

BUSINESS IN 2022
WEEKLY WEBINAR SERIES

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& KING ATTORNEYS

1



COVID Update



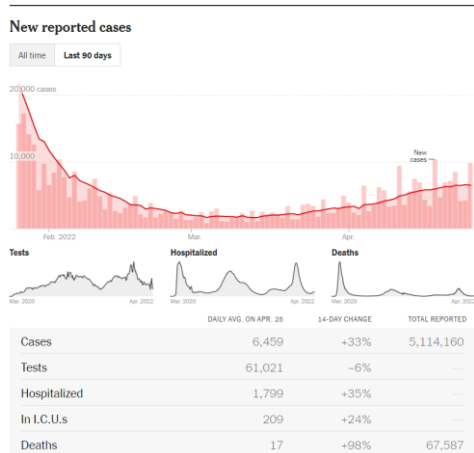
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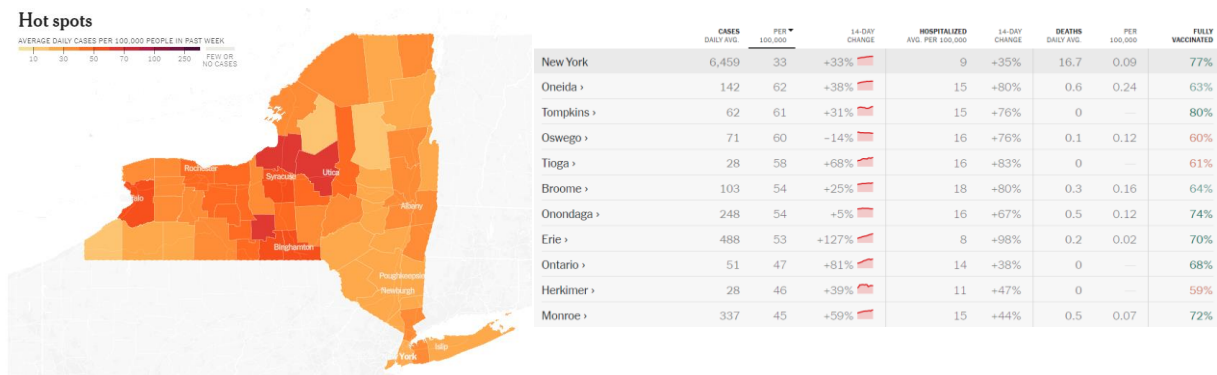
Current COVID Data in New York



- Case numbers still increasing
- No policy changes to date

3

Current COVID Data in New York



4

Whistleblower Protections – and Their Effects on Medicaid Providers



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The Interplay between Standards

- New whistleblower protections in New York State
- How do they affect existing requirements – like those from the Deficit Reduction Act of 2005?

§. 4394-A

1 (d) "public body" includes the following:

2 (i) the United States Congress, any state legislature, or any ~~legis-~~
~~lative~~ ~~body~~ ~~of~~ ~~the~~ ~~United~~ ~~States~~ ~~legislature~~, or any number or employ-

3 ee thereof;

4 (ii) any federal, state, or local ~~public~~ ~~body~~ ~~or~~ ~~any~~ ~~number~~ ~~or~~ ~~em-~~
~~ployee~~ ~~thereof~~, or any grand or petit jury;

5 (iii) any federal, state, or local regulatory, administrative, or

6 public agency or authority, or instrumentality thereof; ~~and~~

7 (iv) any federal, state, or local law enforcement agency, prosecu-
8 torial office, or police or peace officer; ~~and~~

9 (v) ~~any~~ ~~federal~~, ~~state~~ ~~or~~ ~~local~~ ~~department~~ ~~of~~ ~~an~~ ~~executive~~ ~~branch~~ ~~of~~
10 ~~government~~, or

11 ~~any~~ ~~division~~, ~~board~~, ~~bureau~~, ~~office~~, ~~committee~~, ~~or~~ ~~commission~~ ~~of~~
12 ~~any~~ ~~of~~ ~~the~~ ~~public~~ ~~bodies~~ ~~described~~ ~~in~~ ~~subsections~~ ~~(i)~~ ~~through~~ ~~(iv)~~ ~~of~~
13 ~~this~~ ~~paragraph~~.

14 (e) "Retaliatory (personnel) action" means ~~the~~ ~~discharge~~, ~~suspension~~, ~~or~~
15 ~~dismissal~~ ~~of~~ ~~an~~ ~~employee~~, ~~or~~ ~~other~~ ~~adverse~~ ~~employment~~ ~~action~~ ~~taken~~
16 ~~against~~ ~~an~~ ~~employee~~ ~~in~~ ~~the~~ ~~course~~ ~~and~~ ~~conditions~~ ~~of~~ ~~employment~~ ~~an~~
17 ~~adverse~~ ~~action~~ ~~taken~~ ~~by~~ ~~an~~ ~~employer~~, ~~or~~ ~~his~~ ~~or~~ ~~her~~ ~~agent~~ ~~to~~ ~~discharge~~,
18 ~~dismiss~~, ~~suspend~~, ~~or~~ ~~in~~ ~~any~~ ~~other~~ ~~manner~~ ~~discriminate~~ ~~against~~ ~~any~~
19 ~~employee~~ ~~or~~ ~~former~~ ~~employee~~ ~~exercising~~ ~~his~~ ~~or~~ ~~her~~ ~~right~~ ~~under~~ ~~this~~
20 ~~section~~, ~~including~~ ~~(i)~~ ~~adverse~~ ~~employment~~ ~~actions~~ ~~or~~ ~~threats~~ ~~to~~ ~~take~~
21 ~~such~~ ~~adverse~~ ~~employment~~ ~~actions~~ ~~against~~ ~~an~~ ~~employee~~ ~~in~~ ~~the~~ ~~course~~ ~~of~~
22 ~~conditions~~ ~~of~~ ~~employment~~ ~~including~~ ~~but~~ ~~not~~ ~~limited~~ ~~to~~ ~~discharge~~, ~~suspension~~,
23 ~~dismissal~~, ~~or~~ ~~other~~ ~~adverse~~ ~~employment~~ ~~actions~~ ~~or~~ ~~threats~~ ~~to~~ ~~take~~ ~~such~~ ~~adverse~~ ~~actions~~ ~~that~~
24 ~~would~~ ~~adversely~~ ~~impact~~ ~~a~~ ~~former~~ ~~employee's~~ ~~current~~ ~~or~~ ~~future~~ ~~employment~~,
25 ~~or~~ ~~will~~ ~~threaten~~ ~~to~~ ~~contact~~ ~~or~~ ~~contact~~ ~~United~~ ~~States~~ ~~Immigration~~
26 ~~authorities~~, ~~or~~ ~~otherwise~~ ~~reporting~~ ~~or~~ ~~threatening~~ ~~to~~ ~~report~~ ~~an~~ ~~employ-~~
27 ~~er's~~ ~~sanctioned~~ ~~alienable~~ ~~or~~ ~~immigration~~ ~~status~~ ~~or~~ ~~the~~ ~~sanctioned~~ ~~ali-~~
28 ~~enable~~ ~~or~~ ~~immigration~~ ~~status~~ ~~of~~ ~~an~~ ~~employee's~~ ~~family~~ ~~or~~ ~~household~~
29 ~~member~~ ~~as~~ ~~defined~~ ~~in~~ ~~subdivision~~ ~~two~~ ~~of~~ ~~section~~ ~~four~~ ~~hundred~~ ~~fifty~~,
30 ~~and~~ ~~a~~ ~~of~~ ~~the~~ ~~social~~ ~~services~~ ~~law~~, ~~or~~ ~~a~~ ~~federal~~, ~~state~~, ~~or~~ ~~local~~ ~~agency~~.

31 (f) "Supervisor" means any individual within an employer's organiza-
32 tion who has the authority to direct and control the work performance of
33 the affected employee, or who has managerial authority to take correc-
34 tive action regarding the violation of the law, rule or regulation of
35 which the employee complains.

36 (g) ~~Health-care fraud means health care fraud as defined by article~~
37 ~~one hundred seventy-seven of the penal law.~~

38 2. ~~Prohibition.~~ An employer shall not take any retaliatory (person-
39 nel) action against an employee, whether or not within the scope of the
40 employee's job duties, because such employee does any of the following:
41 (a) discloses, or threatens to disclose to a supervisor or to a public
42 body an activity, policy or practice of the employer that ~~the~~ ~~employer~~
43 ~~reasonably~~ ~~believes~~ ~~is~~ ~~in~~ ~~violation~~ ~~of~~ ~~law~~, ~~rule~~ ~~or~~ ~~regulation~~ ~~that~~ ~~constitutes~~ ~~a~~ ~~violation~~ ~~of~~ ~~the~~ ~~law~~,
44 ~~rule~~ ~~or~~ ~~regulation~~ ~~that~~ ~~constitutes~~ ~~a~~ ~~violation~~ ~~of~~ ~~the~~ ~~law~~, ~~rule~~ ~~or~~ ~~regulation~~ ~~that~~ ~~constitutes~~ ~~a~~ ~~violation~~ ~~of~~ ~~the~~ ~~law~~,
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50 ~~rule~~ ~~or~~ ~~regulation~~ ~~that~~ ~~constitutes~~ ~~a~~ ~~violation~~ ~~of~~ ~~the~~ ~~law~~, ~~rule~~ ~~or~~ ~~regulation~~ ~~that~~ ~~constitutes~~ ~~a~~ ~~violation~~ ~~of~~ ~~the~~ ~~law~~,
51 ~~rule~~ ~~or~~ ~~regulation~~ ~~that~~ ~~constitutes~~ ~~a~~ ~~violation~~ ~~of~~ ~~the~~ ~~law~~, ~~rule~~ ~~or~~ ~~regulation~~ ~~that~~ ~~constitutes~~ ~~a~~ ~~violation~~ ~~of~~ ~~the~~ ~~law~~,
52 ~~rule~~ ~~or~~ ~~regulation~~ ~~that~~ ~~constitutes~~ ~~a~~ ~~violation~~ ~~of~~ ~~the~~ ~~law~~, ~~rule~~ ~~or~~ ~~regulation~~ ~~that~~ ~~constitutes~~ ~~a~~ ~~violation~~ ~~of~~ ~~the~~ ~~law~~,
53 ~~rule~~ ~~or~~ ~~regulation~~ ~~that~~ ~~constitutes~~ ~~a~~ ~~violation~~ ~~of~~ ~~the~~ ~~law~~, ~~rule~~ ~~or~~ ~~regulation~~ ~~that~~ ~~constitutes~~ ~~a~~ ~~violation~~ ~~of~~ ~~the~~ ~~law~~,
54 ~~rule~~ ~~or~~ ~~regulation~~ ~~that~~ ~~constitutes~~ ~~a~~ ~~violation~~ ~~of~~ ~~the~~ ~~law~~, ~~rule~~ ~~or~~ ~~regulation~~ ~~that~~ ~~constitutes~~ ~~a~~ ~~violation~~ ~~of~~ ~~the~~ ~~law~~,
55 3. ~~Application.~~ The protection against retaliatory (personnel) action
56 provided by paragraph (a) of subdivision two of this section pertaining



The Deficit Reduction Act of 2005

Deficit Reduction Act of 2005

- Effective January 1, 2007
- Federal law that grants states the ability to modify their Medicaid programs
- Prevention of fraud and waste in Medicaid programs
- 'Infamous' for the increased lookback period for Medicaid planning purposes
- Employers need to be aware of Section 6032

DRA Section 6032

- Established section 1902(a)(68) of the Social Security Act
- 42 U.S.C. 1396a (aka Section 1902(a)(68) of the SSA):

(68) provide that any entity that receives or makes annual payments under the State plan of at least \$5,000,000, as a condition of receiving such payments, shall—

(A) establish written policies for all employees of the entity (including management), and of any contractor or agent of the entity, that provide detailed information about the False Claims Act established under sections 3729 through 3733 of title 31, United States Code, administrative remedies for false claims and statements established under chapter 38 of title 31, United States Code⁴⁷¹, any State laws pertaining to civil or criminal penalties for false claims and statements, and whistleblower protections under such laws, with respect to the role of such laws in preventing and detecting fraud, waste, and abuse in Federal health care programs(as defined in section 1128B(f));

(B) include as part of such written policies, detailed provisions regarding the entity's policies and procedures for detecting and preventing fraud, waste, and abuse; and

(C) include in any employee handbook for the entity, a specific discussion of the laws described in subparagraph (A), the rights of employees to be protected as whistleblowers, and the entity's policies and procedures for detecting and preventing fraud, waste, and abuse;



Who does this apply to?

- “Entities”
 - Governmental agency
 - Organization
 - Unit
 - Corporation
 - Partnership
 - Other business arrangement (including any Medicaid managed care organization irrespective of the form of business structure or arrangement by which it exists)
- Receiving Medicaid Payments of at least \$5 million annually
- Employees of the entity
- Contractors and/or Agents of the entity



What must Entities do?

- Establish written policies that cover:
 - The False Claims Act
 - Administrative Remedies
 - State Laws
 - Whistleblower Protections
 - Prevention
- Provide the policies to:
 - Employees (including management)
 - Entity contractors
 - Entity agents



Compliance Certification

NOTIFICATION TO PROVIDERS REGARDING CHANGES TO COMPLIANCE CERTIFICATION REQUIREMENT

Pursuant to New York State Social Services Law (SOS) §363-d, providers are required to certify to the Department upon enrollment in the Medicaid program that they are satisfactorily meeting the requirements of SOS §363-d. Furthermore, compliance with the requirements of SOS §363-d is a condition of payment from the Medicaid program.

Effective immediately, providers are no longer required to complete the annual December certification, commonly referred to as the "SSL Certification," using the form located on the Office of the Medicaid Inspector General's (OMIG) website. Instead, a provider adopting and maintaining an effective compliance program will now record (atbest) to this as part of their annual "Certification Statement for Provider Billing Medicaid." This annual certification shall occur on the anniversary date of the provider's enrollment in Medicaid.

Providers can find their anniversary dates on their initial Medicaid enrollment welcome letters. Additionally, each year, approximately 45-60 days before the anniversary of a provider's enrollment, the NYS Department of Health (NYSDOH) sends by mail a package of information and materials to the provider, which includes the Certification of Statement for Provider Billing Medicaid Form. This Form must be completed and returned to NYSDOH by the enrollment anniversary date.

The Deficit Reduction Act (DRA) requirements have been incorporated into SOS §363-d. As a result, there is no longer a separate DRA certification requirement. By submitting the annual "Certification Statement for Provider Billing Medicaid," providers are attesting to satisfactorily meeting the requirements of SOS §363-d, which includes the DRA.

All providers who are subject to the mandatory compliance program requirements in SOS §363-d will be impacted by these changes.

Questions regarding this notice should be directed to OMIG's Bureau of Compliance at compliance@omig.ny.gov



11

New York State Legislation: S. 4394A

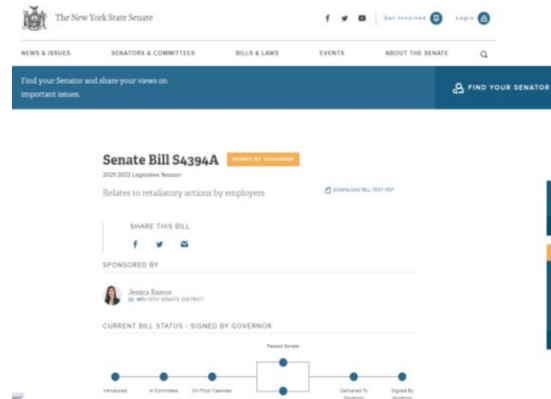
Chaptered October 28, 2021



12

Changes to NYS Labor Law Section 740

- With thanks to Member Jane Sovorn of Bond's Higher Education practice, for her initial analysis of these issues:
 - A significant expansion of New York State's Whistleblower Law (NYS Labor Law Section 740) took effect on Jan. 26, 2022.
 - The amendments opened the door for current employees, as well as former employees and individual independent contractors, to bring claims.
 - As well – significant expansions of what is considered retaliation.



13

More on Those Whistleblower Standards....

- What Changed?
 - Claims had been limited to:
 - “activities that violate the law and pose a substantial and specific danger to public health or safety; or that constitute health care fraud.”
 - Standard now pivots on reasonable belief:
 - (1) there need not be an actual violation of the law, just a ‘reasonable belief’ that one exists; and
 - (2) complaints could include retaliation for allegations of a violation of any law or executive order, including violations of non-discrimination laws.”
 - Moreover, a danger to health or safety is more broadly defined.



14

The Implications for Organizations Receiving Medicaid Funding, in the Wake of S. 4394A

- **Key differences for organizations operating under the new standard include:**
 - The need for expansion of extant policies
 - Scoping in a broader reach – e.g., those former employees
 - Notification requirements
 - Lower standard to bring claims forward

How Do Medicaid Funded Entities Comply?

- Check with your Human Resources specialists to ascertain what compliance program is currently in place
- Reach out to a Bond attorney to
 - bolster your compliance program and make sure it aligns with new standards
 - Develop uniform contract and DRA '05 addendum provisions, particularly with respect to vendors & contractors

Cryptocurrency Investments in Retirement Plans



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17

Compliance Assistance Release No. 2022-01

- March 10, 2022 - Department of Labor published Compliance Assistance Release No. 2022-01 addressing cryptocurrency in 401(k) plans.
 - Same reasoning and principles are applicable to many digital assets, including but not limited to tokens, coins, crypto assets, and any derivatives thereof.
- DOL expressed significant caution to fiduciaries who are considering offering cryptocurrency investment options in their retirement plans
 - Concerns over prudent of these investments – implying they are imprudent
- DOL warns of future investigation of plans offering cryptocurrencies as an investment option
 - including permitting such investment through brokerage windows.



18

Compliance Assistance Release No. 2022-01

Duty of Prudence

- Under ERISA, retirement plan fiduciaries are required to act solely in the best interest of plan participants and beneficiaries – including their financial interests.
- Duty of Prudence
 - Fiduciaries must act ‘with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.
- Fiduciaries have an ongoing duty to ensure only prudent investment options are offered under the plan, requiring both initial and recurring independent evaluations of all investment options offered under a plan to determine if they are, and remain, prudent options.
- No bright line rule on what constitutes prudence



19

Compliance Assistance Release No. 2022-01

Hughes v. Northwestern University

- Defined contribution plan fiduciaries will not be able to avoid liability from offering imprudent investments solely because they provide a variety of investment options.
- Regular monitoring to ensure a prudent investment lineup and removal of imprudent fund options
- Review internal monitoring and decision-making processes and procedures – especially when it comes to evaluating plan fees, investments, and service providers (including recordkeepers)



20

Compliance Assistance Release No. 2022-01

– DOL Concerns

- **Speculative and Volatile Investments.** Highly speculative and subject to extreme price volatility – potentially connected to uncertainties associated with valuing these assets, as well as impact of speculation, fictitious trading, theft, and fraud, amongst other factors.
 - Potential devastating impact on retirement accounts – especially for those approaching retirement.
- **Informed Decisions.** Attract investments from non-expert investors with expectations of high returns, without any appreciation of risks.
 - Even experts find it extraordinarily difficult to value and separate the facts from hype.
 - Participants may lack sufficient knowledge or expertise to make informed investment decisions, as compared to traditional retirement plan investments.
 - Plan fiduciaries are expected to approve only prudent investment options. By offering cryptocurrency, participants may have a false sense of prudent security.
- **Custodial and Recordkeeping Concerns.** Unlike traditional plan investments, cryptocurrencies are not held in trust or custodial accounts, but generally exist as computer code in a digital wallet. Some risks associated with handling cryptocurrency include lost passwords, hackers, and theft.



21

Compliance Assistance Release No. 2022-01

– DOL Concerns

- **Valuation Concerns.** Concerns over the reliability and accuracy of cryptocurrency valuations – noting that even experts find it complex and challenging.
- **Evolving Regulatory Environment.** Cryptocurrency markets have their own rules and regulations, which are continuing to evolve. Some market participants may not be operating or complying with their existing regulatory framework – leading to potential unlawful sale of securities through unregistered transactions.
 - Risks include:
 - inadequate disclosures,
 - loss of investor protections under securities laws.
 - Use in illegal activity leading to restricting use of cryptocurrency pending law enforcement investigation.



22

Compliance Assistance Release No. 2022-01 - Takeaways

- **DOL has implied that cryptocurrency is an imprudent plan investment and will be contacting plans that offer it as an investment option in the plan lineup**
 - Perhaps the first time the DOL has drawn such a broad conclusion on a specific form of plan investment.
 - Plan audits and investigations take time and resources
 - Release is not authoritative. While there is no statutory authority for the DOL to draw this conclusion, as ERISA does not specifically classify any asset class as imprudent.
- **DOL further notes that it will question plan fiduciaries about the prudence of permitting access to cryptocurrencies through brokerage windows.**
 - Traditionally, brokerage windows offer access to participants to buy and sell securities through their 401(k) plan account via a brokerage platform – availing themselves to a much larger range of investments than offered via the plan’s investment fund lineup.
 - Historically, DOL has not investigated brokerage windows, allowing fiduciaries to avoid liability for poor investments directed by participants.
 - The decision to offer the brokerage window, in-of-itself, was viewed as a fiduciary decision.
 - Fiduciaries need to consider whether they are fiduciarily liable for transactions made through brokerage windows -- not just cryptocurrency transactions.
 - Given the significant number of transactions, it would be unreasonable to expect fiduciaries to monitor all of them.



23

Remote Work Issues and Guidance



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24

Remote Work – The Numbers – Pre-COVID

- 173% increase in the number of regular telecommuting employees (excluding the self-employed), since 2005
- 40% increase in the number of employers offering employees the option of working remotely, since 2015
- Pew Research: Survey of workers whose job responsibilities can be mainly done from home:
 - Pre-COVID: **Only 20% worked from home all or most of the time**
 - Dec. 2020: **71% reported doing their job from home all or most of the time**



25

Practical issues to consider...

- If you mandate live attendance at the office, will you lose key talent?
 - If so, can you replace them?
- Do you sow discord among those who stay and agree to return?
- Are you losing productivity or incurring other negative consequences from ongoing remote work?
- What is happening with competitors?



26

Legal issues to consider...

- Are you registered to “do business” where the remote worker is located?
- Must payroll taxes be withheld differently?
- Are there statutory benefits that must be provided?
- Are there any other different employment law requirements?
- Should I have a written policy or agreement in place?

Policy / Agreement Considerations

Eligibility Criteria

- Avoid allegations of unfairness or unlawful discrimination
- Does the job consist of “portable tasks”?
- Can job performance be easily measured by outcomes?
- Does the position require daily interaction with others?
- Does the employee supervise or train others?
- Length of service requirement?
- Performance or attendance requirement?

Policy / Agreement

Terms

- Location
- Schedule
- Availability
- Timekeeping
- Overtime
- Expense Reimbursement
- Caregiving Responsibilities
- Time-Off

Policy / Agreement Considerations

Terms (Cont.)

- Confidentiality
- Connectivity
- Safety & Health
- Equipment & Supplies
- Other Policy Applicability
- Duration/Periodic Evaluation
- Right to Revoke

Employees Working Out-of-State

- There may be tax and legal consequences associated with employee working in a state different from where the employer is physically located or operates
- Tax liability
 - For employer – state income taxes; gross receipts taxes, sales and use taxes
 - For employee – state income taxes
- Employment law concerns
 - Workers' compensation, unemployment insurance, state-specific employment laws
- Evaluate and make decision to permit out-of-state remote work with this in mind



31

Impact of Remote Work During Pandemic

- The EEOC has indicated that a temporary shift to remote work during the pandemic does not require an employer to accept all remote work requests going forward
- If an employee was relieved of performing essential functions as a result of remote work caused by the pandemic, the employer has no obligation to refrain from restoring those essential functions when prior work arrangements are restored
- However, if an employee requested a remote work accommodation pre-pandemic and it was denied, the employee's performance while working remotely would need to be considered if the employee renews its request



32

Takeaways

- Carefully consider requests to work remotely, when framed as a request for reasonable accommodation
- Engage in fact-specific analysis before denying, taking job performance while working remotely during the pandemic into consideration
- Regular communication and evaluation are critical

Workplace Investigations

Thursday, June 9, 2022
DoubleTree by Hilton Hotel, Syracuse
Registration opening soon



COVID Update

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Whistleblower Protections – and Their Effects on Medicaid Providers

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Remote Work Issues and Guidance

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35



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36