EDITION Nº TWENTY EIGHT

NEWS WITH PURPOSE, DECISIONS THAT COUNT

STATE OF THE UNION

THE JOHNSON + KROL NEWSPAPER

JOHNSON+KROL
311 S. WACKER DRIVE
SUITE 1050
CHICAGO IL 60606

PRESIDENT JOE BIDEN'S LABOR AGENDA

On January 20, 2021 Joseph R. Biden was sworn in as the forty-sixth President of the United States of America. His predecessor's legislative agenda was one of the most ambitious pro-management agendas advanced by a presidential administration to date. The expectation is that President Biden will advance a symmetrically aggressive pro-labor agenda as a feature piece of his administration. This article summarizes some of the major proposed changes, though the feasibility of the many proposed legislative changes and nominations will be the subject of intense debate in Congress.

Early personnel selection within the Biden Administration signal that the tone of the administration will be vastly different from Trump's. The Trump administration was notable for its near universal inclusion of business leaders in his transition team, where prominent management labor lawyers were assigned to take the early lead on setting labor policy. By way of contrast, President Biden has tapped two union presidents – Teresa Romero of the United Farm Workers and Lonnie Stephenson of the International Brotherhood of Electrical Workers – to his transition team's advisory board, and named twenty-five (25) other leaders from the labor movement to his transition team. Notably, President Biden has nominated former Boston Mayor Martin Walsh, a former head of both Laborers' Union Local 223 and the Boston Metropolitan District Building Trades Council, to serve as Labor Secretary. As President Biden noted, if confirmed Walsh "would be the first union member to serve in this role in nearly half a century." AFL-CIO President Richard Trumka has strongly endorsed this nomination.

Legislatively, the Biden Administration's legislative agenda stands in stark contrast to what was pursued during the Trump Administration. Of particular note, Biden is a supporter of the Protecting the Right to Organize Act ("PRO Act") which previously passed the House of Representatives in 2020 but stalled thereafter in the Senate. Among the many proposed changes, the following are the most significant:

01. Stronger Remedies for Interference with Workers' Rights. Under the current law, there are no penalties on employers or compensatory damages for workers when employers illegally fire or retaliate against workers who are trying to form a union pursuant to the National Labor Relations Act ("NLRA"). The PRO Act establishes compensatory damages for workers and penalties against employers (including penalties on officers and directors) when employers violate the NLRA and illegally fire or retaliate against workers.

02. Streamlined Election Processes. The PRO Act streamlines the National Labor Relations Board ("NLRB") election process so workers can get a timely vote without their employer interfering and delaying the vote. If the employer breaks the law or interferes with a fair election, the PRO Act empowers the NLRB to require the employer to bargain with the union if it had the support of a majority of workers prior to the election.

03. Facilitating First Contracts and Protecting Fair Share Agreements. Current law requires employers to bargain in good faith with the union chosen by their employees to reach a collective bargaining agreement, and nothing more. The PRO Act establishes a mediation process for reaching a first agreement when workers organize and negotiations reach an impasse on their first contract. Significantly, the PRO Act also overrides so-called "right-to-work" laws by establishing that employers and unions in all 50 states may agree upon a "fair share" clause requiring all workers who are covered by–and benefit from–the collective bargaining agreement to contribute a fair share fee towards the cost of bargaining and administering the agreement.

04. Expanding Strikes and Other Protest Activity. As the law stands now, Unions are prohibited from embroiling neutral parties in their labor disputes through picketing and other job action. The PRO Act proposes repealing the prohibition on secondary boycotts and other secondary activity presently prohibited by the NLRA.

05. Expanding Organizing and Bargaining Rights. The PRO Act tightens the definitions of independent contractors and supervisors to crack down on misclassification and extend NLRA protections to more workers. Additionally, the PRO Act makes clear that workers can have more than one employer, and that both employers need to engage in collective bargaining over the terms and conditions of employment that they control or influence. This provision is particularly important given the prevalence of contracting out and temporary work arrangements.

06. Employer Disclosure of Third-Party Influencers. The PRO Act reinstates an Obama administration rule, which was repealed by the Trump administration, to require employers to disclose the names and payments they make to outside third-party union-busters that they hire to campaign against the union.

The 2019 version of the PRO Act was a virtual wish list of changes for organized labor, and it remains to be seen what portions will be reintroduced during the Biden Administration. As originally proposed, it represented the most significant change to labor laws since the Landrum Griffin Act Amendments to the NLRA in 1959. And if passed, it would be the only amendment since the NLRA was passed in 1935 that would expand rights for unions. For that reason alone, it is historically significant and faces stiff opposition.

Although Democrats have since secured full control of Congress, the fate of this legislation is still unclear. The PRO Act would need to be reintroduced in the House (either in its most recent form or in some variation) before confronting the prospect of a filibuster in the Senate. And even if the filibuster is eliminated, it's uncertain whether all 50 Democratic senators would agree to such sweeping legislation. Nonetheless, President Biden has underscored that the policy interests of organized labor will be a priority for his administration, and for that reason it's fair to assume that we will see a variation of this legislation reemerge in 2021.

PROPOSED MODIFICATIONS TO THE HIPAA PRIVACY RULE

On December 10, 2020, the United States Department of Health and Human Services ("HHS") issued a Notice of Proposed Rulemaking to modify the Privacy Rule that falls under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). The Privacy Rule protects the privacy and security of individuals' protected health information ("PHI"), such as medical records and other individually identifiable health information and regulates its use or disclosure. HHS is proposing modifications that will increase individuals' access to their PHI, thus improving care coordination and case management. HHS believes that the ease of access to PHI will allow for refined coordination and cooperation between the members of an individual's healthcare delivery team. The notice highlights that delays to access of PHI hinders an individual's coordination of care and can lead to worse health outcomes. The issued notice is a continuation of the HHS's ongoing initiative to promote improved care coordination and value-based health care.

Key modifications to the Privacy Rule include reducing the identity verification burden, modifying provisions on the individuals' right of access to PHI and changes to notices of access and authorization fees.

REDUCING THE IDENTITY VERIFICATION BURDEN

Under the proposed modifications, covered entities, such as healthcare providers, are prohibited from imposing unreasonable identity verification measures on an individual or personal representative requesting access to PHI. The HHS defines unreasonable measures as "those that require an individual to expend unnecessary effort or expense when a less burdensome verification measure is practical." Examples of unreasonable measures include requiring notarization of a signature or demanding that individuals provide identity verification in person when they are able to do so remotely. The HHS holds that reasonably reducing the burden of identity verification will ensure that individuals have a greater ease of access to their PHI.

MODIFYING PROVISIONS ON THE INDIVIDUALS' RIGHT OF ACCESS TO PHI

Under the new rule, covered entities will be required to allow an individual, such as a patient or personal representative, to take notes, videos, recordings, photographs and use other personal resources to capture PHI without imposing a fee and will not be permitted to delay the right of an individual to inspect their PHI if it is readily available. The current rule does not explicitly state that individuals are permitted to use personal resources to inspect and obtain a copy of their PHI. In addition, the required time for covered entities to respond to requests for access to an individual's PHI has been shortened to 15 days from the current 30 day rule. The HHS believes that this modification will eliminate possible barriers faced when an individual is attempting to inspect or obtain copies of their PHI and that shorter timelines will assist individuals in making more informed health care decisions.

CHANGES TO NOTICES OF ACCESS AND AUTHORIZATION FEES

The updated provisions propose that covered entities be required to provide advance notice of the approximate fees for requested copies of PHI. Covered entities will need to post a fee schedule online, as well as make a fee schedule available to individuals at the point of service. Covered entities will also be required to provide individualized estimates of total fees to be charged for copies of PHI at request. In addition, the HHS noted that they are continuing to encourage covered entities that charge fees for copies of PHI to waive or express flexibility on the payment of fees for individuals unable to pay due to a lack of resources or hardship.

The HHS maintains that the proposed modifications to the Privacy Rule will increase access to PHI, thus improving case management and coordination of care. The effective date of the proposed modified rule will be 60 days after its publication, and covered entities will have 180 days after the rule's effective date to implement policies and practices that are in compliance with the new standards.

FINAL RULE:

ESG Investing in Retirement Plans

On October 30, 2020, the Department of Labor ("DOL") issued its final regulation ("Final Rule"), amending its longstanding "investment duties" regulation under Title I of ERISA. Up until now, DOL guidance on fiduciary duties in investment has usually come in the form of advisory opinions or other sub-regulatory guidance. The DOL's decision to issue substantive regulation comes after years of debate regarding the application of the fiduciary duties of prudence and loyalty to plan investments that promote non-financial objectives, specifically environmental, social, and governance (ESG) investing. The Final Rule codifies the DOL's longstanding view that plan fiduciaries should not use retirement funds as vehicles for advancing social goals that are not in the plan's financial interest.

MINIMUM VALUE : THE FINAL RULE - KEY PROVISIONS

First, the Final Rule mandates that ERISA fiduciaries evaluate investment and investment courses of action based solely on pecuniary factors. §2550.404a–1(c)(1). The Final Rule defines a "pecuniary factor" as a factor that a fiduciary "prudently determines is expected to have a material effect on the risk and/or return of an investment based on appropriate investment horizons consistent with the plan's investment objectives and funding policy." §2550.404a–1(f)(3).

It's important to note that the proposed rule specifically singled out ESG investments. However, after much opposition, the Final Rule removed all explicit references to ESG factors and permits fiduciaries to use non-pecuniary factors when they are unable to distinguish investment alternatives on the basis of pecuniary factors alone.

Second, the Final Rule expressly states that the duty of loyalty under ERISA prohibits plan fiduciaries from subordinating the interests of participants to other objectives and sacrificing investment returns or taking additional investment risk to promote non-pecuniary goals. §2550.404a–1(c)(1).

Third, the Final Rule sets forth investment analysis and documentation requirements in circumstances where the plan fiduciary uses non-pecuniary factors when choosing between or among investments the fiduciary is unable to distinguish on the basis of pecuniary factors alone. The Final Rule outlines a "tie breaker" test for these situations. This provision acts as a limited exception to the general rule prohibiting investment based on non-pecuniary factors. §2550.404a–1(c)(2).

Fourth, the Final Rule provides that ERISA's prudence and loyalty standards apply to a fiduciary's selection of designated investment alternatives in participant-directed individual account plans. §2550.404a–1(d). This does not mean that a fiduciary is prohibited from considering or including an investment option merely because the option promotes a non-pecuniary goal. However, it does mean that a fiduciary must satisfy the duties of prudence and loyalty, which includes evaluating investments solely based on pecuniary factors.

Finally, the Final Rule prohibits plans from adding any investment as a qualified default investment alternative ("QDIA") if the investment objectives or principal investment strategies include, consider or indicate the use of a non-pecuniary factor. §2550.404a–1(d).

IMPLICATIONS

As the Final Rule now stands, there likely won't be fundamental changes in the way many ERISA fiduciaries invest because the Final Rule merely clarifies the long-standing view of the DOL.

It's also important to note that the regulation was passed under the Republican Trump administration. With climate change and renewable energy at the forefront of President Biden's campaign, it's very likely the new administration will work to reverse or issue sub-regulatory guidance on ESG investing. The Biden administration will also have the opportunity to replace the Securities and Exchange Commission chair and the head of the Commodity Futures Trading Commission, both of which may shift the regulatory environment to be more favorable toward ESG investing.

Because the Final Rule does not explicitly reference ESG factors, the Biden administration plans to provide guidance clarifying that ESG factors are pecuniary and can be considered by fiduciaries. It's also likely that the Biden administration would allow ESG funds as default options in 401(k) plans. If these changes were implemented, pension plan fiduciaries would likely still be hesitant in considering ESG factors in their investments. However, there would be a significant effect on defined contribution plans with plan participants potentially having ESG investment options.

The Final Rule is effective January 12, 2021 and will apply prospectively. However, plan fiduciaries will have until April 30, 2022 to modify or divest QDIAs to comply with the new restriction.

As the Final Rule now stands, there likely won't be fundamental changes in the way many ERISA fiduciaries invest because the Final Rule merely clarifies the long-standing view of the DOL.

MINERS' PENSION BAILOUT BRINGS TEMPORARY REPRIEVE TO PBGC MULTIEMPLOYER PROGRAM

Without additional interventions, the program could fail before the decade's end.

There are roughly 1,400 multiemployer pension plans ("MPPs") in the United States and these plans have more than 10 million participants. Unfortunately, many of these MPPs are underfunded and on the verge of being unable to pay the benefits promised to their participants. As of June 2017, at least 100 of these plans had been classified as being in "critical and declining" status, which means they are projected to have insufficient assets and will be unable to pay full benefits to their participants within the next twenty years. Other MPPs are insolvent already.

Enter the Pension Benefit Guarantee Corporation ("PBGC"), a federally chartered corporation designed to backstop both MPPs and single-employer pension plans. The PBGC was created by the Employee Retirement Income Security Act of 1974 ("ERISA"), and currently safeguards the pension benefits of some 34 million American workers. The PBGC's Multiemployer Program and Single-Employer Program are legally separate and financially independent.[1] During FY 2019, the Multiemployer Program provided $160 million in financial assistance to 89 MPPs. In FY 2020, 95 MPPs received $173 million in financial assistance. Unfortunately, this statutorily created backstop is itself headed towards insolvency. According to the PBGC's Annual Report for 2020, the Multiemployer Program is projected to run out of money in 2026, and the Director of the PBGC has stated that legislative reform is necessary to avert insolvency.

While 2026 is certainly looming in the not so distant future, it was previously projected that the Multiemployer fund would become insolvent in 2025. This one year reprieve is due to a $1.4 trillion spending bill passed by Congress in December 2019, or more specifically passage of the Bipartisan American Miners Act. As a result of this legislation, taxpayer money will be used to bail out a private sector pension fund, the United Mine Workers of America 1974 Pension Plan, for the first time since ERISA was enacted more than 45 years ago.

The bailout for the miners utilizes money from the Abandoned Mine Land ("AML") Fund, which was originally created by the Surface Mining Control and Reclamation Act of 1977 ("SMCRA"). The AML reclamation program is funded by a fee assessed on each ton of coal produced and was originally set to expire fifteen years following the date of enactment. To date, the reclamation fee has been extended seven times. The Bipartisan American Miners Act allows the transfer of funds in excess of the amounts needed to meet existing obligations under the AML Fund, as much as $750 million per year, to the pension plan to prevent its insolvency.

The United Mine Workers of America 1974 Pension Plan is one of the largest MPPs in the United States. Consequently, Congress has postponed the PBGC's insolvency by saving the miners' fund from insolvency. Yet this fix is only temporary. There are other large plans on the verge of collapse which are capable of depleting the PBGC's Multiemployer Program's assets. Without intervention from the government on their behalf, it is very likely that the PBGC's Multiemployer Program will fail before the end of this decade.

[1] The two programs are also in very different financial positions: the Multiemployer Program is headed towards insolvency with a $63.7 billion negative net position, while the Single-Employer Program has positive net position of $15.5 billion.

"The United Mine Workers of America 1974 Pension Plan is one of the largest MPPs in the United States.

“The welfare plan was arguably in violation of law at that point.

TITLE VII LIABILITY COULD ATTACH TO UNIONS AND MULTIEMPLOYER HEALTH PLANS FOR DISCRIMINATORY COVERAGE

Recently, in the United States District Court for the Northern District of Illinois, a labor union and its affiliated welfare fund were sued by a plan participant for providing discriminatory coverage under Title VII of the Civil Rights Act of 1964.[1] The participant in the case married her same-sex spouse in October of 2014. Entitled to a health insurance benefit through the Fund, the participant attempted to enroll herself and her same-sex spouse. However, on November 17, 2014, the fund informed the participant that same-sex partners were not eligible dependents under the welfare fund. In November of 2018, the participant filed a lawsuit for the discriminatory denial of coverage for her same-sex spouse under the plan.[2]

State and federal laws evolved in recent years to recognize same-sex marriage in all fifty states. Section 3 of the Defense of Marriage Act (DOMA)—which denied federal recognition of same-sex marriages—was found to be unconstitutional by the Supreme Court in 2013.[3] Following this decision, welfare plans across the country were amended to recognize same-sex spouses. Illinois legalized same-sex marriage on June 1, 2014, a little over a year before same-sex marriage became legal in the rest of the United States.[4] And just last year in Bostock v. Clayton County, Georgia, the Supreme Court expanded its reading of Title VII and held that workplace discrimination for sexual orientation or gender identity is prohibited under Title VII.[5]

Despite these well published changes to both federal and state laws, the welfare fund here did not amend its plan to include same-sex spouses until May of 2015.[6] Consequently, the welfare plan was arguably in violation of law at that point.

Now, the participant/plaintiff is seeking to use the recent decision in Bostock to extend a claim of discrimination against the welfare fund and the union based on a benefit denial, arguing that the union can be held liable under Title VII because it bargained for a discriminatory health insurance plan on behalf of its members. Similarly, the participant is arguing that the welfare fund, while not her employer, can be held liable under Title VII as an agent of her employer.[7]

The case is still in the early stages of litigation and it remains to be seen whether either of these theories will prevail. Thus far, the District Court has only found that the participant has sufficiently pled a Title VII claim in federal court. Obviously, if these claims are ultimately successful, this would mark a significant expansion of potential liability for both plans and plan sponsors alike. JK will continue to track and monitor additional developments in this case as the litigation progresses.

1 See Jimenez v. Laborer's Welfare Fund, No. 18-7886, 2020 U.S. Dist. LEXIS 187023 (N.D. Ill. Oct. 8, 2020).
2 Id. at 1.
3 See United States v. Windsor, 570 U.S. 744 (2013).
4 https://www.isba.org/ibj/2014/08/same-sexmarriagecomesillinois
5 See Bostock v. Clayton County, Georgia, 140 S. Ct. 1731 (2020).
6 Ewing, James. Plan Participant Sues Local Union and Related Health Fund Under Title VII for Refusing to Cover Her Same-Sex Spouse. United Actuarial Services, Inc. December 8, 2020.
7 Id.

COVID-19 VACCINATIONS: LEGAL CONSIDERATIONS FOR EMPLOYERS

The recent approval of several COVID-19 vaccines in the United States has introduced yet another layer of complexity in an already complex legal environment for employers. As employers are returning to something that resembles the pre-COVID-19 workplace, an omnipresent question throughout 2020 was what behaviors and protocols can be required of employees as a condition of their return? The introduction of a vaccine brings this question front and center: employers may consider mandating COVID-19 vaccinations prior to allowing employees back into the workplace for safety reasons. On December 16, 2020, the Equal Employment Opportunity Commission (EEOC) updated its guidance "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and other EEO Laws to include new information addressing how the COVID-19 vaccination interacts with the legal requirements of the Americans with Disabilities Act (ADA), Title VII of the Civil Rights Act (Title VII), and the Genetic Information Nondiscrimination Act (GINA)". The updated guidance applies previous EEOC Guidance to several COVID-19-specific issues and provides some clarity on several issues:

I MEDICAL EXAMINATIONS AND INQUIRIES UNDER THE ADA

The administration of a COVID-19 vaccine to an employee by an employer (or a third party on behalf of an employer) is not a "medical examination" under the ADA. However, pre-vaccination medical screening questions asked by an employer or a contractor on the employers' behalf for mandatory COVID-19 vaccination are disability-related inquiries under the ADA, which requires a showing that the questions are "job-related and consistent with business necessity." Asking or requiring an employee to show proof of receipt of a COVID-19 vaccination is not a disability-related inquiry. However, follow-up questions such as why an individual did not receive a vaccination may reveal information about a disability and thus would be subject to the ADA's standard that they be "job-related and consistent with business necessity."

II REASONABLE ACCOMMODATIONS UNDER THE ADA

If an employer mandates COVID-19 vaccinations and an employee indicates that he or she cannot receive it due to a disability, the employer must conduct an individualized assessment to determine if that employee poses a "direct threat" to the workplace. If an employer determines that such an employee poses a direct threat, the employer must determine whether a reasonable accommodation can be provided to reduce the direct threat without causing undue hardship. This determination is highly individualized and takes into consideration factors such as whether the employee can be isolated from other employees, whether others in the workplace are vaccinated, and similar factors.

If the direct threat cannot be reduced, the employer can exclude the employee from physically entering the workplace. This does not mean that the employer may terminate the employee. Rather, an employer must determine if there is any other reasonable accommodation available, such as being able to work remotely or take leave.

III RELIGIOUS OBJECTIONS TO VACCINATION UNDER TITLE VII

If an employer requires COVID-19 vaccinations, an employee can object on the basis he or she is unable to receive a COVID-19 vaccination because of a "sincerely held religious practice or belief." An employer must provide a reasonable accommodation for the religious belief, practice or observance unless it would pose an undue hardship under Title VII. This is a much lower standard than the "direct threat" analysis under the ADA, and generally requires only a "de minimis" accommodation. Note that this is different than simply being against or afraid of vaccinations. There is doctrinal element to it.

If an employer cannot exempt or provide a reasonable accommodation to an employee who cannot comply with a mandatory vaccination policy because of a religious belief, the employer may exclude the employee from the workplace. Like an employee who poses a direct threat under the ADA, this does not permit termination of employment. Instead, the employer will need to determine what accommodations can be made to the employee's religious belief.

IV GENETIC INFORMATION PROTECTIONS UNDER GINA

Administering a COVID-19 vaccination to employees or requiring employees to provide proof that they have received a COVID-19 vaccination does not implicate Title II of GINA. However, if administration of the vaccine requires pre-screening questions that ask about genetic information, the inquiries seeking genetic information, such as family members' medical history, may violate GINA.

V MISCELLANEOUS CONSIDERATIONS

There are other legal issues outside the discrimination context which employers should take into consideration before mandating or administering COVID-19 vaccinations in the workplace:

01. The Occupational Safety and Health Act (OSHA) general mission is to ensure that the workplace is "free from recognized hazards that are causing or are likely to cause death or serious physical harm to employees." This "general duty clause" may impose a duty on employers to take steps to prevent employees from contracting or spreading COVID-19 in the workplace. OSHA has published guidance recommending that employers promote vaccination and make vaccines readily accessible to employees to prevent the spread of the illness in the workplace. OSHA has stopped short of saying that vaccines should be required.

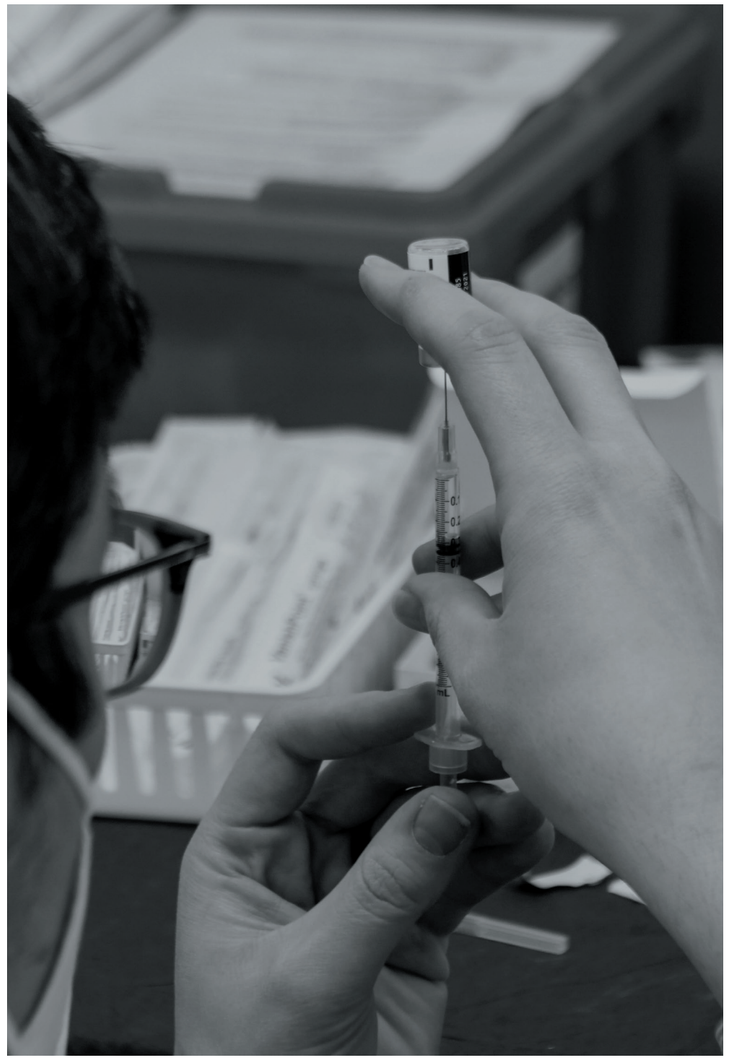
02. Public employers should be mindful of the limitations of governmental actions imposed by federal and state constitutions. These include the protection against regulation of religious beliefs in the First Amendment to the U.S. Constitution and the protection against state deprivation of certain liberty interests in the Fourteenth Amendment to the U.S. Constitution.

03. Worker's compensation laws may require the employer to pay for vaccine-related injuries if the employee is vaccinated at the employer's request.

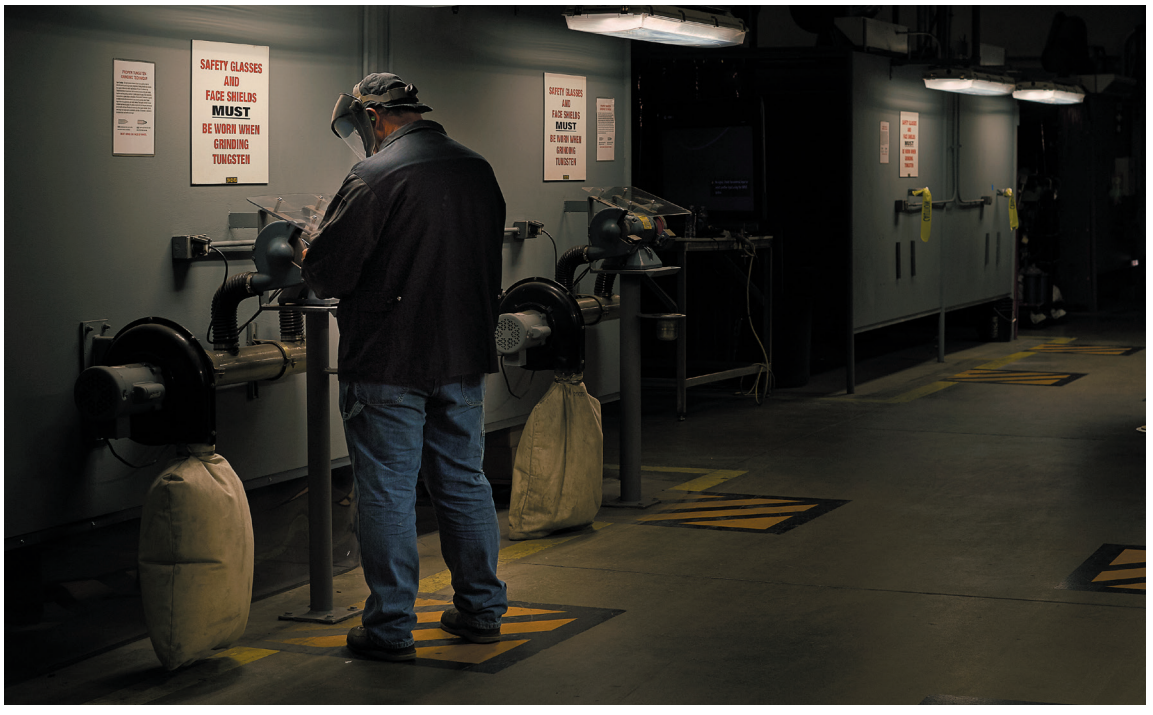
04. Under state tort law, employers may owe a duty of care to employees, vendors and clients who enter the workplace and business. The actual duty depends on what is considered "reasonable" at any given time. There has been some discussion on a national level about providing employers some form of immunity from liability, but to date nothing has been passed.

05. Unionized employers may have to bargain with the union regarding a mandatory vaccination policy.

Though this article should not be treated as an exhaustive list, it is evident that the eventual solution to COVID-19 has brought forth new problems for employers and employees alike. It is best to work with legal counsel to navigate this ever-changing landscape.



NEW PRICE TRANSPARENCY REQUIREMENTS



On November 12, 2020, the Department of Health and Human Services, together with the Centers for Medicare & Medicaid Services (CMS), the U.S. Department of Labor, and the U.S. Department of the Treasury, published a new Final Rule that will require health plans to disclose new cost-sharing information to plan enrollees, participants, and beneficiaries. The data to be disclosed includes a plan's negotiated in-network rates, historical out-of-network allowed amounts, and drug pricing information; all data that was previously unavailable to plan participants. The Final Rule also requires that health plans begin providing their plan participants and enrollees an estimate of the cost-sharing liability an individual can expect for specific covered items or services furnished by a particular provider.

The purpose in establishing these updated disclosure requirements is to give consumers and other healthcare stakeholders the information needed to make truly informed decisions. The enhanced transparency that will result from the Final Rule's implementation will support an efficient and competitive health care market by enabling consumers to better understand their healthcare costs upfront and perform a more in-depth evaluation of their options. This enhanced transparency should also generate more competitive pricing between providers and servicers, ultimately resulting in lower costs to benefit plan participants and enrollees.

The Final Rule adopts a phased-in approach to take effect over a period of three years. Beginning January 1, 2022, machine-readable files containing pricing information and disclosure of provider rates will be available to view on the public facing internet website of a plan. Then, beginning January 1, 2023, plan participants and enrollees may request the cost-sharing information for 500 items and services which have been identified by the Departments as being of primary interest. By January 1, 2024, plan participants and enrollees will be able to request cost-sharing information for all items and services made available for coverage under a health plan.

The guidelines issued for these disclosures advise adopting a format similar to that of an Explanation of Benefits (EOB). The Final Rule reasons that this would be a reasonable and appropriate utilization of existing tools, especially as EOBs are likely familiar to most consumers and similarly styled disclosures would provide the required cost-sharing information in a recognizable format that can be readily understood. The disclosure rules require seven content elements be disclosed relative to a covered item or service; the elements are as follows:

01. The estimated cost-sharing liability of the consumer;

02. The accumulated amounts of financial responsibility the consumer has incurred at the time of the request (including amounts incurred towards meeting deductibles or out-of-pocket limits);

03. The in-network rates that the plan has negotiated for the item or service;

04. The out-of-network allowed amount the plan would pay for the item or service;

05. A list of covered items and services for which cost-sharing information is disclosed subject to a bundled payment arrangement;

06. Notice of any prerequisite to receipt of coverage for the item or service; and

07. A notice of disclosure regarding the estimated nature of the disclosure notice and any other required or additional information that the plan deems appropriate.

The first disclosures set to be made available January 1, 2023 will be found on the plan's public-facing webpage. The more detailed disclosures that plan participants and enrollees may request beginning January 1, 2024, however, can be requested via an internet-based self-service tool which should be available to plan participants and enrollees to search for a covered item or service by inputting a) a billing code (such as a CPT code) or a descriptive term, b) by name of in-network provider, or c) allowed amounts for a covered service provided by an out-of-network provider. This will enable consumers to be provided with real-time responses based on the cost-sharing information accurate at the time of their request. The Final Rule requires that, just as a consumer would be able to search an internet website for cost-sharing information for a specific service or item, they are entitled to be provided such tailored information in a physical paper copy, if they so request.

In addition to the automated search tool and disclosure files required to be made available on a plan's website, health plans will need to implement new measures to provide detailed benefit estimates, tailored to a plan participant or enrollee's specific information under the Plan (i.e., progress towards deductibles, cost-sharing benchmarks, etc.), upon request from the plan participant or enrollee. Unlike the other required disclosures, compliance with these individualized cost-sharing estimates cannot be met by publishing uniformly automated documents relative to a specific item or service. The Final Rule encourages utilizing existing EOBs as a template for these new disclosures, however, a personalized workup will be required each time a plan participant or enrollee requests a cost-sharing estimate for a specific item or service. These disclosures are not required until plan years beginning January 1, 2023, but planning should start soon as compliance could pose some serious technological hurdles.

The publishing of the Final Rule was driven by the belief in the necessity for consumers to have accurate and meaningful information regarding the cost of their healthcare. The current scheme of healthcare disclosure provides a breakdown of expenses after the service has been rendered; by providing the estimated cost of a service upfront, consumers will be given an actual opportunity to research and compare pricing - and then choose the most cost-efficient option while mitigating the potential for surprise billing.

JOHNSON +KROL
ATTORNEYS AT LAW