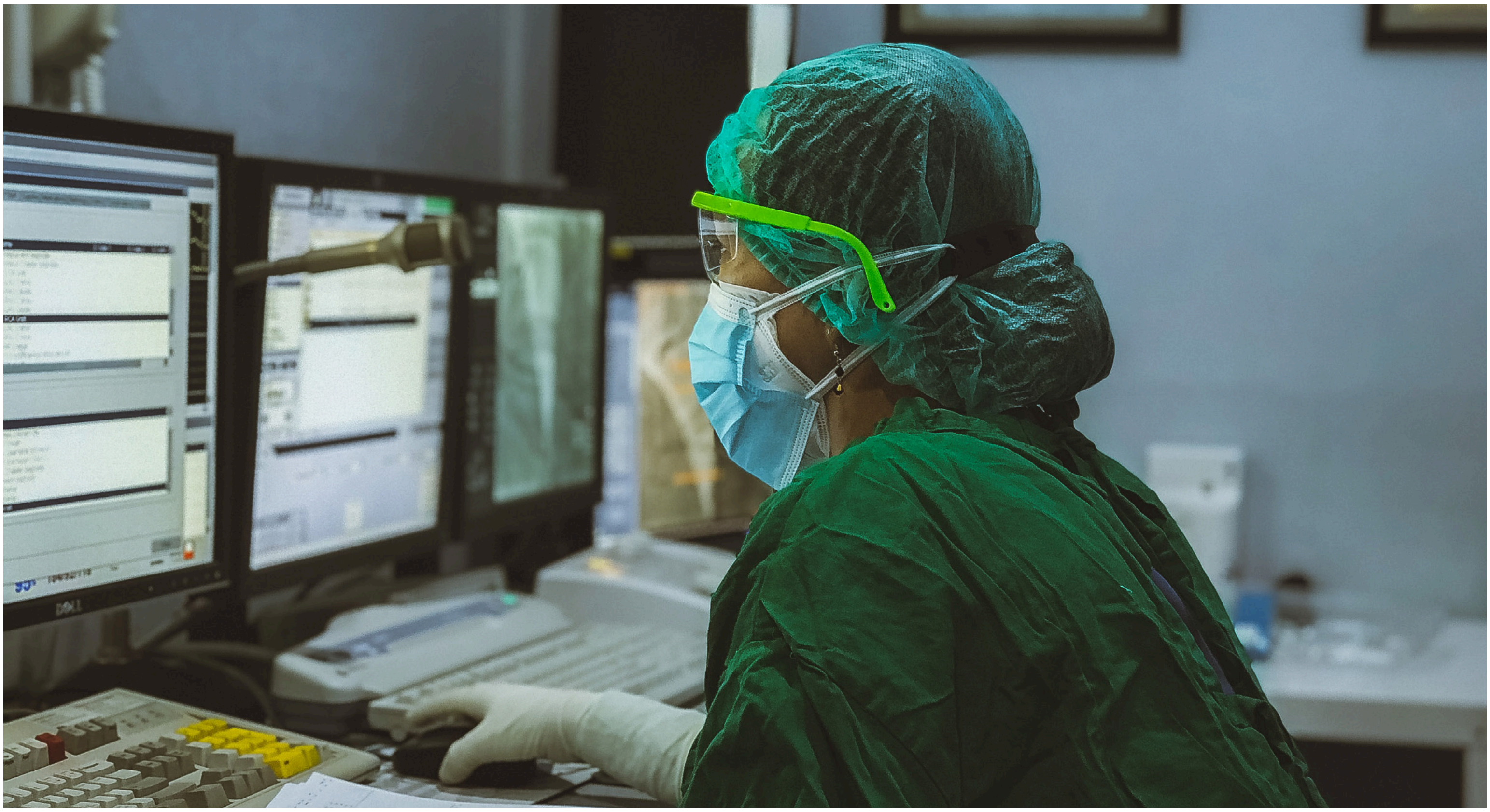
The Bulletin defines tracking technology as a "script or code on a website or mobile app used to gather information about users as they interact with the website or mobile app," which is then analyzed by third parties to create insights about users' online activities. These tracking technologies include cookies, web beacons or tracking pixels, session replay scripts, and fingerprinting scripts.

HOW DO HIPAA RULES APPLY TO REGULATED ENTITIES' USE OF TRACKING TECHNOLOGIES?

The Bulletin distinguishes between tracking on user-authenticated webpages, unauthenticated webpages, and mobile apps.

User-authenticated webpages require a user to log in before they can access the webpage, such as a health plan portal or a telehealth platform. Generally, tracking technologies on user-authenticated webpages have access to PHI. Accordingly, regulated entities must





configure these webpages to allow such technologies to only use and disclose PHI in compliance with HIPAA. The Bulletin reminds covered entities to ensure that the disclosure of PHI collected on user-authenticated web pages is permissible (i.e. that the vendor is providing a service to the covered entity) and to enter into a Business Associate Agreement (BAA) with tracking technology vendors that access such PHI. For example, if an individual makes a medical appointment through the website and that website uses third party tracking technologies, it's likely the website automatically transmits PHI to a tracking technology vendor. In this example, the tracking technology vendor is a "business associate" as defined by HIPAA and a BAA is required.

On the other hand, unauthenticated webpages are publicly available pages and typically only contain general information about a covered entity such as their location, services they provide, or their policies and procedures. Accordingly, because unauthenticated webpages generally do not have access to individuals' PHI, tracking on such webpages is generally not regulated under HIPAA. However, the Bulletin cautions that there may still be risks of PHI disclosure on unauthenticated webpages. For example, if a person visiting an unauthenticated webpage seeks out information related to specific health conditions (e.g. pregnancy or miscarriage) or searches for specific doctors, tracking technologies could collect the individual's email address and/or IP address. Accordingly, in this example, the regulated entity is disclosing PHI to the tracking technology vendor and HIPAA would apply.

Finally, if a regulated entity offers a mobile app (e.g. an app to help manage an individual's health information, pay bills, etc.) that collects information provided by the user, then such information is considered PHI and is covered by the HIPAA rules. On the other hand, mobile apps that individuals voluntarily download and are not developed or offered by or on behalf of the regulated entity are not governed by HIPAA rules.

WHAT ARE REGULATED ENTITIES' COMPLIANCE OBLIGATIONS?

First, regulated entities must ensure all disclosures of PHI to tracking technology vendors are specifically permitted by the Privacy Rule and that only the minimum necessary PHI is disclosed. The Bulletin clarifies that informing an individual in a "privacy policy" or in "terms and conditions" of PHI disclosures to a tracking technology vendor is insufficient. Similarly, the use of cookie consent banners does not constitute a valid HIPAA authorization, nor would it be sufficient for a tracking technology vendor to agree to de-identify the PHI after it has already been disclosed.

Further, regulated entities should evaluate their relationships with tracking technology vendors and establish BAAs with those that meet the definition of a "Business Associate" under the Privacy Rule.

Finally, regulated entities should analyze the tracking technologies in their HIPAA Risk Analysis and Risk Management Process to ensure transmitted PHI is properly secured and provide breach notification to affected individuals of any impermissible disclosures.

For additional information on how this Guidance impacts your organization, please contact our office.

PRESIDENT BIDEN'S COVID-19 VACCINE MANDATE FOR GOVERNMENT CONTRACTORS

President Biden suffered a series of losses due to recent court rulings striking down his COVID-19 vaccine requirement for government contractors.

In response to the COVID-19 pandemic, President Biden's Safer Federal Workforce Task Force ("Task Force") issued COVID-19 Guidance ("COVID-19 Vaccine Mandate") requiring that all government contractor employees performing covered work be fully vaccinated against COVID-19. *Missouri v. Biden*, 576 F. Supp. 3d 622, 627-28 (E.D. Mo. 2021). Covered employees included full-time and part-time employees that were working under, or in connection with, a government contract. *Id.* at 633. The mandate also applied to employees of government contractors who were not working with the government contract. *Id.* Furthermore, government contractors would also be responsible for validating their own employees COVID-19 vaccine status. In essence, the COVID-19 Vaccine Mandate requires government contractors to only employ people who are fully vaccinated against COVID-19 in order to obtain a government contract.

In response to the COVID-19 Vaccine Mandate, several lawsuits were filed against President Biden seeking an injunction to prevent his Task Force from enforcing the mandate. In the Sixth Circuit Court of Appeals, President Biden appealed the issuance of an injunction that prevented the Task Force from enforcing the COVID-19 Vaccine Mandate. *Kentucky v. Biden*, No. 21-6147, 2023 U.S. App. LEXIS 729, at *10 (6th Cir. Jan. 12, 2023). The Court ruled that President Biden failed to show that he had the authority to issue a COVID-19 Vaccine Mandate for government contractors and affirmed the injunction. *Id.* at 22.

President Biden's COVID-19 Vaccine Mandate was also challenged in the Fifth and Eleventh Circuits. In both cases, the injunctions preventing the Task Force from enforcing the COVID-19 Vaccine Mandate against the Plaintiffs were affirmed by the Courts. See *Georgia v. President of the United States*, 46 F.4th 1283, 1301, 29 Fla. L. Weekly Fed. C 1672 (11th Cir. 2022); *Louisiana v. Biden*, 55 F.4th 1017 (5th Cir. 2022). In *Georgia*, President Biden and his Task Force did receive a small victory, when the United States Court of Appeals for the Eleventh Circuit Court vacated an injunction preventing the COVID-19 Vaccine Mandate from being enforced nationwide. *Georgia*, 46 F.4th at 1307.

On October 19, 2022, the Task Force issued an update stating that government contractors are not required to enforce the COVID-19 Vaccine Mandate on employees. President Biden is set to end the national emergency and public health emergencies that were enacted in response to the COVID-19 pandemic on May 11, 2023. Therefore, government contractors can safely assume that the Government's attempt to mandate COVID-19 vaccines on government contractor employees is over.

In response to the COVID-19 Vaccine Mandate, several lawsuits were filed against President Biden seeking an injunction to prevent his Task Force from enforcing the mandate.

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