ALERTS

New Year, New Employment and Benefits Developments for Employers

January 10, 2022

As the new year begins, in addition to the recent COVID-19 related developments (discussed here), employers should be aware of the following changes to ensure continuing compliance with federal, state and local laws and regulations. Employers should also be aware of the amendment to the New York Whistleblower Protection Law, previously discussed here, that will go into effect on Jan. 26, 2022.

Privacy Notification Law

A new New York State law, which goes into effect on May 7, 2022, requires employers to both notify and obtain the acknowledgment of new hires if the employer monitors telephone, email or the Internet. The notice to new hires needs to advise "that any and all telephone conversations or transmissions, electronic mail or transmissions, or internet access or usage by an employee by any electronic device or system, including but not limited to the use of a computer, telephone, wire, radio or electromagnetic, photo-electronic or photo-optical systems may be subject to monitoring at any and all times and by any lawful means." The notice needs to be in writing, in an electronic record, or in an another electronic form and must be acknowledged by the employee either in writing or electronically. Employers must also post the notice of electronic monitoring in a conspicuous place which is readily available for viewing by employees. The new law does not apply to processes that are designed to manage the type or volume of incoming or outgoing email, voicemail or internet usage solely for the purpose of system maintenance and/or protection, rather than to target an individual. Employers found to be in

violation of this law will be subject to a maximum civil penalty of $500 for the first offense, $1,000 for the second offense and $3,000 for the third and each subsequent offense.

New York City Law Targeting Bias in Hiring

A new New York City Council law goes into effect on Jan. 1, 2023. The law affects New York City employers that use automated employment decision tools as part of their hiring practices. The term "automated employment decision tool" refers to technology that uses machine learning, statistical modeling, data analytics or artificial intelligence to score or classify job seekers and replaces some discretionary decisions by employers.

The law prohibits New York City employers from using automated employment decision tools to promote or screen job candidates, unless certain criteria have been met. The tool must be subject to a "bias audit," conducted no more than a year before the use of the tool. Completing a "bias audit" will entail having an impartial evaluation conducted by an independent auditor. Bias audits must test, at minimum, whether an employer's automated employment decision tool may have a disparate impact on the basis of race, sex or other protected categories. Employers must make a summary of the results of the tool's most recent bias audit, as well as the distribution date of said tool, publicly available on the employer's website.

In addition, employers will need to adhere to several notification requirements. Employers must notify any candidate residing in New York City that an automated employment decision tool will be used in connection with the candidate's evaluation, along with the job qualifications and characteristics that the tool will use. Notice must be given no less than ten business days before each use, allowing a candidate to request an alternative selection process or accommodation. Additionally, if an employer's website does not disclose information about the type of data collected for the tool, that data's source and the employer's data retention policy, employers must provide that information within 30 days in response to a candidate's written request. Penalties for violating the law are $500 for first-time violations and up to $1,500 for repeat offenses.

Guidance Addressing Legalization of Cannabis

The New York State Department of Labor ("NYDOL") issued guidance to address questions related to the Marijuana Regulation and Taxation Act ("MRTA"), which authorized recreational use of cannabis. The guidance does not address medical use of cannabis.

MRTA amended Section 201-D of the New York Labor Law and prohibits employers from discriminating against employees based on an employee's legal use of cannabis outside of the workplace, outside of work hours and without use of the employer's equipment or property. An employer may take action when an employee, while working, manifests specific "articulable symptoms" of cannabis impairment that decrease the employee's work performance or that interfere with the employer's obligation to provide a safe workplace. These articulable symptoms are "objectively observable indications that the employee's performance of the duties of their position are decreased or lessened" and do not include signs of use that do not indicate impairment on their own, such as the odor of cannabis or a positive drug test.

Employers are allowed to prohibit cannabis during "work hours," meaning all time that an employee is working, including breaks and when the employee is on call, even if the employee leaves the worksite. Regardless of "work hours," employers may prohibit employees from bringing cannabis onto the employer's property, including rented space, company vehicles[1] and areas typically used by employees such as lockers and desks. An employee's private residence being used for remote work is not a worksite within the meaning of the statute.

An employer may not require employees to agree to not use cannabis or prohibit its use outside of the workplace. Employers are prohibited from drug testing employees for cannabis unless federal or state law requires doing so or makes it a mandatory requirement of the position.

DHS Extends Form I-9 Requirement Flexibility

On Dec. 20, 2021, Department of Homeland Security (DHS) and U.S. Immigration and Customs Enforcement (ICE) announced a further extension of the temporary guidance until April 30, 2022. This guidance

permits flexibility in complying with requirements related to Form I-9, Employment Eligibility Verification, due to COVID-19.

The requirement that employers inspect new hires' Form I-9 identity and employment eligibility documentation in-person now applies only to those employees who physically report to work at a company location on any regular, consistent or predictable basis. For employees that do not work in person, employers must inspect employment eligibility documents remotely and obtain, inspect and retain copies of the documents. Once normal operations resume, all employees that were on-boarded using remote verification, must report to their employer within three business days for in-person verification of identity and employment eligibility documentation for Form I-9.

New York Paid Sick Leave Guidance

On Dec. 22, 2021, final regulations were released interpreting the New York Paid Sick Leave Law, a law we have previously discussed here and here. The final regulations adopted by the New York State Department of Labor ("NYDOL") do not contain any changes from the proposed regulations, but include public comments and responses to such comments, that provide clarification of certain issues.

With respect to required documentation for sick leave, the NYDOL stated that it will produce an "employee attestation template." The NYDOL also clarified that an employer may not deny an employee leave while attempting to confirm the basis for the leave and documentation is not required for leave less than three days.

Additionally, the NYDOL clarified that although the statute requires that employers carry over unused sick leave to the next calendar year, employers may (a) give employees the option to voluntarily elect to use and receive payment for paid sick leave prior to the end of a calendar year or carry over unused sick leave; or (b) only allow employees to carry over unused sick leave.

Legislation Expanding New York State Paid Family Leave to Cover Siblings

New York State's Paid Family Leave legislation was amended to include caring for siblings with a serious health condition. The change will go into

effect on Jan. 1, 2023. The New York Paid Family Leave Law, previously discussed here, here and here, currently provides employees with up to 12 weeks of paid leave to bond with a new child, to assist a family member who is on active military service or to care for a family member with a serious health condition. Eligible workers may take up to 12 weeks off at 67% of their pay (up to a cap) to care for family members in times of need. Before the latest change, "family member" included employees' spouses, domestic partners, children and stepchildren, parents and stepparents, parents-in-law, grandparents and grandchildren. The new legislation will expand the definition of "family members" to include biological siblings, adopted siblings, stepsiblings and half-siblings. Family members can live outside of New York State, including outside of the country.

Changes to the Connecticut Family and Medical Leave Act

Several changes to the Connecticut Family and Medical Leave Act ("CTFMLA") go into effect Jan. 1, 2022. Regarding eligibility, the modifications make the law applicable to employers with one or more employees working in Connecticut. Additionally, while eligible employees must be employed for at least three months immediately preceding their request for leave, the changes eliminate any hours worked requirement. Covered family members for "care" leave have been expanded from only spouse, child or parent, to also include grandparent, grandchild, sibling and any other "individual related to the employee by blood or affinity whose close association the employee shows to be the equivalent of those family relationships."

The CTFMLA changes permit eligible employees up to 12 weeks of leave (up to 16 weeks for military caregiver leave) in a 12-month period, as well an additional 2 weeks of leave that may be available for incapacitation during pregnancy.

New York City Council Approves Bill Requiring Salary Ranges in Job Postings

Following the lead of Connecticut, the New York City Council approved a bill that, if enacted, will amend the New York City Human Rights Law to make it an unlawful discriminatory practice for employers with four or more employees to not include the minimum and maximum salary offered

in a job posting for any position located within New York City. The posted salary range for a position would need to "extend from the lowest to the highest salary the employer in good faith believes at the time of the posting it would pay for the advertised job, promotion or transfer opportunity."

The bill is pending either approval by the Mayor or enactment if no action by the Mayor by Jan. 13, 2022. The law will take effect 120 days after it is enacted. As the legislation notes that the New York City Commission on Human Rights ("NYCCHR") "may take such actions as are necessary to implement this local law, including the promulgation of rules, before [the effective date of the law]," we expect the NYCCHR to provide guidance before the law would become effective.

Employee Benefit Plan Considerations

Over the past year, the Departments of Labor ("DOL"), the Treasury and Health and Human Services ("HHS") (collectively, the "Departments") have issued guidance impacting sponsors of retirement, health and welfare plans. In addition to this guidance, the Consolidated Appropriations Act of 2021 ("CAA"), which was signed into law on Dec. 27, 2020, provides additional relief for these plans, as well as educational assistance plans. Below we summarize some of the key requirements that are set to take effect in 2022. Plan sponsors should consider the effect that these changes will have on financial and administrative planning, now and in the coming years.

Employer Nontaxable Benefits for Student Loan Repayment

The CAA extends for five more years through Dec. 31, 2025 the ability for employers to treat student loan repayments as nontaxable fringe benefits under an educational assistance program that meets the rules under Code Section 127. Accordingly, employers may amend existing employer educational assistance programs or adopt a new program to pay or reimburse employees on a tax-free basis up to $5,250 per year for 2021 through 2025 (up to $26,250 total), saving the employer payroll taxes and saving the employee payroll and income taxes.

Retirement Plan Amendments

- **Plan Amendments for Compliance with the SECURE Act.** Plan amendments are required this year to comply with various changes

under the SECURE Act, as previously discussed here, including the new requirement to enroll part-time employees, the option for plan sponsors to increase the plan's required beginning date for mandatory distributions to age 72, the option to allow penalty-free withdrawals for birth and adoption expenses and the new required disclosure rules regarding lifetime income.

- **Plan Amendments for Compliance with the CARES Act.** Plan amendments are required this year to comply with various changes under the CARES Act, as previously discussed here, including Coronavirus-related distributions, increased loan limits and the temporary waiver of minimum required distributions in 2020.

- **Plan Amendments for Distribution and Loan Relief for Non-COVID Disasters.** Plan amendments are required this year to comply with the non-COVID disaster relief under the CAA allowing distributions and loans similar to the CARES Act provisions for FEMA declared disasters (other than COVID-19) that were taken during the period from Jan. 1, 2020 through June 24, 2021. This relief included the right to take a plan distribution up to $100,000 without tax penalties, the ability to repay hardship distributions taken to purchase or construct a principal residence and loan relief such as an increase in the maximum loan amount from $50,000 to $100,000 and a delay of one-year for loan repayments. For plans that elected to allow these distributions and loans, amendments are due by the end of the 2022 Plan Year.

- **Plan Amendments for Coronavirus-Related Distributions from Money Purchase Plans**. The CAA extended the COVID-19 in-service distribution relief under the CARES Act to retroactively apply to money purchase pension plans that had mistakenly allowed for such distributions during 2020. For money purchase plans that elected to allow such in-service distributions, amendments are due by the end of the 2022 Plan Year.

- **Plan Amendments for Compliance with the New Minimum Required Distribution Tables.** Beginning Jan. 1, 2022, defined contribution plans, including 401(k) plans, profit sharing plans and 403(b) plans, have to update the life expectancy and distribution tables that are used to calculate required minimum distributions.

- **Partial Plan Termination Relief.** The CAA provides relief for employers with calendar year plans from the partial plan termination rule that

would otherwise require 100% vesting for turnover due to the economic impact of the COVID-19 pandemic. Specifically, a retirement plan will not be treated as having incurred a partial plan termination for any plan year that included the period beginning March 13, 2020 and ending March 31, 2021, provided that the number of active participants covered on March 31, 2021 was at least 80 percent of the number of active participants covered on March 13, 2020. Thus, employers who rehired a substantial number of laid off employees will not have to fully vest participants under the partial plan termination rule.

No Surprises Act

The No Surprises Act, which is a part of the CAA, protects patients against surprise billing from providers for certain out-of-network services. The No Surprises Act applies to both self- and fully-insured grandfathered and non-grandfathered health plans, but does not apply to retiree-only plans, flexible spending and health reimbursement arrangements or stand-alone excepted benefit plans. Certain parts of the No Surprises Act become effective for the first plan year beginning on or after Jan. 1, 2022 (i.e., Jan. 1, 2022 for calendar year plans).

The No Surprises Act requires group health plans to cover out-of-network emergency services (including emergency services at out-of-network facilities, services and/or items provided by an out-of-network provider at an in-network facility, and out-of-network air ambulance services) without prior authorization and at the plans' in-network rates. Providers and facilities cannot balance-bill participants for these services. This means that, ultimately, participants will not receive a surprise medical bill after receiving certain emergency services; instead, they will pay their plans' standard in-network rates regardless of whether they receive such services from in-network or out-of-network providers and regardless of whether such services are provided at in-network or out-of-network facilities.

In addition, the No Surprises Act establishes a federal dispute resolution process if a provider and a plan cannot agree on the appropriate rate. Before initiating the dispute resolution process, the parties must undergo a 30-day negotiation period to determine the appropriate payment to the provider. If the negotiation is unsuccessful, either party can initiate the federal independent review.

Additional components of the No Surprises Act, such as the requirements for group health plans to include certain information about deductibles and out-of-pocket maximums on insurance cards and to publicize certain payment rates, have delayed effective and/or enforcement dates. In the interim, plan sponsors of group health plans that are subject to the No Surprises Act should confirm that applicable emergency services are recoded appropriately so that participants are paying the correct rate. In addition, plan sponsors should review their participant communications and update as necessary to clarify when participants pay in-network and out-of-network rates for certain emergency services and when preauthorization is and is not, required.

Mental Health Parity

The Mental Health Parity and Addiction Equity Act generally requires that group health plans measure parity across a number of factors with respect to the medical/surgical and mental health and substance use disorder benefits they offer. Specifically, group health plans that provide medical/surgical benefits and mental health or substance use disorder benefits cannot apply a financial requirement or treatment limitation to a mental health or substance use disorder that is more restrictive than the "predominant" financial requirement or treatment limitation applied to substantially all medical/surgical benefits. In addition, these group health plans cannot impose nonquantitative treatment limitations on mental health or substance use disorder benefits unless the standard used in applying such limitation to mental health or substance use disorder benefits is comparable to and applied no more stringently than, the standard used in applying the nonquantitative treatment limitation to medical/surgical benefits (unless recognized clinically appropriate standards of care permit a difference). Examples of nonquantitative treatment limitations include preauthorization requirements and concurrent review.

Beginning Feb. 10, 2021, under the CAA, regulatory agencies may ask group health plans to provide comparative analyses of their nonquantitative treatment limitations. Although additional guidance is expected, group health plans should review any applicable nonquantitative treatment limitations now and begin gathering any necessary information in case such analysis is requested.

Health and Welfare Plan Amendments Related to the COVID-19 Pandemic

Plan sponsors of group health plans that adopted certain changes during 2020 or 2021 as a result of the COVID-19 pandemic (e.g., extending the grace period for unused health and dependent care Flexible Spending Account ("FSA") funds, increasing the maximum age of eligible dependents for dependent care FSAs, allowing participants to make mid-year changes to their health plan elections without a corresponding change in status event and increasing the annual contribution limit to dependent care FSAs) were required to adopt written plan amendments by Dec. 31, 2021. Additional information about these relief measures can be found in our alerts here and here. Plan sponsors should review their plan documents to ensure that all documents have been updated appropriately, with all changes communicated to participants.

Authored by Mark E. Brossman, Ronald E. Richman, Susan E. Bernstein, Max Garfield, Scott A. Gold, Donna K. Lazarus and Melissa J. Sandak.

If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

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[1] For employers that require employees to drive as part of their duties, see CDC's guidance with respect to marijuana and driving, available here.

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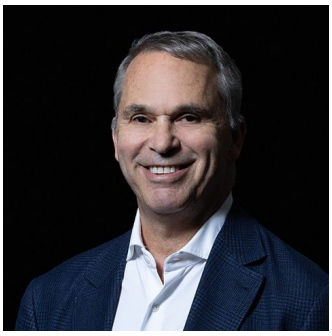
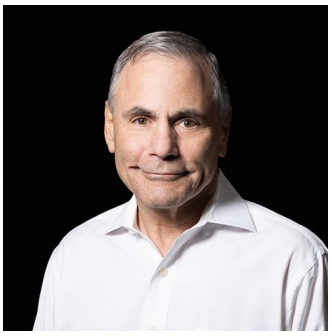


Mark Brossman

Partner

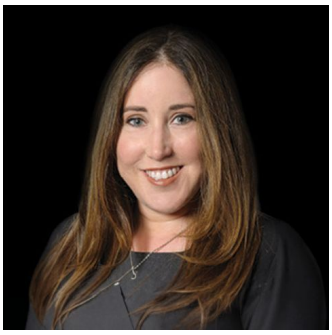
New York



Ronald Richman

Partner

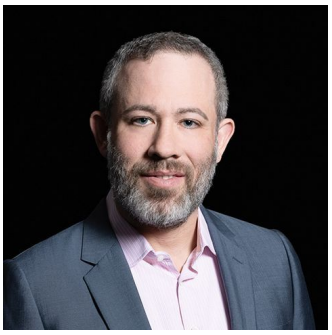
New York



Susan Niver

Special Counsel

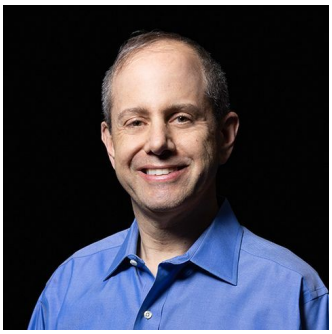
New York



Max Garfield

Special Counsel

New York



Scott Gold

Special Counsel

New York

Donna Lazarus

Partner

New York

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