EDITION Nº FORTY-FOUR

NEWS WITH PURPOSE, DECISIONS THAT COUNT

STATE OF THE UNION

THE JOHNSON + KROL NEWSPAPER

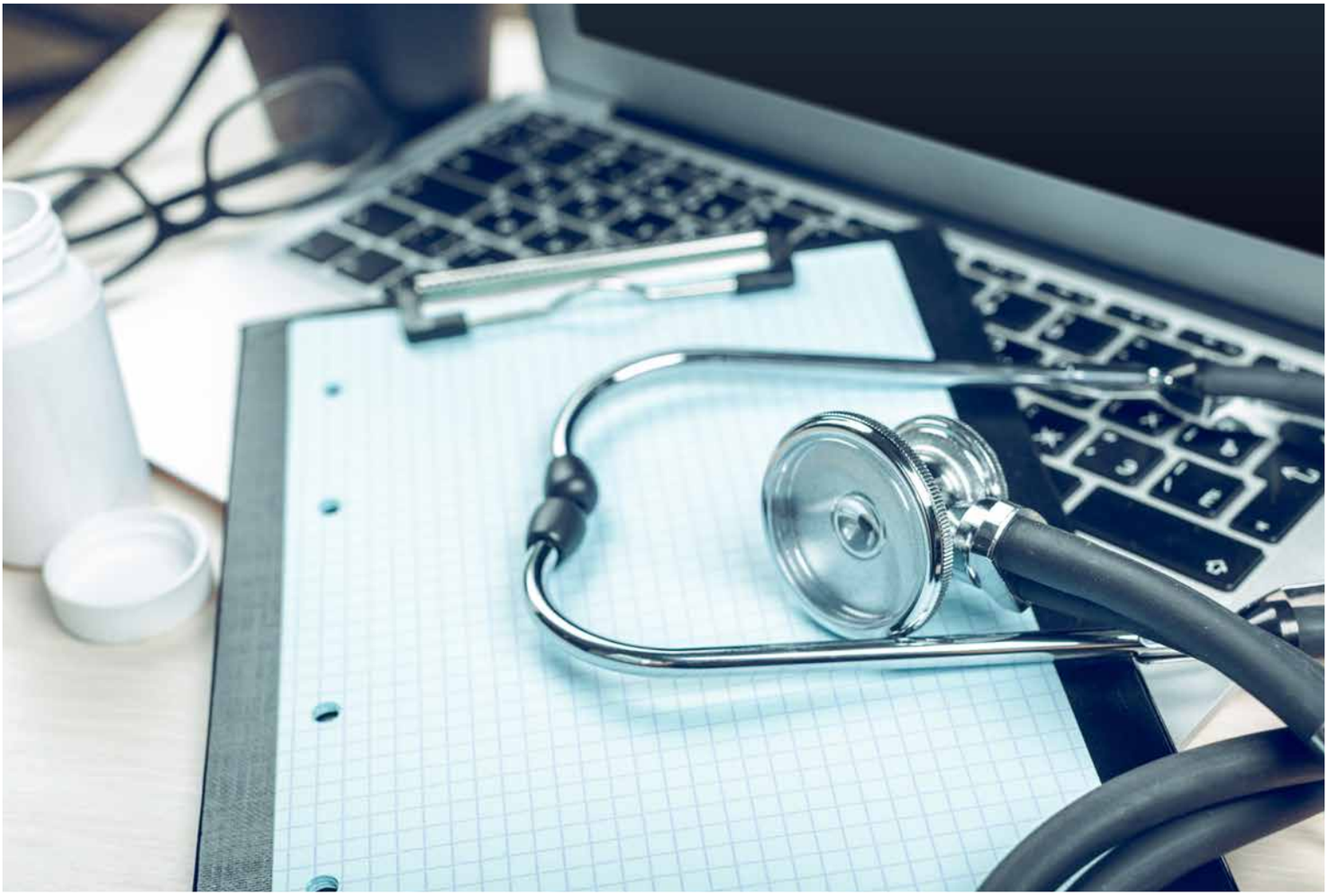
JOHNSON + KROL'S NEWEST MEMBER: SUZANNE C. DYER

Johnson + Krol is proud to announce that Suzanne C. Dyer is now a Partner/Member of the firm.

Since joining J+K in 2020 she has delivered a long string of successes in arbitrations, at the NLRB and at the negotiating table. She brings a wealth of knowledge, experience and can-do work ethic to the ownership group of J+K.

Congratulations, Suzanne! Your commitment to our mission of supporting working people and protecting their benefits is second to none. Your decision to join the ownership team at J+K is greatly appreciated and will pay dividends to the firm and our clients for many years.

DENNIS R. JOHNSON
MANAGING MEMBER



NEW FEDERAL PUSH FOR HEALTHCARE PRICE TRANSPARENCY

In an effort to improve price transparency in health care, the U.S. Departments of Labor, Health and Human Services, and the Treasury announced new steps aimed at ensuring Americans have access to clearer cost information about medical services and prescription drugs.

These agencies jointly released a Request for Information (RFI) to gather public input on improving prescription drug price transparency. They aim to simplify data for consumers and promote informed healthcare decisions. The comment period for the RFI ended on July 2, 2025. The request sought insight into data accessibility for health plans, the usability of current pricing formats and state-led innovations.

Additionally, the Departments issued RFIs to solicit feedback on improving transparency practices, especially regarding prescription drug machine-readable files and the completeness of hospital pricing data.

On May 22, 2025, the Departments also released updated guidance for health plans and health insurance issuers, setting timelines for disclosing certain pricing information starting from January 1, 2022. The change aims to require some group health plans and health insurance issuers to publicly disclose certain types of pricing information.

The Departments of Labor, Health and Human Services, and Treasury have issued technical guidance for these files. This guidance describes with specificity who is required to make the disclosures, where the disclosures need to be made, what types of information need to be disclosed, and how the disclosures should be provided publicly.

"Transparency empowers individuals to make well-informed health care decisions for themselves and their families," said Deputy Secretary of Labor Keith Sonderling in a statement. "The departments' actions today execute President Trump's mission to address rising health care costs by promoting competition in the marketplace."

Additionally, on May 22, 2025, the Centers for Medicare and Medicaid Services (CMS) issued guidance requiring hospitals to disclose actual prices for services rather than estimates. CMS also issued its own RFI to improve hospital compliance and data accuracy. In a separate move, CMS issued new guidance that requires hospitals to post the real price of items and services instead of price estimates. The centers also issued a request for information seeking feedback on how to improve hospitals' ability to supply "accurate and complete" data.

"Transparency in health care is essential, not optional," CMS's Chief of Staff and Deputy Administrator Stephanie Carlton said in a statement.

These actions support Executive Order 14221 from President Trump. The February 2025 Executive Order seeks to empower patients with clear pricing information. Key regulatory actions include the Transparency in Coverage regulations, requiring health plans to disclose various pricing details, and the Hospital Price Transparency regulations, mandating hospitals to present standard charges in an understandable format. Overall, these measures aim to reduce healthcare costs, foster competition, and enhance patient empowerment.

TRUMP ADMINISTRATION MOVES TO ALIGN U.S. DRUG PRICES WITH LOWER GLOBAL RATES

On May 12, 2025, President Trump signed an Executive Order titled *"Delivering Most Favored Nation Prescription Drug Pricing to American Patients."* The Order directs that U.S. consumers should not pay more for certain prescription medications than the prices offered in countries that use government-imposed price controls.[1]

Under the Order, the Department of Health and Human Services ("HHS") has 30 days to set "most favored nation" price benchmarks based on international drug pricing data and notify pharmaceutical manufacturers. Initially, manufacturers will be invited to comply voluntarily. If they do not, HHS may initiate formal rulemaking, pursue drug importation options, or impose tariffs or other economic measures on companies or countries deemed non-compliant.[2]

POLICY GOALS AND CONTEXT:

The stated intent of the order is to reduce the financial burden of prescription drug costs on U.S. consumers. According to figures cited by the Administration, Americans account for less than 5% of the global population, but represent approximately 75% of global pharmaceutical profits. By referencing lower drug prices abroad, the Administration aims to bring U.S. prices more in line with those in peer countries, potentially reducing costs for brand-name medications by 30% to 80%, and in some cases up to 90%.[3]

This initiative builds on a previous executive order from September 2020, which focused on Medicare Part B drug pricing. That earlier measure encountered legal challenges and was not fully implemented. The current order expands the scope to include all prescription drugs and applies more broadly across the healthcare system.

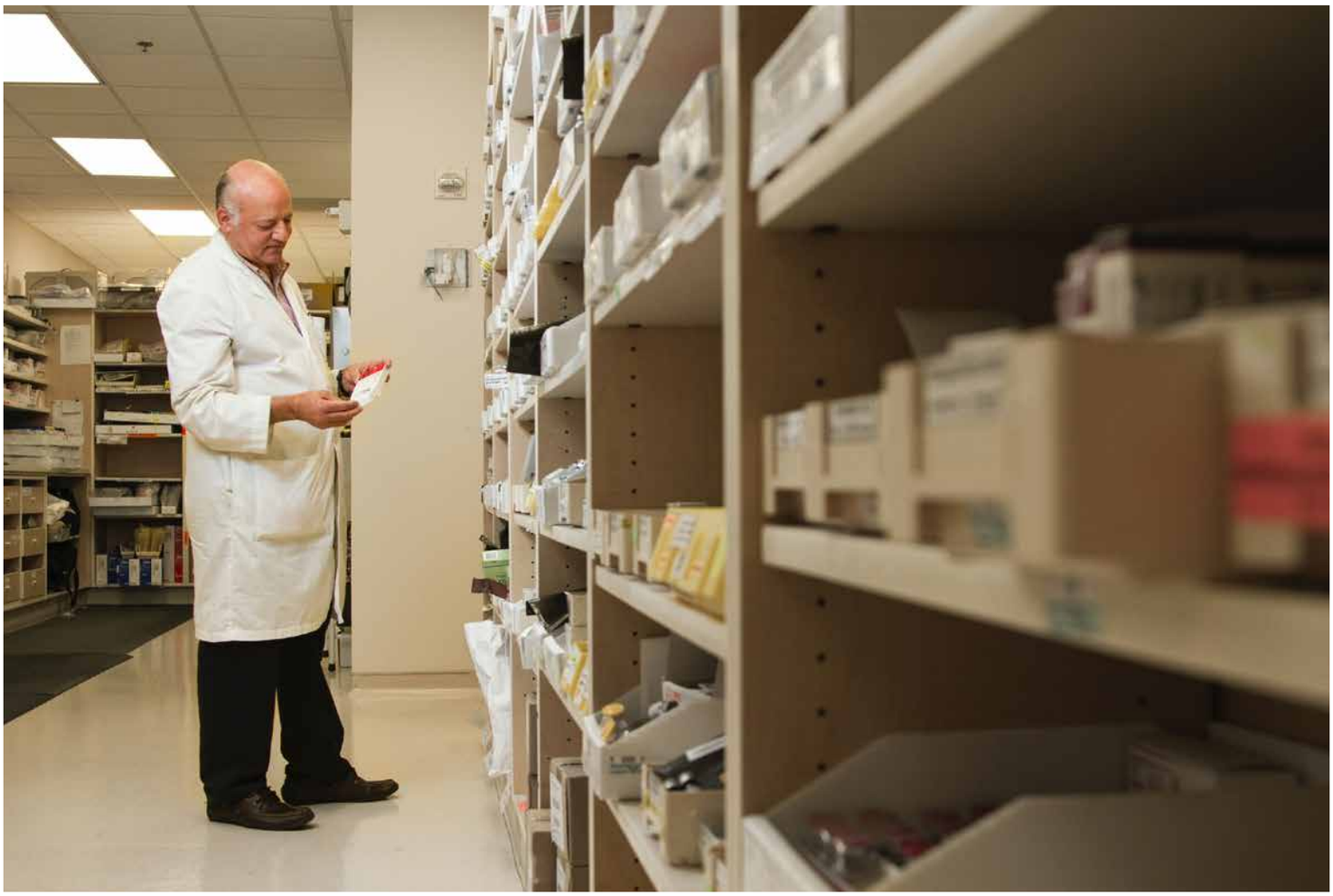
BIPARTISAN INTEREST AND POLICY DIFFERENCES:

Prescription drug pricing has been a consistent concern across the political spectrum. Both Democratic and Republican lawmakers have introduced proposals to address high medication costs. For instance, President Biden's *Inflation Reduction Act* enables Medicare to negotiate some drug prices, a strategy typically associated with Democratic policy preferences. While led by a Republican Administration, the instant Executive Order reflects a different approach, including price referencing and importation strategies more often supported by market-based policy advocates. While the goals are shared, the mechanisms differ: some policymakers prioritize direct negotiation or price caps, while others focus on reducing intermediary costs or tying U.S. prices to international benchmarks.

INDUSTRY RESPONSE AND CONSIDERATIONS FOR INNOVATION:

The pharmaceutical industry has raised concerns that tying U.S. drug prices to lower prices abroad could reduce revenues that support research and development. Critics argue this could slow the pace of innovation or impact access to new treatments.[4] However, others point out that pharmaceutical companies continue

"*Americans account for less than 5% of the global population, but represent approximately 75% of global pharmaceutical profits.*"



to operate profitably in countries with lower prices and that significant portions of early-stage drug research are funded by public institutions, such as the National Institutes of Health ("NIH").

LEGAL AND IMPLEMENTATION CHALLENGES:

Whether the Executive Order can achieve its intended effects remains uncertain. Although the Executive Branch has authority over federal health programs and international trade tools like tariffs and importation rules, there are limits. Previous attempts to implement similar drug pricing rules have been struck down for procedural reasons, including failure to undergo required notice-and-comment rulemaking. Additionally, legal challenges from industry stakeholders are likely, including arguments related to price setting and regulatory overreach. Major changes to drug pricing policy, especially those affecting the private insurance market, may ultimately require Congressional legislation to ensure durability and avoid litigation setbacks.

CONCLUSION:

This Executive Order represents a significant attempt to lower prescription drug costs by benchmarking U.S. prices against international rates. It aims to broaden access to affordable medications while maintaining incentives for innovation. However, successful implementation will depend on regulatory processes, legal outcomes, industry cooperation, and potentially future legislative support. The timeline for realizing its full impact is likely to be extended due to administrative and legal complexities.

For further details or questions about how this policy may affect you or your organization, please contact our office.

[1] https://www.whitehouse.gov/presidential-actions/2025/05/delivering-most-favored-nation-prescription-drug-pricing-to-american-patients

[2] https://www.debevoise.com/insights/publications/2025/05/unpacking-president-trumps-new-executive-order

[3] https://www.whitehouse.gov/fact-sheets/2025/05/fact-sheet-president-donald-j-trump-announces-actions-to-put-american-patients-first-by-lowering-drug-prices-and-stopping-foreign-free-riding-on-american-pharmaceutical-innovation

[4] https://kffhealthnews.org/news/article/drug-price-pricing-executive-order-may-12-most-favored-nation-fact-check-timing; http://rheumatologyadvisor.com/news/trump-reduce-drug-prices-most-favored-nation

SUPREME COURT SAYS: NO "REVERSE DISCRIMINATION"— ONLY DISCRIMINATION

On June 5, 2025, a unanimous Supreme Court ruled in favor of Marlean Ames, a straight woman who had worked for the Ohio Department of Youth Services and alleged she was discriminated against by her Employer.[1] Justice Kentaji Brown Jackson wrote the Opinion, overruling the Sixth Circuit Court of Appeals, which had ruled that as a member of a majority group, Ms. Ames had to meet a more heightened standard when alleging discrimination.

Ms. Ames had worked for the Youth Services Department for 15 years, she started as a clerical employee and eventually worked her way to the position of program administrator. In 2018, her supervisor, who is gay, had given her a favorable evaluation. A year later, Ms. Ames applied for a management position, but the position was ultimately given to a lesbian woman. Thereafter, Ms. Ames was demoted from her position of program administrator and the agency later filled her previous role by hiring a gay man. Ms. Ames was demoted into a position where she made half of her previous salary. Ms. Ames filed a lawsuit under Title VII, alleging that she was discriminated against based on her heterosexual orientation.

Both the District Court and the Sixth Circuit Court of Appeals ruled against Ms. Ames. In their rulings, both Courts analyzed Ms. Ames complaint under the *McDonnell Douglas*[2] standard which requires that when alleging disparate treatment, a plaintiff must "make a prima facie showing that the defendant acted with a discriminatory motive." The District Court and the Sixth Circuit Court of Appeals added a higher burden for Ms. Ames, holding that she failed to meet her burden because she had not demonstrated, "background circumstances to support the suspicion that the defendant is the unusual employer who discriminates against the majority."[3] Essentially, the Sixth Circuit had added an additional evidentiary burden for alleging discrimination based on a protected characteristic for those in a majority class as opposed to those in a minority class. When a member of a majority class alleges discrimination on the basis of a being in protected class, i.e., a white person alleges discrimination on the basis race, this is often referred to as "reverse discrimination".

The Supreme Court held, "the Sixth Circuit's 'background circumstances' rule —which requires members of majority group to satisfy a heightened evidentiary standard to prevail on a Title VII claim— cannot be squared with the text of Title VII or the Court's precedents…the text of Title VII's disparate treatment provision draws no distinctions between majority group plaintiffs and minority-group plaintiffs… Congress left no room to impose special requirements on majority-group plaintiffs alone."

What the Supreme Court's ruling means is that there is no such thing as "reverse discrimination," there is simply discrimination. Regardless of whether a person is a member of a majority class or a minority class, if the individual is discriminated against on the basis of a protected characteristic (i.e. race, gender, sexual orientation) their claims will be treated the same under the law. However, the ruling does not mean the Ms. Ames has proved her claim of discrimination against her former employer, it simply sends the case back down to be analyzed under the *McDonnell Douglas* disparate treatment standard without being required to show the heightened evidentiary standard.

While the Opinion was unanimous, Justices Thomas and Gorsuch filed a concurring opinion in which they agreed with the Court's holding, but went further to suggest that in their opinion the *McDonnell Douglas* framework was not derived from federal discrimination law and that if a case came before the Supreme Court asking the Court to overrule the standard, they would consider doing so.

[1] *Ames v. Ohio Dept. of Youth Services*, __U.S.___, Case No. 23-1039, (2025).
[2] *McDonnell Douglas Corp v. Green*, 411 U.S. 792 (1973).
[3] *Ames v. Ohio Dept of Youth Services*, 87 F. 4th 822, 825 (6th Cir. 2023).

SUPREME COURT RULING GIVES WORKERS STRONGER TOOLS TO PROTECT RETIREMENT SAVINGS

Section 406 of the Employee Retirement Income Security Act of 1974 (ERISA) prohibits fiduciaries from engaging in certain transactions with parties in interest that are considered inherently risky or conflicted, unless a specific exemption applies. Under ERISA, a "party in interest" includes plan fiduciaries, service providers, employers, and certain relatives or affiliates, as defined in 29 U.S.C. § 1002(14). These prohibitions are designed to protect plan participants from the potential abuse and mismanagement of plan assets.

The statute treats these transactions as automatically prohibited, even if they seem fair or beneficial to the plan. Congress chose this strict approach to avoid getting into questions about what the fiduciary was thinking or whether their intentions were good. This is different than the general fiduciary duty provisions in Section 404 of ERISA, which requires fiduciaries to act prudently. In contrast, Section 406, sets out firm rules that apply regardless of intent or outcome.

However, Section 408 of ERISA sets forth a series of exemptions to the prohibited transaction rule. Some of these exceptions are built into the law and apply automatically if specific conditions are met, while others must be approved by the Department of Labor. For example, exceptions may apply to transactions involving necessary services at a fair price, certain loans to plan participants, or investments in qualifying employer stock. Whether an exception applies depends on the details of the transaction and often requires a close look at the specific facts.

Recently, the Supreme Court clarified the pleading standards for bringing a valid prohibited transaction claim against a defendant fiduciary in the case Cunningham v. Cornell Univ., 601 U.S. ___ (2024). There, the Supreme Court held that a plaintiff only needs to allege that (1) the fiduciary caused the plan to engage in a transaction; (2) that the fiduciary knew or should have known that the transaction involved providing goods, services, or facilities; and (3) the transaction was with a party in interest. Prior to this decision, courts often required the plaintiff to also plead specific facts demonstrating that a transaction was both prohibited and lacked a legitimate fiduciary justification.

While the Court's decision primarily addresses procedural requirements, it is likely to affect how prohibited transaction cases unfold by making it easier for some cases to move beyond the initial pleading stage. Its broader impact will depend on how lower courts interpret and apply the clarified standard and how litigants present their claims and defenses under Sections 406 and 408. Ultimately, the final outcome in these cases will still hinge on whether the fiduciary can demonstrate that an exception applies and that the transaction meets all the necessary conditions.

SUPREME COURT TO DECIDE HOW PENSION DEBT IS CALCULATED FOR EMPLOYERS

In a significant development for multiemployer pension plans and contributing employers, the United States Supreme Court has granted certiorari in *M & K Emp. Sols., LLC v. Trs. of the IAM Nat'l Pension Fund*, No. 23-1209, a case involving the timing of decisions with respect to actuarial assumptions used to calculate withdrawal liability under the Employee Retirement Income Security Act of 1974 ("ERISA"). The Solicitor General had previously recommended that the Court hear the case in a Brief for the United States as Amicus Curiae. The Supreme Court limited its review to the following question:

> "Whether 29 U.S.C. § 1391's instruction to compute withdrawal liability 'as of the end of the plan year' requires the plan to base the computation on the actuarial assumptions to which its actuary subscribed at the end of the year, or allows the plan to use different actuarial assumptions that were adopted after the end of the year." *M & K Emp. Sols., LLC v. Trs. of the IAM Nat'l Pension Fund*, No. 23-1209, (certiorari granted June 30, 2025).

SPLIT AMONG THE CIRCUIT COURTS

At issue is whether a plan's actuary may adopt or revise actuarial assumptions–such as the assumed rate of return–after the statutory measurement date (typically the end of the plan year) for purposes of calculating an employer's withdrawal liability. The Second Circuit, in *National Ret. Fund v. Metz Culinary Mgmt., Inc.*, held that only those assumptions in effect as of the measurement date may be used. In contrast, the D.C. Circuit held in *M & K* that ERISA allows actuaries to adopt assumptions after the measurement date, but only if they are based on information available as of that date.

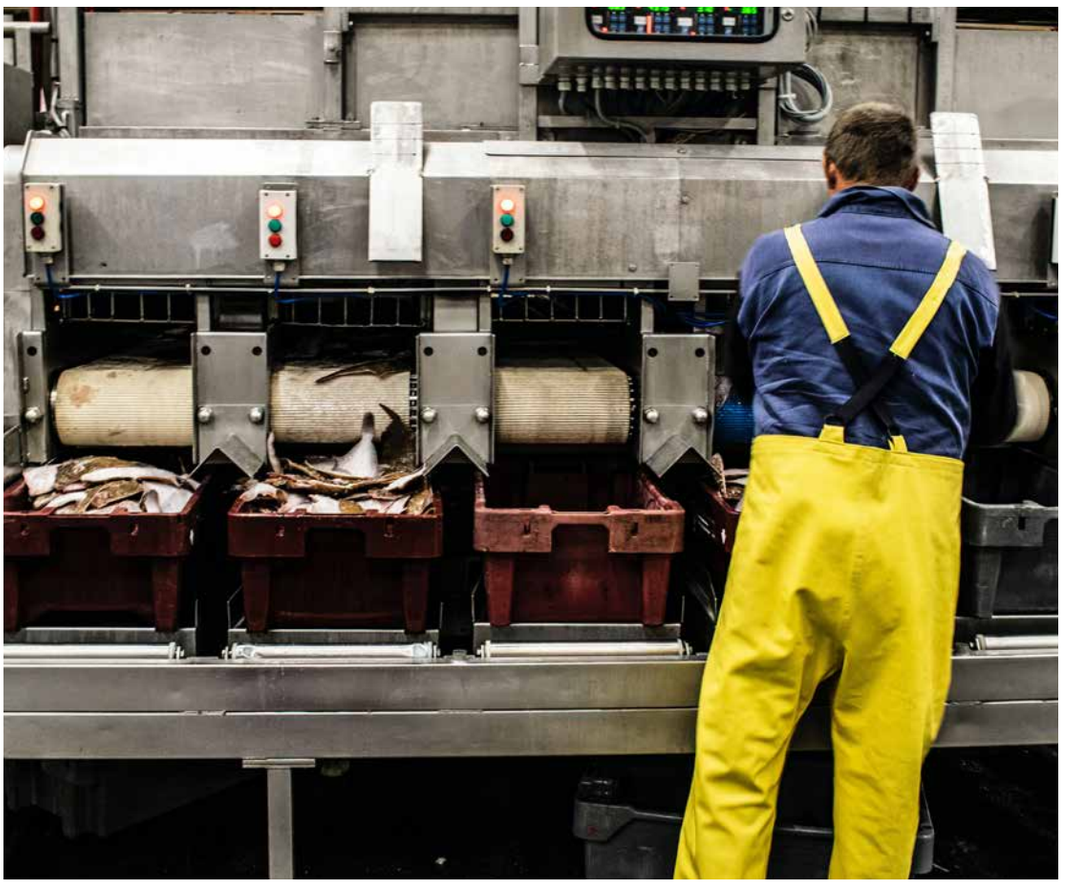
The timing issue plays a vital role in determining withdrawal liability. Even minor changes in actuarial assumptions–primarily the assumed rate of return–can significantly change the amount of withdrawal liability owed by employers. The withdrawal liability amount can be altered by millions of dollars. As a result, the lack of uniform rules across jurisdictions in the United States creates uncertainty and risks of litigation for both multiemployer funds and employers.

The Solicitor General argued that ERISA does not prohibit actuaries from adopting assumptions after the measurement date and that longstanding actuarial policies and practices support this approach. The brief cited the Supreme Court's prior reasoning in *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993) in emphasizing that actuaries are professionals who are relied upon to apply their best estimates in good faith, without falling to improper influences from trustees.

A ruling from the Supreme Court on this issue could bring much-needed clarity to over 1,400 multiemployer pension funds covering more than 11 million employees. Under the current split among the courts, actuaries are facing conflicting obligations depending on the jurisdiction. Adhering to the D.C. Circuit's opinion in *M & K* invites challenges under the Second Circuit's reasoning in *Metz*, while acting in accordance with *Metz* may conflict with ERISA and the requirement for the actuaries to use their "best estimate of anticipated experience under the plan."

Until the Supreme Court resolves the conflict, trustees and actuaries will need to take care to document the timing and rationale behind their assumptions–setting certain standards and being aware that the validity of their assumptions may depend on which circuit governs the dispute. A decision from the Supreme Court could either reinforce greater flexibility in discretion of the actuaries or mandate a more rigid approach.

NLRB COUNSEL SHIFTS SETTLEMENT STRATEGY, RESTORES REGIONAL AUTHORITY IN LABOR CASES



In June 2025, Acting General Counsel of the National Labor Relations Board (NLRB), William B. Cowen, issued Memorandum GC 25-06, outlining a recalibrated approach to resolving unfair labor practice (ULP) cases through settlement and seeking appropriate remedial relief. The new memo signals a measured shift from the more aggressive remedial stance taken in recent years, emphasizing both flexibility and efficiency while preserving the Board's obligation to ensure employees are made whole when their rights under the National Labor Relations Act (NLRA) are violated.

GC 25-06 builds on changes initiated earlier this year, particularly those contained in GC 25-05, which rescinded several memoranda from the President Biden-era General Counsel that had called for expansive remedies including front pay, liquidated damages, and broad prohibitions on confidentiality provisions. In contrast, the June memo articulates a more pragmatic framework for resolving cases, balancing the need for effective enforcement with a recognition of the value of timely, fair settlement.

At the heart of GC 25-06 is an effort to empower NLRB Regional Directors to exercise greater discretion in resolving cases. The memo restores their authority to approve unilateral settlement agreements without requiring prior clearance from the Division of Advice, which had been a mandatory step under earlier guidance. This usually means approving a settlement over the objection of the Charging Party. This change is intended to reduce administrative bottlenecks and give front-line staff the flexibility to resolve cases more efficiently.

The memo also provides clarity on what constitutes an acceptable settlement. While the General Counsel continues to support "make-whole" relief as the standard, the memo acknowledges that settlements often involve compromise. As a result, Cowen introduces a threshold: settlements that fall below 80 percent of the projected monetary relief must receive further scrutiny and approval from the Division of Operations-Management. This is intended to ensure that employees are not shortchanged while still allowing space for practical resolutions when litigation would be costly, time-consuming, or uncertain. This 80% threshold was the standard for many years.

GC 25-06 encourages the use of default judgment or liquidated damages provisions in cases involving repeat or egregious violators, but cautions against overuse of such terms in routine cases. It also permits the inclusion of non-admission clauses in settlement agreements—especially when a case is still in its early stages—reflecting a recognition that many employers may prefer to resolve disputes without conceding liability.

On the remedial front, the memo continues to endorse the Board's 2022 *Thryv, Inc.* Decision, which affirmed that employees should be compensated for all direct and foreseeable pecuniary harm resulting from unlawful conduct. However, it tempers this by advising Regions to focus on harms that can be clearly traced to the violation, suggesting a preference for targeted and supportable relief over more speculative or expansive claims.

The broader message of the memo is that the NLRB's enforcement should remain grounded in the realities of the case at hand. Cowen explicitly warns against pursuing "everything" in every case, noting that such an approach can ultimately result in achieving nothing. Instead, GC 25-06 urges field offices to focus on outcomes that are fair, timely, and proportional to the violation.

MENTAL HEALTH PARITY ENFORCEMENT: ALL LAW, NO ORDER

On May 15, 2025, the U.S. Departments of Labor, Treasury and Health and Human Services ("Departments") issued a statement of its "nonenforcement policy" regarding the 2024 Mental Health Parity regulations. Specifically, the Statement asked the D.C. Federal Court to suspend a lawsuit to challenge the legality of the 2024 Final Rule of the Mental Health Parity and Addiction Equity Act (MHPAEA), which added new rules implementing the nonquantitative treatment limitation comparative (NQTL) analysis required under the law. The Final Rule became effective on November 22, 2024, and has applicability dates in 2025 and 2026.

Per the Statement, the Departments will not enforce the 2024 Final Rule prior to a final decision in an ongoing litigation, plus an additional 18 months after the decision. The Departments added that they "intend to undertake a broader reexamination of each department's respective enforcement approach under MHPAEA." The litigation in question is regarding a complaint filed against the Departments in 2024 by the ERISA Industry Committee (ERIC). ERIC argued that in issuing the 2024 Final Rule, the Departments exceeded their authority by (1) requiring health plans offer "meaningful benefits" for every mental health/substance abuse condition in every classification (such as in-patient hospitalization) that medical/surgical benefits are provided and to offer coverage for a core treatment of that condition; (2) requiring health plans to examine data for "material difference in access" and to take reasonable action to address the difference in access; (3) adding a fiduciary requirement to certify that the plan selected a prudent service provider to perform the analysis. In May, the Departments filed a motion asking the Court to stay the case while the Departments reconsider the Final Rule.

Pursuant to the Statement, nonenforcement is applicable "only with respect to those portions of the 2024 Final Rule that are new in relation to the 2013 final rule." The Departments reiterated that "MHPAEA's statutory obligations, as amended by the Consolidated Appropriators Act, 2021, continue to have effect." Thus, the requirement to perform and document comparative analyses of health plans' NQTLs remains in effect, but the requirement for a plan fiduciary to certify that it complied with its fiduciary duties in selecting and monitoring a service provider to perform and document the comparative analyses will not be enforced until future notice. Also, specific content requirements that were not already set forth in the statute or prior regulations will not be enforced until future notice.

It is important to note that the requirement to perform the NQTL analysis exists, and health plans are still required to disclose the comparative analysis as part of an audit or in response to a request by a participant. Our office will continue to monitor the guidance and changes in enforcement of the MHPAEA.

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ATTORNEYS AT LAW