The Baldwin Professional Education Institute

Top 10 Issues in Employee Benefits for 2023-2024

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AGENDA

Update I:	IRS Lowers the Health Plan Affordability Threshold
Update II:	Transparency Related Features of the Consolidated Appropriations Act
Update III:	MHPAEA Related Rulemaking and Enforcement
Update IV:	HIPAA Related Enforcement and New Regulatory Interpretations
Update V:	Access to Abortion Related Treatments and Services
Update VI:	Individual Rights Related to Gender Expression
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Update IX:	Suits Against Claims Administrators for Breach of ERISA Fiduciary Duty
Update X:	Education Assistance Plans & Student Loan Reimbursement

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Legal Update I:

IRS Lowers the Health Plan Affordability Threshold

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IRS Lowers 2024 Health Plan Affordability Threshold

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- **For the second year in a row, the IRS has decreased the annual affordability percentage.**
  - **According to IRC section 36B(c)(3)(v)(A)(1) an employer-sponsored plan is affordable for an employee if the portion of the annual premium the employee must pay, whether by salary reduction or otherwise (required contribution) for self-only coverage does not exceed the required contribution percentage (9.61% for 2022 and 9.12% in 2023) of the applicable taxpayer's household income for the taxable year.**
  - **The affordability percentage for 2024 is:**

Year	Affordability Percentage
Calendar/reporting Year 2024	↓ Down to 8.39%
Calendar/reporting Year 2023	↓ Down to 9.12%
Calendar/reporting Year 2022	↓ Down to 9.61%
Calendar/reporting Year 2021	↑ Up to 9.83%

    - **As a result, ALEs may have to lower their employee contributions for plans starting in 2024 to meet the adjusted percentage.**
    - **Keep in mind that wellness incentives and surcharges (for non-tobacco) as well as certain opt-out and cash-in-lieu arrangements may affect the affordability calculation.**

IRS Lowers 2024 Health Plan Affordability Threshold

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- Failure by an ALE to offer at least one "*affordable*" health plan option could result in a penalty assessment under IRC §4980H(b) (the "tack hammer" penalty) for each full-time employee who obtains coverage in the Marketplace and qualifies for a subsidy. For 2024, the Part B penalty amount is $371.67/month.
- As a reminder, the IRS provides three safe harbors for determining whether an ALE's offer of coverage is affordable:
  1) 1. Federal Poverty Line (FPL) safe harbor
  2) 2. Rate of Pay safe harbor
  3) 3. Form W-2 safe harbor

Legal Update II:

Transparency Related Features of the Consolidated Appropriations Act*

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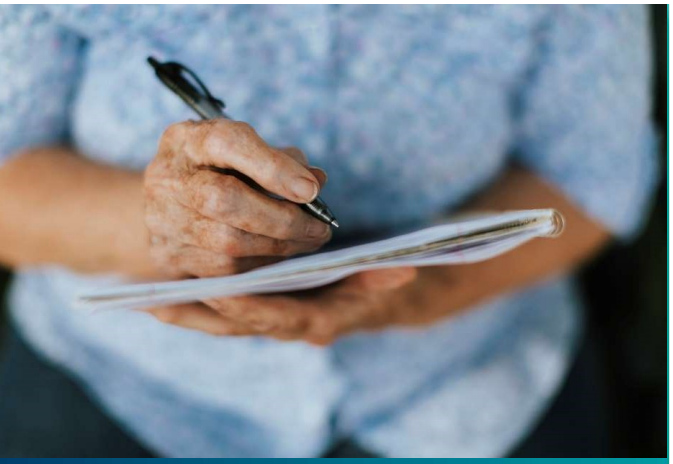

"…Tools designed to improve health care services and network design…"

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An Introduction to Transparency:

- Congress enacted the Consolidated Appropriations Act (CAA) in December of 2020.
- Along with prior federal rules promoting hospital and health plan price transparency, the CAA also promotes tools designed to improve health care purchasers' decision-making with respect to health care services and network design, as well as to limit certain anti-competitive practices in provider-payer contracting. Individual requirements include the following:

- Price Comparison Tools
- Health Plan Price Transparency
- Advanced Explanation of Benefits
- Eliminating Gag Clauses in Payer-Provider Contracts
- Provider Directories
- Prescription Drug Price Transparency
- Plan Identification Cards
- Broker and Consultant Disclosures

Overview of Transparency Requirements – Part I

1
ACTIVE

- The CAA requires group health plans to give enrollees' access to a "price comparison" tool that allows them to compare the amount of cost-sharing they would be responsible for across providers.

Price Comparison Tools

2
ON-HOLD

- The CAA requires health plans to provide an EOB to enrollees prior to their receipt of services.
- To inform the advanced EOB, the statute also requires providers to submit a good faith estimate of their costs to the plan within specified time limits after the service is scheduled.

Advanced Explanation of Benefits

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Overview of Transparency Requirements – Part II

3
ACTIVE

Provider Directories

- The CAA requires group health plans to improve accuracy of provider directories, provide them on a public website, and to establish a protocol for promptly responding to requests from members about a provider's network status.

4
ACTIVE

Plan ID Cards

- The CAA requires health plans to include members' in-network and out-of-network deductible and any plan maximum out-of-pocket limits on ID cards.
- The ID cards must also include a phone number and website address where members can receive consumer assistance.

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Overview of Transparency Requirements – Part III

5
ACTIVE

Health Plan Price Transparency

- Group health plans are required to make the following machine-readable files available on a public website, updated monthly:
- In-network rates for all covered items and services; and
- Out-of-network allowed amounts and billed charges for all covered items and services.

6
ACTIVE

Eliminating Gag Clauses in Payer-Provider Contracts

- The CAA prohibits group health plans from entering into or renewing contracts with providers if it would preclude the plan from:
- (a) disclosing provider-specific cost or quality information in a consumer-facing price comparison tool or other mechanisms;
- (b) obtaining de-identified claims data, and
- (c) sharing provider-specific cost or claims data with a business associate.

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Overview of Transparency Requirements – Part IV

7
ON-HOLD

Prescription Drug Price Transparency

- The CAA requires a range of employer and carrier obligations related to prescription price transparency, including, without limitation:
  - (a) 50 most frequently dispensed brand prescription drugs;
  - (b) 50 costliest prescription drugs by annual spending;
  - (c) 50 prescription drugs with the greatest increase in plan or coverage expenditures the previous year; and,
  - (d) Prescription drug rebates, fees, and other remuneration paid by drug manufacturers.

8
ACTIVE

Broker and Consultant Disclosures

- The CAA requires brokers and consultants who reasonably expect to receive at least $1000 in direct and indirect compensation to disclose compensation of $250 or more. They must also provide a description of the services they rendered in exchange for the compensation.

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Legal Update III:

MHPAEA Related Rulemaking and Enforcement*

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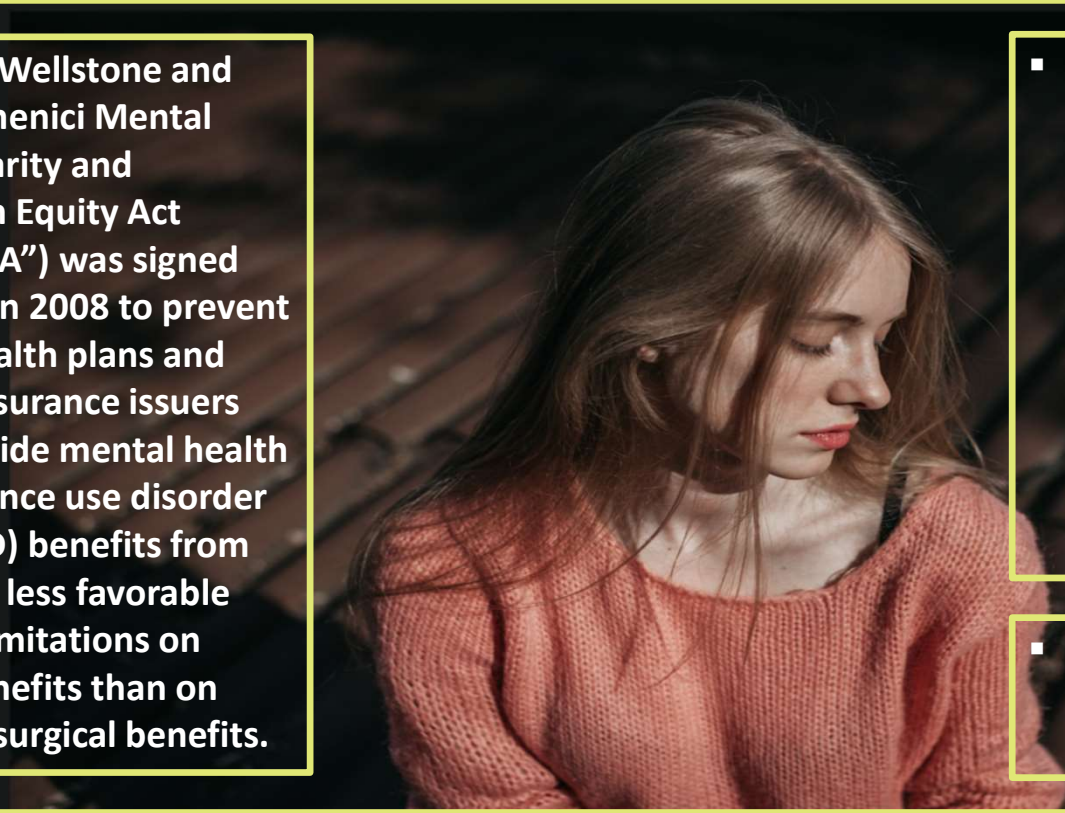
Mental Health Parity Overview

- The Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act ("MHPAEA") was signed into law in 2008 to prevent group health plans and health insurance issuers that provide mental health or substance use disorder (MH/SUD) benefits from imposing less favorable benefit limitations on those benefits than on medical/surgical benefits.



- The law generally plans and issuers offering group or individual health insurance coverage ensure that any financial requirements (such as coinsurance and copays) and treatment limitations (such as visit limits) that apply to MH/SUD benefits are no more restrictive than the predominant financial requirements or treatment limitations that apply to substantially all medical/surgical benefits in a benefits classification.

- In addition, MHPAEA prohibits separate treatment limitations that apply only to MH/SUD benefits.

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An Overview of Mental Health Parity & Addiction Equity Compliance Assuredness

MHPAEA Intents & Requirements:

REQUIRES MENTAL HEALTH & ADDICTION-RELATED MEDICAL SERVICES PARITY

- MHPAEA is a federal law that prevents group health plans that provide mental health or substance use disorder (MH/SUD) benefits from imposing less favorable benefit limitations on those benefits than on medical/surgical benefits.

DOES NOT IMPOSE MANDATORY MH/SUD COVERAGE REQUIREMENTS

- MHPAEA does NOT require large group health plans to cover MH/SUD benefits; instead, to the extent an employer does cover MH/SUD benefits, the covered benefits must be offered in parity to medical/surgical benefits.

STATUS OF ENFORCEMENT ACTIVITIES

- Respecting 2022 enforcement activities, EBSA issued 182 letters to plans requesting comparative analyses over 450 NQTLs across 102 investigations and CMS issued 26 letters to issuers in states where CMS has direct enforcement authority over MHPAEA requesting comparative analyses for 44 NQTLs from 24 plans and issuers. To date, none of the comparative analyses received by the DOL have contained sufficient information to warrant satisfactory performance.

WRITTEN COMPARATIVE ANALYSIS REQUIRED AS OF FEBRUARY 10, 2021

- The CAA requires that group health plans offering group health insurance coverage for both M/S and MH/SUD benefits and for which NQTLs are imposed upon MH/SUD benefits, must perform and document comparative analyses of the design and application of their NQTLs.

https://www.bing.com/search?q=mhpaea+2023+report+to+congress&cvid=6b6846acb01142c98ac20aec8f00d74f&aqs=edge..69i57j0l8j69i11004.9102j0j9&FORM=ANAB01&PC=U531&ntref=1

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Summary of MHPAEA Compliance Readiness Process

Step:	Employer Activity:
Step 1	Confirm whether the group health plan ("GHP") **is subject to MHPAEA**. If the GHP is subject to MHPAEA, perform the activities detailed in Steps 2 through 6.
Step 2	Remove any **aggregate lifetime** or **annual dollar limits** on MH/SUD benefits.
Step 3	For each **quantitative treatment limitation** ("QTL") (visit, lab procedure, pharmacy refill), and for each **financial requirement** (deductible, copayment, coinsurance, out-of-pocket maximum), confirm whether the limitation is applied to MH/SUD benefits no more restrictively than the predominant QTL or financial requirement as applied to substantially all M/S benefits in the same benefit classification.*
Step 4	Confirm that the processes, strategies, evidentiary standards, and other factors utilized when applying **nonquantitative treatment limitations** (NQTLs) to analyze MH/SUD benefits are comparable to, and applied no more stringently than, the processes, strategies, evidentiary standards, and other factors utilized in applying the limitation to M/S benefits in the same benefit classification (as written and operationally).*
Step 5	Considering MH/SUD benefits provided by the plan, confirm whether the available benefits are provided **in each benefit classification** for which M/S benefits are provided.
Step 6	Ensure **participant disclosures** are performed and that all supporting documentation evidencing performance of required MHPAEA compliance activities is maintained.

In accordance with Section 13001(a) of the 21st Century Cures Act, the Department of Labor (DOL) has made materials publicly available to improve compliance with MHPAEA. Information included in this document is based on information provided by the DOL. The DOL will update its self-compliance tool biennially to provide additional guidance on MHPAEA's requirements, as appropriate, and can be found at https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/laws/mental-health-parity/self-compliance-tool.pdf.

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Use of Prohibited Quantitative Treatment Limitations

Prohibited QTL	BH Combined	MH Only	SUD Only
Inpatient and Intermediate Treatment Day Limitations	42%/2% (pre- and –post parity)	30%/1% (pre- and –post parity)	26%/<1% (pre- and –post parity)
Inpatient or Intermediate Day Lifetime Limitations	4%/<1% (pre- and –post parity)	1%/<1% (pre- and –post parity)	5%/<1% (pre- and –post parity)
Inpatient or intermediate admissions, lifetime	No Data	No Data	4%/<1% (pre- and –post parity)
Inpatient or Intermediate Days per Admission	30%/<1% (pre- and –post parity)	28%/<1% (pre- and –post parity)	No Data
Outpatient Visits Annual	53%/<0.001% (pre- and –post parity)	23%/<0.001% (pre- and –post parity)	18%/0.001% (pre- and –post parity)
Outpatient Visits Lifetime	50%/<0.001% (pre- and –post parity)	2%/0.096% (pre- and –post parity)	96%/<0.001% (pre- and –post parity)

See: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5411313/

Understanding QTL's After MHPAEA:

For plans with INN/OON benefits, the most common pre-parity inpatient/intermediate limits were combined annual day-limits, with a median of 30 days.

The most common outpatient limit was a combined INN/OON, BH limit, with a median of 45 visits.

Almost all limits disappeared during 2010, the year of transition to parity.

By 2011, virtually all QTLs had disappeared from the plans there were audited.

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DOL's 2023 Proposed Rulemaking

➢ **Proposed Rule**:

1) Creates three new requirements for NQTLs;
2) Requires "meaningful benefits" in each classification (expansion of 2013 Rule);
3) Reorganizes and expands CAA 2021 NQTL comparative analysis requirements;
4) Provides detail on DOL action for inadequate NQTL comparative analysis;
5) Confers ERISA 104(b)(4) status on NQTL comparative analysis;
6) Sunsets opt-out for state & local governmental plans.

https://www.federalregister.gov/documents/2023/08/03/2023-15945/requirements-related-to-the-mental-health-parity-and-addiction-equity-act

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DOL's 2023 Proposed Rulemaking

➢ Proposed Rule Overview – Three Basic Requirements:

1) ***"No more restrictive"***

An NQTL that applies to MH/SUD benefits can be no more restrictive than the predominant NQTL that applies to substantially all (2/3) Med/Surg benefits within the same MHPAEA benefit classification. "Predominant" means "most common or frequent" rather than more than one-half.

2) ***Design & application***

The processes, strategies, evidentiary standards, or other factors used in designing and applying the NQTL to MH/SUD benefits must be comparable to, and applied no more stringently than, those used in designing and applying the NQTL to Med/Surg benefits within the same classification.

3) ***Outcomes Data***

Collect and evaluate relevant data in a manner reasonably designed to assess the impact of NQTLs on access to MH/SUD benefits and Med/Surg benefits. A "material difference" in outcomes represents a "strong indicator" of a NQTL violation generally and establishes an *actual* violation for network composition specifically.

https://www.federalregister.gov/documents/2023/08/03/2023-15945/requirements-related-to-the-mental-health-parity-and-addiction-equity-act

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DOL's 2023 Proposed Rulemaking – Network Adequacy

➢ Outcomes Data:

- **In designing and applying a NQTL, the Proposed Rule requires plans to:**
  - ✓ Collect and evaluate relevant data to assess impact of NQTL on MH/SUD compared to Med/Surg; and,
  - ✓ Consider the impact as part of analysis of whether the NQTL, in operation, complies with "substantially all/predominant" test and the "comparable to/no more stringently than" rule.
- ***All NQTLs.*** **"Relevant data" includes:**
  - ✓ Number/percentage of claims denials; and,
  - ✓ Data required by state law or private accreditation standards.
- ***Network Composition NQTLs.*** **Additional data collection includes:**
  - ✓ In-network and out-of-network utilization rates;
  - ✓ Network adequacy metrics (including time/distance data, and data on providers accepting new patients); and,
  - ✓ Provider reimbursement rates (including as compared to billed charges).

https://www.federalregister.gov/documents/2023/08/03/2023-15945/requirements-related-to-the-mental-health-parity-and-addiction-equity-act

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Legal Update IV:

HIPAA Related Enforcement and New Regulatory Interpretations

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An Overview of the Purposes for HIPAA Privacy & Security Compliance Assuredness

The Purposes of HIPAA:

PHI PROTECTIONS

- Affirming an employer with a self-funded medical plan will not release information to anyone outside the plan (other than the employee) without the employee's permission, unless otherwise permitted by law.

LIMITING EMPLOYMENT DISCRIMINATION

- Affirming an employer with a self-funded medical plan will not use information about an employee related to the medical plan to make employment-related decisions affecting the employee.

TRACKING ACCOUNTABLE DISCLOSURES

- Preserving a paper trail and a system of checks & balance relative to who has access to, and who has accessed, the medical information of any person covered by the medical plan.

DOCUMENTING COMPLIANCE BY THIRD PARTIES

- Documenting satisfactory assurances from insurance carriers, HMOs, managed care organizations, TPAs, and other vendors and third-party service advisors that they will adhere to the requirements of HIPAA's Privacy & Security Rules.

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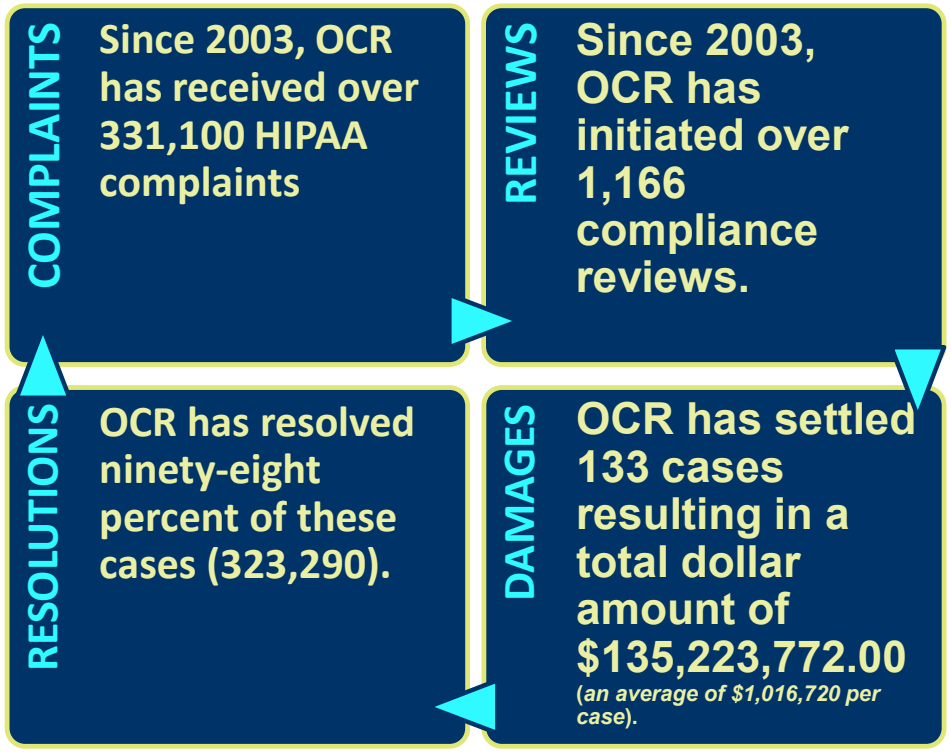
HIPAA Enforcement Aggressively Continues

HIPAA Related Enforcement:

- HIPAA resolution agreements (often requiring changes in privacy practices and extensive corrective actions by HIPAA covered entities and their business associates) are posted online for the public and they are generally not redacted.
- Corrective actions obtained by OCR from these entities have resulted in change that is systemic and that affects all the individuals they serve.
- OCR has successfully enforced the HIPAA Rules by applying corrective measures in all cases where an investigation indicates noncompliance by the covered entity or their business associate.



https://www.bing.com/search?q=hipaa+enforcement&cvid=f6c5a31890d24c88a76a18db8c201f41&aqs=edge.1.69i57j0l8j1001i64i1010l4j69i11004.6373j0j4&FORM=ANAB01&PC=U531

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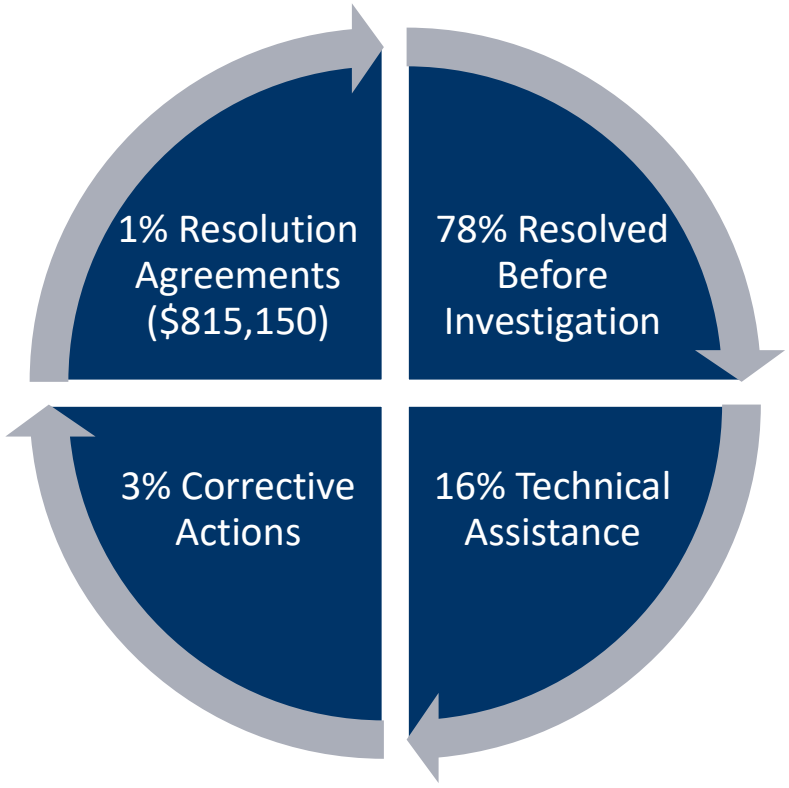
HIPAA Enforcement Resolution Breakdown

→ **OCR received 34,077 new complaints alleging violations of the HIPAA Rules and the HITECH Act, representing an increase of 25% from the number of complaints received in calendar year 2020.**



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New HIPAA-Related Interpretations & Rules

Federal Trade Commission's ("FTC's) Breach Notification Rule

- The HBN Rule requires vendors of personal health records ("PHRs") and related entities that are not covered by the Health Insurance Portability and Accountability Act ("HIPAA") to notify individuals, the FTC, and, in some cases, the media of a breach of unsecured personally identifiable health data.

HIPAA Privacy Rule and Reproductive Health Care Guidance from OCR

- On April 12, 2023, OCR issued a Notice of Proposed Rulemaking (NPRM) to strengthen the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule protections by prohibiting the use or disclosure of protected health information (PHI) to identify, investigate, prosecute, or sue patients, providers and others involved in the provision of legal reproductive health care, including abortion.

HHS & FTC Guidance on Apps & Tracking Technologies

- Regulated entities must configure any user-authenticated webpages that include tracking technologies to allow such technologies to **only** use and disclose PHI in compliance with the HIPAA Privacy Rule and must ensure that the electronic protected health information (ePHI) collected through its website is protected and secured in accordance with the HIPAA Security Rule.

Proliferation of State and Local Privacy Laws

- HIPAA is not the only law that impacts the disclosure of health information. In some instances, a more protective law may require an individual's permission to disclose health information where HIPAA would permit the information to be disclosed without the individual's authorization. State and local laws also apply to health care information stored about patients. HIPAA does not override State law provisions that are at least as protective as HIPAA.

Department of Labor ("DOL") Cybersecurity Guidance

- The U.S. Department of Labor has announced new guidance for plan sponsors, plan fiduciaries, record keepers and plan participants on best practices for maintaining cybersecurity, including tips on how to protect the retirement benefits of America's workers.

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State-level Privacy Law Trackers (September, 2023)

STATE	LEGISLATIVE PROCESS	STATUTE/BILL (HYPERLINKS)	COMMON NAME
LAWS SIGNED (TO DATE)			
California		CCPA	California Consumer Privacy Act (2018; effective Jan. 1, 2020)
		Proposition 24	California Privacy Rights Act (2020; fully operative Jan. 1, 2023)
Colorado		SB 190	Colorado Privacy Act (2021; effective July 1, 2023)
Connecticut		SB 6	Connecticut Data Privacy Act (2022; effective July 1, 2023)
Indiana		SB 5	Indiana Consumer Data Protection Act (2023; effective Jan. 1, 2026)
Iowa		SF 262	Iowa Consumer Data Protection Act (2023; effective Jan. 1, 2025)
Montana		SB 384	Montana Consumer Data Privacy Act (2023, effective Oct. 1, 2024)
Oregon		SB 619	Oregon Consumer Privacy Act (2023; effective July 1, 2024)
Tennessee		HB 1181	Tennessee Information Protection Act (2023; effective July 1, 2025)
Texas		HB 4	Texas Data Privacy and Security Act (2023; effective July 1, 2024)
Utah		SB 227	Utah Consumer Privacy Act (2022; effective Dec. 31, 2023)
Virginia		SB 1392	Virginia Consumer Data Protection Act (2021; effective Jan. 1, 2023)

			ACTIVE BILLS
Delaware		HB 154	Delaware Personal Data Privacy Act
Massachusetts		HD 2281	Massachusetts Data Privacy Protection Act (C)
		SD 745	
		HD 3263	Massachusetts Information Privacy and Security Act (C)
		SD 1971	
		HD 3245	Internet Bill of Rights
New Jersey		SB 3714	New Jersey Disclosure and Accountability Transparency Act (C)
		A 505	
North Carolina		SB 525	North Carolina Consumer Privacy Act
Pennsylvania		HB 1201	Consumer Data Privacy Act
		HB 708	Consumer Data Protection Act

State_Comp_Privacy_Law_Chart.pdf (iapp.org)

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Implementation of HIPAA Compliance Requirements

Understanding HIPAA Compliance Implementation:

- There are six implementation steps required for HIPAA administrative simplification compliance assuredness, which should be completed in order, as detailed int the following graphic.
- After completion of Step 6 (risk management), the covered entity should return to Step 2 (policies and procedures) and perform the process again, and as needed throughout the covered entity's life cycle.

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HIPAA Compliance Assuredness with the 4 A's

The "4 As" Methodology for HIPAA Compliance:

- **While all group health plans have some HIPAA related obligations, employer sponsored self funded and level funded group medical, dental and vision plans have the highest HIPAA compliance bars.**
- **While there are countless HIPAA compliance assuredness methodologies, the "Four A's" methodology is rememberable and easily administered.**

Adoptions
- Policies & procedures
- Business associate agreements
- Participant forms
- ERISA documents

Assessments
- Training for Officers
- Training for designated individuals
- Identification of privacy contacts

Appointments
- Privacy officer
- Security officer
- Designated individuals
- Privacy contacts

Auditing
- Risk assessment
- Risk management
- Post-breach risk analysis
- Self-help options

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Legal Update V:

Access to Abortion Related Treatments and Services

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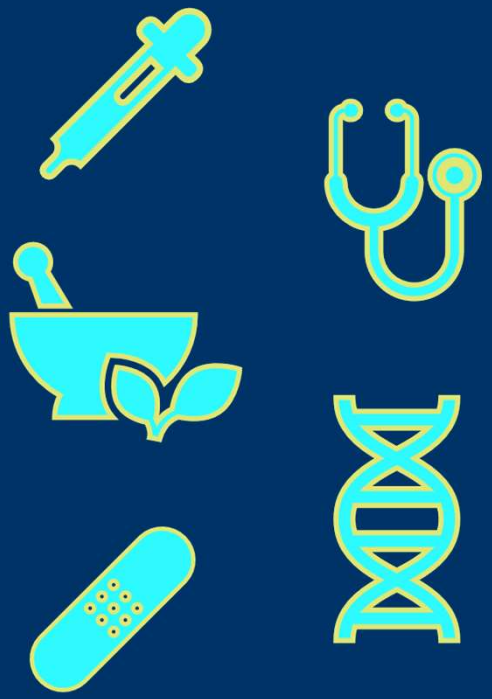
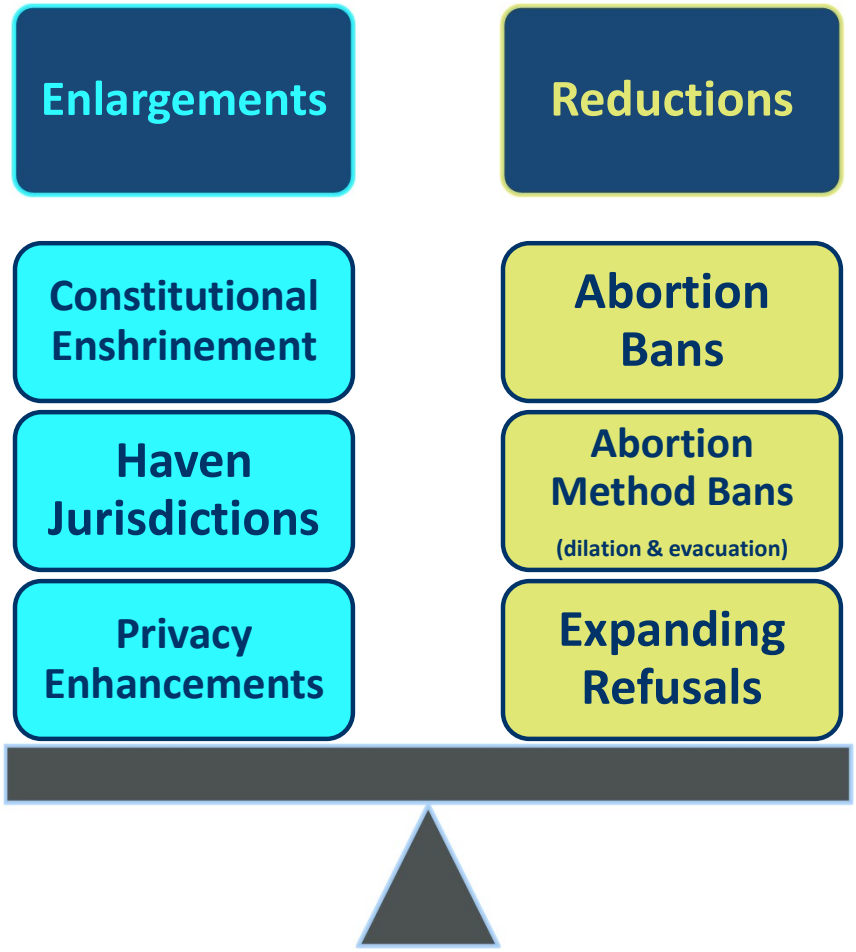
Understanding *Dobbs v. Jackson* and *Roe v. Wade*



- On June 24, 2022, the U.S. Supreme Court ("USSC") ruled in the case of ***Dobbs v. Jackson Women's Health Organization***, that there is no constitutional right to an abortion and that the authority to regulate abortion now rests with the states.
  - ***Dobbs*** involved Mississippi's "Gestational Age Act", which, in general, prohibited abortions after 15 weeks' gestation.
  - The District Court and the U.S. Court of Appeals for the Fifth Circuit ruled against Mississippi based on established precedent.
  - On May 2, 2022, a draft opinion from the USSC was leaked to the press, alerting to a potential overturn of *Roe v. Wade* ("*Roe*").
  - The USSC, in a 6 to 3 decision, ruled in favor of Mississippi.
  - Since ***Dobbs*** was handed down, there has been a flurry of state-based activity seek to both enlarge and reduce access to abortion related treatments and services.

https://www.law.cornell.edu/wex/dobbs_v._jackson_women%27s_health_organization_%282022%29

Balancing Abortion Related Rights & Restrictions



Post-*Dobbs*, state-level legislatures have proposed and passed a bipolar range of new rights and restrictions related to abortion access, creating a patchwork of legal obligations for individuals and employer plan sponsors:

Liberal leaning states have looked to expand medical and privacy protections related to abortion related treatments and services.

While Conservative leaning states have increasingly looked to ban or limit access to abortion related treatments and services.

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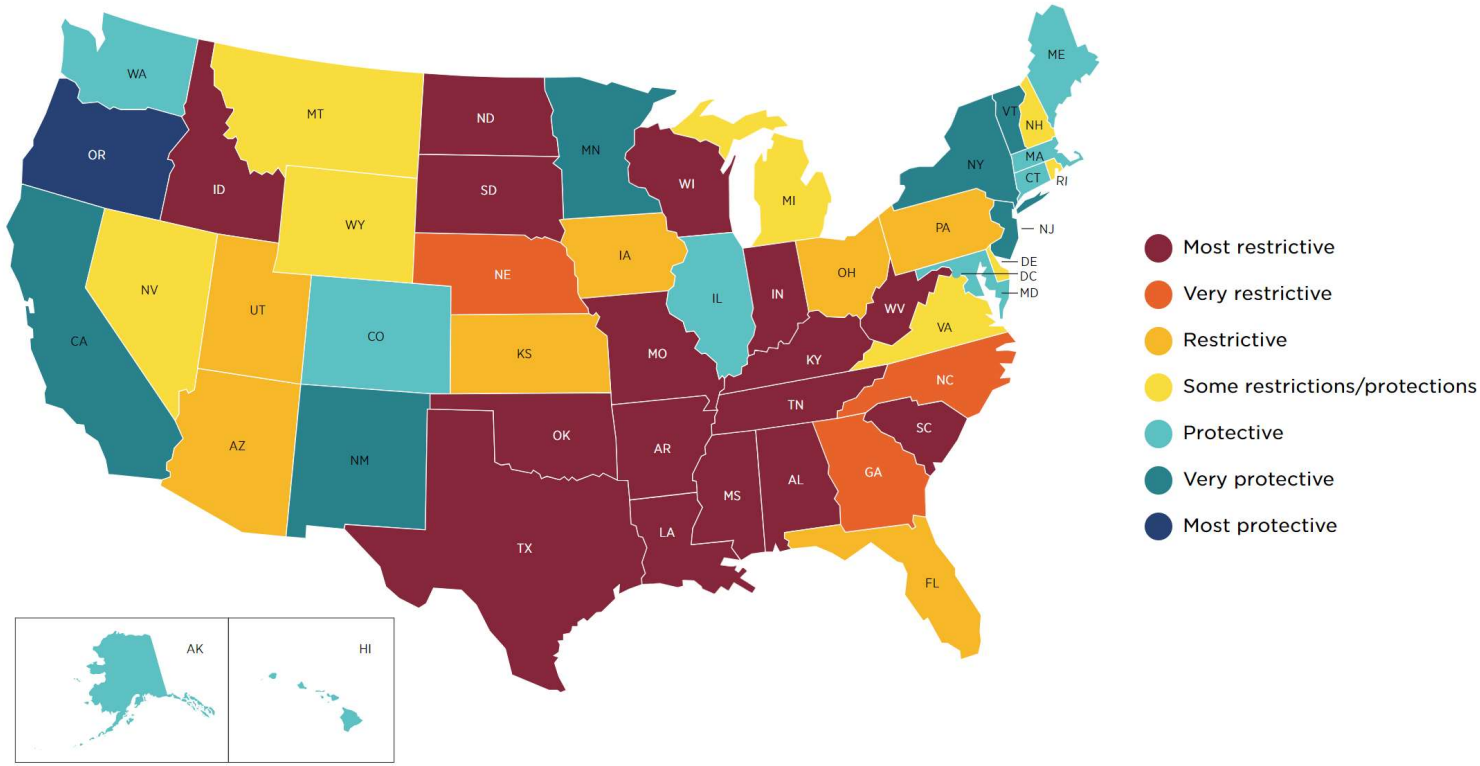
Abortion Access and Restrictions (September, 2023)

Mapping Abortion Access & Restrictions

- 26 states have enacted abortion access restrictions or other barriers;
- 15 states have enacted protective abortion access rights or enlargements;
- Only 8 states have adopted a relative balance of access rights versus access restrictions.



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Inventory of Current State-level Abortion Action

Types of Abortion Related Rights & Restrictions Passed By State Legislatures	
[-] Requires Surgical Abortion Be Performed by a Physician (*31 states and 3 territories*)	**[+] Permits Certain Non-Physician Advanced Practitioners to Perform Certain Abortion Services** (*e.g.*, nurse practitioners and physician assistants) (*14 states and DC*)
[-] Requires Abortion Medication Be Delivered in Person (*e.g.*, prohibiting mail delivery for abortion medication or requiring medication to be taken in a doctor's office) (*22 states*)	**[+] Prohibits Certain Entities from Cooperating with Out-of-State Investigations for Abortions** (*e.g.*, providing information about an abortion taking place in a state where the procedure is legal to a state where it is not) (*10 states and DC*)
[-] Enforces a Mandatory Waiting Period Between Pre-Abortion Counseling and an Abortion (*i.e.*, ranging between 18 and 72 hours) (*30 states and 1 territory*)	**[+] Protects Abortion in State Statute** (*e.g.*, protecting abortion as a right) (*13 states and DC*)
[-] Prohibits Telemedicine for Any Abortion Services (*e.g.*, consultations before a surgical abortion) (*18 states*)	**[+] Requires Private Insurance Coverage for Abortion Services** (*e.g.*, requiring insurance coverage for abortion when the plan covers maternity care) (*7 states*)
[-] Limits or Prohibits Insurance Coverage for Abortion (*e.g.*, limitations to coverage unless for rape, incest or life endangerment, or prohibitions for any abortion coverage) (*23 states*)	**[+] Protects Providers from Certain Penalties** (*e.g.*, revoking licensure or criminal investigations) (*10 states and DC*)

https://www.ncsl.org/health/state-abortion-laws-protections-and-restrictions

Legal Update VI:

Individual Rights Related to Gender Expression*

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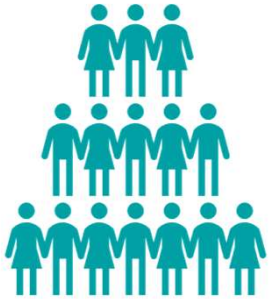
Transgender Demographics in the United States



Over 1.6 million adults (ages 18 and older) and youth (ages 13 to 17) identify as transgender in the United States.

Among U.S. adults, 0.5% (about 1.3 million adults) identify as transgender.

Among youth ages 13 to 17 in the U.S., 1.4% (about 300,000 youth) identify as transgender.

OF THE 1.3 MILLION ADULTS WHO IDENTIFY AS TRANSGENDER:

38.5% (515,200) are transgender women.

35.9% (480,000) are transgender men.

25.6% (341,800) reported they are gender nonconforming.

See: Herman, Jody L. and Andrew R. Flores, *How Many Adults and Youth Identify as Transgender in the United States?* (Jun. 2022), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Medicaid-Gender-Care-Dec-2022.pdf.

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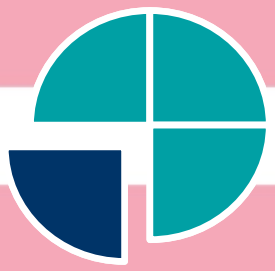
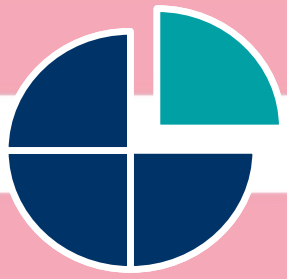
Gender Identity Related Workplace Discrimination



More than three-fourths of all transgender people have experienced some form of workplace discrimination.*

*Experienced at even higher rates by transgender people of color.



More than one in four transgender people have lost a job due to bias related to gender identity and expression.

Common Workplace Occurrences for Transgender People

- Verbal Harassment
- Refusal to Employ or Hire
- Termination of Employment
- Demotion or Lay-offs
- Physical Violence
- Sexual Violence
- Reduced Pay
- Lack of Advancement
- Reduced Incentive Compensation
- Workplace Leave Restrictions
- Benefit Claims Denial
- Barriers to Restroom Access
- Wage Theft
- Benefit Enrollment Obstacles
- Identity Verification Issues
- Misinformation and Generalized Discrimination

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EEOC's LGBTQ+ Related Enforcement Activities

FY 2022 = EEOC clears nearly 2,000 complaints, realizing nearly $9 million in discrimination settlements.

LGBTQ+ EEOC Enforcement Statistics	FY 2013	FY 2022
Total Resolutions		
Receipts	808	2,229
Resolutions	337	1,935
Resolutions By Type		
Settlements	31	185
	9.2%	9.6%
Withdrawals w/Benefits	17	163
	5.0%	8.4%
Administrative Closures	69	406
	20.5%	21.0%
No Reasonable Cause	216	1,128
	64.1%	58.3%
Reasonable Cause	4	53
	1.2%	2.7%
Successful Conciliations	1	19
	0.3%	1.0
Unsuccessful Conciliations	3	34
	0.9%	1.8%
Merit Resolutions	52	401
	15.4%	20.7%
Monetary Benefits (Millions)	$0.9	$8.7

Enforcement of LGBTQ+ Worker Rights Related to Title VII Sex Discrimination:

- For its part, the EEOC has been increasingly aggressive regarding investigation and settlement of workplace discrimination complaints from LGBTQ+ employees.
- In FY 2022, the EEOC resolved an astonishing 1,935 Title VII LGBTQ+ discrimination complaints, up from a total of 337 agency resolutions respecting FY 2013.
- Via its settlement, conciliation, and merit resolution activities, the EEOC realized $8,700,00 for Title VII LGBTQ+ related sex discrimination offenses in 2022, a marked increase over the $900,000 collected by the agency in 2013.

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The Supreme Court Weighs In

Gender Identity and Sexuality-based Discrimination are Discrimination Based Sex and Violate Title VII

- On June 12, 2020, HHS re-released final Section 1557 regulations (June 12, 2020) removing all definitions related to "sex" and affirming the Administration's insistence on **defining "sex" as merely biological sex**.
- Three days later, **the Supreme Court rejected this interpretation of the meaning of "sex" in federal civil rights statutes, *finding that the plain meaning of "because of sex," as used in Title VII, prohibits an employer from discriminating against an individual for being homosexual or transgender*.** *Bostock v. Clayton County, -- S.Ct.--, 2020 WL 3146686 (June 15, 2020).*
- The Court closely analyzed and examined the use of the term "sex" in Title VII cases regarding employment discrimination, concluding that treating a person differently because of a characteristic that is necessarily related to a person's sex **qualifies as discrimination based on sex and is prohibited under Title VII**.

Implications of the Supreme Court's Ruling

Time to Review Health Plans to Eliminate Discrimination Based on the Revised Definition of "Sex"

The Supreme Court's decision in *Bostock* arguably provides clearer guidance for sponsors of employee health benefit plans on prohibitions on sex discrimination than the ACA ever did.

Title VII prohibits employment discrimination broadly, and the Supreme Court just clarified that the prohibition extends to sexual orientation, gender identity, and any characteristic intertwined with a person's sex, including pregnancy.

Sponsors of employee health benefit plans, particularly self-funded ERISA plans not subject to state insurance laws and exempt from certain ACA requirements, should consider a review of their health plan benefit designs to ensure that benefit offerings do not discriminate on the basis of gender identity, sexual orientation, or any characteristic tied to a participant's sex.

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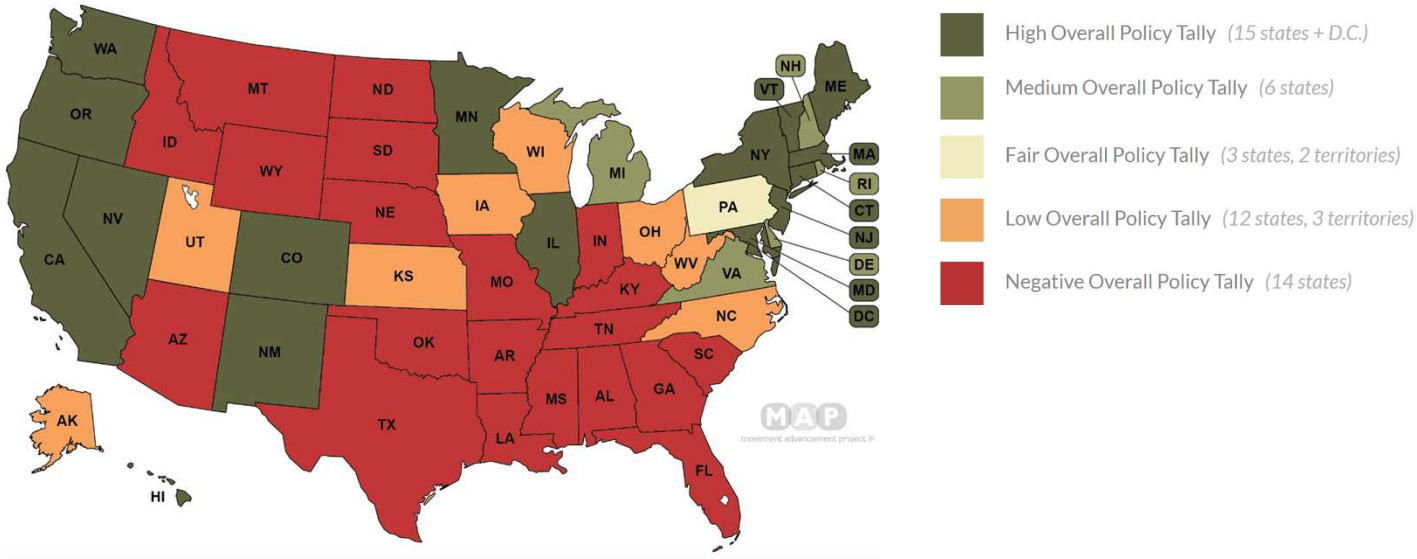
Understanding State Laws Related to Gender Identity

15 States and DC have high levels of inclusion/equality:
(**High Equality States**) Washington; Oregon; California; Nevada, Colorado, New Mexico, Minnesota, Illinois, New York, Vermont, Maine, Massachusetts, Connecticut, New Jersey, Maryland, and the District of Columbia.



18 States have negative equality laws on the books. Negative equality laws are either religious non-discrimination laws or state sovereignty laws.
(**Negative Equality States)** North Dakota, South Dakota, Nebraska, Idaho, Wyoming, Oklahoma, Texas, Arizona, Missouri, Arkansas, Louisiana, Mississippi, Alabama, Georgia, Indiana, Florida, South Carolina, and Tennessee.

See: Movement Advancement Project at https://www.lgbtmap.org/equality-maps.

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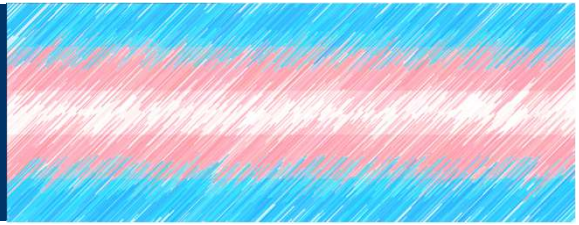
Understanding State Laws Related to Gender Identity

State-level laws related to non-discrimination on the basis of gender identity come in two general varieties:



Gender identity inclusive laws tend to focus on non-discrimination generally, including transgender individuals in their protections.

Gender-identity exclusive laws tend to focus on use of bathrooms and public accommodations, generally excluding transgender individuals from protection.

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Transphobic Employer Policies & Actions

Common Types of Transphobic Employer Actions:

1. Silence on Restroom Use Policies
2. No Enforcement of Nondiscrimination Policies
3. Bans on Employees Using Certain Restrooms
4. Dress Code Enforcement
5. Failure to Enforce Appropriate Pronoun Usage
6. Lapse of DEI Funding or Removal of DEI Policies
7. Failure to Apply Sanctions to Non-conforming Workforce
8. Silence on LGBTQ+ Policies

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Trans Positive Employer Actions & Policies

Common Types of Trans Positive Employer Actions and Policies:

1. Inclusive Restroom Use Policies
2. General Nondiscrimination Policies
3. Anti-bullying Policies
4. Pronoun Usage Policy Requirements
5. LGBTQ Inclusive Policy Statements
6. Employment Nondiscrimination Statutes
7. Identifying Document Exceptions
8. Unisex and Gender-Neutral Restroom Availability

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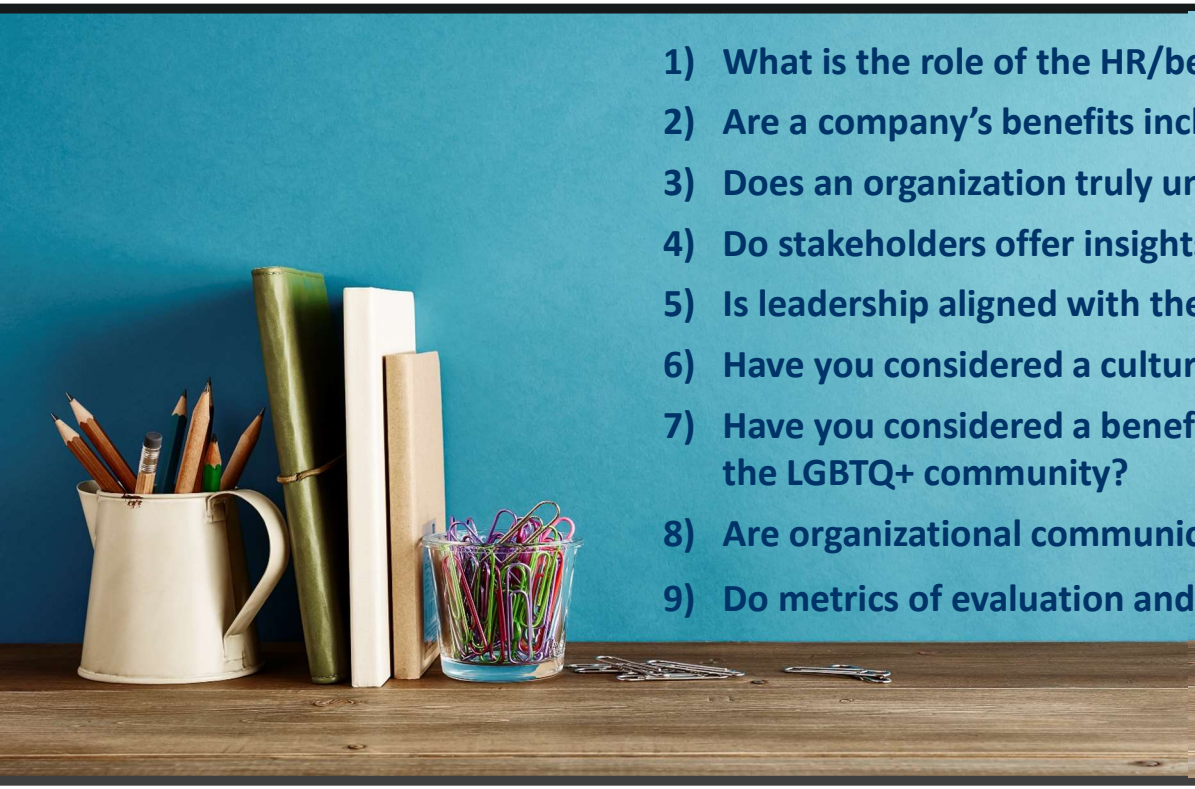
Quick List of Employer Considerations



1) What is the role of the HR/benefit consultant in trans change management?
2) Are a company's benefits inclusive and supporting of the LGBTQ+ community?
3) Does an organization truly understand "culture"?
4) Do stakeholders offer insights where appropriate?
5) Is leadership aligned with the company's culture?
6) Have you considered a culture assessment?
7) Have you considered a benefit assessment to ensure benefits are supportive of the LGBTQ+ community?
8) Are organizational communications supportive?
9) Do metrics of evaluation and performance support LGBTQ+ integration?

Legal Update VII:

Proposed Regulation for STLDI and Fixed Indemnity Plans*

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Proposed Rule for STLDI & Fixed Indemnity Coverage

Proposed Rule for Short-term Limited Duration Insurance & Fixed Indemnity Coverage:

- Core purpose of proposed rule is to reduce confusing STLDI and fixed indemnity coverage with ACA-compliant coverage.
- Proposed rule published by federal regulators on July 12, 2023 would:
  - Cut back the current 36-month max renewal limit on STLDI to three months with one month extension (also includes an anti-stacking provision);
  - Redefine "excepted benefits" status for hospital indemnity and other fixed indemnity supplement benefits;
  - Impose new notice requirements; and,
  - Change the tax treatment of all fixed indemnity health policies, including specified disease coverage.

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Proposed Rule for STLDI & Fixed Indemnity Coverage

What if New Reg is Finalized as is . . .

- Limits on the available types of fixed indemnity coverage;
  All pre-tax health indemnity coverage create a taxable benefit;
- Elimination of non-coordination rules result in prohibition against:
  - ✓ Mini-MEC Coverage;
  - ✓ Major-medical look-alike plans;
  - ✓ Double dip wellness programs; and,
  - ✓ HDHP indemnity combinations.
- Requests comments on the treatment of specified disease coverage; and,
- Requests comments on impact of, and intersection with, level funded premium (LFP) plans.

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Legal Update VIII:

Pharmacy Benefit Manager Regulation

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Regulation of Pharmacy Benefit Managers

What's the Problem with PBM's?

- Pharmacy benefit managers were created as middlemen to reduce administrative costs for insurers, validate a patient's eligibility, administer plan benefits, and negotiate costs between pharmacies and health plans.
- Over time, PBMs have been allowed to operate virtually unchecked as they consolidated to where three companies now control 80% of the prescription drug market.
- Vertical integration and a lack of transparency have led many states to enact PBM laws to address egregious business practices and level the playing field for pharmacies and patients.
- PBMs found ways to circumvent much of this early legislation, prompting states to revisit laws and add greater oversight and enforcement through state Departments of Insurance.

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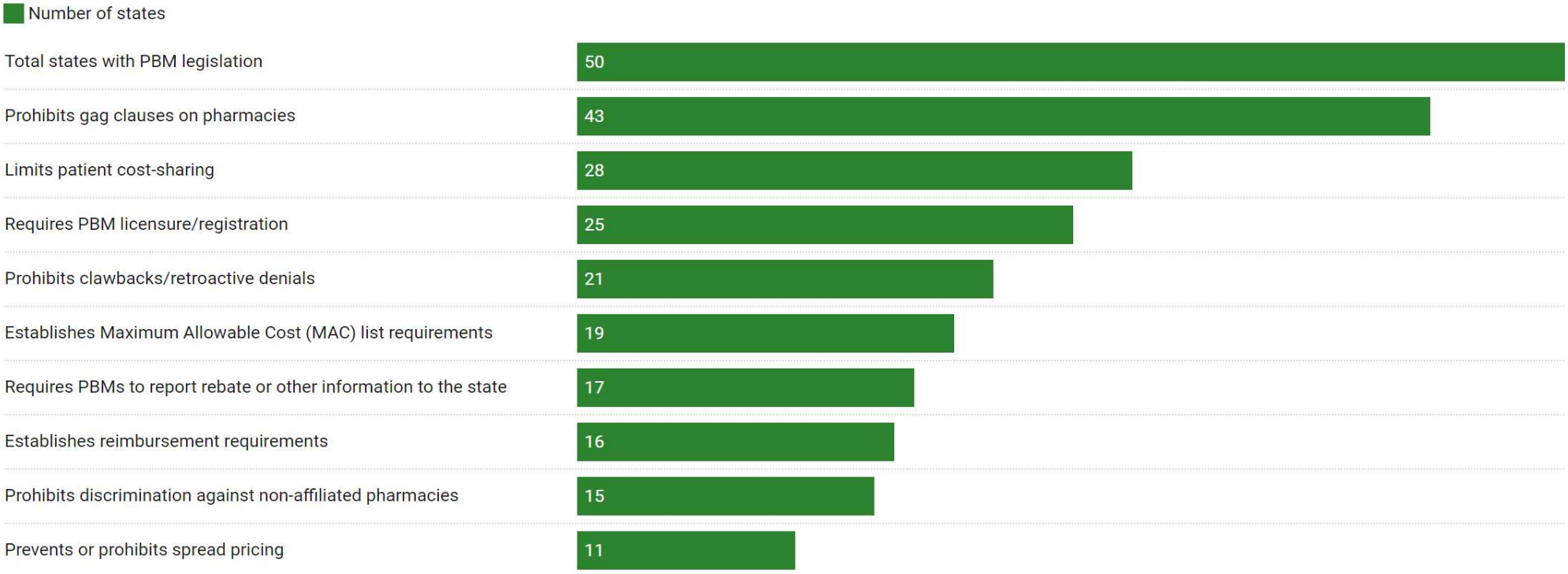
State-level Efforts to Reign In PBMs

Number of States with Common Provisions in State PBM Legislation: 2017–2022



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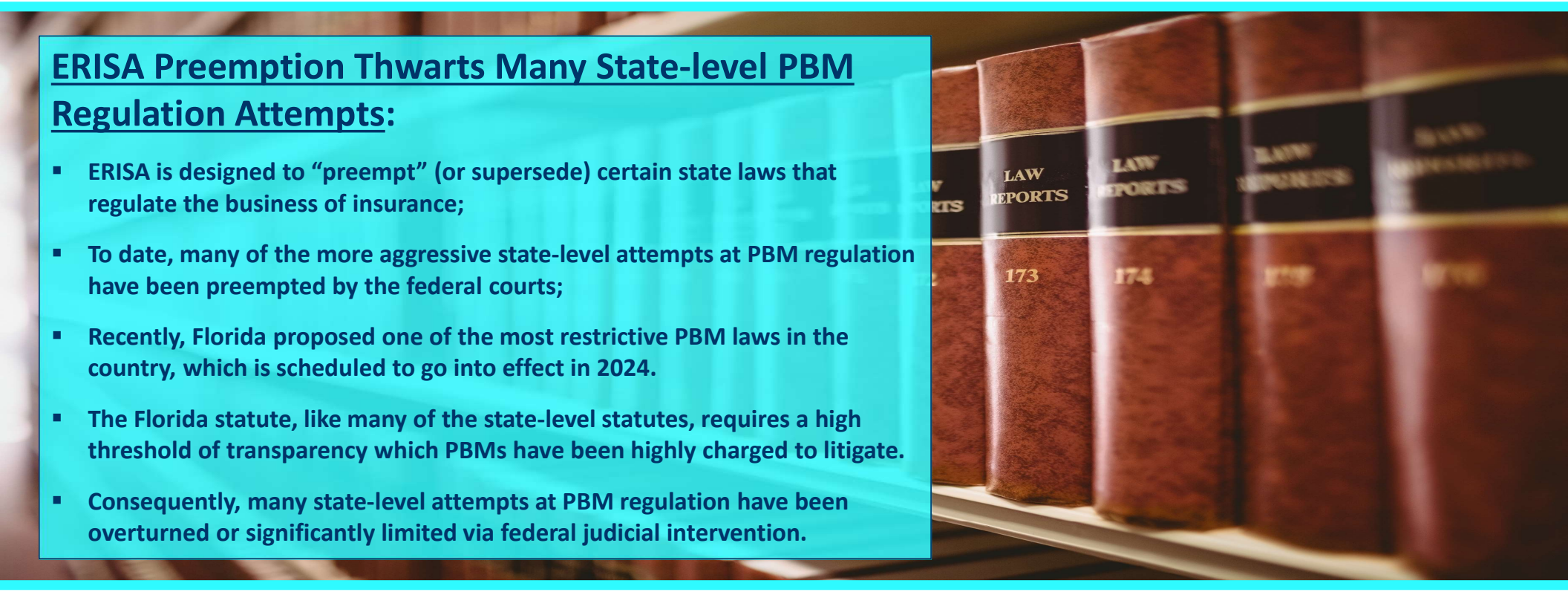
ERISA Preemption Limits Effectiveness of State Regulation



ERISA Preemption Thwarts Many State-level PBM Regulation Attempts:

- ERISA is designed to "preempt" (or supersede) certain state laws that regulate the business of insurance;
- To date, many of the more aggressive state-level attempts at PBM regulation have been preempted by the federal courts;
- Recently, Florida proposed one of the most restrictive PBM laws in the country, which is scheduled to go into effect in 2024.
- The Florida statute, like many of the state-level statutes, requires a high threshold of transparency which PBMs have been highly charged to litigate.
- Consequently, many state-level attempts at PBM regulation have been overturned or significantly limited via federal judicial intervention.

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Is There a Federal Answer to PBM Regulation?

On 01/26/2023, the Pharmacy Benefit Manager Transparency Act of 2023 was Introduced in the US Senate:

This bill would generally prohibit pharmacy benefit managers (PBMs) from engaging in certain practices when managing the prescription drug benefits under a health insurance plan, including charging the plan a different amount than the PBM reimburses the pharmacy;

The bill would also prohibit PBMs from arbitrarily, unfairly, or deceptively:

(1) clawing back reimbursement payments, or

(2) increasing fees or lowering reimbursements to pharmacies to offset changes to federally funded health plans;

PBMs *would not be* subject to the new prohibitions if they

(1) pass along 100% of any price concession or discount to the health plan, and

(2) disclose specified costs, prices, reimbursements, fees, markups, discounts, and aggregate payments received with respect to their PBM services.

Further, PBMs would be required to annually report to the Federal Trade Commission (FTC) certain information about payments received from health plans and fees charged to pharmacies.

Note: The FTC and state attorneys general are authorized to enforce the provisions of the bill.

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Legal Update IX:

Suits Against Claims Administrators for Breach of ERISA Fiduciary Duty*

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Claims Administrator's ERISA Fiduciary Liability Litigation

Owens & Minor v. Anthem; Kraft Heinz Company v. Aetna

- **Complaints not only focus on claims processing practices that allegedly generate additional income, but they focus on failures to provide access to claims data.**
- ***Owens & Minor* claims that Anthem violated CAA's gag clause prohibition .**

Claims Administrator's ERISA Fiduciary Liability Litigation

Knudsen v. MetLife

- Participants claimed that MetLife failed to properly apply prescription drug rebates to plan participants, which resulted in higher premiums and cost share.
- District Court dismissed by applying *Thole:*
  - Premiums and benefits do not fluctuate based on the plan's profits and losses;
  - Plan participants have no individual right to the general pool of plan assets; and,
  - Therefore, participants did not suffer an injury themselves No allegation that they didn't receive the promised benefits.

Claims Administrator's ERISA Fiduciary Liability Litigation

Winsor v. Sequoia Benefits and Insurance Services

- Participants claimed that administrator breached fiduciary duty by improperly receiving commissions from the insurers that the administrator chose, which resulted in higher costs for the participants.
- District Court dismissed by applying *Thole:*
  - No allegations to support the claim that costs would be lower otherwise (sponsor is free to determine the premiums and cost share);
  - Participants have no beneficial interest that increases or decreases dependent on the management of the funds;
  - Therefore, participants did not suffer an injury; and,
  - No allegations that they didn't receive the promised benefits.

Legal Update X:

Education Assistance Plans & Student Loan Reimbursement

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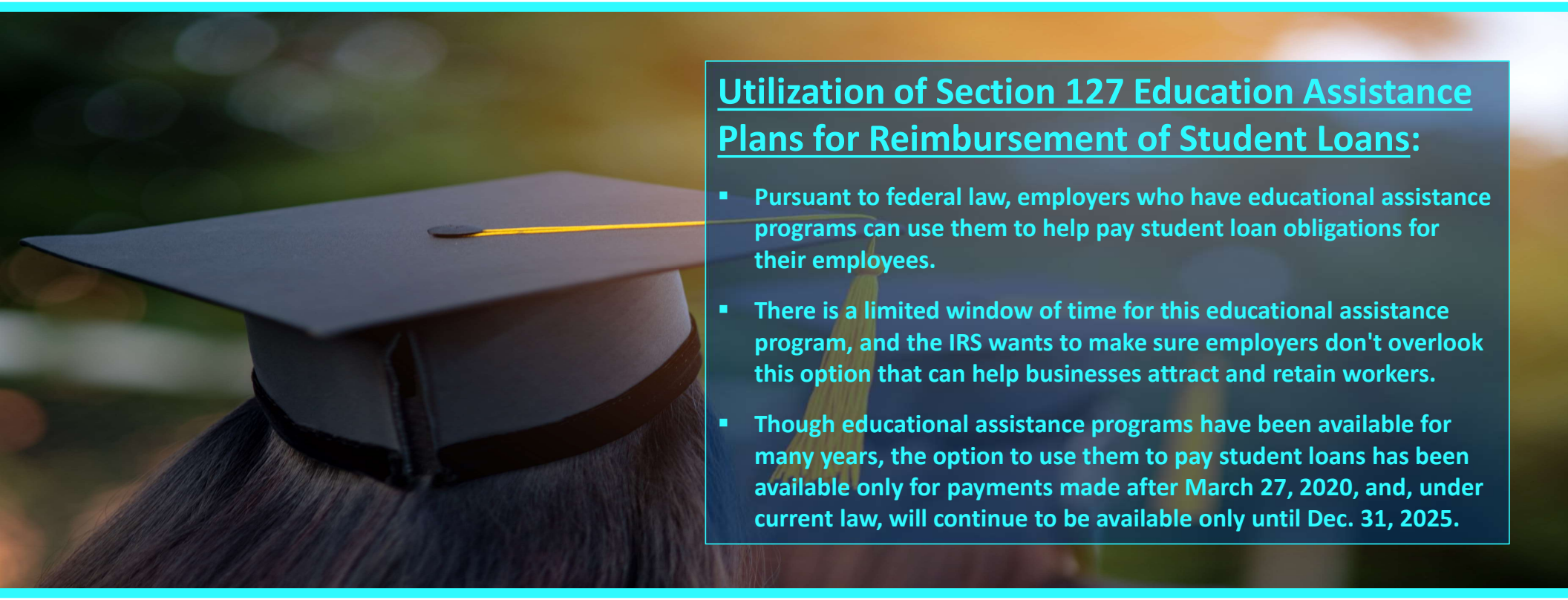
Utilization of Section 127 Plans for Student Loan Repayment



Utilization of Section 127 Education Assistance Plans for Reimbursement of Student Loans:

- Pursuant to federal law, employers who have educational assistance programs can use them to help pay student loan obligations for their employees.
- There is a limited window of time for this educational assistance program, and the IRS wants to make sure employers don't overlook this option that can help businesses attract and retain workers.
- Though educational assistance programs have been available for many years, the option to use them to pay student loans has been available only for payments made after March 27, 2020, and, under current law, will continue to be available only until Dec. 31, 2025.

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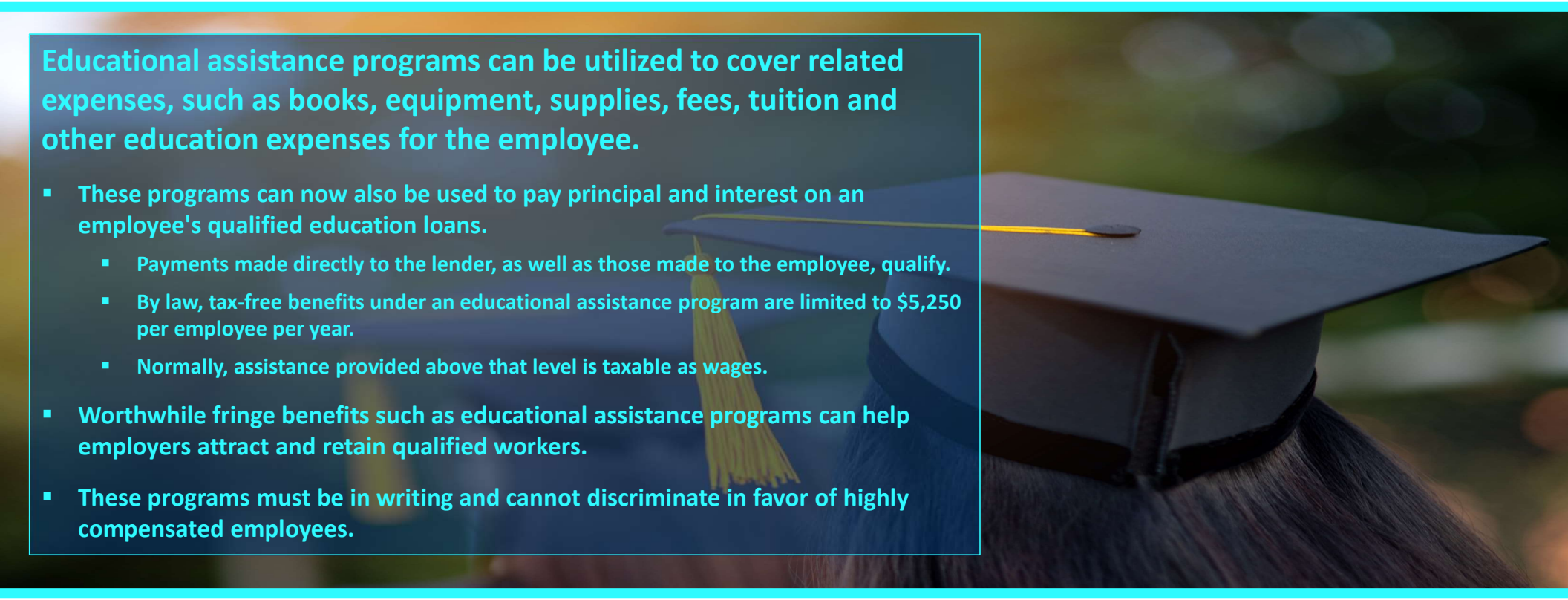
Utilization of Section 127 Plans for Student Loan Repayment



Educational assistance programs can be utilized to cover related expenses, such as books, equipment, supplies, fees, tuition and other education expenses for the employee.

- These programs can now also be used to pay principal and interest on an employee's qualified education loans.
  - Payments made directly to the lender, as well as those made to the employee, qualify.
  - By law, tax-free benefits under an educational assistance program are limited to $5,250 per employee per year.
  - Normally, assistance provided above that level is taxable as wages.
- Worthwhile fringe benefits such as educational assistance programs can help employers attract and retain qualified workers.
- These programs must be in writing and cannot discriminate in favor of highly compensated employees.

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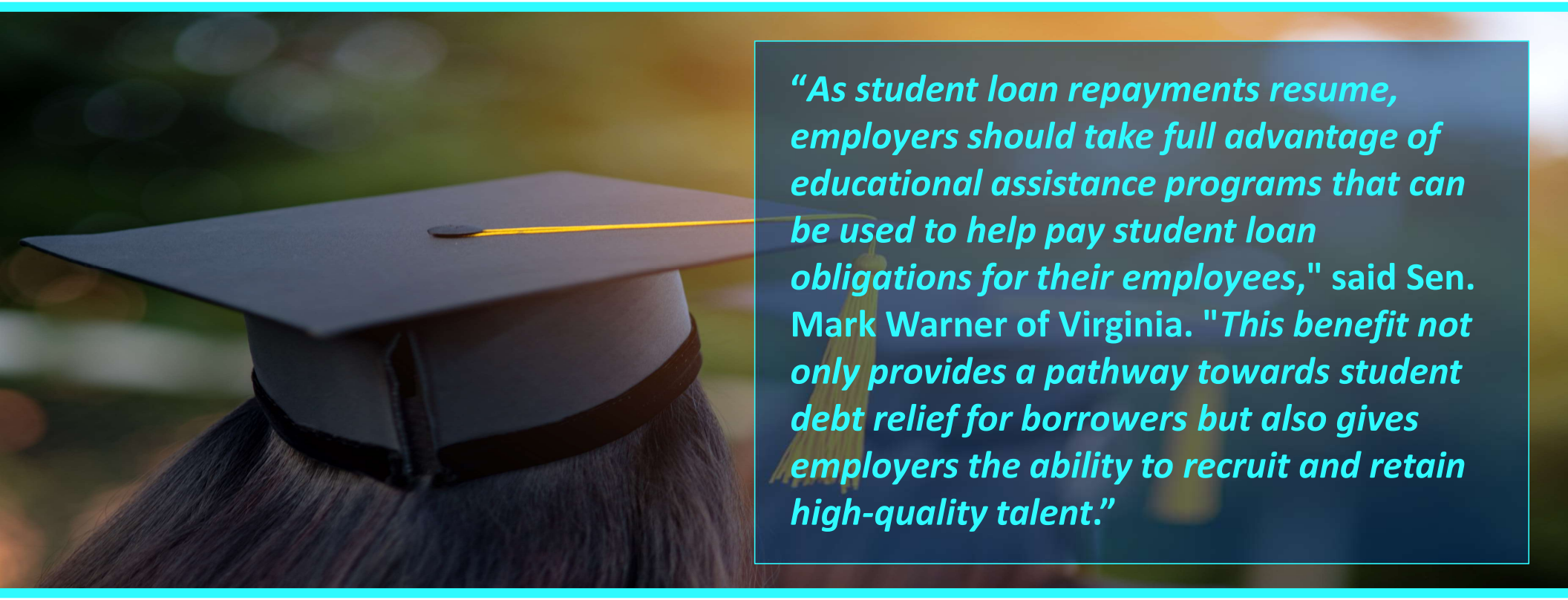
Utilization of Section 127 Plans for Student Loan Repayment



"As student loan repayments resume, employers should take full advantage of educational assistance programs that can be used to help pay student loan obligations for their employees," said Sen. Mark Warner of Virginia. "*This benefit not only provides a pathway towards student debt relief for borrowers but also gives employers the ability to recruit and retain high-quality talent.*"

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– QUESTIONS, COMMENTS & ADDITIONAL INFORMATION –

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