Employer LINC25

PRESENTED BY McAFEE & TAFT

April 2 | OKC
National Cowboy & Western Heritage Museum

April 4 | Tulsa
Renaissance Tulsa Hotel & Convention Center

Employer LINC25

CONTENTS

Agenda 3

MORNING LINE-UP

EmployerTrek: The Next Administration 5
Employment Law Horizon: Impact of a New Administration
OKC Natalie Ramsey and Paul Ross | **Tulsa** Courtney Bru and Jake Crawford

N*L*R*B 14
What to Expect from the New Labor Board
OKC Tony Puckett and Phil Bruce | **Tulsa** Charlie Plumb

Law & Onboarder 23
Employment Law Issues in Recruitment and Hiring
OKC Paige Good | **Tulsa** Harrison Kosmider and Kirk Turner

Employed… With Children 32
Navigating the Pregnant Workers Fairness Act
OKC Alyssa Lankford and Connor Curtis | **Tulsa** Grace DeJohn and Kathy Neal

HR's Heroes 40
Labor & Employment "Ask the Experts" Panel
OKC Moderator Nathan Whatley with Kate Dodoo, Roberta Fields, and Kristin Simpsen
Tulsa Moderator Kirk Turner with Courtney Bru, Kate Dodoo, and Jake Crawford

AFTERNOON LINE-UP

All in the Fiduciary 46
Common Retirement Plan Administration Issues and How to Avoid Them
Brian Beatty and Judy Burdg

Trends 57
Grab Bag of Hot Topics for the New Year
Melissa Cottle and Lake Moore

Flubs 75
Your Health Plan: Litigation Risks, Risky Strategies, and Critical Issues
Brandon Long and Riley Wren

Get Smart 85
Employee Benefits "Ask the Experts" Panel
Judy Burdg, Brandon Long, and Lake Moore

Attorney Pictorial 90

Employer LINC25

AGENDA

MORNING SESSION

7:30–8:30a Seminar check-in and continental breakfast

8:30–8:35a Welcome
OKC Paul Ross | Tulsa Charlie Plumb

8:35–9:05a

EmployerTrek: The Next Administration
Employment Law Horizon: Impact of a New Administration
OKC Natalie Ramsey and Paul Ross | Tulsa Courtney Bru and Jake Crawford

9:05–9:35a

N*L*R*B
What to Expect from the New Labor Board
OKC Tony Puckett and Phil Bruce | Tulsa Charlie Plumb

9:35–9:50a Break

9:50–10:20a

Law & Onboarder
Employment Law Issues in Recruitment and Hiring
OKC Paige Good | Tulsa Harrison Kosmider and Kirk Turner

10:20–10:50a

Employed... With Children
Navigating the Pregnant Workers Fairness Act
OKC Alyssa Lankford and Connor Curtis | Tulsa Grace DeJohn and Kathy Neal

10:50–11:05a Break

11:05–11:50a

HR's Heroes
Labor & Employment "Ask the Experts" Panel
OKC Moderator Nathan Whatley with Kate Dodoo, Roberta Fields, and Kristin Simpsen
Tulsa Moderator Kirk Turner with Courtney Bru, Kate Dodoo, and Jake Crawford

11:50a–1:30p Lunch Break ** LUNCH NOT PROVIDED*

AFTERNOON SESSION

1:00–1:30p	**Afternoon check-in**

1:30–2:00p

All in the Fiduciary
Common Retirement Plan Administration Issues and How to Avoid Them
Brian Beatty and Judy Burdg

2:00–2:30p

Trends
Grab Bag of Hot Topics for the New Year
Melissa Cottle and Lake Moore

2:30–2:45p	**Break**

2:45–3:15p

Flubs
Your Health Plan: Litigation Risks, Risky Strategies, and Critical Issues
Brandon Long and Riley Wren

3:15–3:45p

Get Smart
Employee Benefits "Ask the Experts" Panel
Judy Burdg, Brandon Long, and Lake Moore

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Employment Law Horizon: Impact of a New Administration

PRESENTED BY

Natalie Ramsey AND Paul Ross (OKC)
Courtney Bru AND Jake Crawford (TUL)

Introduction

- As of this week, we are nearly 75 days into the new administration. In that time, President Trump has issued Executive Orders and made other decisions directly impacting employers in almost every area of employment law. Some examples are:
  - DEI programing (January 21)
  - Affirmative action (January 21)
  - Gender ideology (January 20)
  - Immigration (January 20) (10 different Executive Orders)
  - EEOC membership (January 27)
  - NLRB membership (January 27)
  - Non-competition agreements (February 26)

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Introduction *(cont'd)*

- We will focus today on several of those actions:
  - DEI and affirmative action
  - Gender ideology
  - FTC approach to non-competition agreements and unfair competition
- These are all evolving matters. Please look for EmployerLINC updates on www.mcafeetaft.com and LinkedIn, and don't hesitate to reach out to your McAfee & Taft labor and employment attorney for questions.

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DEI and affirmative action

- January 21, 2025 – President Trump issued Executive Order 14173 entitled "Ending Illegal Discrimination and Restoring Merit-Based Opportunity"
- EO's expressly stated purpose is to end "race and sex-based preferences" that operate "under the guise of so-called Diversity, Equity, and Inclusion" ("DEI") programs
- In EO 14173, President Trump ordered "all executive departments and agencies to terminate all discriminatory and 'illegal' preferences, mandates, policies, programs, activities, guidance, regulations, enforcement actions, consent orders, and requirements. **I further order all agencies to enforce our longstanding civil-rights laws and to combat illegal private-sector DEI preferences, mandates, policies, programs, and activities.**"

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DEI and affirmative action *(cont'd)*

- EO 14173 has several effects. Some are applicable to public (governmental) employers, some are applicable to private employers who are government contractors and/or subcontractors, and some are directly applicable to all private employers.
- The EO does not change existing law – discrimination in contracting and employment remain illegal under Title VII, the ADA, the ADEA, and various other statutory and regulatory structures. However, this EO makes clear that the new administration will target DEI that provides racial or gender-based preferences as "illegal" DEI.
- Always remember that governmental enforcement agencies (EEOC, DOL, NLRB, etc.) are executive agencies that are guided by the priorities of the sitting president

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DEI and affirmative action *(cont'd)*

- The most direct impact of EO 14173 on private employers is on government contractors and subcontractors
- Section 3 of the new EO repeals EO 11246, which has been law since 1965
- EO 11246, "Equal Employment Opportunity," prohibited employment discrimination by federal contractors and subcontractors and required contractors and subcontractors take affirmative action to ensure equal employment opportunity
- New EO bars federal contractors and subcontractors from considering protected classifications in their employment, procurement, or contracting practices "in ways that violate the Nation's civil rights laws"

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DEI and affirmative action *(cont'd)*

- In addition, the EO orders the Office of Federal Contract Compliance Programs (OFCCP) to "immediately cease" (1) promoting "diversity," (2) holding contractors and subcontractors responsible for taking "affirmative action," and (3) allowing or encouraging workforce balancing based on protected characteristics
- In response, the OFCCP has issued an internal order prohibiting its employees from enforcing any obligations in federal contracts that were previously required by EO 11246. See OFCCP Secretary's Order 03-2025.
- Pursuant to the EO and the OFCCP guidance, employers can continue to comply with the provisions of EO 11246 for 90 days after the issuance of the new EO (until April 21, 2025)

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DEI and affirmative action *(cont'd)*

- EO 14173 does have an effect on private employers who are not governmental contractors or subcontractors. EO 11246 only applied to governmental contractors, but EO 14173 goes further than simply revoking that previous EO.
- As stated above, EO 14173 directs "all agencies to enforce our longstanding civil-rights laws and to combat illegal private-sector DEI preferences, mandates, policies, [and] programs"
- It is possible, therefore, that private employers could see EEOC charges premised upon DEI programs that contain preferences or affirmative action
- On March 19, 2025, the EEOC issued affirmative guidance regarding what it will consider to be "illegal" DEI programs

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DEI and affirmative action *(cont'd)*

- That guidance reminds employers that discriminatory conduct premised upon protected characteristics is unlawful "no matter which employees are harmed," and that Title VII applies equally "to all racial, ethnic, and national origin groups, as well as both sexes"
- The EEOC also stated its new position that "there is no such thing as 'reverse' discrimination," meaning that Title VII's protections do not apply only to individuals who are part of a "minority group." Rather, they apply to "majority groups" as well, and the EEOC will process claims accordingly, without a higher burden of proof.

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DEI and affirmative action *(cont'd)*

- Title VII allows for a *bona fide occupational qualification* ("BFOQ") in very limited circumstances to excuse hiring or classifying an individual based on religion, sex, or national origin. The EEOC's new guidance states unequivocally that Title VII does not provide any "diversity interest" exception to these rules.
- "No general business interests in diversity and equity (including perceived operational benefits or customer/client preference) have ever been found by the Supreme Court or the EEOC to be sufficient to allow race-motivated employment actions"
- Guidance specifically identifies some employment practices as likely examples of "illegal" DEI, including preferential hiring, quotas, separating employees, or excluding employees from groups based upon protected characteristics, and even harassment during DEI training

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DEI and affirmative action *(cont'd)*

- EO 14173 is facing legal challenges by various groups in various jurisdictions.
  - On February 21, 2025, the U.S. District Court for the District of Maryland issued a nationwide injunction prohibiting the implementation of EO 14173
  - On March 17, 2025, the Forth Circuit Court of Appeals stayed that injunction while the matter proceeds through the legal process
- Currently, EO 14173 is in full effect
- HR and Compliance teams may face a difficult challenge in educating leadership on the very subtle changes this EO provides, making clear that nearly all pre-existing employment law remains intact

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Gender ideology

- January 20, 2025 – President Trump issued Executive Order 14168 entitled "Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government"
- EO's expressly stated purpose is to "defend women's rights and protect freedom of conscience by using clear and accurate language and policies that recognize women are biologically female, and men are biologically male"
- EO defines terms such as "sex," "woman" or "girl," "man" or "boy," and "female" and "male" for the purposes of interpreting federal legislation enforced by the Executive Branch

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Gender ideology *(cont'd)*

- EO 14168 also defines "gender identity" as "a fully internal and subjective sense of self, disconnected from biological reality and sex and existing on an infinite continuum, that does not provide a meaningful basis for identification <u>and cannot be recognized as a replacement for sex</u>"
- This creates a clear conflict for employers. The EEOC is a federal agency under the Executive Branch that enforces employment laws that interpret terms such as "sex."
- However, the laws the EEOC interprets (including Title VII of the Civil Rights Act of 1964) are written by Congress. Where Congress does not define words, executive agencies can provide guidance, but the final interpretation lies with the U.S. Supreme Court.

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Gender ideology *(cont'd)*

- U.S. Supreme Court has already interpreted the term "sex" as contained in Title VII to include gender identity
- Court concluded in *Bostock v. Clayton County* (2020), that discrimination because of transgender status is discrimination "because of sex" that is prohibited by Title VII
- The EO cannot change Supreme Court precedent, but it expressly anticipates the authoring and submission of a bill in Congress that would codify these definitions
- For the time being, for private employers, nothing has changed with respect to the law regarding transgender employees

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FTC and non-competition agreements

- Under the prior administration, the Federal Trade Commission issued a strong ban on most non-competition agreements for almost all employees of private companies
- Final rule implementing that ban was challenged in court, and several cases remain in progress
- In somewhat of a surprise move, the FTC under President Trump has recently announced a plan to continue its efforts to scrutinize non-competition agreements and other agreements it considers to be unfair to workers

FTC and non-competition agreements *(cont'd)*

- On February 26, 2025, new FTC Chair Andrew Ferguson announced the formation of a joint task force to, among other things, prioritize the FTC's focus on Americans not just as consumers, but as workers selling labor
- Task force will be tasked with investigating and prosecuting deceptive, unfair, or anticompetitive labor market conduct affecting Americans, including but not limited to non-compete agreements
- While the fate of the final rule is still pending, it is worth noting that non-compete agreements that "employers can use to impose unnecessary, onerous, and often lengthy restrictions on former employees' ability to take new jobs in the same industry after they leave their employment" may be a target of FTC enforcement through traditional methods (whether or not the final rule survives court scrutiny)

Takeaways

- Presidential administration changes always result in policy changes, especially when the new administration results in a switch of controlling political parties
- Current change seems to have resulted in broad change in policy perspective, particularly for the EEOC
- However, it is not clear how much practical effect that change will have on anti-discrimination law in the workplace
- For employers with active DEI initiatives and/or policies regarding transgender employees, careful review of those policies will be needed as this area of the law develops

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PRESENTED BY
TONY PUCKETT AND PHIL BRUCE (OKC)
CHARLIE PLUMB (TUL)

NLRB's reach – it's greater than you think

- Applies to all employers – not just to unionized employers
- Addresses employees' rights to discuss and speak out about workplace issues
- Expanding its involvement
- Sharing information with other governmental agencies – e.g., Department of Labor, Wage & Hour, EEOC, OSHA, IRS

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NLRB’s structure

- **NLRB Chairman** – Marvin Kaplan, named by President Trump
- **Board Members**
  - 5 members, including chairman
  - 3 from one party and 2 from the other party
  - Should be a Republican majority during 2025
- **General Counsel**
  - New acting general counsel is William B. Cowen
  - Provides advice to the Board
  - Decides which cases will be heard by the Board
  - Issues interpretations and directives to NLRB offices

… the NLRB is a political animal

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The Biden NLRB

- 20 Board decisions changing precedent
- 75% of the decisions overturned or modified previous Trump NLRB decisions
- Created new Board law

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The Trump NLRB: What to watch for

- Rescind prior general counsel's memos or directives
- Changes in NLRB precedent
- Board decides not to enforce current NLRB precedent without expressly overruling

> **Generally, NLRB inaction works to the advantage of employers**

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Effect of new federal court appointees (from Trump 1 and Trump 2)

- More employer-friendly judiciary
- Support employer-friendly decisions by the NLRB
- Uphold employer-friendly rules issued by the NLRB

> **Constitutional challenges to the NLRB and its authority underway**

> **Future court challenges to regulatory overreach by NLRB**

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Issues Likely to Revert to Former Rules

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Employee handbook policies

- ***Stericycle*** (August 2023): Does the challenged policy have "a reasonable tendency to chill employees from excising their [rights under the NLRA]" – easier "could be" standard
  - Triggered challenges by individual employees and unions of handbook policies
  - Affected union and non-union employers
- **Former Rule:** If a handbook policy was challenged as unlawful, the NLRB weighed its potential impact against the employer's legitimate need for the policy

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Restrictive covenants

- ***General Counsel's May 2023 Memo***
  - Non-competition and/or no-solicitation agreements violate federal labor laws
  - Covered union and non-union employers
- **Former Rule:** NLRB rarely addressed the issue of employers' non-competition or no-solicitation agreements/policies

- ***General Counsel's May 2023 Memo***
  - Broad confidentiality and non-disparagement policies in severance agreements unlawful
  - Covered union and non-union employers
- **Former Rule:** Employers' broad confidentiality or non-disparagement agreements enforceable

Independent contractor test

- ***Atlanta Opera*** (June 2023)
  - Easier for an individual to establish themselves as an employee, rather than an independent contractor
  - NLRB sharing findings of employee/employer relationship with IRS, DOL, etc.
- **Former Rule:** Does the arrangement between the employer and the alleged "employee" provide an "entrepreneurial opportunity" to the individual?

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Internal employee/employer groups

- ***Current Rule:*** Internal committees or meeting between employees and supervisors/managers to discuss and solve workplace issues unlawfully discourage employees' concerted activity
- **Proposed: Teamwork for Employees and Managers Act (TEAM)**
  - Supported by Vance and Rubio
  - Permits employers to establish such groups to encourage communication and engagements – dissuade the need for unions

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Union Election and Organizing Decisions Likely to Change

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Quickie election rules

- Issued in August 2023
- Generally, an accelerated union election schedule improves a union's chances of winning

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Anti-union captive audience meetings

- ***Amazon*** (November 2024)
  - Employer prohibited from requiring employees to attend meetings where the employer expresses its opposition to unionization
  - Notice to employees about the meeting: voluntary and no record of who attends/doesn't attend
- **Former Rule:** Up until 24 hours before a union election, an employer could hold mandatory meetings for employees to explain the negative points of unionization and to encourage employees to vote in favor of the employer and against the union in an upcoming election

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Employers' right to state potential negative effects of unionization

- ***Starbucks*** (November 2024)
  - Employer prohibited from discussing with employees the possible loss of benefits, or that unionization could limit employees' ability to directly address issues with supervisors
- **Former Rule:** During a union campaign, an employer could point out that bringing a union into the workplace could mean the end of employees being able to deal directly with their supervisor

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Recognizing a union without an election

- ***Cemex*** (August 2023)
  - If union claims recognition based on a majority of employees showing support, employer must recognize the union or the employer must immediately file an election petition with the NLRB
  - Accelerates the time period to hold an election
  - If the employer does not timely file a request for election, the union is automatically recognized as the employees' representative
- **Former Rule:** If a union presents union cards or a petition signed by a majority of employees, an employer was not required to recognize the union, and it was the union's obligation to decide whether to file a petition with the NLRB to schedule an election

What to expect from the Labor Board during the next four years

- ✓ A more employer-friendly NLRB
- ✓ Results from Board decisions, GC interpretive memos and enforcement priorities
- ✓ The speed and order of changes will be affected by:
  - Acting and final general counsel
  - Approval of new Board members
  - Completing the rulemaking process for changes
  - When particular cases and issues come before the Board
  - Court challenges by individual employers

EMPLOYMENT LAW ISSUES IN RECRUITMENT AND HIRING

PRESENTED BY
PAIGE GOOD (OKC)
HARRISON KOSMIDER AND KIRK TURNER (TULSA)

Overview

- Equal Employment Opportunity
- Job postings
- Use of AI and social media in recruiting process
- Accommodations in the application/interview process
- No-no questions
- Onboarding documents

EEO is still the law

- Title VII makes it unlawful to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin
- From job posting to interview to on the job, the focus should be:
  - Qualifications, experience, skills, professionalism, communication, competencies, work product

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Job postings

- **Multi-state employers** – Job posting pay and benefit disclosure laws in various states may require you to include a compensation rate or range in the job posting and/or a description of benefits
- **California** – Employer with 15 or more employees that engages a third party to job post shall provide the pay scale to the third party to include in the job posting. Pay scale must be included in job posting or provided upon request from applicant.
- **Colorado, Illinois, Maryland, Minnesota, New Jersey** – For certain employers, disclose the hourly/salary compensation or pay range and a general description of benefits

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Job postings *(cont'd)*

- External, internal job postings
- No Oklahoma law currently
- Not an exhaustive list – current area of active legislation
- Many states cover recruitment done through a third-party – think LinkedIn, Indeed, Simply Hired, Glassdoor, etc.
- Some state laws cover employers with only one employee in that state (remote or otherwise)

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Job postings *(cont'd)*

- Remember – avoid use of terminology that could be considered discriminatory
- Example – ADEA compliance:
  - Obvious:
    - Young
    - Age criteria
  - Other:
    - "Recent graduates"
    - "Energetic"
    - "Digital age applicants," "Digital natives"
    - "Millennials," "Gen Z"
    - "No more than X years experience"

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Use of AI in recruiting

- Previously issued technical guidance: **"Assessing Adverse Impact in Software, Algorithms, and Artificial Intelligence Used in Employment Selection Procedures Under Title VII of the Civil Rights Act of 1964."**
- Current administration has removed this guidance from its website. It has also removed the EEOC's previous Joint Statement on Enforcement Efforts Against Discrimination and Bias in Automated Systems.
- Where does that leave employers?

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Use of AI in recruiting *(cont'd)*

- Use of AI not a priority of the current EEOC/administration
- Title VII is still good law
- Still a best practice to ensure software, applications, algorithms do not result in employment discrimination
  - Résumé scanners; virtual assistants or chatbots; testing software
- AI is not unlawful – but tools should not have adverse impact on individuals of a certain race, color, religion, national origin, age

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Use of social media in recruiting

- When using digital platforms, be sure to avoid micro-targeting
  - Targeted ads or postings, specifying demographics for delivery, steering ads to specific groups, etc.
- Prior EEOC charge of discrimination – Facebook enabled an advertiser to select the age of the FB users who would receive the ad. Facebook enabled employers to target ads for recruitment based on user's sex and age.
- Delivery – always select "ALL" or use defaults that do not restrict delivery

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Interviews – ADA compliance

- Remember: Employers are required to provide reasonable accommodations to a qualified **candidate** to enable them to be considered for a job opening, unless it would cause undue hardship
  - **EEOC example:** A trucking company conducts job interviews in a second-floor office. There is no elevator. The company calls Tanya to arrange for an interview for a secretarial position. She requests a reasonable accommodation because she uses a wheelchair. Installing an elevator would be an undue hardship, but the employer could conduct the interview in a first-floor office. The employer must move the location of the interview as a reasonable accommodation.

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Interviews – ADA compliance *(cont'd)*

- **EEOC example:** An employer gives a written test to learn about an applicant's knowledge of marketing trends. Maria is blind and requests that the test be given to her in braille. An individual's knowledge of marketing trends is critical to this job, but the employer can test Maria's knowledge by giving her the test in braille. Alternatively, the employer could explore other testing formats with Maria to determine if they would be effective – for example, providing a reader or a computer version of the test.
- **EEOC example:** An employer gives a written test for a proofreading position. The employer does not have to offer this test in a different format (e.g., orally) to an applicant who has dyslexia because the job itself requires an ability to read.

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No-no questions

- Is the question I'm asking job-related? Will it tell me more about a person's
  - Qualifications, skills, experience
- Areas of inquiry to avoid during recruitment, interviews, hiring process:

Age, Race, National Origin, Religion, Sex, Military Status, Disabilities/Handicaps	Marital Status, Children/Childcare, Pregnancy, Workers' Compensation History, Union Affiliation

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No-no questions *(cont'd)*

- Examples of no-no questions:
  - How old are you?
  - When were you born?
  - Avoid: How much longer do you plan to work? When do you plan to retire?
  - Are you pregnant? What are your plans to have children?
  - Were you born here?
  - What is your ethnicity? Are you biracial?
  - Are you a person of faith? What is your religion? Were you raised in the church?

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No-no questions *(cont'd)*

- More examples of no-no questions:
  - Do you have a disability that would interfere with your ability to perform the job?
  - How many days were you sick last year?
  - Have you ever filed for workers' compensation?
  - Have you ever been treated for mental health problems?
  - What prescription drugs are you taking?

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No-no questions – real life example

- High-level executive of company
- Wants to ask applicant if they have kids
- Why? What will that tell you about their ability to perform the job?
- What do you really want to know?
  - Dependability
  - Attendance
  - Punctuality

✓ **Ask the right question! (Is there any reason you cannot fulfill the requirements of this position – hours, overtime, travel?)**

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Interviews - misrepresentations

- Avoid puffery
  - Do not mispresent the job position and what it will entail; performance metrics and standards; set expectations (possibility for PRETEXT)
  - Do not suggest the candidate is the "best" or "perfect" or "exactly what the company needs"
- At-will
  - Do not suggest that the position is "permanent" or "long term"
  - Do not make any promises regarding job security
  - Do not suggest that the candidate will be able to stay in the position for a certain period of time

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Onboarding documents

- Apart from I-9 employment authorization and any lawful background check or drug/alcohol test, consider:
  1) **Conditional offer of at-will employment**
     » Position, compensation, at-will, benefits, verifications, written
  2) **Confidential information, intellectual property, non-solicitation agreements**
     » Protection, non-competes not permissible in Oklahoma
  3) **Payroll deduction agreement**
     » Voluntary, in writing, required by Oklahoma law
  4) **Handbook acknowledgment**

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As a reminder …

- Your actions are DISCOVERABLE – Exhibit "A"
- Internal and external communications and documents
- Notes
- Audio/video recordings; Teams recordings
- Communications with candidates on social media (LinkedIn), via email, text, or other chats

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NAVIGATING THE PREGNANT WORKERS FAIRNESS ACT

PRESENTED BY

ALYSSA LANKFORD AND CONNOR CURTIS (OKC)

GRACE DEJOHN AND KATHY NEAL (TULSA)

Presentation overview

- Introduction to the Pregnant Workers Fairness Act (PWFA)
- PWFA: Final Rule issued by EEOC (4/19/24)
- Comparing PWFA and the Americans with Disabilities Act (ADA)
- The PUMP Act
- Best practices

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Pregnant Workers Fairness Act

- PWFA became effective June 27, 2023
  - Applies to private and public sector employers with at least 15 employees
- Title VII prohibited discrimination based on pregnancy, childbirth, and related medical conditions, but did not address a pregnant or postpartum employee's need for special accommodations
- PWFA fills the gap in Title VII by protecting employees **and applicants** who have known limitations related to pregnancy, childbirth, or related medical conditions

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PWFA: What is a "known limitation"

- Any physical or mental condition related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions that the employee has communicated to the employer
- Includes modest, minor, and/or episodic conditions
- Includes conditions exacerbated by pregnancy or childbirth
- Does not have to meet the definition of "disability"

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PWFA: Employers' obligations

What must employers do if they have an employee or applicant with a "known limitation" related to pregnancy, childbirth, or related medical conditions?

- ✓ Employees and applicants are entitled to "reasonable accommodations"
- ✓ Employers must engage in the interactive process regarding an accommodation

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PWFA: Accommodations

- Examples of "reasonable accommodations"
  - Sitting (for jobs that require standing, or vice versa)*
  - Closer parking
  - Flexible hours
  - Additional break time to use bathroom or eat*
  - Take leave to recover from childbirth
  - Be excused from strenuous activities
  - Permitted to keep water nearby and drink*
- Unless an "undue hardship" – "significant difficulty or expense"

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PWFA: A request for accommodation can sound like …

- A pregnant employee tells her supervisor, "I'm having trouble getting to work at my scheduled starting time because of morning sickness."
- An employee who gave birth 3 months ago tells the person who assigns her work at the employment agency, "I need an hour off once a week for treatments to help with my back problem that started during my pregnancy."
- An employee tells a human resources specialist that they are worried about continuing to lift heavy boxes because they are concerned that it will harm their pregnancy

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PWFA: EEOC guidance

- EEOC's final rule and interpretive guidance for implementing the PWFA was published on April 19, 2024
- Notable guidance from the final rule includes:
  - Employees themselves must have the "known limitation"— not the employee's partner, spouse, or family member
  - Employers may only ask for documentation in narrow circumstances
  - No "end date" for providing accommodations
  - Additional examples of reasonable accommodations for lactation
    - » E.g., space for pumping in proximity to a sink, running water, and refrigerator for storing milk

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Comparing PWFA and the Americans with Disabilities Act (ADA)

- Both utilize the concept of reasonable accommodations, the interactive process, and undue hardships
- However, the PWFA is *broader* in scope
  - ADA: impairment that **substantially limits a major life activity**
  - PWFA: only requires the employee to have a condition **related to, affected by, or arising out of childbirth** or related medical conditions
- Some pregnancy related conditions *may* be disabilities, but pregnancy itself is not a disability under the ADA

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PWFA v. ADA: Essential job functions

- ADA: does not require employers to eliminate an essential function of the job as a reasonable accommodation
- However, under the PWFA, employers must consider eliminating one or more essential functions of the job:
  - if the function can be **eliminated temporarily** and
  - if the employee expects to be able to **resume doing it in the near future**

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PWFA litigation

- Case from the Northern District of Oklahoma
- EEOC alleged a specialty medical practice did not allow a pregnant medical assistant at its Tulsa facility to sit, take breaks, or work part-time as directed by her doctor to protect her health and safety during the final trimester of her high-risk pregnancy
- Employee alleged she was forced to take unpaid leave. When she would not return to work without breaks, the medical practice terminated her.

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PWFA litigation *(cont'd)*

- Southern District of Florida: EEOC filed a lawsuit against a resort after failing to reach a settlement through its administrative process
- According to the lawsuit, the resort terminated an employee shortly after requesting leave to **recover and grieve following a stillbirth** during the fifth month of her pregnancy
- The resort agreed to **pay $100,000 in damages** to the former employee, appoint an EEO coordinator, revise its employment policies to ensure employees are provided reasonable accommodation under the PWFA, and provide training to all its employees

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The PUMP Act

- The Providing Urgent Maternal Protections (PUMP) for Nursing Mothers Act
- Part of the Fair Labor Standards Act (FLSA)
- Employers must provide a place, other than a bathroom, for an employee to express breastmilk that is:
  - Shielded from view;
  - Free from intrusion from coworkers and the public; and
  - Freely accessible by the employee at all times.

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PUMP Act litigation

- Northern District of Oklahoma: Court denied a motion to dismiss an action against a local restaurant by its former employee under the PUMP Act
- Employee was only given access to pump in an office that was accessible to other employees — who frequently interrupted her — and she was monitored by a security camera in the office

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Best practices

What should employers do now?

- ✓ Ensure policies, procedures, and handbooks are updated to reflect protections of the PWFA and PUMP Act
- ✓ Engage in the interactive process with employees with known limitations related to pregnancy, childbirth, or related medical conditions
- ✓ Seek advice and assistance from counsel on implementation of policies and/or questions related to PWFA and PUMP Act accommodations

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Labor & Employment 'Ask the Experts' Panel

presented by
Nathan Whatley, Kate Dodoo, Roberta Fields, Kristin Simpsen
Kirk Turner, Courtney Bru, and Jake Crawford

What tips can you recommend to help prevent leave abuse in situations involving FMLA, the ADA, and workers' compensation leave?

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What immigration enforcement measures should employers expect under the second Trump Administration?

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How do you deal with an employee who is taking intermittent leave one day a week – forever?

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Can any type of animal be used or designated as a support or service animal as part of an ADA accommodation request?

Is it possible to end a remote work arrangement? If so, how?

After merging with a company and acquiring its workforce, what steps should we take regarding Form I-9s, and who is liable for any compliance errors?

What are best practices for HR when a complaint comes "through the grapevine"?

What happens when an employee raises – for the first time – an issue that could potentially constitute a "disability" when the employee is being disciplined?

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Which application and interview questions are permissible:

a) Are you a U.S. citizen?
b) Are you a Legal Permanent Resident?
c) What is your immigration status?
d) Were you born in the United States?

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Can an employee be fired when the workers' comp injury is the fault of the employee?

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What are the best practices for complying with wage garnishments?

In addition, how do you process an out-of-state wage garnishment?

And how do you process a garnishment if there already exists a child support order?

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Common Retirement Plan Administration Issues and How to Avoid Them

Presented by

Brian Beatty and Judy Burdg

Overview

- Failure to amend the plan for tax law changes
- Failure to follow the plan definition of compensation
- Failure to include eligible employees
- Nondiscrimination testing failures
- Plan loan failures
- What to do when you discover a failure

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Failure to amend the plan for tax law changes

- Failure description
  - Plan is not restated timely or required amendment not adopted timely
    - » Preapproved plans have a restatement cycle
    - » Individually designed plans have a remedial amendment period
  - Results in the plan failing to operate in accordance with current law

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Failure to amend the plan for tax law changes
(cont'd)

- Tips on how to avoid this failure
  - Work with your document provider (if using a preapproved plan), and plan consultants to determine restatement cycle or remedial amendment period, required amendments, and timing for adoption
  - Educate fiduciaries and employees
  - Keep plan contacts up to date and make sure more than one person receives plan communications

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Failure to amend the plan for tax law changes
(cont'd)

- Correct the failure
  - IRS EPCRS: SCP or VCP, depending on the failure

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Failure to follow the plan definition of compensation

- Failure description
  - Plan's definition of compensation is written one way but the plan is operated a different way
  - Results in participants receiving contributions that are either higher or lower than what the plan terms dictate

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Failure to follow the plan definition of compensation *(cont'd)*

- Examples of when the failure arises
  - Plan amendment changes definition of compensation from plan's initial terms
  - Box on the plan document is marked incorrectly
  - Plan document is not carefully reviewed

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Failure to follow the plan definition of compensation *(cont'd)*

- Tips on how to avoid this failure
  - Confirm key plan provisions are consistent with plan operations
  - Perform comparison of key plan provisions with any new plan document

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Failure to follow the plan definition of compensation *(cont'd)*

- Correct the failure
  - Corrective contributions allocated among affected participants in affected years
  - Retroactively amend plan to reflect operation of plan

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Failure to include eligible employees

- Failure description
  - Eligible employees are not given the opportunity to make elective deferral elections
  - Results in otherwise eligible employees not making deferrals or receiving an allocation to which they are entitled

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Failure to include eligible employees *(cont'd)*

- Examples of failure
  - Eligibility provisions are not applied correctly
  - Automatic enrollment is not processed correctly

Failure to include eligible employees *(cont'd)*

- Tips on how to avoid this failure
  - Review plan eligibility provisions
  - Train in-house personnel who determine employee eligibility about plan provisions
  - Inspect payroll and plan records for operational consistency with plan document

Failure to include eligible employees *(cont'd)*

- Correction
  - Qualified Nonelective Contribution (QNEC)

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Nondiscrimination testing failures

- Failure description
  - Qualified retirement plans must meet the Code's nondiscrimination standards
  - Done through several tests that measure the extent to which a plan benefits employees, often comparing the treatment of highly paid employees to non-highly paid employees
  - Examples of the tests include coverage, ADP, and ACP testing

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Nondiscrimination testing failures *(cont'd)*

- Tip on how to avoid this failure
  - Ensure plan census information is accurate
  - Prioritize providing TPA census info in a timely manner
  - When notified of a testing failure, contact ERISA legal counsel
  - Discuss any proposed plan design changes with ERISA legal counsel before adopting

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Nondiscrimination testing failures *(cont'd)*

- Correct the failure
  - When a plan fails a particular test, there is generally a limited window to correct to avoid adverse tax consequences and/or plan disqualification
  - Correction may include making contributions to or distributing contributions from the plan

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Plan loan failures

- Failure description
  - Occurs when the plan sponsor fails to withhold loan payments
  - Commonly arises when there is an issue with payroll set-up, there is a change in payroll providers, or during a merger or acquisition
  - If not corrected within the cure period, the loan goes into default and a deemed distribution will occur

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Plan loan failures *(cont'd)*

- Tips on how to avoid this failure
  - Review and audit loan procedures
  - When changing payroll providers, review reporting post transitions to ensure loan repayment are being withheld
  - If there is a merger or acquisitions, ensure there is a process in place to address any plan loans and to ensure withholdings are set up correctly

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Plan loan failures *(cont'd)*

- Correct failure
  - Corrective payments or reamortization

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What to do when you discover a failure

Everyone makes mistakes. Everyone.
The key is fixing – the right way

- Gather information as quickly as possible
  - Contact recordkeeper and other relevant parties
  - Review records

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What to do when you discover a failure *(cont'd)*

- Determine how to correct the failure
  - Make participants whole
- Implement the correction
  - IRS' EPCRS
  - DOL's VFCP
- Communicate with impacted participants

What to do when you discover a failure *(cont'd)*

- Make the correction
  - Example: Failure to follow the plan definition of compensation
    - Corrective contributions or retroactively amend plan
  - Example: Failure to include eligible employees
    - QNEC
- Document the correction
  - Retain calculations, contribution records, or administrative changes
  - Retain copies of IRS compliance statements or correction memoranda

2025 hot topics in employee benefits

- Where are we now?
  - Secure 2.0 – Mandatory automatic enrollment
  - Roth catch-up contributions
  - DOL VFCP self-correction
- Where are we going?
  - Recent Executive Orders
  - Refresher on transparency requirements
  - Potential new legislation (SECURE 3.0?)

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Retirement plans: Mandatory auto enroll

- SECURE 2.0 – Certain plans required to include automatic enrollment provisions
  - Effective for plan years beginning on or after January 1, 2025
- Grandfathered plans exempt
- Other exceptions:
  - Small businesses
  - New businesses
  - Church/governmental plans

Mandatory auto enroll *(cont'd)*

- Why the focus on automatic enrollment?
- Beneficial for employee and plan sponsor
  - Increased retirement readiness
  - Raises ADP rate
- Potential disadvantages, too
  - Higher cost (with increased employer contributions)
  - Increased administrative complexity

Mandatory auto enroll *(cont'd)*

- Plans "established" before December 29, 2022 must include an EACA Auto Enroll feature
  - When is a plan "established"?
- Adoption date or effective date?
  - Adoption date governs
- EACA requirement
  - Initial deferral rate – 3-10%; Annual escalation until 10% and 15%
  - 90-day withdrawal window

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Mandatory auto enroll *(cont'd)*

Special situations – mergers & acquisitions

- Merged Plans – Business Transaction
  - Grandfathered status of surviving plan
- Merged Plans – Single Employer
  - Status of either plan
- Joining or Leaving Multiple Employer Plan
  - Determined at employer level

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Mandatory auto enroll *(cont'd)*

- Notes for new mandatory auto enrollment requirement:
  - Initial default deferral percentage must be at least 3% (max of 10%)
  - Auto-escalation of deferral percentage at least 1% each year
  - Max deferral percentage must be at least 10% (max 15%)
  - Default deferrals rules must apply to all covered employees
  - Participants may still "opt out" at any time
  - Defaults apply to all employees (even those that have previously elected not to defer or elected less than 3%)
  - Must include 90-day permissible withdrawal option

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Retirement plans: Roth catch-up contributions

- New proposed regulations – January 13, 2025
- Secure 2.0 – Roth Catch-up Contribution Requirement
  - Effective for plan years beginning after 2023; compliance until 2026
  - Catch-up contributions by certain high-earning employees in 401(k), 403(b), and governmental 457(b) plans must be Roth contributions
- Secure 2.0 – "Super Catch-Up" Requirement
  - Effective for plan years beginning after December 31, 2025
  - Affects employees turning ages 60, 61, 62, or 63 during the year

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Roth catch-up contributions

- Refresher on catch-up basics
  - In year employee turns age 50, plans can allow to make contributions above the 402(g) limit and 415(c) limit, up to limit set each year by IRS. (For 2025, catch-up limit is $7,500).
- Required Roth catch-up – the "Roth Mandate"
  - Roth catch-up required if employee's FICA wages in preceding calendar year from the sponsoring employer exceeded $145,000
  - If any employee is subject to the "Roth Mandate," all other eligible employees must have option to make Roth catch-ups

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Roth catch-up contributions *(cont'd)*

- Deemed Roth catch-up elections
  - Must include option to decline making catch-up contributions
- Error corrections
  - Form W-2 correction method
  - In-plan Roth rollover correction method
- Correction deadlines

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Roth catch-up contributions *(cont'd)*

- What if we don't have a Roth program?
  - Proposed regs do NOT require a plan not offering Roth to add a Roth feature to comply with the Roth mandate
- Don't the Roth regs require universal availability?
  - Proposed regs amend existing regs
  - Plan can satisfy universal availability if each catch-up-eligible employee could make catch-up contributions up to the dollar limit *that applies to them*
- But beware potential BRF testing complications

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Retirement plans: VFCP self-correction

- Department of Labor – recently added Self-Correction Component (SCC) to Voluntary Fiduciary Correction Program (VFCP)
  - Includes an addition to PTE 2002-51 to include certain SCC transactions
- Most common use – "late deposit" failures
- SCC final amendment – effective date of March 17, 2025

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VFCP self-correction *(cont'd)*

- Self-correction of late deposit operational failures completed through electronic submission of SCC Notice
  - Will receive a receipt of SCC Notice submission but no No-Action Letter
- Relief available to plan fiduciaries regardless of plan size or amount of plan assets affected
  - Plan must not be currently "under investigation"
- No limit to use of SCC

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VFCP self-correction *(cont'd)*

- Qualifying conditions for relief
  - Amount of lost earnings must be $1,000 or less
  - Delinquent contributions/loan repayments must be remitted no more than 180 days from the date the contributions are withheld from a participant's paycheck

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VFCP self-correction *(cont'd)*

- SCC correction method requirements
  - Lost earnings must be calculated using VFCP online calculator
  - Use "date of withholding or receipt" as beginning date
  - Complete SCC retention record checklist
  - Collect supporting documents
  - Complete and retain penalty of perjury statement
  - Provide all to plan administrator

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VFCP self-correction *(cont'd)*

- SCC notice requirements
  - Self-corrector's name and address
  - Plan sponsor's EIN and plan number
  - Principal amount of lost earnings
  - Loss date (date of withholding or receipt)
  - Number of participants affected
- Exceptions to eligibility conditions

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VFCP self-correction *(cont'd)*

- Department of Labor reserves the right to investigate and take other actions with respect to SCC submissions
  - Including taking steps to confirm that the corrective action was actually taken
- SCC relief does not apply to persons other than the employer
- If DOL determines the terms and conditions of SCC not satisfied, no protection from enforcement actions or civil penalties

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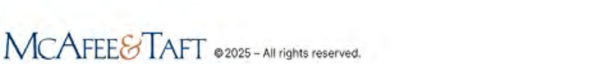
VFCP self-correction *(cont'd)*

- Changes to PTE 2002-51
  - Provides an exemption from excise taxes for certain eligible transactions under VFCP, now including SCC
  - Under SCC, the amount of the excise tax will be paid to plan
  - Employers must retain a completed Form 5330 and supporting documentation and be able to show proof of payment to plan
  - Frequency of use limitation removed



Secretary of Labor: Lori Chavez-DeRemer

- Voted in favor of Congressional disapproval of the ESG Rule (Biden vetoed and ESG Rule remains)
- Co-sponsored the Health Data Access, Transparency, and Affordability Act
  - Amends ERISA to expand plan access to claims data (died in Senate)
- Co-sponsored the Increasing Value for Families (IVF) with HSAs Act of 2024
  - Discussed later in presentation

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Secretary of Labor *(cont'd)*

- Introduced a resolution in the House of Representatives supportive of in vitro fertilization
- Sponsored the "Helping to Optimize Patients' Experience with Fertility Services Act"
  - Requires group health plans to cover certain fertility services
- Co-sponsored a resolution in the House of Representatives to establish a refundable tax credit for IVF expenses
- Has spoken of effects of vertical integration in the health industry and the need for PBM price transparency

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Regulatory freeze memo

- Common in transition of administrations
- Pauses issuance of new regulations, withdraws rules not yet published, and potentially delays the effective date of recent final rules
- Immediate effect on:
  - Proposed updates to Medicare Part D creditable coverage methodology for CY2026
  - Proposed updates to the HIPAA Security Rule
- EO 14192: 10-to-1 deregulation memo
  - 2-to-1 under Trump 1.0

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"America First Investment Policy"

- Directs the DOL to "publish updated fiduciary standards under [ERISA] for investments in public market securities of foreign adversary companies."
  - Public market securities?
  - Foreign adversary companies?
- Purposes to restrict investment in foreign adversary companies by ERISA-covered retirement plans
- China, Cuba, Iran, North Korea, Russia, Venezuela

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"America First Investment Policy" *(cont'd)*

- Mostly directed at China – EO says China invests in US companies to access cutting-edge tech, IP, etc.
- ERISA's exclusive benefit rule generally prohibits subordinating participants' interests for unrelated objectives
  - historical fund performance, stability of and future outlook for the fund provider, quality, reputation, fees, exit strategy
- National security considerations may not always lead to best financial benefits for participants
- National security factors vs. ESG investing

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Transparency enforcement

- "Making America Healthy Again by Empowering Patients with Clear, Accurate, and Actionable Healthcare Pricing Information"
  - Health care prices can be hidden from participants and plan sponsors
  - Participants cannot obtain accurate pricing information from hospitals
- Directs Treasury, DOL, and HHS to:
  - Require disclosure of actual prices – not estimates
  - Issue new rules ensuring price information is standardized and easily comparable across hospitals and plans
  - Update enforcement policies to ensure compliance

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Refresher: Transparency in Coverage (TiC) Regulations

- Public disclosures: Machine-readable files (effective July 2022):
  - (1) In-network negotiated rates, (2) OON allowed amounts and billed charges, (3) negotiated rates and historical net prices for prescription drugs (deferred enforcement until September 2023)
  - Posted on public website of plan or employer – hosted by TPA or employer?

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TiC Regulations *(cont'd)*

- Participant disclosures: Internet-based cost-sharing tool and paper
  - Initially 500 shoppable services – all services required in **2024**
  - **Estimate** of cost-sharing for covered services – deductibles, coinsurance, copays
  - Accumulated amounts (deductible, OOP limit)
  - In-network rates
  - OON allowed amount
  - Prerequisites to coverage – concurrent review, prior authorization, step-therapy, or fail-first protocols

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TiC Regulations *(cont'd)*

- Removing estimates?
  - Shopping tool is currently NOT required to reflect the actual or final cost of a particular item or service
  - What about:
    - » Unanticipated items/services during procedure
    - » Severity of illness/injury
    - » Provider treatment decisions
    - » Limited historical information for new providers or newly covered services

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Refresher: Advance EOBs

- Effective date? Initially 2022 plan year – deferred enforcement
- Future guidance on relation to cost-sharing tool
  - Simultaneous compliance?
- Good faith **estimate** of the expected charges for furnishing a scheduled item or service
  - Any item or service reasonably expected to be provided
- AEOB Content:
  - (1) In-network/OON provider; (2) negotiated rate for in-network provider; (3) good faith estimate of plan payment and cost-sharing; (4) current accumulated amounts; (5) prerequisites to coverage

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Refresher: Advance EOBs *(cont'd)*

- December 2024 CMS update
  - Still gathering information and consulting with industry
  - Advancing toward the rulemaking stage
  - Industry has made progress toward an industry-wide data standard for transmitting good faith estimates
  - No specific timeline – similar to April 2024 update

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"Designating English as the Official Language of the United States"

- Formally designates English as the one and only official language of the United States
- Revoked a Clinton-era executive order to promote access for individuals with limited English proficiency
  - Required each federal agency to establish a language access plan for improving access to the agency's activities by LEP individuals

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"Designating English as the Official Language of the United States" *(cont'd)*

- Could signal the administration's intention to change benefit-related language access requirements
  - Biden's 1557 regulations require covered entities to develop and implement written language access procedures for their covered health programs and activities that explain the entity's procedures for furnishing language access services to LEP individuals
- Does not appear to change existing ERISA content regulations
  - For example, SPDs must include an offer of assistance in a non-English language in certain situations

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"Expanding Access to In Vitro Fertilization"

- Cites cost at $12,000 to $25,000
- "[E]nsure reliable access to IVF treatment, including by easing unnecessary statutory or regulatory burdens to make IVF treatment drastically more affordable."
- Seeking policy recommendations to protect IVF access and "aggressively reducing out-of-pocket and health plan costs for IVF treatment."
- Remains to be seen how the directive will be implemented (HSAs?)
  - Appears to be area of interest for Secretary Chavez-DeRemer

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Expansion of HSAs

- "Increasing Value for Families ("IVF") with HSAs Act" (S. 4771)
- Co-sponsored by Secretary Chavez-DeRemer while in Congress
- Introduced July 25, 2024
- Makes HSAs available to anyone with "health insurance" – not just HDHP
- Doubles contribution limits to HSAs ($8,550 self-only and $17,100)
- Trump admin theme of expanding access to account-based/consumer-driven plans
  - e.g. ICHRAs, EBHRAs, expansion of preventive care/chronic disease coverage for HDHP pre-deductible
  - Similar goal of increasing group purchasing power – AHPs/ARPs

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Chronic disease

- EO 14212: Establishing the President's Make America Healthy Again Commission
  - Instructs agencies to promote availability of expanded treatment options to provide benefits that support "beneficial lifestyle changes and disease prevention"
- In 2019, Trump administration expanded "first dollar coverage" to 14 chronic care management medical services
  - Beta-blockers for patients with congestive heart failure
  - Blood pressure monitors for patients with high blood pressure
  - Glucometers for patients with diabetes
  - Inhalers for patients with asthma
  - Cholesterol drugs and testing for patients with heart disease
- Proposed codification by Chronic Disease Flexible Coverage Act (H.R. 3800)

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Other potential Congressional actions

- SECURE 2.0 technical corrections
- HDHP pre-deductible telehealth extension – expired 12/31/24
- Tax reform
  - Enhanced ACA PTC (ARPA 2021) subsidies expire end of 2025 – effect on family enrollment in employer plans?
    - Plan is affordable (no PTC) for family only if FAMILY premium does not exceed 9.02% (2025) of HH income
  - Revenue raisers?
    - Cap on tax-free employer-provided health benefits
    - Rothification (e.g. mandatory Roth catch-ups)
    - Caps on retirement contributions (IRA, 401(k))

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Other potential Congressional actions *(cont'd)*

- SECURE 3.0
  - Increase coverage (auto enroll IRA/401(k))?
    - Already required for plans adopted after SECURE 2.0 effective date (December 29, 2022)
  - Reduce eligibility from 21 to 18?
  - Expand availability of lifetime income?
  - Portability – expand on SECURE 2.0?
    - Help accounts follow employees to new jobs and avoid lost participants
- More health transparency and PBM reform
  - Extensive disclosure requirements (in line with RxDC, gag clause)
  - Require 100% rebate passthrough
  - Require disclosure of indirect compensation

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Fiduciary litigation

- Continued uptick in lawsuits against fiduciaries for alleged mismanagement of health plan costs
- *Stern v. JP Morgan Chase*, USDC – SD NY (Mar. 13, 2025)
- "ERISA's duty of prudence requires plan fiduciaries to make a diligent effort to compare alternative service providers in the marketplace, seek to minimize the expenses paid for the goods and services to be provided, and continuously monitor plan expenses to ensure they remain reasonable and appropriate under the circumstances."

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Prescription drug prices

- "This case principally involves Defendants' systematic, mismanagement of JPMorgan's prescription-drug benefits program under the Plan. Over the past several years Defendants breached their fiduciary duties by agreeing to grossly inflated prescription drug prices, costing the JPMorgan Plan and its participants/beneficiaries millions of dollars through higher payments for prescription drugs, higher premiums, higher out-of-pocket costs, higher deductibles, higher coinsurance, higher copays, and suppressed wages years."

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Comparing no insurance cost

- "The stark disparity in prices that Defendants accepted is illustrated by teriflunomide (generic Aubagio, used to treat multiple sclerosis). Anyone with a 30-unit prescription for the teriflunomide could fill that prescription, **without even using their insurance, at Rite Aid for $32.96, Wegmans for $34.71, ShopRite for $29.24, or from Cost Plus Drugs online pharmacy for $11.05.** Defendants, however, agreed and/or allowed the Plan and its participants/beneficiaries to pay $6,229 for each 30-unit teriflunomide prescription."

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Alleged breaches

- Agreeing to allow the plan and its beneficiaries to pay unreasonable prices for prescription drugs,
- Agreeing to contract terms with the PBM that needlessly allow the PBM to enrich itself at the expense of the plan and its participants/beneficiaries,
- Failing to monitor the PBM and the prices charged for prescription drugs,
- Failing to address conflicts of interest,
- Failing to actively manage and take reasonable measures oversee key aspects of the company's prescription-drug program, and
- Failing to take available steps to rein in the PBM's profiteering

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Defendants [allegedly] should have …

- Used their bargaining power to obtain better rates from their own PBM or another traditional PBM
- Moved all or parts of their prescription-drug plan to a "pass-through" PBM that bases its prices on actual pharmacy acquisition costs rather than inflated and manipulable benchmarks
- Directed substantial portions of their prescription-drug program to a well-known online pharmacy that charges only a modest markup above acquisition cost
- Taken other steps

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Johnson & Johnson fiduciary claims dismissed

- Plaintiffs alleged J&J breached its fiduciary duties by entering into unreasonable contract arrangement with its PBM
- Arrangement allowed J&J's PBM to charge extraordinary costs for drugs that participants could obtain at a fraction of the cost
  - Example: Generic 90-day prescription without insurance cost $28-$77; same prescription with J&J insurance cost the plan $10,200 (250x higher)
- Alleged breach – selecting PBM, unreasonable arrangement, and failure to oversee prescription drug program

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J&J fiduciary claims dismissed *(cont'd)*

- January 24, 2025 - Court granted J&J's motion to dismiss
- Fiduciary claims dismissed because plaintiff lacked "standing"
- "Standing" – legal concept dictating who can bring a lawsuit, requires an "injury-in-fact" – alleged injury was hypothetical
- Dismissal for lack of standing is procedural; does not address the substantive allegations of fiduciary breach
- Does not mean there was no breach of fiduciary duties
- Very similar Wells Fargo case pending – different result?

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State PBM regulation – Arkansas Rule 128

- "Fair and Reasonable Pharmacy Reimbursements"
- Rule made permanent in December 2024
- Requires plans and PBMs to submit an annual written report to the AIC for review and approval, including data such as –
  - Annual avg % of pharmacy reimbursement above NADAC pricing
  - Avg dispensing fee paid to pharmacies in prior calendar year
  - Annual estimates of cost impact for various dispensing costs (projected increase in drug cost, increase in premiums, etc.)
  - And more

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Arkansas Rule 128 *(cont'd)*

- "Fair and Reasonable Pharmacy Reimbursements" *(cont'd)*
  - Allows AIC to impose additional dispensing fee on plans if determined that methodology is not approved
  - AIC intends Rule 128 to apply to self-funded employer plans

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ERISA preemption of PBM laws

- Laws directed at PBMs
- Laws directed at PBMs that indirectly impact self-funded plan costs
- Laws directed at PBMs that directly impact self-funded plan costs
- Laws directed at PBMs that change self-funded plan design

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Tobacco surcharge litigation

- Class actions challenging wellness programs that financially incentivize participants to stop using tobacco products via a "tobacco surcharge"
- Allege that tobacco surcharges and related wellness programs violate various legal requirements
- Health plans generally cannot discriminate based on "health status" (e.g. tobacco use)

✓ **Exception** – "wellness programs" that meet certain requirements

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Tobacco surcharge litigation *(cont'd)*

- Compliant "wellness programs" must meet requirements regarding
  - Surcharge amount
  - Reasonable alternative to surcharge
  - Annual opportunity to avoid surcharge
  - Notice of wellness program terms
  - Reasonably designed to promote health or prevent disease, not merely penalize tobacco use
  - "Full reward" must be available to similarly situated individuals

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Tobacco surcharge litigation *(cont'd)*

- Class actions are challenging these tobacco programs on various grounds, including –
  - Removing surcharge prospectively without refund does not provide the "full reward" to participants
  - Programs that require individuals to be tobacco free after cessation program to avoid surcharge do not provide a "reasonable alternative"
  - Plan materials do not clearly disclose what actions are necessary to avoid surcharge
  - Imposition of surcharge under a noncompliant wellness program is a breach of fiduciary duty and a prohibited transaction under ERISA
- Significant financial risk – Bass Pro $4.95M settlement

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Caution

- Too-good-to-be-true savings (that basically kick off unhealthy members)
- 125 plan tax-saving strategies
- Copay-coupon maximizer programs
- Gender-based exclusions

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February 26, 2025 Executive Order

- **Title:** "Making America Healthy Again by Empowering Patients with Clear, Accurate, and Actionable Healthcare Pricing Information"
- **Purpose:** "During my first term, my Administration took historic steps to correct a fundamental wrong within the American healthcare system. For far too long, prices were hidden from patients and employers, with inadequate recourse available to individuals looking to shop for care or obtain pricing information from a healthcare provider in advance of a visit or procedure. These opaque pricing arrangements allowed powerful entities, such as hospitals and insurance companies, to operate with insufficient accountability regarding their pricing practices, resulting in patients, employers, and taxpayers shouldering the burden of inflated healthcare costs."

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February 26, 2025 EO *(cont'd)*

- "[M]y Administration issued paradigm-shifting regulations to put patients first by requiring hospitals and health plans to deliver meaningful price information to the American people. These regulations require hospitals to maintain a consumer-friendly display of pricing information for up to 300 shoppable services and a machine-readable file with negotiated rates for every single service the hospital provides; health plans to post their negotiated rates with providers as well as their out-of-network payments to providers and the actual prices they or their pharmacy benefit manager pay for prescription drugs; and health plans to maintain a consumer-facing internet tool through which individuals can access price information."

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February 26, 2025 EO *(cont'd)*

- "Unfortunately, progress on price transparency at the Federal level has stalled since the end of my first term. Hospitals and health plans were not adequately held to account when their price transparency data was incomplete or not even posted at all. The Biden Administration failed to take sufficient steps to fully enforce my Administration's requirement that would end the opaque nature of drug prices by ensuring health plans publicly post the true prices they pay for prescription drugs.

- "The American people deserve better."

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February 26, 2025 EO *(cont'd)*

- **Policy:** It is the policy of the United States to put patients first and ensure they have the information they need to make well-informed healthcare decisions. The Federal Government will continue to promote universal access to clear and accurate healthcare prices and will take all necessary steps to improve existing price transparency requirements; increase enforcement of price transparency requirements; and identify opportunities to further empower patients with meaningful price information, potentially including through the expansion of existing price transparency requirements.

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February 26, 2025 EO *(cont'd)*

- The Secretary of the Treasury, the Secretary of Labor, and the Secretary of Health and Human Services shall take all necessary and appropriate action to rapidly implement and enforce the healthcare price transparency regulations issued pursuant to Executive Order 13877, including, within 90 days of the date of this order, action to:
  - (a) require the disclosure of the actual prices of items and services, not estimates;
  - (b) issue updated guidance or proposed regulatory action ensuring pricing information is standardized and easily comparable across hospitals and health plans; and
  - (c) issue guidance or proposed regulatory action updating enforcement policies designed to ensure compliance with the transparent reporting of complete, accurate, and meaningful data.

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Employee Benefits "Ask the Experts" Panel

presented by

Judy Burdg, Brandon Long and Lake Moore

When can COBRA coverage be terminated?

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What should employers know about litigation challenging the use of retirement plan forfeitures?

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Is it permissible to offer reduced or waived COBRA premiums for certain individuals in on-off situations?

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How did the Paperwork Burden Reduction Act and the Employer Reporting Improvement Act change the ACA information reporting requirements?

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What nondiscrimination tests apply to cafeteria plans?

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Our plan allows employees to continue coverage after retirement.

Must they be given the same special enrollment rights as active employees?

What recourse do employers have when employees do not notify them of a change in status that affects benefits eligibility (e.g. divorce)?

When selecting HIPAA Business Associates for our ERISA self-insured group health plan, what steps should we take to be compliant with ERISA and HIPAA?

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Our plan allows employees to continue coverage after retirement.

Must retirees or dependents be given the opportunity to elect COBRA when retiree coverage ends?

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