Employment Law & Benefits Update

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Christine Long

Partner

Berliner Cohen

Susan Bishop

Partner

Berliner Cohen

Eileen Kennedy

Partner

Berliner Cohen

Liz Mann

Director of Compliance

EPIC Insurance Brokers & Consultants

Bob Carrington

Vice President, Employee Benefits

EPIC Insurance Brokers & Consultants

2025 Employment Law Update

BERLINER COHEN LLP

Presented By:

Christine H. Long, Department Chair

Susan E. Bishop, Partner

Eileen P. Kennedy, Partner

Updates to California Leave Laws

Victims of Qualifying Acts of Violence Leave Law Defined

- California provides employee leave and accommodation protections for victims of certain crimes so that they may seek assistance related to their status as a victim. Currently, for example:

- Labor Code section 230 prohibits employers from discharging or discriminating against an employee because of the employee's status as a victim of "crime or abuse" or for taking time off for certain purposes

- Labor Code section 230.1 builds on section 230 and imposes additional requirements and prohibitions on employers that have 25 or more employees.

- Labor Code section 246.5 requires employers to provide paid sick days, upon an employee's request, for an employee who is a victim of domestic violence, sexual assault, or stalking and needs time off for the same purposes referenced above.

Domestic Violence Leave Laws – Expanded in 2025

Effective January 1, 2025, the leave law for domestic violence is now governed by FEHA not the Labor Code and the rules for other types of leave or accommodations under FEHA will govern.

The New Key Term is “Qualifying Act of Violence” which is now defined as

- domestic violence;
- sexual assault; stalking;
- or any act, conduct, or pattern of conduct that includes (i) bodily injury or death to another; (ii) brandishing, exhibiting, or drawing a firearm or other dangerous weapon; or (iii) a perceived or actual threat to use force against another to cause physical injury or death.

Can’t Discriminate for Taking Time Off – All Employers

- Employers of any size are prohibited from retaliating against or otherwise discriminating against employees who participate in the legal process.

- Employers cannot discharge or discriminate against an employee in any manner for any of the following:

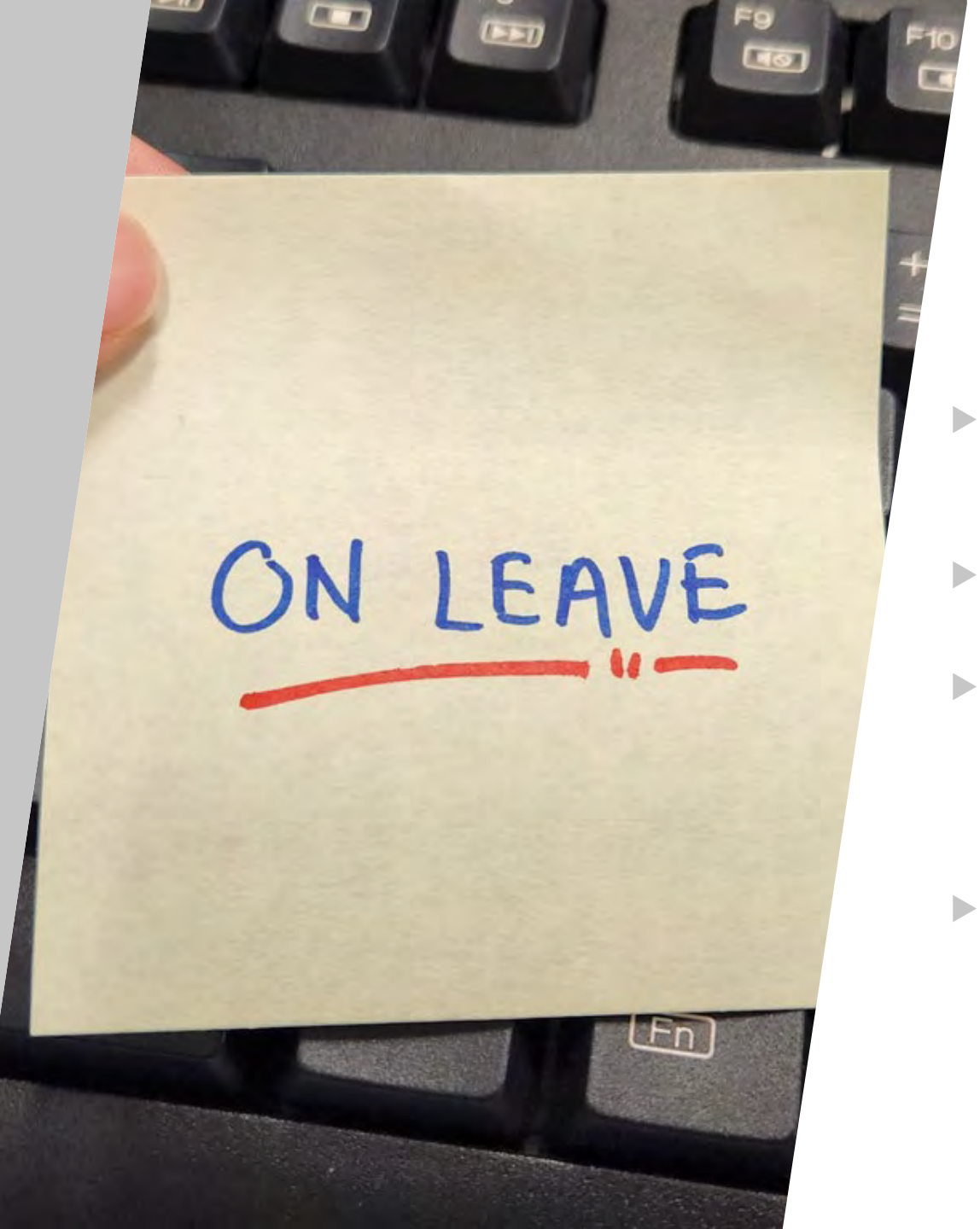
  - taking time off to serve as required by law on an inquest jury or trial jury, so long as the employee gives reasonable advance notice to the employer;

  - taking time off to appear in court to comply with a subpoena or other court order as a witness in any judicial proceeding; or

  - taking time off to obtain or attempt to obtain a restraining order or other injunctive relief, to help ensure the health, safety, or welfare of the employee or their child where the employee is a victim of a QAV.

Leave Allowed for Family Members for Qualifying Acts of Violence Leave – 25 or More Employees

- Employers of 25 or more also have to allow leave for Employee or any family member of an Employee who is a victim.
- "Family member" is defined to include:
  - a child, parent, grandparent, grandchild, sibling, spouse, or domestic partner (as those terms are defined under the CFRA); or
  - a designated person, who does not need to be a blood relative, so long as their association with the employee is the equivalent of a family relationship. An employee may identify a "designated person" at the time they request leave, but the employer may limit an employee to one designated person per 12-month period.



Leave Can Be Capped

- In certain instances, leave can be Capped at 10 days so long as victim did not die and the Employee is not the victim.
- If the leave is requested to find housing the cap should be limited to be 5 days.
- In all other circumstances, the time off is guided by CFRA and can be capped at 12 weeks.

- PRACTICE NOTE: This is a new amendment and it will be clarified as cases come up so if you have a situation consult legal counsel.

Court Limits the Definition of Disability Related to Pregnancy

Paleny v. Fireplace Products U.S., Inc.

- Under FEHA, employers are prohibited from discriminating, harassing, or terminating an employee for a medical condition or disability related to pregnancy
- Here, the court found that egg retrieval does not constitute as pregnancy related leave or qualifying event
- The court's decision relies on the fact that the employee was not pregnant and has not identified a medical condition or disability related to pregnancy, rather she was going through the process of freezing her eggs for a potential future pregnancy
- For there to be PDL, there must be a pregnancy.

Paid Sick Leave Update – Agricultural Workers (SB 1105)

- Effective January 1, 2025, Employers must provide agricultural employees who work outside sick leave to avoid smoke, heat, or flooding conditions
  - Smoke, heat, or flooding exist when created by a local or state emergency OR when that employee's worksite is closed due to smoke, heat, or flooding
  - Smoke, heat, or flooding conditions are created by a local or state emergency when Governor proclaims a state of emergency, or a locality proclaims a state of emergency
  - This law does not offer additional paid sick days, but allows employees to use their sick days for additional reasons.

AB 2123: No Mandatory Use of Vacation Leave before PFL

- Paid Family Leave provides wage replacement benefits to workers who take time off work to care for certain seriously ill family members, to bond with a minor child within one year of birth or placement, as specified, or to participate in a qualifying exigency related to the covered active duty or call to covered active duty of certain family members.
- Existing law authorizes an employer to require an employee to take up to 2 weeks of earned but unused vacation before, and as a condition of, the employee's initial receipt of these benefits during any 12-month period in which the employee is eligible for these benefits.
- Assembly Bill 2123 eliminates the ability of an employer to mandate taking vacation before PFL.
- Effective January 1, 2025.

Wage Issues

End of Time Clock Rounding?

- California Supreme Court is currently reviewing time clock rounding for payroll purposes in *Camp v. Home Depot*
  - Sixth District of California ruled for Camp and held that rounding of employee's total time is impermissible when the employer records actual time and has the ability to pay by the minute
  - Home Depot appealed, and the Court began reviewing in February 2023. We are still waiting for a decision.
- Recent California Supreme Court cases, like *Troester v. Starbucks*, emphasize that state law requires the payment of wages for all time worked
- **Advice: Start having employees track their arrival/departure time to the minute, and pay them accordingly**

California Supreme Court Provides Employers Good Faith Defense

- In *Naranjo v. Spectrum* California Supreme Court held that employers have a good faith defense to statutory penalties for wage statement violations under Labor Code Section 226
- An employer is not subject to penalties under Labor Code 226 when they can prove that they did not "knowingly and intentionally" fail to comply with wage statement requirements
- Here, the employer was not found liable for statutory penalties due to their good faith belief that they were not bound by California meal premium requirements because their employees worked on federal properties

Licensed Manicurists Are No Longer Independent Contractors

- In January 2020, California set forth a new standard for evaluating whether a worker could be classified as an independent contractor or an employee.
- Generally, a company could prove independent contractor status by satisfying three conditions:

1. worker is free from control and direction of company
2. worker performs work outside of the usual course of the company's business
3. worker is customarily engaged in an independently established trade

The law had many exceptions, including one for licensed manicurists.

- Beginning January 1, 2025, the AB 5 sunset provision excludes licensed manicurists from being classified as independent contractors, even if the three conditions are satisfied
- This means all licensed manicurists must be classified as W-2 employees

Freelance Worker Protection Act (FWPA) for Professional Services

New Guidelines for Marketing, Graphic Design, Writing and Photography

Freelance Worker Protection Act (FWPA) for Professional Services (cont.)

- **Mandatory contracts:** Any freelancer performing over $250 of work for a hiring entity over a four-month period is entitled to a contract outlining the scope of the work expected, the rate of pay, and the method of payment.
- **30-day payment terms:** Clients must pay their freelancers within 30 days of completion of work unless otherwise specified in the contract.
- **Payment agreement protections:** Clients cannot require that freelancers accept less than the contract stipulates in exchange for faster payment.
- **Anti-retaliation:** Clients cannot retaliate against freelancers for pursuing payment.
- **Double Damages:** Freelancers who are the victim of non-payment are entitled to damages equal to double the payment originally specified in their contract, plus costs and attorney's fees.

California Supreme Court Expands Definition of Working Time *Huerta v. CSI Electrical Contractors*

- The Court held that in this case, an employee's time spent awaiting and undergoing the exit security procedure was compensable as "hours worked" because the employee was subject to the employer's control during that period
- The court noted that requiring employees to simply scan a badge to enter or exit a parking garage would not be sufficient "employer control" to require compensation. It was the high level of control present in the particular circumstances before the court that required payment.

The 9th Circuit clarifies *de minimus* time, despite California's position

- In *Cadena v. Customer Connexx LLC*, the 9th Circuit considered whether or not time spent booting up and shutting down computers was compensable time.
- The 9th Circuit held time spent booting up and shutting down computers each day is "de minimus" and therefore not compensable under the Fair Labor Standards Act
- FLSA does not require an employer to pay wages for work performed before or after scheduled work hours where the amount of time in question is "de minimus"
- Federal courts hold that employers may disregard time as *de minimis* depending on three factors: (1) the practical difficulty the employer would encounter in recording the additional time, (2) the total amount of compensable time and (3) the regularity of the additional work.
- In *Starbucks v. Troester California ruled that* daily work that was 4 – 10 minutes that was actual labor is not deminimums. De minimis means something is too minor or trivial to take into account, and the Court clarified what is trivial and what is not

Compare FLSA to California

- The California Supreme Court in *Starbucks v. Troester* made it clear that neither the California Labor Code nor the California Wage Orders have adopted the *de minimis* doctrine found in the FLSA and found the following scenarios could be de minimus or compensable depending on frequency and the amount of time
  - An employer requires workers to turn on their computers and log in to an application in order to start their shifts. Ordinarily, this process takes employees no more than a minute (and often far less, depending on the employee's typing speed), but on rare and unpredictable occasions a software glitch delays workers' log-ins for as long as two to three minutes.
  - An employer ordinarily distributes work schedules and schedule changes during working hours at the place of employment. But occasionally employees are notified of schedule changes by e-mail or text message during their off hours and are expected to read and acknowledge the messages.
  - After their shifts have ended, employees in a retail store waiting for transportation will be asked a waiting employee a question, not realizing the employees is off duty. The employee – with the employer's knowledge – spends a minute or two helping the customer.

True-Up Payments on Wage Statements

- Under California law, employers must include most bonuses and incentives in the “regular rate” for paying overtime
- It can be difficult to calculate such sums on a weekly or bi-weekly basis depending on commission or bonus plans
- In *Meza v. Pacific Bell Telephone Co*. court held that true up wage statements at the end of month were lawful.
  - Employee challenged on basis that the true up pay check didn’t show hourly rates and but rather had a lump sum and words that said “overtime true up.
  - Wage statements do not need to include a list of hours and rates from earlier periods with respect to true-up payments.
- Opinion was Depublished But Opened the Door

Private Attorneys General Act (PAGA) and Arbitration Updates

PAGA Reform: Effective October 1, 2024

- Early Evaluation and Cure Options
  - Fewer than 100 employees: Within 33 days of the employer's receipt of the plaintiff employee's LWDA letter, the employer may make a proposal to the LWDA regarding a cure plan and cure within 120 days
  - More than 100 employees or if LWDA does not review: Early Neutral Evaluation process
- Individuals Must have "Standing" to File PAGA Actions
  - Can only bring a claim if the employee personally suffered each of the Labor Code violations sought on a representative basis
  - Can only seek penalties on behalf of current or former employees against whom a suffered a violation of the same Labor Code section
- Manageability
  - Courts may limit the evidence presented at trial or limit scope of any PAGA claim so it can be effectively tried
- Consolidation and Coordination of Actions
  - Courts may consolidate or coordinate civil actions that legally or factually overlap violations against same employer

PAGA Reform: Penalty Reduction

Previous Penalties

- Initial violation $100 per aggrieved employee per payroll period
- Each additional violation $200 per aggrieved employee per payroll period

Current Penalties Under Amended PAGA

- $100 per aggrieved employee per payroll
- $25 for certain paystub violations
- $50 per aggrieved employee per payroll period for a non-recurring violation
- $200 per aggrieved employee per payroll period, if previous adjudication or malicious conduct

PAGA Reform: Reasonable Steps

Prior to receipt of LWDA notice or Records Request

- The amount of penalties shall not be more than 15% of otherwise applicable penalties, if employer took reasonable steps.

Upon receipt of LWDA notice

- The amount of penalties shall not be more than 30% of otherwise applicable penalties, if employer took reasonable steps within 60 days of receipt of LWDA notice.

Limited PAGA Exemption for Unionized Construction Employers: Extended to January 1, 2038

- The Private Attorneys General Act (PAGA) presently prohibits unionized employees from suing their employers under PAGA in state or federal courts.
- AB 1034 extends existing exemption for certain unionized construction industry employers for fourteen more years.
- "Exempt" employees must raise their claims pursuant to their collective bargaining agreement's grievance and arbitration procedure.
- The collective bargaining agreement must <u>expressly</u> meet specific requirements for this exemption to apply, including *without limitation*:
  - CBA must provide the wages, hours of work, and working conditions of employees, and
  - CBA must provide premium wage rates for all overtime hours worked, and
  - CBA must provide employees a regular hourly pay rate of not less than 30 percent *more than* the state minimum wage rate, and
  - CBA must provide a grievance and arbitration procedure to redress Labor Code violations;
  - CBA must clearly waive PAGA (waiver must meet certain requirements); and
  - CBA must authorize an arbitrator overseeing a PAGA proceeding to award all remedies available under the Labor Code (§ 2699.6, subd. (a)

Can’t Dismiss Based on Manageability and Judicial Economy

- In *Estrada v. Royalty Carpet Mills, Inc*. the court held the trial court could not dismiss PAGA claims based on unmanageability. However, the court held that trial judges could still use tools such as
  - Narrowing claims via definition of aggrieved employee
  - Limiting evidence to be presented at trial
  - Granting summary judgment motions
  - Engaging in other provisions other than striking claim
- The reformed PAGA statute responds to this holding by EXPRESSLY permitting trial judges to handle manageability of PAGA claims,
  - limiting evidence to be presented at trial
  - limiting scope to “ensure that the claim can be effectively tried,”
  - consolidating or coordinating actions with overlapping violations

Arbitration Agreement: Substantive Unconscionability

- Arbitration agreement was struck down for substantive unconscionability found in the *plain language* of the agreement.
  - Scope: Plain language of the agreement required Plaintiff to arbitrate claims unrelated to her employment with USC.
  - Duration: It survived Termination of Employment and can only be terminated by mutual agreement.
  - Lack of Mutuality: Agreement required Plaintiff to arbitrate all disputes with USC and its related entities, but only USC had to arbitrate and NOT USC entities who could file suit.
- Court rejected USC's argument that the provisions should be interpreted with a reasonableness standard, for example, that the agreement's duration lasted a "reasonable time" after termination of employment.

Arbitration Agreement:

No Bright Line Rule When Severability Clause Is Allowed

- Arbitration Agreements have severability clauses to allow them to survive.
- Trial court and Court of Appeals determined that the unconscionable provisions of the arbitration agreement could not be severed because there was more than 1 unconscionable provision.
- California Supreme Court Ruled: No bright line rule on severability.
  - There is no number of unconscionable provisions that automatically triggers a denial of severability.
  - “The decision whether to sever unconscionable provisions and enforce the balance is a qualitative one, based on the totality of circumstances.”
  - Court will ask if the “central purpose of the contract is tainted with illegality.”

Arbitration Agreement: PAGA Claims

- Recent case confirmed that an employee's individual PAGA claims may be arbitrated depending on the language of the arbitration agreement.
- Court based decision on the agreement's class or collective action waiver and the clause of covered claims, and the intent at the time the agreement was entered into.
- Court confirmed that non-individual PAGA claims are non-arbitrable and should be stayed pending the outcome of arbitration.

Workplace Discrimination, Harassment & Retaliation Issues

Family Leave Mediation Pilot Program

- New law expands CRD's existing mediation program for resolving alleged violations of family care, medical, bereavement, and reproductive loss leave provisions.
- CRD's pilot mediation program applies to small employers (5 to 19 employees)
- **Key changes include**:

1. **Tolling of Statute of Limitations**: The statute of limitations for claims related to reproductive loss leave will now be tolled from the date the employee contacts the CRD until mediation completion.
2. **Indefinite Extension of Program**: The new law makes the pilot program permanent.

New Posting Requirements

- Employers must post new workers' compensation posters to inform employees that they can consult a licensed attorney about their rights and that attorney's fees are usually paid from the injured employee's recovery
- New model whistleblower rights poster is available: https://www.dir.ca.gov/dlse/WhistleblowersNotice.pdf
- 14-point font poster requirement

New Protections: Combination of Protected Class or Status and Protective Traits Related to Race

- Key changes have been made to California law prohibiting workplace discrimination and harassment based on certain protected categories or statuses:
  - “Race” definition is “inclusive of traits associated with race, including but not limited to hair texture and protective styles”
  - “Protective hairstyles” has been amended to include, but are not limited to, “hairstyles such as braids, locs, and twists”
  - Unlawful discriminatory practices may be based on any combination of protected status or category – not just a single one

State and Federal Protections for Pregnant Workers (Reminder)

- **Fair Employment and Housing Act**
  - Reasonable accommodations for medical needs related to pregnancy
  - Transfer to a less strenuous or hazardous position (if one is available) or duties if medically needed
  - Provide Pregnancy Disability Leave of up to 4 months and return to your same job when no longer disabled by pregnancy
  - Provide reasonable amount of break time and use of a room or other private location in close proximity to the employee's work area to express breast milk
  - Never discriminate, harass, or retaliate on the basis of pregnancy
- **Pregnant Workers Fairness Act (PWFA)**
  - Reasonable accommodations for medical needs related to pregnancy
  - Cannot require an employee to accept an accommodation without a discussion about the accommodation
  - Cannot require an employee to take leave if another reasonable accommodation can be provided that would let the employee keep working
  - Never discriminate, harass, or retaliate on the basis of pregnancy
- **PUMP for Nursing Mothers Act**
  - Employers must provide break time and a private place to express breast milk

Pregnant Workers Fairness Act Regulations

- Pregnant Workers Fairness Act went into effect on June 27, 2023; EEOC released final regulations that went into effect on June 18, 2024
- **Coverage:** PWFA covers employers, employees, applicants, and former employees.
- **Remedies and Enforcement:** Procedures for filing a charge or claim are same; damages are limited if the claim involves the provision of a reasonable accommodation and the employer makes a good faith effort to meet the effort for a reasonable accommodation.
- **Requesting Accommodation:** The employee must identify the limitation (the physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions) and that the employee needs an adjustment or change at work due to the limitation.

Pregnant Workers Fairness Act Regulations Highlights

- Prohibits employer from failing to make a reasonable accommodation to the known limitations of qualified employees or applicants absent an undue hardship
- Prohibits an employer from requiring a qualified employee or applicant to accept an accommodation other than the one arrived at through the interactive process
- Prohibits employers from denying employment opportunities to a qualified employee or applicant if the denial is based on the employer's need to make a reasonable accommodation
- Prohibits employer from requiring a qualified employee with a known limitation to take leave, paid or unpaid, if another effective reasonable accommodation exists

Driver's License Discrimination in Job Postings
(Cal. Gov. Code § 12940(q))

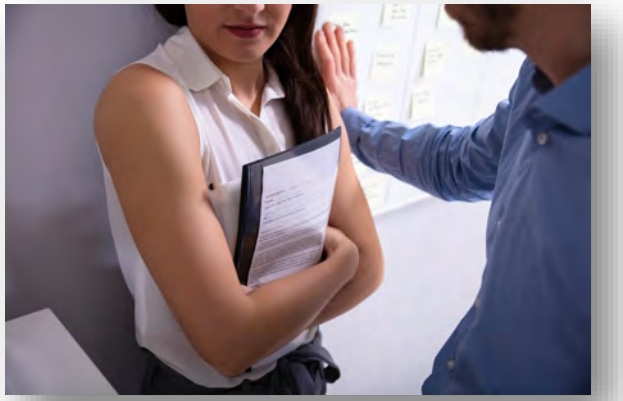
- Introduces a new restriction/requirement on job postings. Begins on January 1, 2025.
  - Employers may only list a driver's license as a job requirement if:
  - (1) Driving is an *essential* function of the position; and
  - (2) It would *not be reasonable* to use alternative forms of transportation because alternative transportation is not comparable in travel time or cost to the employer.
- "Alternative form of transportation" may include:
  - Public Transportation
  - Carpooling
  - Walking and Bicycling
  - Rideshares and Taxis (Uber, Lyft, etc.)

Updates in Development of Prevention of Harassment in Workplace

- Unlawful harassment must rise to the level of “so severe or pervasive enough to create and objectively hostile or abusive work environment”
- **A single act of harassment can be considered extreme enough as to create a hostile work environment.**
  - **However, whether the single act arises to harassment is still a triable issue of fact that must be decided by a jury.**
- In *Bailey*, the California Supreme Court held “a single racial epithet can be so offensive it gives right to a triable issue of actionable harassment.”
  - In this case, the use of the N-word
- Jury must consider the totality of the circumstances, and judge the severity based on the perspective of a reasonable person in the plaintiff’s position.

Updates in Development of Prevention of Harassment in Workplace

- ***Promptly investigate and take corrective action* when social media issues (e.g., bullying, stalking, harassment) arise in the workplace.**
  - In *Okonowsky*, a corrections Lieutenant made sexually offensive posts on an Instagram page which inmates and other employees "liked" and viewed.
  - The prison's leadership took no corrective action and never disciplined the Lieutenant.
- Sexual harassment claims may rely upon posts made on social media by employees, even if posts are made outside of work.
  - Courts analyze the "totality of circumstances" to evaluate whether work environment is sexually hostile.
  - Frequency, severity, whether humiliating or threatening, whether interferes with work performance, but no single factor in the non-exhaustive list is required.



Employment Policies That Need Review

CCPA Employee Privacy Notice (Reminder)

- California Employee Privacy Notice must include:
  - Categories of personal information the employer collects
  - Information on how long the information will be retained
  - How the employer uses personal information
  - Categories of personal information that the employer discloses to third parties
  - Categories of personal information the employer sells or shares with third parties for targeted advertising purposes
  - How employees, contractors, and applicants can exercise their rights with respect to access, deletion or correction of personal information; to limit the use of sensitive personal information; and among other things not to be discriminated against for the exercise of these rights

CCPA Personal Information (Reminder)

- Type of Personal Information Contained in an employer's "employee privacy notice"

Personal Information

- Names and nicknames
- Email addresses
- Purchase history
- Biometrics, like facial recognition
- Browsing history
- Location data
- IP address
- Profiles about a consumer, including pseudonymous profiles ("user1234")
- Sensitive Personal Information

Sensitive Personal Information

- SSN, passport number, driver's license, or state ID
- Financial information
- Precise geolocation
- Racial or ethnic origin, immigration or citizenship status
- Religious or philosophical beliefs, or union membership
- Contents of messages (e.g. emails, texts, chats), unless it's directed at the business
- Genetic data
- Information concerning your health, sex life, or sexual orientation

California Consumer Privacy Act (CCPA) Updates

- The CCPA requires employers to notify California employees of the employment-related personal information the employer collects, and how the data is used in an "employee privacy notice"
- The CCPA applies to for profit employers who do business in California and one or more of the following:
  - Has a gross annual revenue of $25 million in the previous calendar year; or
  - Buys, sells or shares the "Personal Information" of 100,000 or more California household residents or devices

CCPA Updates: Artificial Intelligence (AI)

- CCPA amended to define “personal information” to include Personal information in “abstract digital formats,” including **generative AI systems** capable of outputting consumers’ personal information
- It covers AI systems trained on personal information, and which uses model weights, tokens, or other outputs, derived from a consumer’s personal information that could produce an output linked to that individual.
- Clarifies biometric data- including fingerprints, facial recognition data, and iris scans- collected without a consumer’s knowledge is personal information.
- Adds that “neural data” refers to information generated from measuring a consumer’s central or peripheral nervous system activity.

NEW: Employer's Mandatory Political and Religious Communications Prohibited

- Effective January 1, 2025
- Employers are prohibited from requiring employees to attend meetings and/or to receive communications regarding political or religious comments and requirements of the employer.
- Employees cannot be disciplined or threatened with discipline or termination if they refuse to attend such a meeting or receive such a communication.
- Excludes communications:
  - Information the employer must communicate by law.
  - About job performance or duties.
  - About coursework, if employer is a higher education institution

Workplace Restraining Order Changes

- Currently, an employer can seek a restraining order for workplace violence prevention so long as there is violence or credible threats of violence in the workplace.
- Senate Bill 428 (Labor Code 527.8) expands protection to include CBA representative to seek a temporary restraining order.
- Labor Code 527.8 has now been amended to
- Expands definition of workplace
- Harassment defined as knowing and willful course of conduct directed at the specific person that seriously alarms, annoys or harasses the person and services no legitimate purpose. This makes it similar to a civil harassment order. No longer to employers need to wait until violence.

New Transparency Requirements: Social Compliance Audits

- Gov. Newsom signed AB 3234 into law on September 22, 2024, effective January 1, 2025.
- Existing law does not require California employers to do Social Compliance Audits. However, if an employer chooses to do a Social Compliance Audit, there are new legal requirements.
- Social compliance audit" means a voluntary, nongovernmental inspection or assessment of an employer's operations or practices to **evaluate whether the operations or practices comply with state and federal labor laws, including, but not limited to, wage and hour and health and safety regulations regarding child labor.**
- "An employer who has *voluntarily* subjected itself to a social compliance audit, whether the audit is *conducted in part, or in whole*, to determine if child labor is involved in the employer's operations or practices, shall post a clear and conspicuous link on its internet website to a report detailing the findings of the employer's compliance with child labor laws."
- "AB 3234 does not mandate employers to conduct social compliance audits. The law only imposes specific disclosure requirements for those employers who choose to conduct such audits.

Employer Reminder! Indoor Heat Illness Prevention Policy

- Went into effect July 23, 2024.
- Applies to all indoor work areas where the temperature *equals or exceeds 82 degrees Fahrenheit* when employees are present.
- Employers MUST:
  - Establish, implement, and maintain a written Indoor Heat Illness Prevention Plan.
  - Provide access to drinking water and cool-down areas (less than 82°F).
  - Provide cool-down recovery breaks.
  - Encourage workers to take cool-down rest periods.
  - Closely observe employees during acclimatization.
  - Train employees on these procedures.
  - Provide timely emergency aid.

Employer Reminder! Indoor Heat Illness Prevention Policy

Training – <u>All</u> employees must be trained on:

- Signs of heat illness.
- Employer's procedures for complying with the Indoor Heat Illness Prevention law.
- Importance of immediately reporting any signs of heat illness to supervisors or other managers.

- **Training – Supervisory employees must receive extra training on:**
  - How to implement the Indoor Heat Illness Prevention Policy.
  - Procedures to follow when an employee exhibits signs, or reports, heat illness, such as:
    - Provide cold water;
    - Removal from the high temperature area;
    - Use fans or devices that may provide relief;
    - Emergency procedures (e.g. call 911)

Christine H. Long
Email: Christine.Long@berliner.com
Phone: (408) 286.5800

Susan E. Bishop, Partner
Email: Susan.Bishop@berliner.com
Phone: (408) 286.5800

Eileen P. Kennedy, Partner
Email: Eileen.Kennedy@berliner.com
Phone: (408) 286.5800

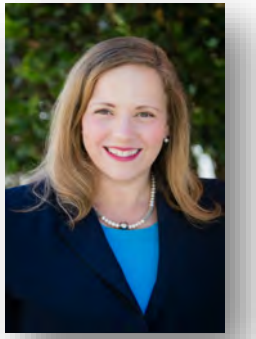
Christine H. Long, Partner
Email: Christine.Long@berliner.com, Phone: (408) 286.5800

Ms. Long maintains a diverse litigation practice in employment, hospitality, business litigation and real estate. Ms. Long is the Chair of the Employment Law Practice Group and Hospitality Practice Group. Ms. Long's employment and hospitality litigation practice includes handling wage and hour claims, claims of employment discrimination, wrongful termination, and breach of employment contract cases. She has experience with class action litigation, and FLSA and EEOC investigations. In addition to her litigation practice, Ms. Long counsels clients on all aspects of employment, including complaints made to and investigations initiated by the Department of Fair Employment and Housing, Labor Commissioner, and the EEOC on matters relating to employment including compensation issues, mandatory leaves of absence, reasonable accommodations, and reductions-in-force for individuals, companies and local government. In the real estate and business litigation areas, Ms. Long has represented parties in a variety of matters, including commercial and residential sales disputes, partnership disagreements and dissolutions, partition actions, commercial landlord/tenant suits, easement and boundary claims, and CC&R.

Susan E. Bishop, Partner
Email: Susan.Bishop@berliner.com, Phone: (408) 286.5800

Ms. Bishop's litigation practice includes working with management of public and private corporations and nonprofit organizations on issues, including employee relations, personnel policies, wage and hour matters, discrimination, harassment, retaliation and wrongful termination. She represents clients before State and Federal Courts, the Department of Fair Employment and Housing, Equal Employment Opportunity Commission, California Labor Commissioner, Workers' Compensation Appeals Board, and California Unemployment Insurance Appeals Board. Much of her time currently is spent defending class actions alleging meal and rest break violations, off-the-desk claims, unpaid overtime, and inaccurate wage statements. Ms. Bishop advises clients in a wide range of industries, including high tech, franchisees, general contractors and subcontractors, homeowner's associations, physicians and medical professionals, produce companies, restaurants, beauty salons, sanitation, senior living, and temporary help agencies. During law school she was a Judicial Extern for Justice Jerome Smith.

Labor & Employment Attorneys



Christine Long,
Partner

Susan Bishop,
Partner

Eileen Kennedy,
Partner

Kimberly Flores,
Partner

Caitlin Capriotti,
Associate

Leah Lambert,
Associate

Kevin Landis,
Associate

Milan Neda,
Associate

Lindsay Walczak,
Associate

Makayla Whitney,
Associate

Berliner Cohen serves the business and regulatory needs of private businesses and public agencies. For over 50 years, the Firm has developed the special expertise required by a diverse client base consisting of some of Northern California's most influential and largest corporations, new ventures, leading real estate developers, cutting-edge technology companies, municipalities and public agencies, healthcare providers, and mortgage banking companies.

Berliner Cohen attorneys concentrate on providing experienced, knowledgeable and innovative solutions and services for our clients in numerous practice areas, including:

- Business Litigation
- Corporate and Tax
- Employment
- Hospitality
- Estate Planning
- Real Estate Litigation and Contract Negotiation
- Land Use Planning and Development

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Employee Benefits Update

December 4, 2024

EPICBROKERS.COM

Federal Updates

Background – Fiduciary Duties

Plan Fiduciary Responsibilities

- Act solely in the interest of plan participants (Duty of Loyalty)
- Act for the exclusive purpose of providing plan benefits, or for defraying reasonable expenses of plan administration (Exclusive Benefit)
- Act with the care, skill, prudence and diligence that a prudent person acting in a like capacity would (Prudent Person Standard)
- Follow the plan documents (Plan Adherence)

ERISA fiduciaries who breach their duties can be found personally liable for damages to the ERISA plan and to the DOL.

So, what does all this mean?

Recent Litigation

Lewandowski v. Johnson & Johnson

Alleges that the defendant plan sponsor breached their fiduciary duty to (among other things) act in the best interest of the plan.

Key allegations and issues highlighted in the complaint include:

- Egregious overpayment due to inflating costs of drugs
- Rebating is an unfair practice
- Failure to negotiate contract terms
- Failure to solicit proposals with other vendors
- Conflicts of interest
- Formulary design is a fiduciary function

Recent Litigation

Navarro v. Wells Fargo

Similar to *Johnson & Johnson,* the complaint alleges that the defendant plan sponsor breached their fiduciary duty to act in the best interest of the plan but also alleges that fees paid to the PBM were excessive, highlighting the importance of understanding service provider compensation and reasonableness of compensation.

Key allegations and issues highlighted in the complaint include:

- Payment of excessive administrative fees
- Plan steerage toward higher prices
- Unreasonable prices for and terms for prescription drugs
- Fiduciary process is fundamentally flawed

This case highlights the importance of the compensation disclosure

Action Items for Plan Sponsors

Plan sponsors can take measures to ensure that they are acting prudently and adhering to fiduciary standards

- Review service agreements for fiduciary responsibility clauses
- Request compensation disclosures from covered service providers
- Evaluate reasonableness of compensation for covered service providers
- Evaluate different types of compensation methods
- Conduct RFPs on plans and service providers
- Review vendor agreements for unreasonable terms and conflicts of interest
- Form a Benefits Committee
- Purchase a fidelity bond/insurance
- Train plan fiduciaries
- Audit plan costs and review cost-saving opportunities
- Consider using a pharmacy consultant with subject matter expertise

Medicare Part D

What is “Creditable Coverage?”

Coverage is “creditable” if it provides coverage for the cost of prescription drugs that at least equals the actuarial value of standard prescription drug coverage under Medicare Part D.

Plan sponsors are NOT required to provide creditable coverage… BUT… individuals who enroll in Medicare Part D will incur a lifetime penalty if they have had a lapse in creditable coverage that exceeds more than 62 days.

- Avoiding the Medicare Part D penalty

Medicare Part D Redesign

Creditable Coverage Determination

- Simplified Determination Method
  - CMS intends to eliminate this method next year
- Determine creditability using an actuarial determination
  - Carrier or TPA may be able to provide the determination
  - Engage with an actuary
  - Compare to other similar plan designs you know are creditable / non-creditable

Medicare Part D Redesign

Inflation Reduction Act (2022)

On August 16, 2022, President Biden signed the Inflation Reduction Act into law. The IRA implemented many changes to the Medicare Part D program phased in over several years including:

- Capping the cost of insulin at $35 for Medicare participants
- Coverage for certain vaccines without cost-sharing
- Establishing a program to negotiate prescription drug prices with drug manufacturers
- Capping annual out-of-pocket maximum limits for prescription drugs at $2,000

What does this mean for employer-sponsored plans?

These IRA changes may affect whether a group health plan's prescription drug coverage is creditable, particularly for HDHPs that have minimum deductibles set by the Internal Revenue Service (IRS).

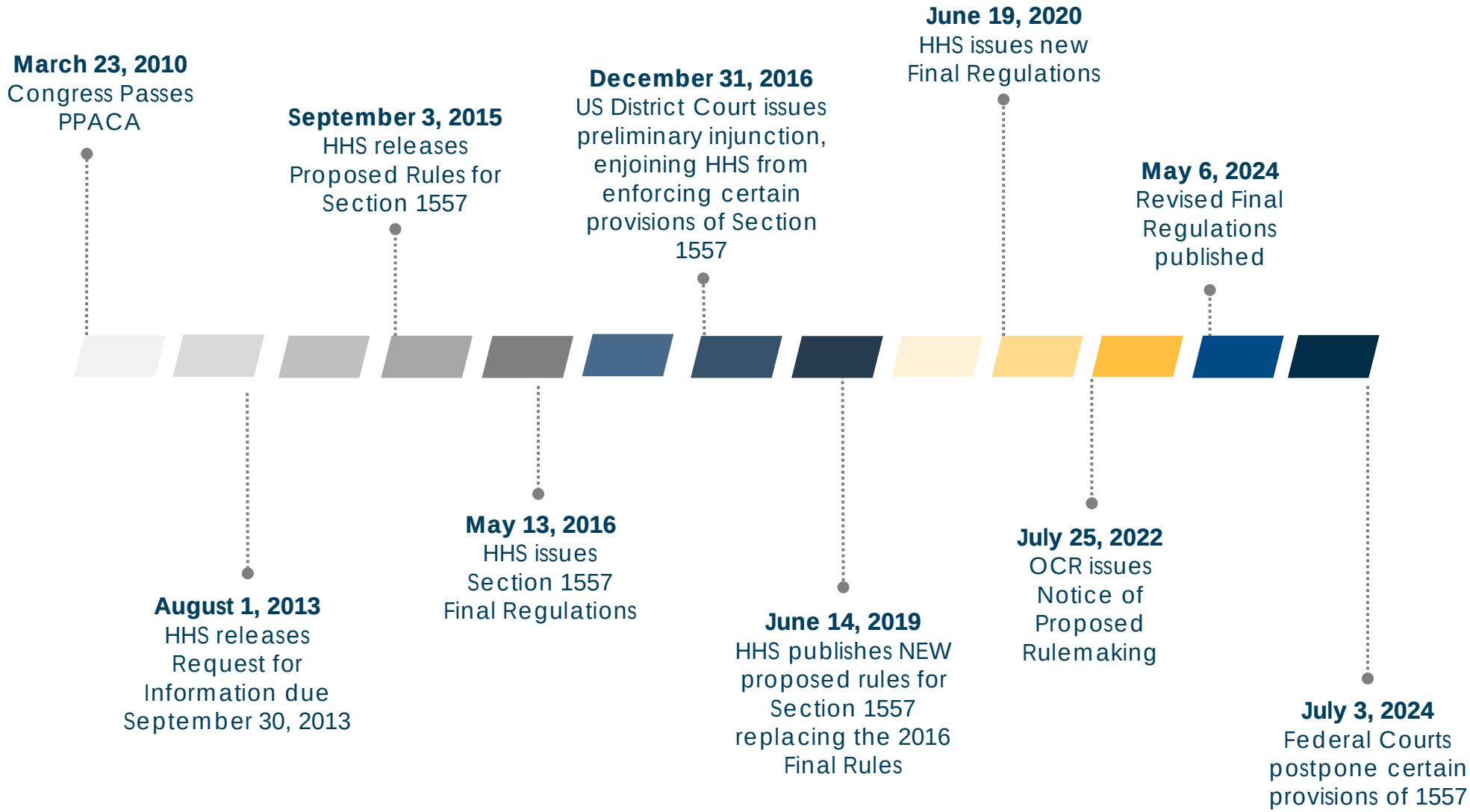
Medicare Part D Redesign

Action Steps for Employers

- Don’t panic
- Obtain a creditable coverage determination for each plan offered
- Provide proper notice to plan participants
- Provide Medicare education to plan participants
- Provide the creditable coverage disclosure to CMS

Final Rules on ACA Section 1557

A Timeline of Section 1557



Final Rules on ACA Section 1557

Section 1557 prohibits discrimination on the basis of race, color, national origin, sex, age and disability in certain health programs and activities receiving federal assistance from the Department of Health & Human Services (HHS).

- Health programs and activities include:
  - Providing or administering health-related services, health insurance coverage, or other health-related coverage;
  - Providing assistance to persons in obtaining health-related services, health insurance coverage, or other health-related coverage;
  - Providing clinical, pharmaceutical or medical care;
  - Engaging in health or clinical research; or
  - Providing education for health care professionals or others

Final Rules on ACA Section 1557

What does this mean for group health plans?

In order for 1557 to apply, a group health plan must:

- Operate a health program or activity
- Receive Federal financial assistance from HHS

But health plans that aren't covered entities may indirectly have to comply because their insurance carrier or TPA must comply.

- Most health insurance carriers WILL be covered entities
- TPAs operated by carriers WILL likely be covered entities
- Employers may have to comply because the carrier or TPA will be required to design and administer plans in accordance with §1557 requirements

Final Rules on ACA Section 1557

Effective Dates & Next Steps

May 6, 2024 (60 days from publication July 5, 2024)

- Group health plan design changes – first day of the plan year in 2025
- Notices – 120 days from effective date
- Designate a coordinator – 120 days from effective date
- Policies & Procedures – one year from effective date

Supreme Court Case May Impact Benefits Regulations

Loper Bright v. Raimondo

In July 2024, the Supreme Court overturned a 40-year precedent called the *Chevron* Doctrine that expected courts to defer to federal agency interpretations when a federal statute was silent or ambiguous.

- Following the *Loper Bright* decision, when an agency regulation is challenged, federal courts do not have to defer to agency interpretations

Impact to Employee Benefits Regulations

- *Loper Bright* was not an employee benefits case and does not have a direct impact on employee benefits regulations; however, courts have already started using this decision to issue injunctions on certain employee benefits regulations.

Final Rules on ACA Section 1557

Effect of *Loper Bright* on the Section 1557 Regulations

Following the Supreme Court decision in *Loper Bright*, three federal courts issued decisions postponing certain aspects of the final 1557 regulations.

- Mississippi Southern District
  - Nationwide injunction that postpones the effective date of provisions that include gender identity in the definition of sex discrimination
- Florida Middle District
  - Postpones effective date of provisions that include gender identity in the definition of sex discrimination in Florida
- Texas Eastern District
  - Postpones the effective date of the entire final rule in Texas and Montana

Final Rules on ACA Section 1557

What about other federal laws?

- Mental Health Parity and Addiction Equity Act (MHPAEA)
- Title VII - *Bostock v, Clayton County (2020)*
- Americans with Disabilities Act - *Williams v. Kincaid (2022)*
- Recent Case Law - *Lange v. Houston County, Georgia (11th Circuit, 2024)*
- Recent Case Law - *Maxwell Kadel v. Dale Folwell (4th Circuit, 2024)*

A Brief History of MHPAEA

Timeline
1996 – Mental Health Parity Act
2008 - Mental Health Parity and Addiction Equity Act (MHPAEA)
2013 – Final MHPAEA rules under Affordable Care Act (ACA)
2020 – Additional requirements under the Consolidated Appropriations Act (CAA)
2023 – Proposed Rules
2024 – Final Rules released

Background

Parity Requirements Generally

- Plans that offer mental health or substance use disorder benefits must provide coverage for those benefits “in parity” with medical/surgical benefits.
  - Parity as to financial requirements and quantitative treatment limitations
  - Parity as to non-quantitative treatment limitations

MHPAEA – 2024 Final Rules

Non-Exhaustive List of NQTLs

- Medical management standards limiting or excluding benefits based on medical necessity or medical appropriateness, or based on whether the treatment is experimental or investigative;
- Prior authorization or ongoing authorization requirements;
- Concurrent review standards;
- Formulary design for prescription drugs;
- For plans with multiple network tiers (such as preferred providers and participating providers), network tier design; • Standards for provider admission to participate in a network, including reimbursement rates;
- Plan or issuer methods for determining usual, customary, and reasonable charges;
- Refusal to pay for higher-cost therapies until it can be shown that a lower-cost therapy is not effective (also known as "fail-first" policies or " step therapy" protocols);
- Exclusions of specific treatments for certain conditions;
- Restrictions on applicable provider billing codes;
- Standards for providing access to out-of-network providers;
- Exclusions based on failure to complete a course of treatment; and
- Restrictions based on geographic location, facility type, provider specialty, and other criteria that limit the scope or duration of benefits for services provided under the plan or coverage.

MHPAEA – 2024 Final Rules: Substantially All Test

Final Rule

Plans and issuers must meet a **Two-part** test to apply NQTLs on MH/SUD benefits.

- Design and application test AND
- Relevant data evaluation test
  - Network access

MHPAEA – 2024 Final Rules: Meaningful Benefits

Overview

For any covered MH/SUD condition, the plan must provide "meaningful benefits" for that condition or disorder in every classification in which medical/surgical benefits are provided.

- The Final Rules require a "core treatment standard" to meet the meaningful benefit standard

Core Treatment Standard

- A standard treatment or course of treatment, therapy, service, or intervention indicated by generally recognized independent standards of current medical practice
- Plan must provide at least one "core treatment" for that specific condition or disorder
  - This is key for treatments such as ABA therapy for autism or treatment for eating disorders
- Final Rules Example – Autism

MHPAEA – 2024 Final Rules: NQTL Comparative Analysis

Content Requirements

1. Description of NQTL, benefits subject to the NQTL, and the classification
2. List and definitions for any factors and evidentiary standards used to design or apply the NQTL
3. Description of how factors are used in the design and application of the NQTL
4. Demonstration of parity for the NQTL, as written
5. Demonstration of parity for the NQTL, in operation
6. Findings and conclusions
7. Certification by a named plan fiduciary

MHPAEA – 2024 Final Rules: NQTL Comparative Analysis

Common Questions

- Do we *really* have to do this?
- Isn't it the Carrier's/TPA's responsibility to be compliant with MHPAEA?
- My TPA/PBM says that they don't have to help, what do I do?
- Can we do this ourselves and save money?

Final Rules for HIPAA Reproductive Healthcare

In April 2024, HHS released final rules for HIPAA privacy of reproductive rights, adding new protections for reproductive healthcare. The final rules are in response to the 2022 Supreme Court decision in *Dobbs v. Jackson Women's Health,* which overturned *Roe v. Wade.* Most of the new requirements take effect December 23, 2024.

Entities cannot disclose protected health information related to lawful reproductive healthcare for investigative purposes.

Attestation required for certain permitted purposes for the PHI that may be potentially related to reproductive health. The attestation requirement applies when the PHI is required for:

- Health care oversight
- Judicial and administrative processing
- Law enforcement purposes
- Decedents to coroners and medical examiners

Final Rules for HIPAA Reproductive Healthcare

Action Items for Employers

- Policy and procedure adjustments
- Request the new attestation when required
- Train personnel on new protections and procedures
- Changes to Business Associate Agreements (BAAs) if necessary
- Updates to Notices of Privacy Practices (due February 2026)

The Office of Civil Rights has provided tools and resources to assist with compliance

2024 ACA Changes

Changes to Affordability Percentage

- 2024 – 8.39%
- 2025 – 9.02%

Final Rules on STLDI & Fixed Indemnity

Short Term Limited Duration Insurance

Proposed & Final Rules

- Coverage limited to 3 months (with a one-month extension allowed)
- Restrictions on “stacking” policies
- New notice requirements
- Effective Date – September 1, 2024

Fixed Indemnity

Final Rules

- New model notice used when an employer offers hospital indemnity plan
- Requires specific formatting and placement in marketing materials
- Must be provide in online enrollment platform and in “marketing materials

2025 IRS Limits for Health Plans

Benefit Plan Limits Comparison (2024-2025)				
Health Flexible Spending Accounts	**2024**		**2025**	
Health FSA Maximum Contribution	$3,200		$3,300	
Health FSA Maximum Carryover	$640		$660	
Health Savings Accounts	**2024**		**2025**	
	Self-Only	**Family**	**Self-Only**	**Family**
HSA Maximum Contribution	$4,150	$8,300	$4,300	$8,550
HSA Maximum Catch-Up Contribution	$1,000	$1,000	$1,000	$1,000
HDHP Minimum Deductible	$1,600	$3,200	$1,650	$3,300
HDHP Out-of-Pocket Maximum Limit	$8,050	$16,100	$8,300	$16,600
Qualified Transportation Benefits	**2024**		**2024**	
Parking	$315/month		$325/month	
Transit/Commuter	$315/month		$325/month	

Telemedicine Relief for HDHPs Ending

Under IRS rules, a telehealth plan, is not compatible with an HSA unless the telehealth plan has a deductible or charges a fair market value (FMV) fee each time participants use the service until the minimum deductible required for a qualifying HDHP is met.

- In 2020, Congress granted temporary relief for telehealth plans to offer first-dollar coverage and remain compatible with an HSA
- Relief was later extended, but expires December 31, 2024
- Without extended relief, plans that provide first-dollar coverage for telehealth or that do not charge fair market value for telehealth before satisfying the deductible will not be HSA eligible

Proposed Extension of ACA Preventive Services

Background

In October, the Biden Administration released proposed rules aimed at expanding access to contraception under the ACA by expanding access to OTC contraceptives without a prescription at no cost-sharing.

Includes:

- Condoms
- Spermicides
- Emergency contraception without a prescription

Disaster Relief Extensions

Extensions of Certain Deadlines Under ERISA and COBRA for Storm Victims

On November 8, 2024, the Departments issued a notice extending certain timeframes under COBRA, HIPAA and ERISA for individuals affected by Hurricanes Helene and Milton. This relief is similar to the outbreak period extensions under COVID.

- Relief lasts until May 1, 2025
- Affects anyone:
  - Who resided, lived or worked in one of the disaster areas as defined by FEMA or
  - Whose coverage was under an employee benefit plan that was directly affected
- Extensions of timeframes for:
  - COBRA notices
  - COBRA premium payments
  - HIPAA special enrollment requests
  - Claim filing deadlines
  - Appeal determinations

California Updates

Mandatory Coverage for IVF

Since January 1, 1990, every group plan issued in California that covers hospital, medical or surgical expenses has had to offer coverage for the treatment of infertility, excluding in vitro fertilization (IVF). Starting July 1, 2025, under SB 729, large fully insured group health plans situsued in California must provide coverage for:

- the diagnosis and treatment of infertility and fertility services, including a maximum of three completed oocyte retrievals and unlimited embryo transfers within the guidelines of the American Society for Reproductive Medicine (ASRM)
- There must be parity between the coverage of fertility medications and other prescription medications
- Coverage cannot be excluded or denied based on an individual's participation in fertility services involving third-party oocyte, sperm or embryo donors, a gestational carrier or a surrogate.
- There must be parity between coverage for the diagnosis and treatment of infertility and benefits for services not related to infertility.

Updates to California Dental Coverage

Starting January 1, 2025, fully insured dental contracts issued in California must comply with the Increasing Patient Protections & Transparency in Dental Insurance Plans" law.

Key Provisions

- Dental plans can no longer impose a waiting period following a participant's effective date
- Dental plans can no longer have pre-existing condition provisions
- Dental carriers have annual filing obligations with the California Department of Insurance

Updates to HCSO & HCAO

The OLSE updates required rates for San Francisco HCSO and HCAO expenditures annually.

	HCSO Medium Employer	HCSO Large Employer	HCAO
2024	$2.34	$2.56	$6.75
2025	$3.52	$3.85	TBD

What to Expect in 2025?

Predictions for Trump 2.0

Trump Administration 2.0

Congressional Review Act

The Trump Administration may use the Congressional Review Act certain federal regulations introduced at the end of the Biden Administration.

Employee Benefits Changes

- Repeal and replace ACA?
- Taxability of benefits
- Pricing transparency
- PBM reform
- International drug importation
- Expansion of Trump 1.0-era rules
  - ICHRAs
  - AHPs
  - STLDI

Questions?

THANK YOU