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TODAY'S AGENDA

2023: A LOOK AHEAD – PART 1

Gabe Oberfield – (12:00PM-12:10PM)

- Health and Public Health

Pete Jones – (12:10PM-12:20PM)

- NLRB Update – What is Going on at the Board?

Lou Orbach and Greg Reilly – (12:20PM-12:35PM)

- Class Actions

Maureen Milmoe – (12:35PM-12:45PM)

- Employee Benefits

G. Oberfield – (12:45PM)

- Questions / Wrap Up

Getting Out of Those Woods...

Congress of the United States
Washington, DC 20515

January 19, 2023

The Honorable Kathy Hochul
Governor of New York State
NYS Capitol Building
Albany, NY 12224

Dear Governor Hochul:

We write to you today with deep concern about disastrous staffing shortages that are hampering our state's healthcare system and impeding New Yorkers from accessing quality care. While the shortages have been an ongoing issue, they continue to be exacerbated by New York's draconian COVID-19 vaccine mandate for healthcare workers, which has forced nearly 34,000 healthcare workers out of their jobs.¹ This has resulted in severe financial distress for New York hospitals and increased barriers to care for those in need.

As of December 7, 2022, there were 9,300 job openings for nurses throughout New York.² In one recent survey of New York hospitals,³ 100% reported a shortage of nursing staff, while 49% reported "reducing and/or eliminating services to mitigate staffing challenges." 27% even reported a risk of defaulting on existing loans, which could further impact available patient care. These statistics are striking and certainly should serve as a call-to-action for your administration.

Furthermore, we have heard directly from hospital administrators and healthcare workers about the devastating impacts of the COVID-19 vaccine mandate, including its exacerbation of the staffing shortage. For example, Alternate Level of Care patients, who require long-term care, are crowding our hospitals because long-term care facilities are lacking the staff needed to keep their beds open. Meanwhile, providers are spending exponentially more on staffing costs. This cannot go on any longer.

The evidence is clear: the staffing shortage affecting New York's healthcare sector is a crisis and must be addressed. While long-term solutions must also be considered, it is imperative for your administration to drop its COVID-19 vaccine mandate immediately so that healthcare workers can return to serving their friends, loved ones, and neighbors. Decades of healthcare experience are being left on the sidelines or pushed into other states as a result of the mandate. This is even more noteworthy given that the U.S. Centers for Disease Control Director has publicly stated that the vaccine cannot prevent transmission.⁴

¹ <https://www.fox40.com/story/news/coronavirus/2021/10/14/new-york-health-workers-hot-jobs-drop-vaccine-mandate/3448413062>
² <https://www.kingston.com/news/article/Hospital-staff-shortage-has-reached-a-crisis-1767280.php>
³ <https://www.hony.com/newsroom/press-releases/2022/annual-satisfaction-report-2022-annual-satisfaction-report-2022>
⁴ <https://www.cdc.gov/media/releases/2022/s021622-cdc-director-covid-vaccine-cannot-prevent-transmission-20220216.html>

- **Masking**
 - Expect to see masking requirements generally unenforced or stricken, except in healthcare delivery settings
 - Challenges to these requirements will continue
- **Staffing**
 - Staffing emergency in NYS remains in place – and solutions to the national staffing crisis will be key
- **COVID Sick Leave**
 - Will the policies relax? What will the legislature do?
- **Quarantine / Isolation**
 - We've noted relaxation and NYS alignment with relatively more flexible Federal policy – unlikely to see a return to restrictions
- **Vaccination**
 - New FDA proposal to standardize vaccines on a yearly schedule (depending on age / vulnerability)



The Public Health Burden – Will It Abate?

Sources: New York Times, Associated Press



- **Risks of ‘triple-demic’ remain**
 - Potent mix of seasonal flu, RSV & COVID-19...
 - But...CDC reports that the holidays didn’t result in a flu spike
 - Overall, flu may be abating
 - The most contagious yet Omicron sub-variant, XBB.1.5, is dominating
 - The virulence generally remains diminished among those with previous exposure / vaccination
 - And what about that **Public Health Emergency** at the Federal Level?
 - The PHE has been extended through April 2023
 - There is strong belief there won’t be another
 - The end of the PHE will have a variety of regulatory implications
 - **Telehealth** – continuing relevance (e.g., behavioral health) but signs the sea change / permanence is lesser in other domains

In the Midst of This...

NYS Healthcare Reform Remains in the Spotlight

- Continued NYS negotiation with CMS concerning new funding to drive healthcare redesign
 - Building from the five-year-run of the Delivery System Reform Incentive Payment Program (which concluded in 2020) – with some key differences
 - Focus on health disparities and health equity
 - Bringing partners together across the healthcare continuum
 - Coordinating with community based providers to enhance wraparound approaches
- Signals from the Federal government that NYS's approach is viewed favorably (e.g., public statements by the Secretary of Health and Human Services in November 2022),
 - But...the approval has yet to issue
 - NYS has sought well more than \$13B
 - Funds likely will fall below that amount
 - Approval may be later in 2023 (Spring rather than in the immediate)



New York State Medicaid Redesign Team (MRT) Waiver Amendment

New York Health Equity Reform (NYHER): Making Targeted, Evidence-Based Investments to Address the Health Disparities Exacerbated by the COVID-19 Pandemic

1115 Research and Demonstration Waiver Amendment
#11-W-00114/2



Budget Season...

Sources: Politico and Office of the Governor, New York State Bar Association

- On January 10th Gov. Hochul delivered her State of the State Address
 - Announced sweeping healthcare initiatives, e.g.
 - “Commission on the Future of Health Care”
 - Agency staffing reforms
- Since that time – The Governor’s nominee to lead the State’s Court of Appeals, Hon. Hector LaSalle, did not receive Senate Judiciary committee approval
 - *Sets up an unprecedented legal fight...*
- While the Governor considers options, the Executive and agencies are preparing budget recommendations – which are expected to be announced on or before February 1
- Thereafter, we will see one-house bills and learn more about the Governor’s priorities for the coming State Fiscal Year
 - April 1, 2023, start



Gov. Kathy Hochul (Credit: Office of the Governor)



Hon. Hector LaSalle (Credit: NYSBA)

And at the Intersection of Healthcare and Data Privacy...

- Federal attention remains focused ... ransomware and its related challenges are not going away
- Efforts to streamline Federal regulatory structure
- Complexities, however, in aligning existing elements like the Health Insurance Portability and Accountability Act of 1996 (HIPAA)
- For a deeper dive, see more on CIRCIA: <https://www.bsk.com/news-events-videos/healthcare-and-cybersecurity-circia-s-potential-effect-on-healthcare-entities>
 - *And don't forget:*
 - *Countdown to Data Privacy Day (this Saturday the 28th) is underway*



CYBERSECURITY



INFRASTRUCTURE SECURITY



EMERGENCY COMMUNICATIONS



NATIONAL RISK MANAGEMENT



ABOUT CISA



MEDIA

CYBER INCIDENT REPORTING FOR CRITICAL INFRASTRUCTURE ACT OF 2022 (CIRCIA)



All organizations are encouraged to share information about unusual cyber activity and/or cyber incidents 24/7 via report@cisa.gov or (888) 282-0870.

In March 2022, President Biden signed into law the Cyber Incident Reporting for Critical Infrastructure Act of 2022 (CIRCIA). Enactment of CIRCIA marks an important milestone in improving America's cybersecurity by, among other things, requiring the Cybersecurity and Infrastructure Security Agency (CISA) to develop and implement regulations requiring covered entities to report covered cyber incidents and ransomware payments to CISA. These reports will allow CISA to rapidly deploy resources and render assistance to victims suffering attacks, analyze incoming reporting across sectors to spot trends, and quickly share that information with network defenders to warn other potential victims.

Rulemaking Process

These new authorities are regulatory in nature and require CISA to complete mandatory rulemaking activities before the reporting requirements go into effect.

NLRB Update – What is Going on at the Board?



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NLRB Developments – What do They Mean?

- December update
- A flurry of activity within the past year
- GC Memos
- Board decisions
- Briefing invitations
- Rulemaking
- Breakdown of the implications for union and nonunion employers

American Steel Construction, 372 NLRB No. 23 (Dec. 14, 2022)

Determining Appropriate Bargaining Units

- *Specialty Healthcare*, 2011 decision overruled by Trump Board restored over dissent of Members Kaplan and Ring.
- Employees in the petitioned for unit must be readily identifiable as a group and share a community of interests. If it excludes employees who are not sufficiently distinct from the petitioned-for employees, the employer must show that the excluded employees share an “overwhelming community of interest” in order to mandate inclusion.
- Prior standard (*PPC*) the Board must consider whether the “excluded employees have meaningfully distinct interests in the context of collective bargaining that outweighs similarities with unit members.”

Organizing Impact

- Petitioner (union) has the advantage of picking the proposed unit
- Respondent (employer) has the burden of showing the excluded employees share an “overwhelming community of interest” in order to mandate inclusion.
- Micro units are available
- Unions can pick their groups
- Potential for more elections, smaller units and more bargaining
- Potential for whipsawing

THRIV, Inc., 372 NLRB No. 22 (Dec. 13, 2022)

Consequential Damages

- The Board will order compensation all direct or foreseeable pecuniary harms suffered as a result of the respondent's unfair labor practice.
- Examples: Out of pocket health care costs, cost of cleaning clothes or providing new toolboxes where unlawful reassignments caused damage, loss of car or home, increased transportation or child care costs, interest or late fees on credit card payments and losses from early retirement withdrawals.
- Dissent: This standard would permit recovery for any losses indirectly caused by an unfair labor practice, regardless of how long the chain of causation may stretch from unfair labor practice to loss, whenever the loss is found to be foreseeable -- speculative damages beyond the Board's remedial authority.

Impact on Disparate Treatment Cases

- Both unionized and nonunion employers may be subject to Section 8(a)(3) discrimination charges
- Make whole relief is available under the statute – cease and desist, post a notice, backpay, reinstatement, etc.
- New standard – direct and foreseeable damages
- Broad and unpredictable – based on the individual employee and the foreseeability
- For unionized employers – interplay with grievance procedure and deferral to arbitration

Impact on Duty to Bargain Cases

- Unionized employers have a duty to bargain under Section 8(a)(5)
- Traditional remedy – cease and desist, post a notice and bargain in good faith
- Possible impact here – bargaining schedules; progress reports; insulation periods
- Other possible impacts – reinstatement of unlawfully withdrawn proposals; reimbursement of bargaining expenses; training of supervisors and managers on good faith bargaining
- Scope of this is unclear (limits on speculative and punitive damages)

Class Actions



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Potential Pitfalls on the Horizon

- New York Employment Law Class Action Developments

The fundamental (and simple) question and answer:

Q: What new legal statutes in New York create risk of class actions?

A: Any law that requires compliance for a group of employees or applicants.

What are some of the most recent laws or contemplated laws creating the risk of class actions?

- NYS and NYC Pay Transparency Laws
- NYC Automated Employment Decision Tools Law
- NYS Changes in Overtime and Tip Credit Law
- NYC Proposed Law Respecting “Good Cause” Discipline/Termination

NYS Pay Transparency Law

- Signed by Governor Hochul on December 21, 2022
- Effective September 17, 2023
- Covers all employers with four (4) or more employees – temporary help firms exempt
- Requires employers to disclose an amount or a range of compensation for any open job, promotion or transfer opportunity that can or will be performed
- Employers are required to keep and maintain records in connection to the law, including the history of compensation ranges for each job, promotion or transfer opportunity and the job descriptions for these positions
- Does not preempt local pay transparency laws (NYC, Ithaca, Albany and Westchester Counties)
- To be enforced by NYSDOL – Not clear if there is a private right of action

NYC Pay Transparency Law

- Effective – November 1, 2022 – applies if four or more employees
- Similar to the NYS Pay Transparency law, but some notable differences
 - Clearly provides for a private right of action, but only current employees can sue
 - One free pass with cure
 - If no cure or other subsequent violations, the fines up to \$250,000

NYC Automated Employment Decision Hiring/Promotion Tools Law

- Effective April 15, 2023 (was supposed to be January 1, 2023, but pushed back)
- Requires bias audit be conducted on an automated employment decision tool prior to the use of said tool.
- Employers using the tools must advise candidates or employees that reside in the city about the use of such tools in the assessment or evaluation for hire or promotion and notify them about the job qualifications and characteristics that will be used by the automated employment decision tool.
- Department of Consumer and Worker Protection (DCWP) enforces administratively or can go to court for enforcement
- Private right of action available
- DCWP working on rules for compliance, but not yet published

NYS Changes in Minimum Wage and Tip Credits

Given the increase to the minimum wage, Upstate New York (outside New York City and Nassau, Suffolk and Westchester counties) had the cash wage and tip credit increase on December 31, 2022. The cash wage for service employees increased to \$11.85 and tip credit to \$2.35. Food service workers also saw an increase in the cash wage to \$9.45 and tip credit to \$4.75.

NYC Proposed Law Respecting “Good Cause” Discipline/Termination

- “Secure Jobs Act” – passed City Council, but not yet signed by Mayor Adams
- “Employer” – any size
- Onus on employer to prove “just cause” or “bona fide economic reason” to fire employee
- Employer must provide 14 day notice to employee of termination, must be a good reason and fair process before discharge

2023: What's on the Horizon for Employee Benefits



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Benefit Considerations for 2023:

1. The SECURE 2.0 Act
2. Ongoing Retirement Plan Litigation
3. COVID-19 National Emergency Extension

The SECURE Act 2.0



#1: Delay in RMD Beginning Date

- In the 2023 plan year, under the SECURE 2.0 Act the requirement to begin taking Required Minimum Distributions (RMDs) will increase from age 72 to age 73.
 - The RMD age will increase to age 75 in 2033.

#2: Retirement Savings Incentives

- In the 2023 plan year, the SECURE 2.0 Act permits employers to offer de minimis financial incentives
 - Incentives cannot be paid with plan assets
 - Examples include low-dollar gift cards to increase employee participation in employer-sponsored retirement plans

#3: Automatic Enrollment for New Plans

- The SECURE 2.0 Act requires that all NEW 401(k) and 403(b) plans with plan years beginning on or after January 1, 2025 include automatic enrollment:
 - Rate of between 3% and 10%
 - Automatic escalation of 1% per year.
 - Exceptions: existing plans, and new plans established by new businesses, employers with 10 employees or less, and governmental and church employers

#4: Matching Contributions on Student Loan Payments

- SECURE 2.0 allows employers to make matching contributions on behalf of participants for “qualified student loan payments.”
- “Qualified” payments basically means debit incurred solely to pay for “cost of attendance” at a higher education institution

#5: Increased Catch-Up Contribution Limits

- Beginning in taxable years after 2024, the SECURE 2.0 Act will increase catch-up contributions for participants age 62-64
 - Participant will be able to contribute up to 10,000 dollars, or
 - 50% more than the applicable catch-up amount into their 401k plan
 - Adjusted periodically for inflation

#5: Emergency Withdrawals

- One distribution is permissible per year of up to \$1,000 for emergency expenses
 - “Emergency expenses” are unforeseeable or immediate financial needs relating to personal or family emergency expenses
 - Option to repay the distribution within three years.
 - No emergency distributions may be made during the three-year repayment period until any amounts previously taken are repaid
- Plan sponsors can also offer a retirement plan-linked emergency savings account to non-highly compensated employees

Ongoing Retirement Plan Litigation



Hughes v. Northwestern University - Fiduciary Focus

- Takeaway: To act prudently, fiduciaries must systematically review *all* investments and expenses at regular intervals and timely remove imprudent investments or recordkeepers. Fiduciaries will not be able to avoid liability simply because they provide a large investment lineup that includes some desirable investments.

COVID-19 National Emergency Extension



National Emergency Period: Ongoing Impact

- In March 2020, COVID-19 national emergency was declared.
 - During the national emergency, the required time periods for certain plan administration requirements and participant election deadlines are delayed.
 - Disregarded periods end earlier of (1) one year from beginning of applicable period, or (2) 60 days after end of the national emergency.
 - Impacted time periods include:
 - 60-day COBRA election period
 - Date for making COBRA premium payments
 - Date for individuals to notify a plan of a qualifying event or disability termination
 - Period for filing benefit claims and appeals
 - Period for requesting special enrollment
 - National emergency period is still ongoing

National Emergency Period: Takeaway

- National Emergency set to end in April 2023.
- Takeaway: Continue monitoring national emergency related extended deadlines. COBRA notices should include as part of, or prominently displayed in an attachment to, information regarding impact of national emergency period.

Your Questions



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Public Health

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2023: What's on the Horizon for Employee Benefits

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New York Employment Law: The Essential Guide

NYS Bar Association Members can buy the book from the bar [here](#).

Non-NYS Bar Association Members can purchase through Amazon [here](#).

Thank You

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It is not to be considered as legal advice.
Laws can change often, and information may become outdated.

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