Important Employment and HR Considerations for Employers

Quarter 1- 2025

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Marquette University
Law School

31 years of law
experience

EXPERTISE

- ERISA/Benefits matters
- State & Federal employment issues
- State Equal Rights Division
- EEOC matters
- DOL audits

AFFILIATIONS

- Wisconsin Bar Association- member
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- Director, Vice President, Treasurer & Co-founder of the Wisconsin Youth Basketball League, Inc.
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- Prior Audit Committee Member for Neighborhood Housing Services of Southeast Wisconsin, Inc.

Legal Disclaimers

All comments today are intended to be educational in nature. They are not intended to be legal advice. Please see out an attorney or tax professional if you have any questions or need further guidance on these topics discussed.

Be advised: as there is pending litigation on some of these topics, the law will continue to evolve.

Agenda

1. Politics In The Workplace
2. Policy (ACA) Changes- Biden
3. Policy Changes- Courts
4. Potential Policy Changes- Trump
5. Punting The “New” OT/Salary Laws
6. Parity (Mental Health) Kicks In
7. Pot In The Workplace Update
8. Pay Transparency Reminders
9. Privacy (HIPPA) Update
10. Miscellaneous

Politics In The Workplace

1st Amendment- Public vs Private

1) Public employees have a constitutional right to express political thoughts in the workplace.
2) However, there are even limits on that. Their comments can't interfere with job duties and employers have a right to balance this free speech against the employer's right to promote an efficient workplace.

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1st Amendment- Public vs Private

1) Private employers have greater control over political speech in the workplace.
2) Private employers can restrict speech and enact disciplinary measures as long as they comply with anything in force with the National Labor Relations Act (“NLRA).

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Federal Laws

1) There is no federal law that specifically prohibits discrimination based on political affiliation or activity.
2) But discriminatory practices based on political affiliation could lead to retaliation, harassment or discrimination claims through the National Labor Relations Board (NRLB) or Equal Employment Opportunity Commission (EEOC).

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The Fools At The NLRB Also Chime In

“Employers are not permitted to infringe on the rights granted to employees under the NLRA; private employers should be wary when restricting political speech in the workplace.”

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Okonowsky v. Garland, 109 F.4th 1166 (9th Cir. 2024).

Okonowsky involved a prison corrections lieutenant's private Instagram account where the lieutenant posted "overtly sexist, racist, anti-Semitic, homophobic, and transphobic memes." The employer argued that the posts originated outside of the workplace and, therefore, could not form the basis of a hostile work environment claim. The Ninth Circuit disagreed and pointed out that coworkers could view, comment on, and otherwise interact with the offensive posts inside and outside the workplace. In rejecting the employer's attempted distinction between workplace and social media conduct, the Ninth Circuit in doing so noted "in light of the ubiquity of social media and the ready use of it to harass and bully both inside and outside of the physical workplace."

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Okonowsky v. Garland, 109 F.4th 1166 (9th Cir. 2024).

Okonowsky highlights the risk that employees' offsite use of social media could contribute to a hostile work environment if the content is harassing and affects the working environment.

Okonosky reinforces the standard for hostile work environment claims, which takes in account the totality of circumstances, meaning discriminatory social media posts need not target a specific person to subject an employer to liability. **Employers should be aware that they may be held liable for employees' conduct occurring in a non-work related settings (including social media).**

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What Can An Employer Do?

1) Maintain or adopt a social medial policy and/or other related policies. Know your federal and state laws and delineate clear acceptable standards for employee use of social media.

2) Update any existing policies as needed.

3) Enforce all policies consistency and in accordance with the written language.

4) Consider training and educational resources.

5) Communicate the policies effectively. Don’t just post the policies. Make sure employees know about them and any subsequent changes. Keep acknowledgements (paper) or email receipts.

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Policy Changes (ACA) - Biden

ACA Penalties Have Decreased!

An ALE is generally an employer that averages 50 or more full-time equivalent (“FTE”) employees during the prior calendar year. Only employers who are ALEs are subject to the employer mandate. Except for employers not in existence in the previous calendar year who reasonably expect to employ 50 or more FTEs in their first year, ALE status is always based on the prior calendar year rather than the employer’s plan year.

You file this year based on 2023 numbers!

Level-funded are exempt from penalties; not filing!

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ACA Penalties Have Decreased!

The (a) penalty is triggered when an “Applicable Large Employer” or “ALE” does not offer coverage to at least 95% of its full-time employees and at least one full-time employee receives a Premium Tax Credit (“PTC”) or subsidy to purchase individual coverage through an ACA public exchange.

Different for controlled groups

The (b) penalty applies for each month when an ALE offers coverage that is either unaffordable or does not meet minimum value requirements, or does not offer coverage to a full-time employee, and that employee receives a PTC to purchase individual coverage through an exchange.

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ACA Penalties Have Decreased!

1) The aren't reduced by much but when is the last time our govt reduced a fine?
2) It is more important than ever before that you don't make mistakes. "Good faith" reliance no longer applies. All mistakes are now penalties.
3) Paper filings no longer permitted.

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ACA Penalties Have Decreased!

1) The (a) penalty for 2025 is $2,900, down from $2,970. The penalty though is the total # of FTEs less 30.

2) The (b) penalty for 2025 is $4,350, down from $4,460. The penalty is per person who receives a subsidiary.

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The Affordability % Has Increased!

The affordability percentage for self only coverage increases to 9.02% for 2025; an increase from 8.39% in 2024.

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But The Affordability % Has Increased!

Impact:

Employers can increase employee contributions as long as they remain under the 9.02% affordability percentage for self only coverage.

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Federal Poverty Level Limit Set

Employers offering a medical plan option in 2025 that provides minimum value and costs the employee no more than $113.20 per month for employee-only coverage automatically satisfies ACA affordability.

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ACA Reporting Changes- Good News!

Employers no longer have to provide employees with Forms 1095-B and 1095-C as long as you provide them with a posted notice stating you will not be providing the forms and that they have the right to request a copy of the form. If the form is requested, it must be provided no later by January 31st or 30 days after the date of the request.-

- The notice can be posted on the employer's website.

- The notice should include an email and physical address where requests could be sent and a telephone number for questions.

- Forms must still be created and filed with the IRS!

- Forms must still be distributed to employees in states where there are still individual reporting requirements- California, Massachusetts, New Jersey, Rhode Island and Washington D.C.

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ACA Reporting Changes- Good News!

- Forms can also now be provided electronically if the employee has affirmatively consented to such receipt at any prior time.

- Employers are now permitted to list date of births if unable to find SS #s for covered individuals.

- A statute of limitations (6 years) is now in effect with respect to filing errors.

- The employer response time to any IRS penalty letter has been increased to 90 days.

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Policy Changes - Courts

New Fixed Indemnity Plan Notice- REPEALED

BACKGROUND:

Employers who offer fixed indemnity coverage must provide clear and conspicuous notices to consumers explaining that fixed indemnity plans are not a substitute for comprehensive health insurance and probably do not meet the minimum essential coverage requirements under the ACA.

These are usually part of an employer's voluntary benefit package.

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New Fixed Indemnity Plan Notice- REPEALED

In December, a Texas court vacated the notice requirement.

As a result, this notice requirement is no longer applicable for hospital and fixed indemnity plans.

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Teleheath Relief Eliminated From Budget

- Generally, individuals who are covered by telehealth programs that provide free or reduced-cost medical benefits are not eligible for HSA contributions.

- To be eligible for HSA contributions, individuals cannot be covered by a health plan that provides benefits, except preventive care benefits, before the minimum HDHP deductible is satisfied for the year.

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Teleheath Relief Eliminated From Budget

- On January 1, 2020, The CARES Act allowed HDHPs to waive the deductible for telehealth services without jeopardizing HSA eligibility.

- During the last second spending bill approved in late December, this relief ended on December 31, 2024, for calendar year plans; non-calendar year plans have until the end of their 2024 plan year to make changes

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Teleheath Relief Eliminated From Budget

- As of 1/1/25, providing a telemedicine benefit other than preventive care at no cost or low cost to participants makes them ineligible for HSA contributions.

- Rumors are that Congress intends to bring this up again during the next spending bill in late spring.

- TRUMP???

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Open Litigation Matters

- Tobacco Cessation Program class action lawsuits- offering a reasonable alternative standard and making the full reward available when satisfied.

- Gender Affirming Care lawsuits- Section 1557 and now, Title VII.

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Potential Policy Changes - Trump

Say It With Me: Good Riddance Current NLRB

1) The lunatic pushing the onerous agenda will be fired any day now.
2) Biden made a last-ditch attempt to have the current board positions renewed for another term, but it was rejected.
3) Expect complete overhaul of policy decisions the past four years and/or reinstatement of the prior Trump policies.

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Say It With Me: Good Riddance Current NLRB

All of these subject matters will be impacted (and more) immediately:

- Abruzzo will be fired.

- Expanded Remedies in Unfair Labor Practices will be rescinded. Completely pro-union policies were enacted.

- Employee Status issues will be re-examined- are college athletes statutory employees?

- Employee Monitoring- Section 7 Concerted Activity. I expect it to be quickly repealed.

- Their holding that confidentiality and non-disparagement clauses violates the NLRA will be redacted.

- Their continued assertion that non-compete agreements are void and illegal will end.

- Their continued use of injunctive relief as a costly and effective weapon will end.

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Say It With Me: Good Riddance Current NLRB

All of these subject matters being litigated will now be resolved by an employer-friendly NLRB:

- Voluntary elections, election conduct, and captive audience issues will be decided (unionization efforts).

- Remedies available to employees in cases of harm will be finalized.

- Lawfulness of handbook policies and workplace rules will be clarified.

- Protected activity under Section 7 of the NLRA will be re-defined.

- Timing of unilateral business changes will be reexamined and altered. end.

- Protected activity on behalf of non-employees will be abolished.

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Other NLRB Topics:

Joint employer rule- DOL also.

Independent Contractor rule- DOL also.

Quickie elections

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Section 1557

This is the non-discrimination rule under the ACA. It was drafted to prohibit health discrimination on the basis of sex.

The Dept of HHS expanded the written rules to include sexual orientation, gender identity, sex stereotypes, etc… which has in turn resulted in significant litigation on these topics.

Expect these expanded rules to be withdrawn so the law is read in accordance with how it was drafted.

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Gender Affirming Care/Gender Dysphoria

It’s pretty clear from the prior slide that these will no longer be legal arguments or protections on the basis of Section 1557 since that language will be redacted.

Going forward, these matters will boil down to whether the exclusion of these issues will be required for fully insured plans because of state laws or by self-insured plans to avoid any possible Title VII lawsuits.

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EEOC

The General Counsel to the EEOC will be fired/replaced because Biden did the same to Trump in 2020.

This organization will be slower to adopt to pro-employer decisions because only one Republican is amongst the 5 board members. There will be two by the end of this month but there will not be a third (majority) until 2026.

I would expect this organization to be more neutral than the others going forward.

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Immigration

If you haven’t heard, immigration is big news, lol.

The downside is to expect more I-9 audits so get your paperwork and files in order.

- Delete old I-9s after the statute of limitations expire.
- Do self-audits

Expect more worksite enforcement actions.

H-1B changes forthcoming.

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Punting The New Salary/OT Laws

All That Work For Nothing-Again!!

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DOL Revised Final Overtime Rule

- On April 23, 2024, the DOL issued a final rule that incorporates two increases for salaried employees: The first step increased the salary threshold for exempt employees from $684 per week ($35,568 annually) to $844 per week ($43,888 annually) effective July 1, 2024.

- The second increase was to go from $844 per week ($43,888 annually) to $1,128 per week ($58,656) or more per year as of January 1, 2025.

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DOL Revised Overtime Rule

The final rule also had a provision for automatic increases to the overtime salary threshold amounts every three years based on then current wage data starting July 1, 2027.

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Litigation Is Over- Rule Is Rescinded

- Over the summer, a Texas court ruled the new DOL OT laws do not apply to Texas companies, but the judge did not extend the injunction beyond the state of Texas.
- On Sept. 11th, the U.S. Court of Appeals for the 5th Circuit held (along with 4 other circuit courts of appeal) that the DOL has authority to impose a minimum salary requirement for application of the exemption.
- Caveat: This was a decision on the prior 2019 rule which increased the OT wages, not the new rule!!

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Litigation Is Over- Rule Is Rescinded

- On November 15, 2024, the U.S. District Court for the Eastern District of Texas struck down this final rule in its ENTIRETY, ruling that the rule is out-of-step with both the DOL's past practices and the historical screening function of the salary-level test.
- Basically, the Court said the DOL arbitrarily changed the focus of the white-collar exemption to a salary test when the law states it is a duties test.
- The Court also said the automatic increase every three years violates the Administrative Procedure Act because it is done automatically without any rulemaking or substantive analysis by the DOL.

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Litigation Is Over- Rule Is Rescinded

- The July, 2024 increase was invalidated and the January, 2025 increase did not go into effect.
- The $684 per week ($35,568 annually) thresholds remain in effect.
- The DOL has appealed this court decision, but the likelihood of success is remote.

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DOL Revised Final Overtime Rule

Bonus Make-Up Option Summary

- Up to 10% of salary.
- Quarterly payments.
- Catch-up payment. If the combined salary and bonuses do not meet the minimum threshold by the end of a quarter, employers have one pay period to make a catch-up payment.

DOL Revised Final Overtime Rule

Commission Employees- it varies but it's not favorable!!

It is suggested that if an exempt commission employee cannot reach the minimum salary requirements, that they be reclassified as non-exempt and be entitled to OT for hours worked in excess of 40 hours. If you do not want to reclassify, you will need to pay the minimum base salary PLUS their commissions which means they fare much better. Again, they get the base salary PLUS commissions. I'd either reclassify as non-exempt OR restructure their pay eliminating commissions (at least for those who are right around the minimum levels). For those way above the minimum, since you must pay the minimum weekly salary plus commissions, I'd reduce to commission schedule taking this into effect.

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Trump Effect

Surprising DOL choice

Lori Chavez-DeRemer is the nominee.

- Founded her own small business before entering politics.

- One of very few pro-union Republicans (daughter to a Teamster- now it makes sense ☺).

- It's expected she will introduce a less "dramatic" OT rule somewhere in the range of $44k this year or next year which Trump is expected to support.

- She will have a power role on whether the IC and Joint Employer tests revert back to what they were under Trump 1.

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Parity (Mental Health) Kicks In

Bad news as the revised rules are now final.

What Is MHPAEA?

The Mental Health Parity and Addiction Equity Act (MHPAEA) applies to group health plans and insurers that offer mental health or substance use disorder benefits. The rules require parity between these benefits and medical and surgical benefits with regards to:

- Annual and lifetime limits
- Financial and quantitative treatment limitations
- Nonquantitative treatment limitations (NQTLs)

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What Is MHPAEA?

The MHPAEA rules were amended under the Consolidated Appropriations Act of 2021 to require group health plans and insurers to perform a written comparative analysis of any NQTLs imposed under the plan.

Later, in September 2024, the DOL, IRS, and HHS (the Agencies) released final rules that implement this comparative analysis requirement (effective beginning January 1, 2025)

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Employer Impact

MHPAEA applies to those companies with 50 or more employees.

Fully insured plans: compliance with the MHPAEA, including the written comparative analysis requirement, will be fulfilled by the health insurance carrier.

Self-insured plans: responsible for ensuring compliance with the MHPAEA, including the completion of the written comparative analysis.

- Work with their TPA to determine the level of assistance that will be provided in completing the analysis.

- If no TPA or no TPA assistance, engage an external vendor.

- **Completion of the analysis is not required on an annual basis but should likely be revisited in the event of a plan design change.**

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Final Rules Are Published

1. On September 9th, the DOL issued final rules on Mental Health Parity (MHP).
2. Some rules take effect 1/1/25 and the rest are effective 1/1/26.
3. The rules simply make things more confusing, costly and frustrating for employers.
4. Expect Mental Health Parity audits to increase quite a bit.

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MHPAEA- Top Changes To The Status Quo

1. The NQTL (nonquantitative treatment limitation) Analysis is much more complex.

The final rule expands this analysis and describes specific types of information that must be included in each element of the analysis, with one element that requires plan-specific, detailed analysis.

The takeaway is that these enhanced requirements now make it impossible for a plan sponsor to complete this task on its own.

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MHPAEA- Top Changes To The Status Quo

The final rules require a written comparative analysis to include:

- A description of the NQTL and the benefits to which it applies;
- Identification of the factors and standards used in designing or applying the NQTL;
- An explanation of how factors are used in the design or application of the NQTL;
- A demonstration of comparability in the plan's written terms;
- A demonstration of comparability in the plan's operation; and
- Findings and conclusions, including certification by a plan fiduciary.

The Agencies are required to annually collect at least 20 analyses. Upon a request, group health plans have ten days to provide the Agencies with the written comparative analysis.

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MHPAEA- Top Changes To The Status Quo

2. Plans May Need to Expand Their Mental Health Provider Networks.

The final rule includes requirements related to network composition standards, such as requirements for provider admission to a network.

Plans are expected to take action to address any material differences in access and to document any actions taken to mitigate the material differences.

MHPAEA- Top Changes To The Status Quo

3. Plans May Need to Cover More Mental Health Resources.

The final rule includes a new “meaningful benefits” standard, which requires that if a plan provides any benefits, it must provide meaningful benefits for that mental health condition or substance use disorder in every classification in which medical/surgical benefits are provided.

This means your plan may need to expand the scope of covered services in these areas or start covering services in additional classifications.

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MHPAEA- Top Changes To The Status Quo

4. Plan Fiduciary Certification is Required- **Effective 1/1/25!!**

The final rule requires the plan fiduciaries to review the analysis and certify in writing that they engaged in a prudent process to select one or more providers to conduct the NQTL analysis and to prepare a written report.

Who wants to be a fiduciary, lol??

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MHPAEA- Top Changes To The Status Quo

5. Response Timeframes Have Narrowed.

    - Copies of the analysis must be provided:

    - 30 days- upon participant request.

    - 10 business days- upon DOL request.

    - 10 more business days if DOL finds the initial request inadequate.

    - 45 days to respond to a DOL initial determination of noncompliance.

    - 7 days to notify participants after a final determination of noncompliance.

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MHPAEA- What Should The Employer Do?

Fully insured plans should confirm the insurer's obligation to comply with MHPAEA (Mental Health Parity and Addiction Equity Act) via written agreement. This should be available since insurers are subject to the MHPAEA's comparative analysis requirements.

Self-insureds must make sure their TPA agreements address responsibility for MHPAEA compliance. If the TPA refuses to provide this service, the plan will need to engage legal counsel or a qualified vendor.

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MHPAEA- There Is “Some” Good News

“For group health plans and group health insurance coverage, the final rules generally apply for plan years beginning on or after January 1, 2025. **However, the provisions implementing the meaningful benefits standard, the prohibition on discriminatory factors and evidentiary standards, required use of outcomes data, and certain related comparative analysis requirements apply for plan years beginning on or after January 1, 2026.**”

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MHPAEA- There Is “Some” Good News

The DOL has indicated that there will be updated guidance and compliance assistance materials. Don’t hold your breath waiting for this!

Litigation has commenced!!! The ERISA Industry Committee (ERIC) filed a complaint on 1/17/25 stating the MHPAEA is unlawful in numerous respects.

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Pot In The Workplace

Know Your State Laws

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Wisconsin Law

Wisconsin prohibits the sale or purchase of marijuana in the state BUT the state law also prohibits (generally) discrimination on the employee's use of lawful products off the employer's premises outside of working hours.

What if someone flunks a subsequent drug test for using pot on vacation where it is legal? Therein lies the problem. Or consumes Delta 9 in Wisconsin?

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Wisconsin Law- Testing Methods

While advanced drug testing methods such as gas chromatography-mass spectrometry can detect with precision the concentrations of the various molecules found in the cannabis sativa plant present in a given biological sample, the typical drug tests widely used by employers cannot determine with any certainty whether a positive concentration of delta-9 THC is the result of illicit marijuana use or use a lawful hemp-derived product.

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Wisconsin Law- Failed Test #1

CBD: If the employee is able to prove to the satisfaction of a factfinder that the presence of THC in their drug test was due to their use of a lawful hemp product such as a CBD gummy, and that they did not otherwise consume an *unlawful* product that might trigger a positive result, the employer's termination of that employee may run afoul of the WFEA. Of course, this is only true if none of the special circumstances in Wis. Stat. section 111.35 would otherwise permit the termination of the employee for using that product.

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Wisconsin Law- Failed Test #1

Wis. Stat. section 111.35.

(2) Notwithstanding s. 111.322, it is not employment discrimination because of use or nonuse of a lawful product off the employer's premises during nonworking hours for an employer, labor organization, employment agency, licensing agency or other person to refuse to hire, employ, admit, or license an individual, to bar, suspend or terminate an individual from employment, membership or licensure, or to discriminate against an individual in promotion, in compensation or in terms, conditions or privileges of employment or labor organization membership if the individual's use or nonuse of a lawful product off the employer's premises during nonworking hours does any of the following:

(a) Impairs the individual's ability to undertake adequately the job-related responsibilities of that individual's employment, membership or licensure.

(b) Creates a conflict of interest, or the appearance of a conflict of interest, with the job-related responsibilities of that individual's employment, membership or licensure.

(c) Conflicts with a bona fide occupational qualification that is reasonably related to the job-related responsibilities of that individual's employment, membership or licensure.

(d) Constitutes a violation of s. 254.92 (2).

(e) Conflicts with any federal or state statute, rule or regulation.

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Wisconsin Law- Failed Test #2

Pot use while on vacation: The employer may subsequently be found to have discriminated against the employee based on the employee's use of a lawful product, when termination was premised on a positive drug test for illicit marijuana.

Recent Litigation

Different states have different rules about zero tolerance, positive tests, medical cards, pre-employment testing (flunking), etc. It's critical to know your state laws.

The problem is also that some states pushed these through with no thought process. For example, the 3rd Circuit recently stated that courts may not necessarily enforce worker protections in state statutes that do not expressly set out a remedy for the worker to seek in court.

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Recent Litigation

Many states now have this clause (or something similar in place):

> “An employee shall not be subject to any adverse action by an employer solely due to the presence of cannabinoid metabolites in the employee’s bodily fluid from engaging in conduct permitted under this Act.”

But NO remedies were written into the law, lol.

Employer Suggestions

Drug testing technology is unable to discern whether the source of THC in a sample was from consumption of Farm Bill-compliant hemp products or use of illicit drugs.

Companies need to know that adverse employment actions following a positive drug test for THC (without other evidence of illicit employee drug use) could expose them to liability under the WFEA.

Employers should understand the “exceptions and special cases” which might provide a defense to employer liability under the WFEA. For example, it does not violate the WFEA to terminate an employee who consumed a lawful hemp product off the employer’s premises and outside of working hours if that product caused them to show up to work intoxicated.[3]

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Employer Suggestions

Generally, a Wisconsin employee who uses marijuana in another state that permits adult consumption of marijuana – such as Illinois – is not protected under the WFEA, as marijuana is still illegal federally and under Wisconsin law.

Although no there is no case law directly on point at time of writing, this use would arguably run afoul of Wis. Stat. section 111.35(e), which does not offer protection where the use of a product conflicts with a federal or state regulation.

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Employer Suggestions

Zero tolerance policies are still allowed in all states where federal laws still exist (DOT) or safety sensitive positions are involved.

Whether you still have pre-employment, post-accident, etc., and whether you can terminate really requires an analysis of the state laws that apply to you, especially if the person has a med card.

Random testing for other than DOT reasons will likely result in some undesirable terminations.

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Pay Transparency Laws

Illinois & Minnesota Join The Fun!

Pay Transparency Laws

Salary ranges must now be posted for jobs in many states, including Illinois (15 employees for positions performed at least in part in Illinois OR will be performed outside Illinois but the employee reports to someone in Illinois) and Minnesota (30 or more employees in Minnesota) as of January 1, 2025.

Minnesota and Illinois both require that all benefits (health & retirement) and other compensation (bonuses, stock options, etc.) to be posted as well. Illinois also requires that when a job is posted externally, the employer must now also announce, within 14 days, the position opening to all current employees to the extent it would represent an opportunity for promotion for existing employees.

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Pay Transparency Laws

Salary ranges must be good faith estimates and can be based on experience. Basically, it is the minimum and maximum compensation the employer reasonably expects to pay for the position. Both Minnesota and Illinois law says you cannot post open-ended pay raises (“$40,000 and up” or “up to $60,000”).

If posting for remote workers, pay ranges are a must unless you expressly exclude candidates from all of the states that require a salary range.

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Pay Transparency Laws

Colorado, California, Connecticut, Maryland, Nevada, New York City and Washington already have these laws in place.

New Jersey, Vermont and Massachusetts will also have similar laws in place at some point in 2025.

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Pay Transparency – Sample Postings

“This position has a starting salary range of $109,900 to $141,700 per year. Actual starting pay is determined by a number of factors, including relevant skills, qualifications, and experience. This position is eligible for an annual incentive as well as long-term incentives.

“The posted range for this position is $109,807 to $171,574 which is the expected starting base salary range for an employee who is new to the role to fully proficient in the role. Many factors go into determining employee pay within the posted range including prior experience, current skills, location/labor market, internal equity, etc.”

“At this time, the Company does not hire candidates residing in New York, California, Colorado, Washington, Nevada, Connecticut, Hawaii, or Alaska.” (I assume the last two states were added simply due to logistics/travel)

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Privacy (HIPAA) Update

Changes in effect for 1/1/25

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HIPAA Privacy Rules Amended

1. In April, the Dept of Health and Human Services (HHS) issued new regulations under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) that impose new restrictions on the use and disclosure of reproductive health care by covered entities, include employer-sponsored health plans.
2. There are two relevant deadlines: December 23, 2024 and February 16, 2026.

HIPAA Privacy Rules Amended

3. Covered entities (health plans amongst others) and business associates must comply with the new requirements by December 23, 2024, **but they have until February 16, 2026, to update their Notice of Privacy Practices.**
4. Reproductive healthcare includes female (contraception, preconception screening, counseling, pregnancy screening, miscarriage management, fertility and infertility diagnosis, menopause, etc.) and male (vasectomies and erectile dysfunction) matters.

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What Does The Final Rule Do?

1) Prohibits the use of PHI against people for providing or obtaining lawful reproductive healthcare.
2) Prohibits covered entities and business associates from using or disclosing PHI for either of the following non-health care purposes:

   a) to conduct a criminal, civil or administrative investigation into or impose similar liability on any person for the mere act of seeking, obtaining, providing, or facilitating reproductive health care, where such health care is lawful under the circumstances in which it is provided; and

   b) the identification of any person for the purpose of conducting such an investigation or imposing such liability.

What Does The Final Rule Do?

3) Requires you to obtain a signed statement in certain situations before using or disclosing PHI related to reproductive healthcare.
4) Requires the distribution of a revised Notice of Privacy Practices.

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Steps To Take

1) Update HIPAA policies and procedures. Include the new requirements under the final rule; a model attestation for requests of reproductive health care PHI is available from HHS
2) Update BAAs.
3) Train your workforce on the new privacy rules – employees are the most common cause of healthcare data breaches.
4) Keep up with state (and neighboring state) laws related to reproductive healthcare. Some of the prohibitions under the new law apply only when PHI at issue involves lawful reproductive healthcare.
5) Prepare required statements or attestations. See here: https://www.hhs.gov/sites/default/files/model-attestation.pdf

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Proposed Major Modifications To Security Rule

HHS released a proposed rule on December 27, 2024.

The purpose is the strengthen the cybersecurity protections for electronic protected health information.

The proposed rule would result in significant costs (& time) to employers. I expect significant modifications before the rule ever is published in final form.

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Miscellaneous Updates

Compliance Deadlines

- **December 31, 2024 -** Gag Clause Submission. See next slide.

- **February 28, 2025 -** ACA employer Forms 1094-C and Form 1095-C filings due to IRS if paper filing.

- **March 1, 2025 -** The Centers for Medicare and Medicaid Services (CMS) filing deadline for Medicare Part D reporting is 60 days after the start of the plan year. https://www.cms.gov/medicare/employers-plan-sponsors/creditable-coverage/disclosure-form

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Compliance Deadlines

- **March 3, 2025 -** Applicable Large Employers (ALEs) must provide Form 1095-C to eligible employees unless alternative option (discussed later) is used.

- **March 31, 2025** - ACA employer Forms 1094-C and Form 1095-C filings due to IRS if electronic filing.

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[illegible]

Under the CAA, a gag clause is defined as:

1. Restrictions on electronic access to de-identified claims and encounter information or data for each participant, beneficiary, or enrollee upon request and consistent with HIPAA, GINA and ADA privacy regulations, including, on a per claim basis—

- Financial information, such as the allowed amount, or any other claim-related financial obligations included in the provider contract;
- Provider information, including name and clinical designation;
- Service codes; or
- Any other data element included in claim or encounter transactions; or

2. Restrictions on sharing information or data, or directing that such information or data be shared, with a business associate.

The gag clause provisions of the CAA (specifically Code section 9824, ERISA section 724, and PHSA §2799A-9(a)(1)), generally prohibit plans and carriers from entering into agreements with providers, TPAs, or other service providers that include such provisions.

Gag Clause Attestation

Insurers will do the Attestation for fully-insured plans.

For self insured or level funded plans, the plan may need to enter into an agreement with the plan's service provider (TPA or PBM) where the service provider will attest on the plan's behalf by December 31st each year.

The plan is responsible for the Attestation and may have to do this itself. If the service provider fails to timely do this submission or does the Attestation incorrectly, the plan is still liable. Plans should ask their TPAs and networks to confirm that gag clauses have not been in their contracts.

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Gag Clause Attestation

December 31: Gag Clause Attestations. Must be filed with CMS electronically. $100 penalty per day per entity per individual affected by the violation.
https://hios.cms.gov/HIOS-GCPCA-UI

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QUESTIONS?

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