

STATE OF THE UNION

THE JOHNSON + KROL NEWSPAPER

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GROWING OUR TEAM.
EXPANDING OUR IMPACT.

INTRODUCING
OUR NEXT
CHAPTER

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announces that the St. Louis
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JK

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ATTORNEYS AT LAW





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SAME VALUES, BROADER IMPACT

Johnson + Krol is proud to announce that, effective September 1, 2026, the highly respected St. Louis law firm of Hammond & Shinnery is joining Johnson + Krol. As J+K enters its 25th year, this combination marks an exciting new chapter in the firm's continued growth and service to labor unions, fringe benefit funds, signatory contractors, and working people throughout the Midwest. With offices in Chicago, Indianapolis, and St. Louis, J+K will be uniquely positioned to be the law firm of choice for labor and Taft-Hartley benefits across the Midwest.

The attorneys of Hammond & Shinnery bring with them decades of experience serving labor unions and fringe benefit funds. With a shared commitment to protecting union members, signatory contractors, and hard-earned benefits, J+K is equipped to serve clients with twenty full-time attorneys and six seasoned Of Counsel attorneys, making J+K one of the largest labor and Taft-Hartley law firms in the country.

Reflecting on J+K's growth since its founding, Managing Member Dennis Johnson said, "From the beginning, our goal has been to build the leading law firm and unquestioned market leader in our field. Starting small but growing fast, this combination brings us even closer to realizing that goal by expanding the depth, scale, and continuity of service we provide to our clients." J+K is excited to welcome new members Dan McLaughlin, Jagadeesh Mandava, and Ann Dalton. Richard Shinnery, Greg Campbell, Janine Martin, and Mary Linmark will join J+K as Of Counsel, and Melissa McLaughlin will join J+K as an associate.

We look forward to the opportunities ahead and to continuing to serve our clients with the same commitment, experience, and dedication that have defined J+K for the past 25 years.

PROTECTING RETIREMENT ASSETS IN AN AGE OF SOPHISTICATED SCAMS

Retirement fraud is rising, and retirees are being targeted

A recent warning from Vanguard highlights a growing threat facing retirees and pension recipients: financial scams designed to drain retirement savings through manipulation and deception.¹

According to recent reports, fraud losses in the United States reached billions of dollars last year, with older Americans suffering the most. Unlike traditional identity theft or computer hacking, many of today's scams rely on emotional pressure and trust-building tactics. Scammers often spend weeks or even months convincing victims that they are helping protect their money.

Family members and plan participants should remain alert for unusual financial behavior, including large or repeated cash withdrawals; transfers to unfamiliar accounts; sudden purchases of cryptocurrency, gold, or other commodities; increased secrecy regarding finances or phone calls; and pressure to act immediately to “protect” assets. Financial institutions have also reported that scammers increasingly direct victims to move funds out of traditional retirement accounts into hard-to-trace investments or accounts controlled by fraudsters.

Experts recommend several safeguards to help protect retirement assets:

- Adding a trusted contact person to financial accounts
- Enabling transaction alerts and account monitoring
- Verifying suspicious requests independently before transferring funds
- Being cautious of unsolicited calls, emails, or text messages
- Two-factor authentication
- Never sending money to someone claiming it must be moved “for protection”

This list is not exhaustive. Participants should also remember that legitimate financial institutions and government agencies generally will not demand immediate transfers, secrecy, cryptocurrency payments, or gift cards.

One of the most important protections against fraud is open communication among retirees, family members, and their trusted advisors. Experts caution that victims of scams are often embarrassed, fearful, or in denial, which can make intervention difficult. A calm and supportive conversation may help prevent significant financial loss. Below is a list of common scams that target retirees.

GOVERNMENT IMPERSONATION SCAMS

In these schemes, scammers pose as representatives from the IRS, Social Security Administration, Medicare, or law enforcement agencies. Victims may receive phone calls, emails, or text messages claiming that their benefits will be suspended, their taxes are overdue, their Social Security number has been compromised, or that they are under investigation for criminal activity. The scammer then pressures the individual to “protect” their money by transferring funds, purchasing gift cards, or providing banking information. These scams often rely on fear and urgency to prevent victims from verifying the claims independently.

BANK AND FINANCIAL INSTITUTION SCAMS

Fraudsters may pretend to be calling from a bank, brokerage firm, or retirement plan administrator. They frequently use caller ID spoofing technology so the call appears legitimate. Victims are told their account has been hacked or compromised and are instructed to move funds to a



“safe” account, authorize a wire transfer, disclose account credentials, or provide authentication codes sent by text message. In reality, the “safe” account is controlled by the scammer.

INVESTMENT AND CRYPTOCURRENCY SCAMS

Investment fraud remains one of the most financially damaging scams affecting retirees. Fraudsters promote fake investment opportunities promising unusually high or guaranteed returns with little risk. Common examples include cryptocurrency investments, foreign exchange trading platforms, private lending opportunities, real estate ventures, and “exclusive” retirement investments. Scammers often create professional-looking websites and may even allow victims to see fake account balances showing apparent investment growth. Once additional funds are deposited, the money disappears or victims are prevented from withdrawing funds.

ROMANCE AND COMPANION SCAMS

These scams frequently begin through social media, text messaging, or online dating platforms. Over time, the scammer develops an emotional relationship with the victim and gradually gains trust. Eventually, the scammer requests money for medical emergencies, travel expenses, business problems, investment opportunities, or temporary financial hardships. In many cases, victims are persuaded to liquidate retirement savings or borrow against assets to help the scammer.

TECH SUPPORT SCAMS

Victims may receive pop-up warnings on their computer claiming their device has been infected with a virus or compromised by hackers. A phone number is provided for “technical support.” The scammer then convinces the victim to allow remote access to their computer, disclose banking information, or log into retirement or investment accounts. Some scammers will even direct victims to transfer funds while claiming they are helping secure their accounts.

GRANDPARENT AND FAMILY EMERGENCY SCAMS

These scams exploit emotional reactions and urgency. A retiree may receive a call from someone pretending to be a grandchild, relative, or attorney claiming a loved one has been arrested, involved in an accident, hospitalized, or become stranded

while traveling. The victim is told to send money immediately and often instructed not to tell other family members.

LOTTERY AND SWEEPSTAKES SCAMS

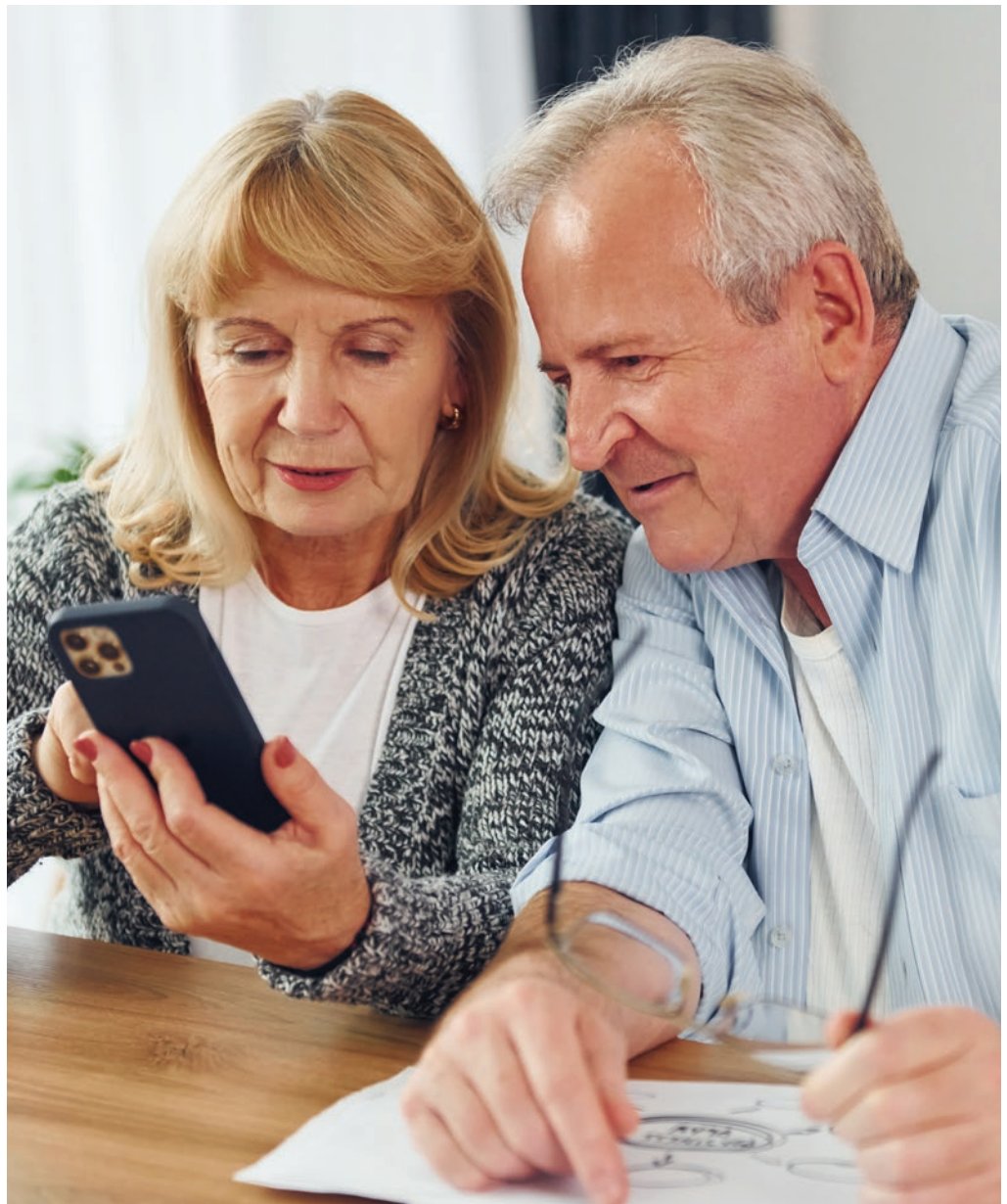
Victims are told they have won a lottery, prize, or sweepstakes but must first pay taxes, fees, or processing costs to receive the winnings. No legitimate lottery requires advance payment to claim a prize.

Many scams share common warning signs, such as pressure to act immediately, requests for secrecy, demands for wire transfers or cryptocurrency, guarantees of unusually high returns, threats involving arrest or loss of benefits, requests for gift card purchases, and unsolicited contact from unknown individuals. Participants should remain cautious whenever someone requests financial information or urges immediate action. In addition, it is best to

independently verify the caller’s identity, contact financial institutions using official phone numbers, discuss major financial decisions with trusted family members or advisors, and be skeptical of unsolicited investment opportunities **before** moving funds or sharing account information.

Retirement savings are often accumulated over decades, while a single fraudulent transaction can cause devastating and irreversible losses. Increased awareness, careful verification, and regular account review remain some of the most effective defenses against these evolving scams. As scams become more sophisticated, protecting retirement savings now requires not only sound financial planning, but also vigilance against fraud and manipulation. For more information, please contact our office.

¹<https://www.thestreet.com/retirement/vanguard-warns-fraud-is-quietly-draining-retirements-now>



FEDERAL COURT KEEPS PROJECT LABOR AGREEMENT RULE IN EFFECT

The Eleventh Circuit rejects a challenge, leaving the federal PLA requirement in place

In late April 2026, a federal appeals court affirmed a lower court's decision declining to temporarily block a federal rule requiring certain large construction contractors on federal projects to enter into project labor agreements. The ruling leaves the policy first established during former President Joe Biden's administration in effect and President Donald Trump's administration continues to defend it.

The U.S. Court of Appeals for the Eleventh Circuit affirmed the denial of a preliminary injunction sought by construction industry groups challenging Executive Order 14063 and related procurement regulations. The lawsuit, brought by Associated Builders and Contractors and its Florida First Coast Chapter, argued the policy exceeded presidential authority and conflicted with federal law. Those laws included the Competition Act, Federal Property Act, First Amendment, Administrative Procedures Act, the Office of Federal Procedure Policy Act, and the National Labor Relations Act. The Eleventh Circuit was equally as unconvinced as the underlying District Court. However, it affirmed for different reasons. The Eleventh Circuit did not believe the plaintiffs could establish, under any of its claims, the Executive Order was inherently in violation of the respective federal laws.



Executive Order 14063, signed in February 2022, generally requires federal construction contracts valued at \$35 million or more to include project labor agreements. The order states that large-scale federal construction projects can face risks involving labor coordination, delays, and cost uncertainty, and that project labor agreements may promote economy and efficiency in procurement. Agencies may grant exceptions under specified circumstances, including when competition would be substantially reduced or when the requirement would conflict with legal requirements.

Federal acquisition regulations implementing the order were finalized in December 2023. Those regulations generally apply the requirement to large-scale construction projects while preserving agency authority to issue exceptions.

In its decision, the Eleventh Circuit said presidential authority under the Federal Property and Administrative Services Act permits procurement policies deemed necessary to promote an efficient federal procurement system. The panel concluded that, at least at this stage of the case, the project labor agreement requirement was sufficiently tied to labor management and procurement efficiency to fall within that authority.

The ruling leaves the federal project labor agreement requirement in effect while litigation over the policy continues. President Trump has not rescinded Executive Order 14063 and has signaled he does not intend to.

ERISA LITIGATION REFORM ACT ADVANCES IN CONGRESS



In November 2025, lawmakers introduced the ERISA Litigation Reform Act (H.R. 6084). The proposed legislation is designed to address the increasing number of costly ERISA class action lawsuits under the Employee Retirement Income Security Act (ERISA). By adjusting the underlying legal standards for how these cases are initiated, the bill aims to redefine the responsibilities and legal burdens placed on both the plan participants filing the lawsuits and the fiduciaries responding to the claims.

The bill responds to the Supreme Court's recent decision in *Cunningham v. Cornell University*, 604 U.S. 693 (2025) which lowered the pleading threshold required for plan participants to bring forward prohibited transaction claims under ERISA. In *Cunningham*, the Court held that if a participant wants to successfully bring a prohibited transaction claim, they only need to plead a fiduciary entered into a routine transaction with a "party in interest" (such as hiring a standard third-party administrator or investment consultant). Once a participant meets that low standard, the burden shifts to the plan managers to prove the transaction was legal, reasonable, and beneficial to the plan. In the real world, this set an incredibly low bar

for filing a lawsuit. Because the initial pleading requirements became so easily satisfied, almost any standard business agreement could force a plan fiduciary into the most expensive and time-consuming phase of a lawsuit, discovery.

If enacted, H.R. 6084 would amend ERISA to adjust the legal requirements for navigating these cases through the federal court system. Instead of requiring plan fiduciaries to immediately prove the legality of a routine transaction, the bill would place the burden on the plaintiff to demonstrate that a specific wrongdoing occurred. Under this framework, plaintiffs would have to provide detailed facts showing a business transaction was genuinely improper, rather than relying on broad, generalized accusations of mismanagement. Supporters state this framework would filter out weak or frivolous lawsuits before fiduciaries incur substantial defense costs. Conversely, critics of the bill argue higher pleading standards create an unfair hurdle for participants to uncover and remedy legitimate instances of plan mismanagement and breaches of fiduciary duties.

The bill has begun to make steady progress through the legislative pipeline. In March 2026, the House Committee

on Education and the Workforce approved H.R. 6084 by a 19 to 13 vote. Having advanced out of committee, the bill is currently being prepared for consideration on the floor of the full House of Representatives. As a result, Congress now faces the delicate task of determining how to properly balance robust protections and legal remedies for plan participants with the escalating litigation and operational costs borne by plan sponsors and fiduciaries.



CEMEX CURTAILED: SIXTH CIRCUIT LIMITS NLRB BARGAINING ORDERS

The National Labor Relations Board's (NLRB) authority to impose bargaining orders on employers—compelling them to recognize and negotiate with a union even if the union loses a secret-ballot election—has long been a contentious issue in U.S. labor law. Recent developments, particularly the NLRB's August 2023 decision in *Cemex Construction Materials Pacific, LLC*, and the Sixth Circuit's 2026 decision in *Brown-Forman Corp. v. NLRB*, have significantly shifted the legal landscape, especially for employers and employees in Kentucky, Michigan, Ohio, and Tennessee. This article examines both sides of the debate, tracing how *Cemex* expanded the NLRB's power to impose bargaining orders and how the Sixth Circuit's *Brown-Forman* decision has now curtailed that expansion.

THE *CEMEX* DECISION

In August 2023, the NLRB issued its decision in *Cemex Construction Materials Pacific, LLC*, fundamentally altering the process by which employees could unionize and how employers were required to respond to union organizing efforts.¹ Under the prior standard, a union seeking recognition would generally have to win a secret-ballot election if the employer refused voluntary recognition and had not committed serious unfair labor practices, but a union could be recognized based on a card majority if employer misconduct made a fair election impossible.² If the employer committed egregious unfair labor practices (ULPs) making a fair election impossible, the Board could issue a so-called “*Gissel* bargaining order,” requiring the employer to bargain with the union based on evidence (such as signed authorization cards) that the union had majority support at some point.³

Cemex significantly altered prior legal precedent by adopting a more union-friendly approach that facilitates obtaining bargaining orders when unfair labor practices occur. Under *Cemex*, if a union presented evidence of majority support and requested recognition, the employer had two weeks to either voluntarily recognize the union or file a petition (an “RM petition”) for a Board-supervised election. If the employer fails to file an RM petition within this two-week period, the union was automatically certified as the bargaining representative. If the employer committed any ULPs requiring the election be set aside, the Board would dismiss the election petition and issue a bargaining order—even if the union lost the election. The Board's rationale was that “representation delayed is often representation denied,” and employers had developed perverse incentives to commit ULPs to disrupt elections and delay bargaining.¹

The *Cemex* standard thus made it significantly easier for unions to obtain bargaining orders. The Board stated even a single, non-egregious ULP could justify a bargaining order if it interfered with the election process. The new rule was applied retroactively and was intended to deter employer misconduct by making the risk of a bargaining order more immediate and certain.

THE IMPACT OF *CEMEX*

The Proponents' Perspective: Supporters of *Cemex*, including the NLRB's General Counsel, argued the new standard was necessary to protect employees' rights to organize and bargain collectively. They pointed to the lengthy delays and procedural hurdles unions often faced under the old system, which allowed employers to “run out the clock” by committing ULPs and forcing repeated elections. By making bargaining orders a more readily available remedy, *Cemex* was seen as restoring the balance of power and ensuring employees' free choice was respected.



Critics’ Perspective: Employers and business groups, on the other hand, criticized *Cemex* as an overreach of the NLRB’s authority and a threat to the principle that secret-ballot elections are the preferred method for determining employees’ wishes. They argued the new standard made it too easy for unions to bypass elections by alleging ULPs, even minor ones, and it undermined the legitimacy of the election process. Critics also contended the Board’s decision to adopt such a sweeping policy change through adjudication, rather than formal rulemaking, was procedurally improper and exceeded its statutory authority.

THE SIXTH CIRCUIT’S BROWN-FORMAN DECISION: REINING IN CEMEX

The legal landscape shifted dramatically in March 2026, when the U.S. Court of Appeals for the Sixth Circuit decided *Brown-Forman Corp. v. NLRB*. In that case, the NLRB had applied the *Cemex* standard to order Brown-Forman, a Kentucky bourbon distillery, to bargain with the Teamsters union—even though the union had lost the election—because the company had committed ULPs during the organizing campaign. The Board relied solely on *Cemex*, not the traditional *Gissel* standard, to justify its order.⁵

The Sixth Circuit upheld the Board’s findings that Brown-Forman had committed ULPs, but it vacated the bargaining order and remanded the case. The court held the *Cemex* standard was invalid because it was a “rulemaking in disguise,” not a permissible exercise of the Board’s adjudicatory authority.² The court emphasized that secret-ballot elections remain the “preferred method” for determining employee sentiment and bargaining orders should be an “extraordinary remedy,” reserved for cases where employer misconduct makes a fair election impossible.³ Note, however, the court never mentioned the two-week RM petition filing rule from the *Cemex* decision, meaning this rule remains in effect and was not addressed or invalidated by the court’s decision.

The court’s majority reasoned the Board had overstepped its authority by creating a new, generally applicable standard through case adjudication rather than through the notice-and-comment rulemaking process required by the Administrative Procedure Act. The decision also reflected a broader judicial skepticism toward agency policymaking by adjudication, consistent with recent Supreme Court decisions.⁴

IMPLICATIONS FOR EMPLOYERS AND UNIONS IN THE SIXTH CIRCUIT

The Brown-Forman decision has immediate and significant consequences for employers and unions in Kentucky, Michigan, Ohio, and Tennessee. Within the Sixth Circuit, the NLRB may no longer rely on the *Cemex* standard to impose bargaining orders. Instead, the Board must return to the traditional *Gissel* framework, under which bargaining orders are only appropriate when employer misconduct is so severe that a fair election cannot be held.

For Employers: Employers in the Sixth Circuit now have greater assurance that secret-ballot elections will remain the primary means of determining union representation, and bargaining orders will be reserved for truly egregious cases of misconduct. The decision also provides a potential roadmap for challenging NLRB policy changes made through adjudication rather than rulemaking.

For Unions: Unions face a higher bar for obtaining bargaining orders in the Sixth Circuit. They must demonstrate not only that the employer committed ULPs, but that those violations were so serious as to make a fair election impossible. The decision may also slow the pace of union organizing efforts, as unions can no longer rely on the more lenient *Cemex* standard in the Sixth Circuit’s jurisdiction.

THE NATIONAL PICTURE: A CIRCUIT SPLIT AND FUTURE UNCERTAINTY

It is important to note that Sixth Circuit’s decision is not binding outside its jurisdiction. Other circuits, such as the Ninth Circuit, have upheld the *Cemex* standard and enforced NLRB bargaining orders issued under it. This creates a split among the federal courts of appeals, increasing the likelihood that the issue will ultimately be resolved by the Supreme Court.

Meanwhile, the NLRB’s approach to bargaining orders may continue to evolve, especially the Board’s membership changes and as courts scrutinize the limits of agency policymaking by adjudication. For now, however, the Sixth Circuit has drawn a clear line: in Kentucky, Michigan, Ohio, and Tennessee, the NLRB’s power to impose bargaining orders is once again tightly circumscribed.

CONCLUSION

The recent developments in *Cemex* and *Brown-Forman* illustrate the ongoing tension between protecting employees’ rights to organize and ensuring union representation is determined by free and fair elections. While *Cemex* sought to make it easier for unions to obtain bargaining orders in the face of employer misconduct, the Sixth Circuit’s *Brown-Forman* decision has restored the traditional preference for secret-ballot elections and limited the NLRB’s ability to impose bargaining orders without clear, case-specific justification. As the legal landscape continues to shift, employers and unions alike must stay attuned to both the evolving standards and the procedural requirements governing the unionization process in their jurisdiction.

¹ *Cemex Construction Materials Pacific, LLC*, NLRB Case No. 28-CA-230115 (2023).

² *Brown-Forman Corp* at 44.

³ *Brown-Forman Corp* at 10.

⁴ *Brown-Forman Corp*.



TRUMPRx EXPANDS AS TARIFFS RESHAPE THE PRESCRIPTION DRUG LANDSCAPE

MFN pricing agreements and new pharmaceutical tariffs could have significant implications for employer-sponsored health plans and pharmacy benefits

The Trump Administration launched TrumpRx.gov in February 2026 as part of a broader prescription drug pricing initiative connected to Most-Favored-Nation (“MFN”) pricing agreements with pharmaceutical manufacturers. The initiative was designed to align prices for certain prescription medications in the United States with prices paid in other developed countries.

At launch on February 5, 2026, the Administration announced agreements with AstraZeneca, Eli Lilly, EMD Serono, Novo Nordisk, and Pfizer. The initial TrumpRx platform included a range of brand-name medications, including GLP-1 drugs and specialty therapies. The Administration stated that additional manufacturers and medications would be added through future MFN agreements.

According to White House materials released in February, the Administration highlighted reduced listed cash prices for several medications, including Ozempic, Wegovy, and Zepbound.

During the February 2026 State of the Union address, President Trump referenced TrumpRx and the MFN initiative as part of the Administration’s prescription drug pricing strategy.

In April 2026, the Administration announced an additional agreement with Regeneron, described as the 17th

MFN agreement completed under the program. The White House stated the agreements collectively covered approximately 86% of the branded pharmaceutical market.

The April agreement included provisions involving Medicaid pricing, launch pricing commitments for future therapies, and domestic manufacturing plans.

Alongside the MFN pricing initiative, the Administration introduced new pharmaceutical tariff measures tied to domestic manufacturing commitments. On April 2, 2026, President Trump issued a proclamation under Section 232 of the Trade Expansion Act establishing tariffs on imported patented pharmaceuticals and pharmaceutical ingredients.

Under the proclamation, imported patented pharmaceuticals and associated active pharmaceutical ingredients became subject to a 100% fixed tariff rate, with implementation scheduled to begin July 31, 2026, for certain large manufacturers and September 29, 2026, for other companies. For cash-paying customers on TrumpRx, this may result in experiencing more immediate and visible price increases. Health-plan members may not see an initial price increase; however higher premiums and deductibles could result from the imposed tariffs on those



imported patented pharmaceuticals and associated active pharmaceutical ingredients.

The administration also established reduced tariff rates for companies entering approved domestic manufacturing or MFN pricing arrangements. Companies with approved U.S. onshoring plans became eligible for a 20% tariff rate that would remain in place until 2030. Products imported from certain allied regions, including the European Union, Japan, South Korea, Switzerland, and Liechtenstein, were assigned a 15% tariff rate under the proclamation.

The proclamation exempted generic pharmaceuticals and biosimilars from the tariff program at the time of issuance. The Administration directed the Department of Commerce to conduct a future review regarding possible action involving generic drug imports.

There are two main purposes behind the tariffs and MFN pricing initiative. First, according to the Trump Administration, the purpose of the tariff rate increases is to reduce the United States' reliance on foreign suppliers and drive for more domestic manufacturing. The tariff framework also incorporated incentives connected to MFN pricing participation. Reports published in April

2026 indicated companies entering MFN pricing agreements and meeting domestic manufacturing commitments could qualify for reduced or deferred tariff treatment. Second, MFN pricing is still working to immediately lower prices of medications in the short term, and the incentive of lowering prices results in a delayed tariff rollout for those companies.

In May 2026, the White House released an economic analysis estimating projected savings associated with the MFN program and stating voluntary agreements had been reached with 17 major pharmaceutical manufacturers.

On May 5, 2026, the White House published a report outlining the discussion beyond Medicaid and TrumpRx cash-pay purchases and explicitly addressing the private insurance market. Prior to the May 2026 report, most public discussion of TrumpRx centered on uninsured individuals, Medicaid programs, and direct-to-consumer purchases. The May report was the first Administration document to describe MFN pricing as a framework intended to operate across all U.S. markets. That language brought employer-sponsored health plans directly into the policy discussion and signaled future implementation could affect commercial pharmacy benefits,

PBM (pharmacy benefit-managers) contracting, deductible administration, and specialty drug purchasing strategies. The report did not address the question of how self-funded ERISA plans would be incorporated.

On May 18, 2026, the Administration announced a major expansion of TrumpRx.gov. The updated platform added more than 600 generic medications and integrated pricing comparison features involving Amazon Pharmacy, GoodRx, and Cost Plus Drugs. The Administration stated the expansion was intended to increase pricing transparency for cash-paying consumers.

Industry organizations, healthcare analysts, and legal observers have continued evaluating the implementation of the MFN agreements and pharmaceutical tariff policies, including their potential impact on supply chains, domestic manufacturing investment, international trade relationships, and prescription drug pricing structures.



NINTH CIRCUIT CONFIRMS CONSTRUCTION INDUSTRY EXCEPTION

The Ninth Circuit recently issued an important decision interpreting the “building and construction industry” exception to withdrawal liability under the Multiemployer Pension Plan Amendments Act (“MPPAA”). In *Walker Specialty Const., Inc. v. Board of Trustees of the Construction Industry and Laborers Joint Pension Trust for Southern Nevada*, the court held that asbestos abatement work falls within the construction industry exception, potentially broadening the categories of employers eligible for special withdrawal liability treatment.

BACKGROUND

Under ERISA Section 4201, an employer that completely or partially withdraws from a multiemployer pension plan generally incurs withdrawal liability for its allocable share of the plan’s unfunded vested benefits. However, Congress created a special rule for employers in the “building and construction industry” under ERISA Section 4203(b).

Under that exception, a construction industry employer does not incur withdrawal liability merely because it ceases contributions or goes out of business. Instead, withdrawal liability generally arises only if the employer continues or resumes the same type of work in the jurisdiction of the collective bargaining agreement

without continuing to contribute to the pension fund.

The exception reflects the unique nature of the construction industry, where employers often perform project-based work, experience intermittent labor needs, and frequently enter and exit particular labor markets or bargaining relationships.

FACTS OF THE CASE

Walker Specialty Construction performed asbestos abatement and related environmental remediation work in Nevada and contributed to a multiemployer pension fund pursuant to collective bargaining agreements. After the company ceased covered operations, the pension fund assessed approximately \$2.8 million in withdrawal liability.

Walker disputed the assessment, arguing it qualified for the construction industry exception. The pension fund contended asbestos abatement was not sufficiently connected to “building and construction” work because it did not involve the actual construction of structures.

The Ninth Circuit rejected the pension fund’s narrow interpretation. Because ERISA does not define the phrase “building and construction industry,” the court looked to other federal labor law authorities, including National Labor Relations Board precedent interpreting similar language

under the Taft-Hartley Act.

The court emphasized the construction industry has historically been understood to include not only the erection of new buildings, but also activities involving: alteration, repair, renovation, demolition, maintenance, and work integral to the structural use of buildings.

Applying that broader interpretation, the court concluded asbestos abatement work substantially alters structures and is closely tied to renovation and demolition activities traditionally associated with the construction trades. The court noted asbestos remediation is often necessary before renovation or demolition can proceed and is therefore functionally intertwined with construction activity.

As a result, Walker qualified for the construction industry exception and was not subject to immediate withdrawal liability merely because it ceased contributions.

WHY THE DECISION MATTERS

The decision may significantly expand the range of employers that can invoke the construction industry exception. Historically, disputes have arisen over whether specialized trades or remediation work fall within the exception, particularly where the employer’s activities are adjacent to, rather than directly part of, traditional building construction.

Following Walker, employers engaged in activities such as environmental remediation, asbestos or lead abatement, demolition, specialty renovation, structural repair, or related alteration work may have stronger arguments they qualify as construction industry employers for withdrawal liability purposes.

The case highlights the importance of carefully evaluating whether an employer qualifies for construction industry treatment before assessing withdrawal liability. For pension funds, the decision may complicate withdrawal liability enforcement efforts against specialty contractors and remediation companies operating within the Ninth Circuit.

Although the decision is binding only within the Ninth Circuit, other courts confronting similar issues may find its reasoning persuasive, particularly given the court’s reliance on longstanding federal labor law interpretations of the construction industry. If you have any questions, please contact our office.





IN MEMORY OF SARAH MILCAREK

It is with great sadness that we announce the passing of Sarah Milcarek. Sarah had only recently joined Johnson & Krol as an associate in our benefits and labor departments. In the brief time we had the opportunity to know her, Sarah brought a spark that we knew would make a lasting impression at J&K. Sarah knew firsthand what unions mean to working families. Growing up in a union household, she saw the security, support, and solidarity that organized labor provides when workers need it most. That experience shaped her career and drove her commitment to protecting the rights of unions and the people they represent.

According to Sarah, her father, a member of Carpenters Local 272 for 40 years was her biggest inspiration. Before her passing, Sarah told us, "He is the hardest, most dedicated, and most loyal worker I have ever known. I'm a first-generation college and law student, so going into labor law and working with unions feels like I get to carry on my dad's legacy, even if it is in a bit of a different way!"

Sarah had already proved to be a smart and capable attorney, and we were looking forward to working with Sarah for many years to come. We express our deep sadness and keep Sarah's family, fiancé and friends in our thoughts at this incredibly trying time.