Compliance Outlook

2024

Provided by Employee Benefit Associates, Inc.

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Executive Summary

2023 presented employers with many new and difficult compliance challenges, including federal and state laws and regulations expanding worker protections, widespread adoption of artificial intelligence (AI) in the workplace and increased enforcement actions by federal agencies. Employers have had to respond as courts and federal agencies addressed several hot-button issues. In addition to these novel and growing compliance challenges, employers have also had to navigate record-high inflation, economic slowdown and an unusually resilient labor market. For many employers, these challenges made it more difficult to prioritize compliance or establish successful mitigation strategies because they lacked sufficient time, proper resources or trained personnel. Entering 2024, employers will continue to face the challenge of responding to new legal requirements and increased enforcement efforts.

While the COVID-19 pandemic may be considered a thing of the past for many organizations, employers continue to struggle with the pandemic's lingering effects on their compliance efforts and obligations. The pandemic has and continues to shape many facets of employers' compliance efforts. In many ways, the pandemic acted as a catalyst for addressing certain employment issues that have been simmering for years and bringing to light novel concerns. For instance, it highlighted issues like workplace religious discrimination as employees requested to be exempted from vaccine mandates due to religious reasons. The focus on religious accommodations has continued in 2023 and will likely continue well beyond due to the U.S. Supreme Court's decision in *Groff v. DeJoy*, which clarified the standard when denying religious accommodation requests under Title VII of the Civil Rights Act (Title VII). The pandemic also added a new dimension to the types of accommodations sought by employees under the Americans with Disabilities Act (ADA), including remote and flexible work arrangements. Additionally, large segments of the workforce continued to be impacted by long-haul COVID-19, triggering employers' accommodation obligations under the ADA.

Remote and flexible work arrangements, which became commonplace and proliferated during the pandemic, have also created compliance and operational challenges for employers, especially when it comes to accurately tracking hours. The widespread adoption of remote and flexible work arrangements has led to an increasing number of states and localities passing laws, such as pay transparency and equity and paid leave, to better regulate these arrangements. While trends like pay transparency and paid leave gained a stronger foothold in 2023, more state and local governments are likely to enact similar legislation in 2024, meaning more employers will be subject to these burdensome requirements. Additionally, in 2023, student loan repayments resumed after a three-year pause during the pandemic. With new federal legislation taking effect in 2024 (SECURE 2.0), employers will have the ability to help employees who may be struggling with student debt.

Preparing for and responding to new legal requirements, increased enforcement efforts by government agencies and the incorporation of new technologies is critical for a successful 2024. Employers must ensure their organizations are adequately prepared for any new compliance requirements that might apply to their organizations. This may include responding to a new overtime rule for white-collar employees, a new standard for independent contractors and the National Labor Relations Board (NLRB)'s new joint-employer rule. If enacted, these regulations will have major implications for employers. For example, if the new overtime rule becomes final, many employees may have to be reclassified from exempt to nonexempt. Not only will this create general compliance issues with the Fair Labor Standards Act (FLSA), but it will also force employers to raise employees' salaries to keep them exempt from overtime requirements or start paying them an overtime premium for all hours worked over 40 in a workweek. While there remains a lot of uncertainty surrounding the timing of several anticipated rule changes, acting proactively—by implementing compliant workplace practices, updating policies and training personnel on any new requirements or changes—can greatly enhance employers' compliance efforts and limit their potential liability and legal risks.

Complying with employee benefits requirements will likely be more difficult in 2024 as well. In the wake of the Supreme Court's decision in *Dobbs v. Jackson*, which ended the federal constitutional right to abortion care, reproductive, fertility and family-planning benefits are expanding in a growing number of states. However, there remain many unresolved questions regarding reproductive health benefits that employers must monitor in the upcoming year. Employers may also need to respond to several coverage changes under the Affordable Care Act (ACA), such as covering oral contraceptives, certain medications to treat HIV and common preventive care screening as well as improving access to mental health and substance use disorder care.

Understanding and responding to these challenges will be essential for employers' success in 2024 and beyond. In the upcoming year, many employers will face the difficult task of addressing new compliance requirements with reduced budgets or staff. As employers contend with inflation and budget constraints, they must consider compliance costs as part of a complete cost management strategy. Employers will need to find ways to do more with less. This will include finding creative solutions in response to new compliance rules and regulations; otherwise, they may be faced with increased investigations, enforcement actions and costly lawsuits. Organizations must remain vigilant, monitor for updates and remain flexible as they implement any changes.

As you consider the information presented in the Compliance Outlook, evaluate which changes and trends you may be susceptible to in the upcoming year. Then, reach out to us to discuss the next steps and request valuable resources to help evaluate potential solutions and meet 2024's compliance challenges. Together, we can rise to the challenges and identify opportunities presented in the new year.

2024 Outlook

This section explores legal trends and challenges employers should monitor in 2024, discussing why they're important and how they might impact organizations during the upcoming year and beyond.

Expansion of State Paid Leave Mandates

In 2023, states continued the trend of passing legislation requiring paid employee leave in the form of paid sick leave, paid leave for any reason and paid family and medical leave. Additionally, some states that had already passed paid leave laws amended them during the year to expand coverage by adding additional required paid sick days, or by adding coverage for specific situations or the care of specific people, increasing employers' compliance burden. There is no reason to expect this trend to abate, and employers in states that have not yet passed paid leave laws should watch for movement in that area in 2024. Employers should also be alert to the more novel approaches to paid leave that states undertook or continued with in 2023, as other states may adopt those approaches in the future.

At the start of 2023, 14 states—Arizona, California, Colorado, Connecticut, Maryland, Massachusetts, Michigan, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont and Washington—and the District of Columbia—had paid sick leave mandates in place. Two states—Maine and Nevada—required employers to provide paid leave for any reason. During the year, Minnesota passed a paid leave law that requires a generous 48 hours of paid sick time per year and covers nearly all employers, with no exemption for small employers. It applies to employees who have worked for their employer for 80 hours in the past year. This law takes effect Jan. 1, 2024. Additionally, Illinois joined Maine and Nevada in requiring paid leave for any reason when it passed the 2023 Paid Leave for All Workers Act. The new law applies to all private employers not covered by a local paid leave law. The law covers nearly all employees, whether part-time, full-time or seasonal, as well as all domestic workers as defined by state law. Like the new Minnesota paid sick leave law, the Illinois law takes effect Jan. 1, 2024. Also, like the Minnesota law, it is generous to employees, with very few exceptions for employers or employees, although employers may impose a 90-day waiting period for using accrued leave.

Some states amended their existing paid sick leave laws in 2023 to benefit employees. For example, California expanded the amount of paid sick leave employers must provide workers from three days per year to five, effective Jan. 1, 2024. Connecticut added mental health wellness days as covered time under its paid sick leave law, and it extended paid sick leave to parents of victims of family violence and sexual assault. Meanwhile, Colorado amended its paid sick leave law to cover bereavement, caring for a family member whose school or place of care was closed, and for home evacuations.

On the paid family and medical leave front, 11 states had already passed paid family and medical leave programs at the start of 2023: California, Colorado, Connecticut, Delaware, Maryland, Massachusetts, New Jersey, New York, Oregon, Rhode Island and Washington—plus the District of Columbia. In 2023, Maine and Minnesota enacted new paid family and medical leave laws, bringing the number of states with these programs to 13. Maine allows eligible workers to take 12 weeks of leave per year, and Minnesota 20 weeks, illustrating the often wide variation in these programs. Contributions for Maine's program begin in January 2025, with leave becoming available on May 1, 2026. In Minnesota, contributions and benefits both start on Jan. 1, 2026.

Even in states that enacted paid family and medical leave laws before 2023, there was plenty of activity around some of these laws during the year. For example, in Colorado and Oregon, employer and employee contributions to fund paid family and medical leave began in January, and Oregon issued regulations and began offering benefits in September. Colorado and Delaware also issued regulations, Maryland delayed and amended its program, and Massachusetts changed its law to permit workers to "top off" their paid family and medical leave compensation with pay from employer-provided paid leave. Additionally, as happens toward the end of every year, states began announcing their updated paid family and medical leave contribution and benefit rates for 2024.

There were novel developments as well in paid family and medical leave in 2023. For example, Washington state passed legislation that will require transportation network companies to pay drivers' paid family and medical leave premiums. The mandate is part of a pilot program that runs from July 1, 2024, through Dec. 31, 2028. In addition, New Hampshire and Vermont continued implementing their state-run voluntary paid family and medical leave insurance programs, which were passed in 2021 and 2022, respectively. Open enrollment for individuals began for New Hampshire's program on Jan. 1, 2023, and state government employees began receiving coverage under Vermont's program the following July. It will be interesting to see whether other states follow this voluntary model, which aims to satisfy employees' need for time off without imposing an expensive mandate on employers.

Looking toward 2024 and beyond on the paid family and medical leave landscape, January 1 marks the date benefits become available in Colorado. Delaware also has important deadlines on January 1, first, for small employers to elect to reduce employees' parental leave by 50% (for the first five years of the program), and second, for employers to apply for five-year grandfathering of existing plans. Maryland delayed the start of its program so that contributions will begin Oct. 1, 2024, with benefits starting Jan. 1, 2026. Delaware paid family and medical leave benefits also start on Jan. 1, 2026. Family, private and nonstate public employers will be able to buy coverage for Vermont's voluntary program starting July 1, 2024. The insurance becomes available for purchase by individual workers and employers with only one employee in 2025.

New regulations and guidance materials will likely be issued in states that have recently passed paid family and medical leave. In 2024, employers can expect to see materials issued in Illinois (which has already published proposed regulations for its program), Delaware (which has already begun issuing final regulations), and Maryland (which expects to issue rules and regulations in early 2024). New regulations and guidance will also probably be published for the brand-new programs in Maine and Minnesota in the near future.

Another recent paid family and medical leave trend is state laws that allow insurers to sell employers policies covering voluntary paid family leave they provide their employees. In 2023, Alabama, Florida, Tennessee and Texas passed such laws, which often establish policy terms and parameters employer programs must satisfy to qualify for the insurance, such as permitted reasons for leave and minimum length of leave. It's likely that this trend will continue in 2024.

In 2024, employers not subject to a state paid sick leave requirement should be attuned to legislative momentum in that direction in their states, as it's likely that more states will pass paid leave mandates. Employers already subject to paid sick leave laws should stay alert to amendments that would expand the leave, especially for reasons related to reproductive loss, bereavement, organ donation and public health emergencies, all areas in which states have increasingly granted leave entitlements in recent years.

Employers assessing the impact of a state paid family and medical leave requirement should look closely at the program's features, as the state laws creating them are not alike, and the burdens they impose on employers can differ greatly. Key items to focus on in any paid family and medical leave mandate include:

- Employers covered by the requirement;
- Employee eligibility;
- Permitted reasons for leave;
- Length of leave;
- Employer and employee contributions to fund the leave;
- Job protection during leave; and
- Interaction between paid family and medical leave, employer-provided leave, federally mandated leave (e.g., Family and Medical Leave Act leave), and local paid leave mandates.

While paid leave mandates are becoming more widespread as more states pass leave laws, employers might consider embracing this trend and offering employees paid leave even if they're not legally required to do so. While paid leave may seem like a costly burden for some employers, it can be advantageous for both employers and employees. Offering paid leave can be an effective way to attract and retain key talent, reduce burnout, improve employee productivity, and strengthen employee wellness by allowing for greater work-life balance. As employers continue to struggle with a tight labor market, providing paid leave can provide organizations with a competitive advantage.

Organizations Brace for Employee Classification Changes in 2024

Whether a worker is covered by a particular law or entitled to receive a particular benefit often depends on whether the worker is an employee or independent contractor. In general, employment laws, labor laws and related tax laws do not apply to independent contractors. For example, the FLSA establishes minimum wage, overtime pay and youth employment standards for covered employers but does not extend employee protections to independent contractors.

Misclassifying employees as independent contractors has become an increasing concern for governments, courts and regulatory agencies. Employers that misclassify employees can be liable for expensive fines, criminal charges and civil penalties, including back wages, unpaid overtime, liquidated damages, attorneys' fees and costs. While ensuring employees are properly classified is an ongoing challenge for most employers, it will be particularly difficult and a point of focus in 2024 because of the following three recent major legislative efforts (one final rule and two proposed rules):

- The U.S. Department of Labor's (DOL) proposed rule for defining and delimiting the exemptions for executive, administrative, professional, outside sales, and computer employees (the overtime exemption rule);
- The DOL's proposed rule for employee or independent contractor classification under the FLSA (the independent contractor classification rule); and
- The NLRB's final rule on a standard for determining joint-employer status.

The DOL's Proposed Overtime Exemption Rule

On Aug. 30, 2023, the DOL announced a proposed rule to amend the current salary threshold executive, administrative and professional (EAP) employees must satisfy to be exempt from the FLSA's minimum wage and overtime requirements. Under the FLSA, covered employers must pay employees at least the federal minimum wage for all hours worked and overtime pay—at a rate of one and one-half times their regular pay rate—for all hours worked over 40 in a workweek. However, the FLSA provides several exemptions from minimum wage and overtime pay requirements. The most common are "white-collar" exemptions. These exemptions mainly apply to EAP employees but include outside sales personnel, certain computer-related professionals and highly compensated employees (HCEs).

To qualify for a white-collar exemption, an employee must satisfy the following tests:

- The **salary basis test** ensures the employee is paid a predetermined and fixed salary that is not subject to reduction due to variations in the quality or quantity of work.
- The **salary level test** confirms that the employee meets a minimum specified amount to qualify for the exemption. The current salary threshold is $684 per week ($35,568 per year) for EAP employees and $107,432 per year for HCEs. The current salary threshold took effect on Jan. 1, 2020.
- The **duties test** requires that the employee's job duties conform to EAP duties. To satisfy the duties test, an employee's actual work responsibilities must match the description the FLSA assigns to the exemption.

The proposed rule does not recommend changes to the salary basis or the duties tests for the white-collar exemptions, but it does propose to increase the standard salary level from:

- $684 to $1,059 per week ($35,568 per year to $55,068 per year) for EAP employees; and
- $107,432 to $143,988 per year for HCEs.

The proposed rule would also enable the DOL to update salary levels automatically every three years without having to rely on the rulemaking process. If adopted without changes, the DOL's overtime exemption rule will become effective 60 days after the final rule is published in the Federal Register. It is widely expected that the agency will issue a final rule in 2024. However, it is also expected that the final rule will be challenged before it becomes effective, which could delay the implementation of any changes.

If this substantial increase to the salary level takes place, more workers will likely lose their exempt status and qualify for overtime pay. As a result, the DOL's new overtime rule could significantly affect employers' operational and compliance costs and increase their litigation risks. Increasing compensation for EAP employees to maintain their exempt status or compensating reclassified employees for overtime work could also present significant challenges for employers that are already struggling with smaller budgets and fewer resources due to current economic pressures and the nature of a competitive labor market.

For these reasons, it's critical that employers understand this proposed rule and its potential impact on their workforce and their business's bottom line. Planning to comply with the proposed rule may include reviewing employee compensation data to determine which exempt employees may be impacted and preparing to increase affected employees' salary to the proposed level or reclassifying them as nonexempt. Lastly, employers might need to evaluate how the proposed rule will interact with any state and local overtime pay exemptions and revisit their exemption determinations more broadly.

The DOL's Proposed Independent Contractor Classification Rule

The DOL issued the independent contractor classification final rule on Jan. 7, 2021. As published, this 2021 final rule was scheduled to become effective on March 8, 2021. However, shortly after his inauguration, President Joe Biden ordered a regulatory freeze on this and other regulations adopted during the last few weeks of the Trump administration. On Oct. 11, 2022, after prolonged judicial battles over the rule, the DOL announced a proposed rule to rescind and replace the 2021 independent contractor classification rule. This is the Biden administration's second attempt to reverse the current standard, which it believes leaves workers vulnerable to misclassification.

The proposed rule would implement a test that the DOL will use to determine whether workers are employees or independent contractors under the FLSA. The proposal would formally rescind the current standard created by the Trump administration and would assist with employee classification. The DOL's current rule employs factors that must be considered when classifying workers, known as the economic realities test (ERT). Two of the factors—the nature and degree of control over the work and the worker's opportunity for profit or loss—are considered "core factors," having more probative value and carrying greater weight than the other factors. To answer the ultimate question of whether a worker is economically dependent on their employer, the proposed rule would return the test to a multifactor totality-of-the-circumstances analysis. This means no factor would have a predetermined weight, and all factors would apply equally.

According to the DOL, the proposed rule aligns the department's analysis for determining worker classification with current judicial precedent and the FLSA's text and purpose. When determining a worker's status, the proposed rule would have the following factors weighed equally:

- The amount of control a worker has over how they perform their job
- The worker's opportunity to increase their earnings by offering new services
- The amount of skill required for the work
- The degree of permanence of the working relationship
- The worker's investment in equipment or tools
- The extent to which the work performed is integral to the employer's business

Workers determined to be economically dependent on an employer would most likely be considered employees. Arguably, this would result in classifying a greater number of workers as employees, not independent contractors. This classification would be significant, particularly in the gig economy, as it would afford more individuals FLSA rights and protections (including minimum wage and overtime pay protections) as well as workers' compensation and unemployment benefits.

The DOL was expected to issue a final independent contractor classification rule in Aug. 2023, but—given the delay in its publication—it's not unreasonable to expect that the final rule could be published during the first half of 2024. Even if this rule is challenged again in the courts, employers that monitor these developments and become familiar with the ERT factors will find it easier to comply with their independent contractor classification efforts with more ease when a final rule ultimately becomes effective.

Misclassification of workers remains a top workplace issue for employers. If the DOL's proposed independent contractor rule becomes effective in 2024, it's likely that the agency will place an even greater focus on this issue and potentially increase its enforcement efforts and actions. This is especially likely seeing as the agency's FLSA enforcement initiative has been on the rise over the last few years. The consequences of misclassifying workers can be severe and may include jail time. Monetary penalties can add up quickly and may include back pay, unpaid overtime, liquidated damages, attorneys' fees, civil penalties, lost benefits and interest. Penalties can become even more severe if the DOL or a court determines the misclassification was intentional. Therefore, compliance issues with this proposed rule may increase operational costs and legal exposure. As with the DOL's overtime rule, employers can prepare for the independent contractor rule by reviewing their employee classification determinations and identifying which employees may be impacted.

The NLRB's New Joint-employer Standard

Joint employment situations can happen when two or more employers share personnel hiring, supervision and management practices. When a joint employment status exists, joint employers are equally responsible for compliance with applicable laws and regulations. Under NLRB rules, whether joint employment is by design or unintentional, joint employers are equally:

- Liable for unfair labor practices committed by other joint employers;
- Required to bargain with the union that represents jointly employed workers; and
- Subject to union picketing or other economic pressure if there is a labor dispute.

The effective date for the NLRB's final rule for the joint-employer standard is Feb. 26, 2024. This rule makes it easier for employers to be classified as joint employers. Under the final rule, two or more employers are joint employers if they share or codetermine the essential terms and conditions of employment for two or more employees. Employers share or codetermine the essential terms of employment when they possess the authority to control or exercise the power to control one or more of the employees' essential terms and conditions of employment. Employers may have the authority to control or exercise this power directly, indirectly (through an intermediary) or both.

Whether an employer possesses the authority to control or exercises the power to control one or more essential terms and conditions of employment is determined under common-law agency principles. Specifically, the final rule explains that:

- Possessing the authority to control one or more essential terms and conditions of employment is sufficient to establish status as a joint employer, regardless of whether the control is exercised; and
- Exercising the power to control indirectly (including through an intermediary) one or more essential terms and conditions of employment is sufficient to establish status as a joint employer, regardless of whether the control is exercised directly.

However, the NLRB's new rule recognizes that evidence of an entity's control over employment matters is not relevant to a joint-employer determination if the evidence is immaterial to the existence of an employment relationship under common-law agency principles and does not bear on the essential terms and conditions of employment.

The new standard may impact organizations' National Labor Relations Act compliance efforts across several industries. Because there's no clear limit as to where liability ends based on this standard, the list of potential joint employers may be increased and can noticeably change the way franchises, staffing agencies and seasonal employers operate. Employers in franchises, hotels, technology, real estate, investment, general contracting, transportation and staffing agencies may be particularly affected. Accordingly, employers should review the NLRB's final rule and determine whether they are in joint employment relationships based on the updated standard. Employers in these relationships should also evaluate their compliance liability by determining whether the other joint employers in the relationship are in compliance with applicable labor and employment laws.

A New Standard for Denying Religious Accommodations

Title VII requires employers with 15 or more employees to reasonably accommodate employees' sincerely held religious beliefs unless it would cause "undue hardship" on the business. Some examples of religious accommodations include allowing time off for religious holidays, designating prayer spaces in the workplace, and granting dress code exceptions for religious clothing. Since 1977, the question of whether a religious accommodation would cause undue hardship on an employer was generally determined based on whether the employer could prove that the accommodation would impose "more than a de minimus cost" on its business. However, on June 29, 2023, the Supreme Court changed this with its much-anticipated and unanimous decision in *Groff v. DeJoy.* Under the holding in that case, an employer that wishes to deny a request for religious accommodations based on undue hardship must now show that the burden of granting an accommodation would result in "substantial increased costs in relation to the conduct of its particular business." This new standard requires employers to consider all relevant factors of a particular situation, including the specific accommodations at issue and their practical impact in light of the nature, size and operating cost of the employer. This is a much more refined and rigorous analysis than both the one that previous courts applied for religious accommodations and the standard for denying disability accommodations under the ADA, which requires employers to show "significant hardship and expense."

The decision in *Groff* clarified that employers may not rely on co-worker impact to show undue hardship in religious accommodation cases. Instead, workplace morale issues are only relevant if and to the extent that they directly affect the employer's costs of conducting its business. By contrast, in an earlier decision involving the same employee's request for Sundays off to observe a religious Sabbath, a lower court held that granting this accommodation would cause undue hardship, in part because it "imposed on co-workers, disrupted the workplace and workflow, and diminished employee morale." Under the Supreme Court's new standard for religious accommodations, these co-worker impacts are not relevant—and, in most cases, not even permissible—factors in a determination of undue hardship. However, they could become relevant if an employer can show that they are responsible for substantially increasing the costs of operating the business.

On the other hand, general animosity toward a particular religion or hostility to the idea of accommodating religious practices are never permissible factors under the new standard for religious accommodations. While this generally aligns with how the Equal Employment Opportunity Commission (EEOC) already enforces Title VII, employers should nevertheless be aware that the *Groff* decision has significantly raised the overall bar for proving undue hardship in religious accommodation cases and is, therefore, expected to help keep religious issues at the forefront of workplace concerns in 2024. This ruling could limit an employer's ability to deny employee requests for religious accommodations even if those requests burden the employer. Over the last few years, largely due to the COVID-19 pandemic, many employers experienced an increase in employee requests for religious accommodations, such as being excused from vaccine mandates. Legal experts anticipate there might be an increase in the number of religious accommodation lawsuits following the *Groff* decision. Consequently, the new standard established in *Groff* may create increased operational challenges for employers in 2024 and beyond.

Employers should also take note of other recent developments that may impact how they should handle workplace religious issues in the year ahead. Specifically, the EEOC issued a new proposed regulation on workplace harassment and a new Strategic Enforcement Plan (SEP) in September 2023. These publications include updates to reflect the Supreme Court's 2020 holding in *Bostock v. Clayton County* that Title VII's prohibition against discrimination based on sex includes discrimination based on sexual orientation and gender identity. For example, the SEP indicates that the EEOC plans to pay special attention to enforcing rules that protect "particularly vulnerable workers and persons from underserved communities," which include "LGBTQI+ individuals." In addition, the EEOC's proposed rule on harassment prohibits "intentional and repeated use of a name or pronoun inconsistent with the individual's gender identity (misgendering)" and "the denial of access to a bathroom or other sex-segregated facility consistent with the individual's gender identity." Because certain religious beliefs may present challenges in implementing and enforcing workplace policies consistent with this guidance, employers may expect increased tensions between inclusivity and religious freedom, such as in circumstances where religious convictions dictate an individual's perception of gender identity. Thus, employers will need to balance these competing concerns, especially amid any of their efforts to promote diverse work environments that support all employees.

State and local laws are also likely to help shape and define the landscape of prominent workplace religious issues in 2024, as some jurisdictions have enacted or are contemplating heightened protections for individuals' religious practices and preferences relating to sexual orientation or gender identity. Others have enacted or introduced strengthened protections against discrimination and harassment based on sexual orientation, gender identity and other protected traits. Employers should become familiar with all state and local laws and regulations that may apply to their businesses and adopt proactive measures to address potential clashes between religious freedom and other workplace policies. These changes will likely result in increased compliance costs and administrative burdens for employers in 2024.

Other employer best practices for navigating religious issues in 2024 include monitoring the EEOC's website for additional guidance, regularly reviewing and revising workplace policies to align with evolving rules, and facilitating a culture of tolerance and inclusion that supports religious diversity. Moreover, preliminary data from the EEOC revealed that the agency filed 50% more employment discrimination lawsuits in fiscal year (FY) 2023 than in FY 2022. This trend may continue in 2024, so savvy employers will prioritize organizational compliance in the upcoming year. Employers should also consider implementing effective training programs and engaging in open dialogues with their employees to help foster inclusive environments where both religious rights and individual identities are respected.

Ongoing Expansion of Pregnancy-related Protections

Two new laws that were enacted as part of the federal omnibus spending bill in December 2022—the Providing Urgent Maternal Protections for Nursing Mothers (PUMP) Act and the Pregnant Workers Fairness Act (PWFA)—have significantly expanded workplace rights for employees affected by pregnancy, childbirth and related conditions in 2023. These new laws, along with EEOC guidance and similar state and local laws, will likely continue impacting employers in 2024. While the PWFA applies only to employers with 15 or more employees, those with fewer employees are likely subject to a similar state or local law, as more than 30 states and localities currently have laws providing accommodations for pregnant workers.

Effective upon enactment, the PUMP Act amended the FLSA to require employers to provide break time and a private place, other than a bathroom, for all employees (including those who are exempt from FLSA overtime rules) to express breast milk. It also clarified that these breaks must be paid work time if an employee is not completely relieved of all work duties during them. A hardship exemption is available for employers with fewer than 50 employees. Starting April 27, 2023, the PUMP Act also allows individuals to obtain damages and other remedies from employers that violate the new mandates.

Effective June 27, 2023, the PWFA amended the ADA, which applies to employers with 15 or more employees. Under the PWFA, employers must provide reasonable accommodations for a qualified individual's known limitations related to pregnancy, childbirth or related medical conditions unless it would impose undue hardship on the business. These accommodations must be determined through an informal, interactive process with the requesting individual, and employers may not deny opportunities based on the need to make the accommodations. The PWFA also prohibits employers from requiring leave as accommodation if another change can be provided. Retaliation against an employee for requesting or using a PWFA accommodation is also prohibited.

On Aug. 7, 2023, the EEOC issued a proposed rule to implement the PWFA (the EEOC was also required to issue final regulations by Dec. 29, 2024). The rule explains how the EEOC proposes to interpret the law and key terms within it. For example, the PWFA allows an individual affected by pregnancy or a related condition to be considered "qualified" even if the individual is unable to perform one or more essential functions of a job, but only if the inability to perform the essential functions is temporary, the individual could perform the essential function in the near future, and the inability to perform the essential functions can be reasonably accommodated. The proposed rule defines the term "temporary" as lasting for a limited time, not permanent, and may extend beyond "in the near future." It defines "in the near future" as generally up to 40 weeks, though the actual length of a temporary suspension of essential job functions will usually depend on what the employee actually requires. Employers may find these details helpful when analyzing the potential impact of granting any PWFA accommodation involving the suspension of an essential job function.

A related PWFA paradigm that some employers may find challenging is the proposed rule's framework for establishing undue hardship to justify denying an employee's request for temporary suspension of an essential job function as accommodation for pregnancy, childbirth or a related condition. For all other types of accommodations requested under the PWFA, an employer's burden for establishing undue hardship is identical to the one that applies when determining whether an accommodation for disability would cause undue hardship under the ADA. Both the PWFA and the ADA generally require employers claiming undue hardship to show that an accommodation would cause "significant difficulty or expense" when viewed in light of several factors, such as the employer's size and the nature of its business. However, when a requested accommodation involves a temporary suspension of an essential job function under the PWFA, an employer wishing to deny the accommodation must analyze and consider additional factors to establish undue hardship. These include the length of time the individual will be unable to perform the essential function, the nature and frequency of the essential function, and several others.

Industry experts expect the PWFA will result in an increase in accommodation requests by pregnant employees. While the PWFA is modeled after the ADA, there are some critical differences. For example, under the ADA, employers aren't required to modify the essential functions of a job to accommodate an employee. However, the PWFA allows employers to reevaluate a job's essential functions in light of pregnancy, childbirth and other related medical conditions and make changes. Additionally, while the ADA and other federal fair employment laws (Title VII, the PUMP Act, and the FMLA) safeguard the rights of pregnant workers, the PWFA mandates that employers take further steps to accommodate employees. As a result, employers should become familiar with the reasonable accommodations outlined in the PWFA to comply with the new law. The proposed rule provides numerous examples of potential reasonable accommodations for pregnancy, childbirth and related conditions to aid employers in their compliance efforts. The EEOC is expected to issue a final version by the end of 2023. As the EEOC's interpretation of the PWFA continues to develop and evolve in the meantime, employers should also prepare for the potential need to quickly adapt their policies and practices to align with any updated or additional guidance relating to pregnancy accommodations that the agency may provide in the future.

Because the PWFA and the PUMP Act significantly expand workplace rights and protections for employees affected by pregnancy, childbirth and related conditions, employers will likely face increased compliance burdens and litigation risks in 2024. Employers should also anticipate experiencing a learning curve and other growing pains related to certain PWFA concepts and how they may interact with other applicable employment laws in 2024 and beyond. For example, many states already have their own laws requiring accommodations for pregnancy, childbirth and related medical conditions, and an ongoing trend toward more expansive and enhanced protections for employees is expected to endure. These laws often provide greater employee protections than those granted under the PWFA and usually apply to smaller employers as well. Thus, many employers may expect to encounter differing standards when analyzing whether they can reasonably accommodate an employee's known limitation related to pregnancy or childbirth.

Use of Artificial Intelligence in Employment Decisions

Employers' use of AI in the workplace saw a significant boost in 2023, especially with the proliferation of chatbots like ChatGPT. This technology has made its way into many workplaces nationwide and is rapidly changing how organizations operate and make decisions. The significance of AI technology for employers cannot be understated, as it could change almost every aspect of how organizations operate and conduct business. AI tools are gaining popularity in many employment areas, such as recruiting and hiring, since they can enhance workflows, streamline operations and improve workplace efficiency by automating manual, error-prone tasks. While many larger organizations have been using this technology for years, the advancement in AI tools and chatbots makes this technology not only readily available to employers of all sizes but also more accepted than in the past. Although this technology can help improve employers' operational efficiencies, it presents a myriad of risks that interested employers must confront.

In many ways, 2023 was a watershed moment for the use of AI in the workplace. In response to the way this technology is revolutionizing the employment landscape, several federal, state and local authorities took notable actions to address employers' widespread adoption and use of AI systems and mitigate potential harms. These actions will likely result in increased AI-related guidance and regulation for employers in 2024. For example, the White House announced new actions to promote responsible AI innovation. To that end, the Federal Trade Commission, the EEOC, the Consumer Financial Protection Bureau and the Department of Justice's Civil Rights Division issued a joint statement highlighting their commitment to using their legal authorities to protect the American public from AI-related harm and vigorously enforcing anti-discrimination laws as they relate to AI use. In October 2023, President Biden issued an executive order to establish standards for AI safety and security. Additionally, EEOC issued its SEP for FYs 2024-2028, indicating that the use of AI in the workplace is a priority subject matter for enforcement. The agency also released technical assistance focusing on preventing discrimination against job applicants and employees because of employers' use of algorithmic decision-making tools when making employment decisions. Moreover, the EEOC settled its first discrimination-in-hiring lawsuit arising from an employer's use of AI in recruiting and hiring. This lawsuit is likely the first of many and highlights the importance of understanding and responsibly using AI tools in employment decisions.

As AI technology continues to advance, employers are increasingly exploring its potential to enhance productivity, efficiency and decision-making in the workplace. While this technology presents opportunities for employers, it has limitations that must be considered. Implementing AI systems and tools for use in employment decisions requires careful consideration to ensure an organization's responsible, legal and ethical use, especially as employers face the likely prospect of increased legal scrutiny in 2024.

Organizations are increasingly utilizing AI in employment-related decisions, such as recruitment and candidate screening, hiring and onboarding, performance evaluation and feedback. According to the Society for Human Resources Management, nearly 25% of organizations use AI for HR-related processes. Although AI can offer several benefits, including improved efficiency, it also presents certain risks. These risks include:

- **Perpetuation of potential biases and discrimination**—AI can perpetuate workplace biases and discrimination if not designed, implemented or monitored properly. For example, since AI systems rely on data inputs, they may identify candidates who mirror an existing workforce. If that original workforce predominantly comprises a particular demographic, the AI engine may build a candidate pool that reflects those characteristics while discriminating against other applicants.

- **Lack of transparency and interpretability**—The lack of clarity regarding AI decision-making can create challenges in interpreting and providing precise reasons for candidate selection or rejection.
- **Ethical concerns regarding privacy and data protection**—Utilizing and storing individuals' personal data in AI systems raises ethical and legal considerations, requiring companies to have appropriate policies in place (e.g., receive consent before it is used) as well as systems to safeguard this information (e.g., securely storing it, disseminating it to only necessary decision-makers and destroying it when it is no longer needed).

The increased use of AI tools in the workplace has raised concerns among officials and lawmakers throughout the country. While AI technology in the employment context is largely unregulated, state and local governments are starting to take action to address potential issues and risks. As a result, employers' AI-related compliance challenges are increasing as more states and cities implement laws and regulations that apply when using AI in employment decisions. For example, New York City enacted one such law in 2023, joining states like Maryland and Illinois. Many jurisdictions are considering passing similar legislation in 2024.

Employers who do not operate in the states and localities where these measures are being implemented should still take note of these new laws and monitor AI trends. The EEOC has prioritized the enforcement of applicable federal laws involving AI's use in employment decisions. Therefore, employers will likely face increased scrutiny and legal risks regarding their AI practices in 2024 and beyond. The agency's actions will likely impact many employers, even if they operate in states that do not enact new AI-related legislation.

In 2024, employers will need to stay current on legal developments regarding AI use in the workplace. Failing to do so will likely result in fines, penalties, costly litigation and reputation damage. To mitigate potential liability and reduce risks with AI use, organizations can implement the following strategies:

- **Monitor and comply with applicable laws and regulations.** Organizations need to make certain they are permissibly using AI in employment-related decisions. Working with the AI vendors to understand their algorithms, consulting with attorneys about the applicable laws and regularly monitoring the technology's outputs for discriminatory results may help them do so.
- **Develop clear ethical guidelines.** Internal policies should address appropriate usage, detail consent procedures for candidates and employees, and emphasize transparency and accountability of AI algorithms.
- **Ensure data quality to minimize bias.** Since AI can perpetuate unlawful biases, the data input into the system must be accurate, diverse, relevant and complete. This can help the system produce stronger and more compliant results.
- **Implement human oversight and intervention.** Human involvement in decision-making processes is crucial to ensure the legal and proper functioning of AI systems.
- **Audit and evaluate AI performance regularly to address emerging risks.** Like other systems, AI needs to be audited regularly to analyze its outputs. Adjustments and corrections can then be made to improve its performance.

AI use in employment decision-making is on the rise and will likely become more common in the future. This technology has the potential to change nearly every aspect of how individuals work and businesses operate. However, this technology is relatively new, and there's still much uncertainty surrounding it. Accordingly, employers must carefully weigh the positives and negatives of using this technology in employment-related decisions. Savvy employers will closely monitor AI technology developments and mitigate the potential issues surrounding its use in employment decisions.

SEC's Final Rules for Public Companies' Cybersecurity Disclosures

On July 26, 2023, the U.S. Securities and Exchange Commission (SEC) published final rules to enhance and standardize how companies disclose cybersecurity risk management, strategy, governance and incidents. The rules apply to public companies that are subject to the reporting requirements of the Securities Exchange Act of 1934. The final rules became effective on Sept. 5, 2023.

The final rules mandate that companies must submit Form 8-K within four business days after determining a cybersecurity incident they experienced is significant. To complete this new Form 8-K, companies will need to disclose in Line Item 1.05 to the extent known when filing:

- When the incident was discovered and whether it is ongoing;
- A brief description of the nature and scope of the incident;
- Whether any data were stolen, altered, accessed or used for any other unauthorized purpose;
- The effect of the incident on the registrant's operations; and
- Whether the registrant has remediated or is currently remediating the incident.

The final rules do not provide specific criteria for determining whether a cybersecurity incident is material. Instead, materiality is evaluated based on the overall mix of information, similar to how other materiality assessments are conducted under federal securities laws. This includes information being material if ''there is a substantial likelihood that a reasonable shareholder would consider it important'' in making an investment decision, or if it would have ''significantly altered the 'total mix' of information made available.'' ''Doubts as to the critical nature'' of the relevant information should be ''resolved in favor of those the statute is designed to protect,'' namely investors.

Companies must update a previously filed Item 1.05 Form 8-K to include any information required in Item 1.05 that was not available at the time of the initial Form 8-K filing. A company can delay filing an Item 1.05 Form 8-K only if the U.S. attorney general notifies the SEC in writing that immediate disclosure would jeopardize national security or public safety. All registrants must tag disclosures required under the final rules in Inline eXtensible Business Reporting Language with the related disclosure requirement. This tagging requirement becomes effective one year after the rules' effective date. Form 10-K and Form 20-F disclosures will begin with annual reports for fiscal years ending on or after Dec. 15, 2023. Form 8-K and Form 6-K disclosures will begin Dec. 18, 2023. Smaller reporting companies will have an additional 180 days before they must begin providing Form 8-K disclosures.

There is no requirement for disclosure regarding the incident's remediation status, whether it is ongoing or if the data was compromised or not. Further, an Instruction 4 to Item 1.05 was added to provide that a ''registrant need not disclose specific or technical information about its planned response to the incident or its cybersecurity systems, related networks and devices, or potential system vulnerabilities in such detail as would impede the registrant's response or remediation of the incident.'

In addition, when an incident occurs on a third-party system, disclosure may be required by:

- Both the service provider and customer;
- Either the service provider or the customer;
- Neither.

However, since companies may have reduced visibility into third-party systems, registrants should disclose based on the information available to them. The final rules generally do not require that registrants conduct additional inquiries outside of their regular channels of communication with third-party service providers pursuant to those contracts and in accordance with registrants' disclosure controls and procedures. This is consistent with the SEC's general rules regarding the disclosure of information that is difficult to obtain. The SEC adopted a delay provision in cases where disclosure poses a substantial risk to national security or public safety, as determined by the Attorney General.

Many employers currently feel a sense of urgency to implement or enhance their cybersecurity risk management. As cyberattacks become more commonplace, sophisticated and consequential, the resulting consequences and costs can be significant. Specially, cyberattacks can result in business interruptions, lost revenue, ransom payments, reputational damage, remediation costs and legal liabilities. Public companies should familiarize themselves with the new rules and consult with legal and cybersecurity experts to evaluate their incident response programs, implementing policies and procedures that enable them to comply with SEC disclosure obligations without compromising the efficacy of their response or remediation strategies. Complying with the SEC's new reporting and disclosure requirements may be challenging and burdensome for some companies, especially when faced with a cybersecurity incident that already strains their resources. Moreover, the uncertainty around the meaning of "materiality" may suggest that the SEC intends to initiate enforcement actions under the rule regarding proper and timely disclosure of cyber incidents. For these reasons, companies should plan for how to handle such incidents and assess whether a current report is necessary. Advanced planning could ensure thoughtful incident responses and avoid inconsistent outcomes.

While the SEC's final rules apply to publicly listed companies, most of these organizations rely on smaller third-party software and supply chain companies. As a result, many nonpublic companies may be impacted by these new regulations because a cyber incident at any point along that chain could have a material impact. Therefore, private companies that are third parties to public companies may be held liable for cyber incidents and attacks impacting public companies under the SEC's final rules.

Additionally, the SEC's final rules are likely an indication of what organizations can likely expect from future cybersecurity legislation. This legislation will likely impact both private and public entities, resulting in heightened organizational accountability. Consequently, it's important that employers, whether directly or indirectly impacted by the SEC's final rules, take necessary action to improve their organization's cybersecurity measures.

Expansion of OSHA Injury and Illness Submission Requirements for Employers in High-hazard Industries

OSHA currently requires organizations with 20-249 employees in certain industries to electronically submit information from their OSHA Form 300A annual summary once a year. All establishments with 250 or more employees that are required to keep records under OSHA's injury and illness regulation are also required to electronically submit information from their OSHA form 300A on an annual basis. On July 17, 2023, OSHA announced a long-anticipated final rule that requires certain employers in designated high-hazard industries to electronically submit additional injury and illness information starting Jan. 1, 2024. While employers are currently required to keep the injury and illness information, they have not been required to submit it to OSHA. As a result, employers in certain high-hazard industries will likely experience increased compliance and administrative burdens in 2024.

OSHA's final rule requires employers in certain high-hazard industries to electronically submit information from their Form 300, Log of Work-Related Injuries and Illnesses, and their Form 301, Injury and Illness Incident Report, in addition to its already required Form 300A, Summary of Work-related Injuries and Illnesses, once each year.

The following are the expanded submission requirements:

- Employers with 100 or more employees in certain high-hazard industries must electronically submit information from their Form 300, Log of Work-Related Injuries and Illnesses, and Form 301, Injury and Illness Incident Report, to OSHA once a year. These submissions are in addition to the submission of Form 300A, Summary of Work-Related Injuries and Illnesses; and
- Employers are required to include their legal company name when making electronic submissions to OSHA from their injury and illness records to improve data quality.

The final rule retains the current requirements for electronic submission of Form 300A information from establishments with 20-249 employees in certain high-hazard industries and establishments with 250 or more employees in industries that must routinely keep OSHA injury and illness records.

OSHA will collect data from the submissions. Some of the data that is collected from the OSHA Forms 300, 300A and 301 will be published on the OSHA website to allow employers, employees, potential employees, employee representatives, current and potential customers, researchers and the general public to use information about a company's workplace safety and health record to make informed decisions. OSHA stated that it believes that providing public access to the data will ultimately reduce occupational injuries and illnesses.

The final rule does not add to or change any employer's obligation to complete, retain and certify injury and illness records under OSHA's regulations at 29 CFR part 1904. The final rule also does not remove the reporting requirement from any establishment that is currently required to electronically report Form 300A information to OSHA, nor does it impose a new reporting requirement on any establishment that is not currently required to electronically report Form 300A information to OSHA.

While this rule does not change an employer's requirement to complete, retain and certify injury and illness records, OSHA's new rule will likely impact employers in various ways starting in 2024. For example, the rule change will empower OSHA to enhance its inspection and enforcement efforts. The agency typically targets employers in programmed inspections based on Form 300A data. However, OSHA will now have additional information and data related to workplace injuries and illnesses from

Form 301, including the names of injured employees and how the injuries occurred. Therefore, employers may see an increase in the number of OSHA-programmed inspections in 2024 and beyond.

Additionally, the new rule may increase organizations' exposure to injury- and illness-related citations. This rule allows OSHA to have greater insight into establishments' injury and illness history, allowing the agency to predetermine whether an establishment should fall under the instance-by-instance citation policy. As a result, OSHA can analyze the data to determine areas within a worksite that should receive increased scrutiny. Further, by having injured or sick employees' names, the agency can target those individuals for interviews instead of randomly interviewing workers. This will likely enable OSHA to engage in more targeted and efficient inspections. Therefore, in addition to increased compliance obligations, employers may experience an increase in inspections, resulting in significant citations and penalties. If an employer falls under the new requirements, they should update and implement their policies and procedures to comply with the new regulations by Jan. 1, 2024.

Upcoming NCCI Experience Modification Changes

The National Council on Compensation Insurance (NCCI), which governs the workers' compensation system in 36 states, is making alterations to its experience modification factor for 2024. These changes are slated to go into effect on each state's regular filing date on or after Nov. 1, 2023, with the rollout beginning with the District of Columbia and West Virginia and concluding with Rhode Island on Aug. 1, 2024. Independent bureau states like North Carolina, Indiana, Michigan, Massachusetts, Minnesota and Wisconsin are presently in the process of evaluating the proposed changes by NCCI and will communicate their adoption decisions once they have made a decision. Other states like New York, Pennsylvania, Delaware, New Jersey and California, which operate with distinct experience rating plans, won't be affected by these modifications.

The experience modification factor helps to determine the pricing strategy for workers' compensation coverage. This factor establishes an employer's workers' compensation loss history compared to other organizations in the same industry and is used as a multiplier to increase or decrease premiums. For certain industries, such as construction and oil and gas, this factor can impact employers' bidding process.

The workers' compensation experience rating formula will remain unaltered; however, there are adjustments in how certain foundational components of the formula are derived to more accurately account for cost variations among states. Specifically, there are two changes:

1. A transition from a nationwide primary/excess split point to a state-specific split point and implementation of state-specific split points
2. A revision of the calculation of the state accident limitations

These changes may appear minimal, as the fundamental experience modification factor formula and methodology remain unchanged; yet, these changes have the potential to increase or decrease employer premiums.

The changes will help to better reflect each state's average claim costs and align with other state-specific variables. In addition, the NCCI states the revisions will improve plan performance by providing:

1. Enhanced precision and predictability in experience rating modifications.
2. Equitably accounted for primary and excess losses in states with diverse cost structures through experience rating modifications.
3. Improved performance of the experience rating plan, particularly in states with substantial variations in claim costs.
4. Reduced sensitivity to exceptionally large outlier claims while maintaining predictive accuracy.
5. Consistently calculated anticipated claim counts, resulting in a fairer allocation of credibility to loss history.
6. Reconfigured credibility parameters to enhance fairness among employers.
7. Streamlined calculations by eliminating unnecessary complexities.

State-specific Split Points

The split point plays a crucial role in the workers' compensation experience rating formula. It represents the specific dollar threshold at which each claim is divided into two distinct components:

1. **Primary**—Comprising the expenses of each claim incurred below the split point
2. **Excess**—Comprising the expenses of each claim incurred above the split point

Primary costs are given full weight in the experience algorithm. Excess costs, on the other hand, receive only partial weight in the experience algorithm. For instance, if the split point stands at $15,000, a claim amounting to $50,000 would contribute $15,000 to the primary category and $35,000 to the excess category. In the computation of the experience rating modification, primary losses carry more weight than excess losses. Consequently, primary losses have a more substantial impact on the experience rating modification.

Currently, the split point is uniform across states where NCCI provides rate-setting services. However, the new approach will establish a unique split point for each state based on that state's loss experience. This will provide a more equitable allocation of primary and excess losses across states with differing cost levels. For instance, instead of a uniform split point value of $18,500 for all states, the proposed plan would assign a higher split point value, like $25,000, to a state with above-average claim severity. In contrast, a state with below-average claim severity might have a split-point value of $15,000.

Additionally, the utilization of state-specific split point values, reflective of individual state cost variations, aims to align the significance given to actual employer loss experiences in the calculation of experience rating modifications across states. This is expected to result in improved and more comparable plan performance in states where claim costs deviate significantly from the national average. The split-point value is expected to be modified in tandem with the annual loss cost and rate filings for each state to respond to fluctuations in claim costs and uphold consistency with other factors influencing experience rating. This adaptation will rely on an assessment of yearly shifts in severity between the average loss date during the initial implementation year and the effective year.

Methodology for State Accident Limitations (SALs)

The methodology for determining SALs is also changing. The state-per-claim accident limitation serves to mitigate the impact of significant claims on the experience rating modification, as exceedingly large outlier claims are typically not indicative of future loss patterns. The new approach will adopt a state-level approach that considers the 95th percentile of lost-time claims for each state. The revised definition of the SAL results in lower caps across all states. This adjustment makes experience rating modifications less responsive to exceptionally large outlier claims while still maintaining their ability to predict future loss trends accurately. It's estimated that this will result in a 50% reduction in most cases.

The NCCI experience modification changes for 2024 will affect each state differently. These modifications will come into effect for experience rating modifications with rating effective dates on or after each state's expected loss cost and rate filing effective date, which begins on or after Nov. 1, 2023. However, no significant statewide premium impact is expected from the proposal. The overall average adjustment to experience rating modifications in each state is not anticipated as a result of these proposed revisions.

NCCI states that these modifications will result in an overall “premium-neutral” outcome for the workers’ compensation system. Still, it’s crucial to acknowledge that not every business will experience a neutral impact. The impact on individual employer-level adjustments in experience rating modifications will differ and can be offset by changes in loss occurrences and regular updates to rating criteria. It is projected that experience rating modifications for the majority of employers will undergo changes of less than +/-5%. This means that for some individual employers, their premiums could increase. Employers should speak with their insurance provider to determine how the changes will specifically impact their businesses.

Changes to the ACA's Preventive Care Coverage Requirements

The ACA requires non-grandfathered health plans and health insurance issuers to cover a broad range of preventive care services without charging copayments, coinsurance or deductibles when the services are delivered by in-network providers. The scope of this coverage mandate changes somewhat from year to year as preventive care guidelines are updated. To prepare for each upcoming plan year, health plans and issuers should update their first-dollar coverage of preventive care services to incorporate any new guidelines.

In addition to these routine updates, employers should be aware of recent developments that may impact their preventive care coverage for 2024 and beyond. These developments include:

- The end of certain coverage requirements related to the COVID-19 pandemic
- Ongoing litigation regarding a key part of the ACA's preventive care mandate
- Signals from the Biden administration that it may expand access to contraceptive coverage

Because the COVID-19 public health emergency has ended, health plans are no longer required to cover COVID-19 diagnostic tests and related services without cost sharing. Health plans are still required to cover COVID-19 immunizations without cost sharing, but this coverage requirement can now be limited to in-network providers. Employers should determine how these changes impact their coverage of COVID-19 testing and immunizations for 2024 and make sure any coverage changes are communicated to plan participants.

Also, in March 2023, the U.S. District Court for the Northern District of Texas struck down a key component of the ACA's preventive care mandate as unconstitutional. More specifically, the District Court ruled that preventive care coverage requirements based on an A or B rating by the U.S. Preventive Services Task Force on or after March 23, 2010, violate the U.S. Constitution. The court also ruled that the requirement to provide first-dollar coverage for preexposure prophylaxis (PrEP) drugs used by persons at high risk of getting HIV violates the Religious Freedom Restoration Act. The Biden administration appealed the District Court's decision to the 5th U.S. Circuit Court of Appeals. It is uncertain when the 5th Circuit will issue its decision and whether it will reverse or uphold the District Court's ruling. However, for now, non-grandfathered health plans and issuers must continue to cover, without cost sharing, the full range of preventive care services required by the ACA.

If the 5th Circuit agrees that a key component of the ACA's preventive care mandate is unconstitutional, employers will want to consult with their issuers or third-party administrators (TPAs) to assess the impact on their health coverage. The impact may not be immediate, as making significant midyear changes to plan coverage is unusual and typically triggers a 60-day advance notice requirement to participants. Also, employers may decide to continue providing first-dollar coverage for the full range of preventive care services to help control spending on preventable chronic conditions down the road.

In addition, the scope of the ACA's preventive care mandate may expand in 2024 as the federal government looks for ways to improve access to contraceptives. Federal agencies have indicated that they may expand the ACA's preventive care mandate to include over-the-counter (OTC) preventive products. In July 2023, the U.S. Food and Drug Administration approved the first nonprescription daily oral contraceptive. This drug, called Opill, is expected to become available in stores and online in early 2024. Current guidance requires coverage for OTC preventive products without cost sharing only when they are prescribed by a health care provider. In 2024, employers should watch for any changes regarding coverage of OTC preventive products and make any necessary adjustments to their health plan coverage.

In the meantime, employers who want to cover OTC contraceptives on a first-dollar basis should consult with their issuers and TPAs about expanding their health plan's coverage. Also, employers with health flexible spending accounts (FSAs) or health reimbursement arrangements (HRAs) can design these accounts to reimburse all OTC drugs, even those without a prescription. If employees have health savings accounts (HSAs), employers can remind them that their HSA money can be used on a tax-free basis to pay for all OTC medicines, including contraceptives.

Finally, the Biden administration has indicated that it wants to expand access to contraceptives by narrowing the exemptions to the ACA's contraceptive coverage mandate. Under the ACA, churches and houses of worship are not required to cover contraceptives. Also, current guidance exempts certain employers from covering contraceptives if they object to this coverage based on sincerely held religious beliefs or moral convictions. In January 2023, federal agencies released a proposed rule that would rescind the moral exemption to covering contraceptives but retain the religious exemption. Employers who rely on the moral exemption to cover contraceptives should monitor the release of a final rule in 2024 and adjust their health coverage going forward, if necessary.

Improving Access to Mental Health Care

Over the last few years, the federal government has taken various steps to promote mental health awareness and improve access to care. In 2023, the DOL launched a "Mental Health at Work" initiative to encourage the creation of workplaces that prioritize mental health. At the same time, the DOL and the U.S. Department of Health and Human Services have made mental health parity compliance a top enforcement priority for employer-sponsored health plans and health insurance issuers. In 2024, the Biden administration will continue to take steps to improve access to mental health and substance use disorder (MH/SUD) care by focusing on employers' obligations, particularly with respect to mental health parity compliance.

Despite the prevalence of mental illness, there remains significant stigma around it—including in the workplace—and insufficient access to timely treatment. Many Americans do not seek MH/SUD care because of stigmatization and barriers to care, such as local in-network provider shortages and cost. Employers play a critical role in creating environments where workers are as comfortable seeking treatment for mental health conditions as they are with other types of illnesses. Employers are required to comply with the following federal laws to support workers' mental health:

- **Mental Health Parity and Addiction Equity Act (MHPAEA):** Under MHPAEA, health plans and issuers that cover MH/SUD benefits cannot impose more restrictions on those benefits than what generally applies to comparable medical or surgical benefits.
- **Family and Medical Leave Act (FMLA):** The FMLA requires that covered employers provide up to 12 weeks of job-protected leave to eligible employees, including leave to address mental health conditions.
- **ADA:** Under the ADA, workers with mental health conditions may be protected against workplace discrimination and harassment related to their conditions, have workplace confidentiality rights, and have a legal right to reasonable accommodations that can help them perform and keep their jobs. These accommodations may include offering additional unpaid leave for treatment or recovery, providing a flexible schedule to accommodate therapy appointments, and permitting food and beverages at workstations, if necessary, to mitigate the side effects of medications.

In 2024, the federal government will continue its efforts to improve access to MH/SUD care, with a top enforcement priority being MHPAEA compliance for employer-sponsored health plans. A primary focus will be on MHPAEA's parity requirements for **nonquantitative treatment limitations (NQTLs)** imposed by health plans and issuers. Currently, the DOL's employee benefits division devotes nearly 25% of its enforcement program work to NQTLs. NQTLs are generally health plan provisions that impose nonnumerical limits on the scope or duration of benefits, such as prior authorization requirements, step therapy and provider reimbursement rates. MHPAEA requires health plans and issuers to conduct **comparative analyses** of the NQTLs used for medical/surgical benefits compared to MH/SUD benefits. These analyses must contain a detailed, written and reasoned explanation of the specific plan terms and practices at issue and include the basis for the plan's or issuer's conclusion that the NQTLs comply with MHPAEA. Plans and issuers must make their comparative analyses available to the federal government or applicable state authorities upon request.

In addition, a proposed rule was issued in August 2023 that, if finalized, would make extensive changes to MHPAEA's requirements, especially those for NQTLs. To evaluate parity, the proposed rule would require health plans and issuers to collect, evaluate and consider relevant data on access to MH/SUD coverage relative to access to medical/surgical coverage instead of relying on descriptions of coverage.

The proposed rule would also impose a special rule for NQTLs related to network composition and establish additional standards for comparative analysis.

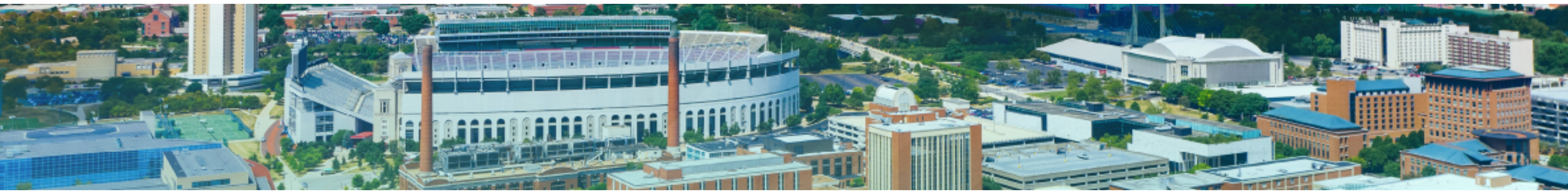
Considering the DOL's continuing MHPAEA enforcement efforts in 2024, employers should consider taking the following steps:

- Reach out to their issuers or third-party administrators to confirm that a comparative analysis has been completed for their health plan's NQTLs and that it is updated to reflect terms and coverage for 2024.
- Monitor any new legislation or regulatory guidance on MHPAEA compliance in 2024, including the issuance of a final rule.
- Watch for warning signs of problematic NQTLs, such as fail-first protocols or written treatment plan requirements.
- Consider MHPAEA's parity requirements before making any changes to the plan's coverage of medical/surgical benefits or MH/SUD benefits.

Employers often rely on their carriers or third-party administrators to design and administer their MH/SUD benefits in a way that complies with MHPAEA. However, employers have a fiduciary duty to make sure their health plan vendors are complying with applicable laws, including MHPAEA. Carefully monitoring MHPAEA compliance can also help protect employers from DOL enforcement action and participant lawsuits. Employers should maintain documentation showing their due diligence regarding MHPAEA compliance. In addition, employers who help eliminate impermissible barriers to mental health care may see benefits in the workforce, such as a more productive workforce and positive company culture.

Employers Empowered to Help Employees with Student Loan Debt

Traditionally, employers have been hesitant to offer student loan repayment benefits because of administrative concerns (such as limited guidance on how to structure these benefits) and budgetary concerns, including a lack of tax exemptions. According to a 2023 industry survey, only about 8% of U.S. employers provide student loan repayments to eligible employees. The percentage of employers offering this employee benefit has remained almost unchanged over the last five years. However, many employers are beginning to explore this benefit offering due to recent legislative measures aimed at easing student loan burdens.



Student loan relief received a lot of attention during the COVID-19 pandemic. At the start of the pandemic, temporary relief was given to eligible student loans, automatically suspending loan payments, stopping collections on defaulted loans and reducing interest rates to 0%. After many extensions, this relief has ended, and, on Sept. 1, 2023, interest rates resumed, and the first post-pandemic student loan repayments became due in October 2023. As a result, some employers are prioritizing student loan repayment benefits as a recruitment, engagement and retention tool in 2024.

According to the National Credit Union Administration, for many employees, the resumption of federal student loan payments represents "an immediate, and in some cases substantial, payment stress due to the increase in their total monthly repayment requirements." In addition, a decrease in personal savings accumulated during the early stages of the pandemic has reduced the financial buffer available to many borrowers to mitigate increased or unexpected expenses.

The timing of repayments, combined with recent tax legislation, has put employers in a good position to offer student loan repayment benefits in 2024. By taking advantage of this legislation, employers can improve their employees' overall financial well-being and thereby attract and retain key talent in 2024 and beyond.

Specifically, two new ways employers can help employees with their student loan debt in 2024 are by:

1. **Making tax-free payments of up to $5,250 toward employees' student loans.** This was initially made possible by the Coronavirus Aid, Relief and Economic Security Act (CARES Act) and was extended through 2025 by the Consolidated Appropriations Act (CAA). During this time, employer payments toward their employees' qualified educational loans can be excluded from their employees' taxable income, resulting in tax advantages for both parties. Employer contributions made outside of this time frame or in excess of the monetary limit are generally considered taxable wages subject to all employment taxes.
2. **Matching contributions under a 401(k) plan, 403(b) plan, or SIMPLE IRA with respect to qualified student loan payments.** This was made possible by an omnibus bill that includes the "SECURE 2.0" legislation, which is effective for contributions made for plan years beginning after Dec. 31, 2023. This SECURE 2.0 provision is intended to assist employees who may not be able to save for retirement because they are overwhelmed with student debt and thus are missing out on available matching contributions for retirement plans.

Employers should note that the first item simply expanded existing requirements contained in Section 127 of the Internal Revenue Code. Section 127 already allows employers to pay up to $5,250 per year toward employees' "qualified educational expenses"—such as for tuition and textbooks—on a tax-free basis. The CARES Act provision expands that law to include student loan repayment assistance as a qualified educational expense. This means that employers may, through 2025, provide each employee with up to the maximum in either education-related expenses, student loan payments or a combination of both. Section 127 also requires employers to have a written educational assistance plan that meets specified content requirements.

The tax savings provision in SECURE 2.0 allows employees with student debt to receive matching contributions by reason of repaying their student loans. An employer can make matching contributions under a 401(k) plan, 403(b) plan, or SIMPLE IRA with respect to "qualified student loan payments." A qualified student loan payment is broadly defined as any indebtedness incurred by the employee solely to pay qualified higher education expenses of the employee. In addition, for purposes of the nondiscrimination test applicable to elective contributions, the SECURE 2.0 provision allows a plan to test the employees who receive matching contributions on student loan repayments separately.

Monthly student loan payments often eat into employees' paychecks and their monthly budgets, forcing many to make difficult financial decisions each month. Record high inflation, which is driving up the price of many goods and services, will likely make this even more challenging for employees in 2024. As a result, employees are increasingly turning to their employers for help alleviating some of their debt-related stress. Student loan repayment benefits can help employers provide employees with personalized and customized benefits that meet their needs and wants. Employers that offer student loan assistance benefits can also experience improved attraction and retention of top talent, enhanced productivity, increased employee loyalty and engagement and strengthened workplace culture.

While this benefit is typically viewed as a way to attract younger workers, such as Millennials and Generation Z, as they're most likely to have student debt, it can be an attractive benefit to individuals who don't need student loan debt assistance since most individuals are likely to have friends and family that have student loans. By offering these benefits, employers can demonstrate they care about their workers and strengthen workplace culture. However, student loan repayment benefits can raise concerns regarding fairness, as some employees may not have student loans, which employers must balance. Since offering debt repayment benefits can often be expensive for employers, allowing employees to swap existing benefits for debt relief, such as converting unused paid time off into loan repayment funds, can be a cost-effective and fair way to offer these benefits.

For 2024, employers can consider establishing—or amending any existing—written educational assistance programs to take advantage of the favorable tax treatment for contributions toward their employees' student loans. Employer contributions can receive tax-free status for eligible employee student loans through Dec. 31, 2025. Employers can also consider providing matching contributions to their employees' retirement accounts in 2024. These new tax advantages can help make student loan repayment benefits more affordable for employers in 2024, which will ultimately enhance their overall benefits package and help them remain competitive in the labor market. In the meantime, employers should monitor for additional guidance on the SECURE 2.0 student loan match and work with their payroll providers and benefits counsel to ensure their plans are properly amended and their programs are properly implemented.

Family Planning Health Benefits on the Rise

In the wake of the Supreme Court decision that overturned *Roe v. Wade*, reproductive benefits became the focus of many state legislatures as they raced to implement their own abortion regulations. Some states banned or restricted abortion coverage, while other states required plans to cover this procedure. In others, the expansion of reproductive benefits took the form of restrictions on cost-sharing for procedures like vasectomies or coverage mandates for prescription drugs for the purpose of abortion. Many of these state laws have faced legal challenges and are still working their way through the court system.

However, another kind of family-planning benefit, fertility care, has been steadily on the rise as the U.S. health care system evolves in response to *Roe v. Wade* being overturned and in an effort to emphasize preventive care to contain health care costs. Traditionally, fertility treatment costs have been paid out of pocket, making this care inaccessible for many families due to the high cost and limited coverage options. While infertility treatment is not required to be covered under the federal ACA, nearly 20 states have enacted legislation over the past few years that requires health insurers to provide some form of fertility coverage. Employers in those states with fully insured plans will need to offer these benefits, the scope of which varies by state. Businesses that self-insure their employees' coverage are generally not subject to these state insurance laws and, therefore, would not be required to offer fertility benefits.

Recently, plan coverage of fertility care has made headlines and become the subject of litigation because of how infertility is defined. The Centers for Disease Control and Prevention (CDC) generally defines infertility as not being able to conceive after one year (or longer) of unprotected sex, a definition that many insurers have implemented but which has been challenged in court as discriminatory against same-sex couples that can only conceive through fertility treatment. For example, health plan participants filed a class action lawsuit in the U.S. District Court case of *Murphy v. Health Care Serv. Corp.*, alleging that their policy's terms were discriminatory against certain participants based on their sexual orientation, violating ACA Section 1557 (which prohibits discrimination in covered health programs and activities based on sex, race, color, national origin, age or disability). The plan participants argued they were discriminated against because they were forced to pay out of pocket for fertility treatments such as intrauterine insemination and in vitro fertilization for a year before their insurers would cover them. The court concluded that the policy was written such that "a significant portion of the LGBTQ community—women who are healthy and could attain, maintain, and sustain a pregnancy—cannot meet the definition of infertility without incurring out-of-pocket costs, whereas their straight counterparts can." Therefore, the court held that the plaintiffs adequately alleged that the policy discriminated against certain participants based only on their sexual orientation.

Another added layer of complexity to these cases involves the uncertainty surrounding Section 1557's prohibition on sex discrimination. This definition is currently being challenged in the court system, with a divide over whether sex discrimination includes discrimination based on sexual orientation and gender identity. The *Murphy* court acknowledged but declined to follow another court's decision that Section 1557 excludes discrimination based on sexual orientation. The litigation surrounding Section 1557's definition of sex-based discrimination will be another area for employers to watch in the context of reproductive health benefits heading into 2024.

In October 2023, the American Society for Reproductive Medicine (ASRM) broadened its definition of infertility to include (among other things) "the inability to achieve a successful pregnancy based on a patient's medical, sexual and reproductive history, age, physical findings, diagnostic testing, or any combination of those factors." According to the ASRM, the new definition "reflects that all persons, regardless of marital status, sexual orientation, or gender identity, deserve equal access to reproductive medicine."

Given that many group health plans defer to the ASRM's definition of infertility, combined with the litigation sparked by the CDC's definition, there may be a trend toward employers expanding fertility treatment coverage in 2024. Large employers traditionally have been more likely than smaller employers to include fertility benefits in their employer-sponsored health plans, but employers of all sizes are beginning to recognize the advantages of offering this benefit. According to employers, advantages include employee retention and loyalty (given that nearly half of those going through fertility treatment consider quitting their jobs due to high costs), equity in benefits for all employees and a positive public image.

Fertility struggles can negatively impact employees' mental health, contribute to financial stress and increase presenteeism and absenteeism. Such stresses from family planning often impact employees' work performance. A 2023 survey by fertility care platform Carrot found that 65% of employees said they spent time at work researching fertility treatments, benefits and family planning, and 55% said fertility challenges had detrimentally impacted work performance. The survey also revealed that 65% of employees said they'd change jobs to work for an organization that provided fertility benefits. Many employers are responding with improved family planning support amid growing interest in fertility benefits for all types of families. The State of Fertility and Family Benefits in 2023 Report by Maven found that of nearly 600 surveyed HR professionals, 63% said they planned to increase family health benefits in the next few years, and 87% recognized family benefits as "extremely important" to current and prospective employees. This is largely due to family-building benefits' impact on employees' mental health, performance and loyalty. As employees continue to express interest in fertility benefits in 2024 and beyond, employers who cover some or all of the costs of fertility treatments will likely experience significant improvements in employee productivity and satisfaction and gain a competitive advantage by strengthening their attraction and retention efforts. Even if employers choose not to cover fertility or family planning benefits, offering flexible spending accounts or health savings accounts can help employees pay for a wide range of family planning and reproductive health care services.

Employers providing benefits for fertility care will need to assess the implications of offering these benefits as state laws continue to evolve. For fully insured health plans, the scope of benefits that may be provided depends on the specific requirements imposed at the state level. Some states have laws in effect requiring coverage of some type of infertility treatment; others only require group health plans to offer coverage to employers for specific treatments or services (though employers are not required to choose these plans). In general, self-insured health plans are not subject to state insurance laws, giving such employers more flexibility to determine the scope of these benefits. In either case, careful consideration should be given to how infertility is defined under the plan's terms, and employers should closely monitor legal developments in the ACA Section 1557 area in 2024.

Conclusion

Many of the compliance challenges employers faced in 2023 will continue through 2024 and beyond. Additionally, organizations' compliance obligations are growing and becoming more complex. As a result, employers will need to find ways to establish effective and efficient compliance practices. Proactively embracing and effectively responding to the evolving regulatory landscape can help employers establish a strong compliance foundation, which is vital for sustained growth and success in today's competitive business landscape.

In an ever-changing regulatory landscape, staying well-informed of compliance requirements is paramount for employers to reduce legal risks, improve operational efficiency and strengthen their bottom line. By understanding the challenges and opportunities presented in this Compliance Outlook, employers can strengthen their compliance efforts, foster ethical cultures and navigate intricate legal frameworks in the upcoming year. In 2024, employers who can effectively meet their regulatory requirements and proactively create a compliance strategy that aligns with their organization's objectives will be better positioned for long-term success by remaining resilient and adaptable in an ever-changing environment. The best strategies will vary by workplace, but being aware of the trends and themes presented in this Compliance Outlook can guide employers as they establish compliance strategies in 2024.

Contact us for more information about these trends and to request additional resources on these and other important compliance topics.