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TODAY'S AGENDA

Gabe Oberfield – (12:00PM-12:05PM)

- Intros / Agenda
- End-of-Session in the NYS Legislature

Pamela Silverblatt – (12:05PM-12:15PM)

- NLRB General Counsel Issues Sweeping Challenge to Non-Compete Agreements

Sandra Casey – (12:15PM-12:25PM)

- U.S. Education Department's Third-Party Servicer Guidance

Mia DeLane-Gurley – (12:25PM-12:35PM)

- Remote Instruction for Students

D.J. Nugent – (12:35PM-12:45PM)

- The Impact of the (Official) End of the COVID-19 National Emergency on Employer Sponsored Employee Benefit Plans

G. Oberfield – (12:45PM)

- Questions / Wrap Up

NYS Legislature – End of Session?

- Legislative session ... is it truly over?
 - Marathon debate through last Saturday morning, June 10, 2023
 - Rumors of legislative return to Albany before conclusion of June, to debate and potentially advance select bills
- What happened:
 - Data privacy
 - Housing
 - Speed limit reductions in NYC
- New York Early Voter Act
- 'Clean Slate' Act –
 - Would seal records of justice involvement in certain instances:
 - 3 years following incarceration for certain misdemeanors, and
 - 7 8 years following certain felonies;
 - Employment and workforce implications...



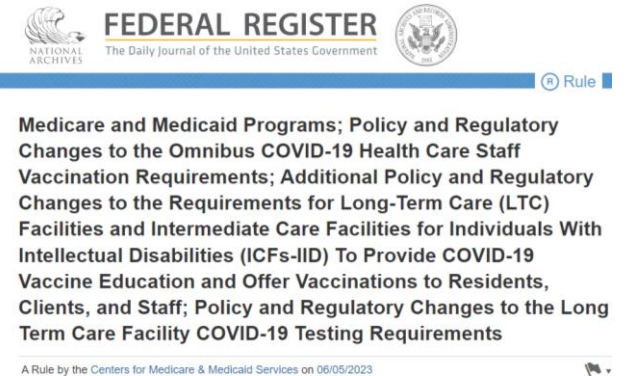
New York State Capital – Office of General Services

Healthcare Vaccination Requirement

- Centers for Medicare and Medicaid Services (CMS) also rolls back healthcare vaccination requirement
 - *On June 5, 2023, CMS final rule released*
 - *Lines up with New York State DOH guidance of May 24, 2023*
 - *No longer required for CMS covered health care providers be vaccinated against COVID-19*
 - *As in NYS, vaccination continues to be encouraged*



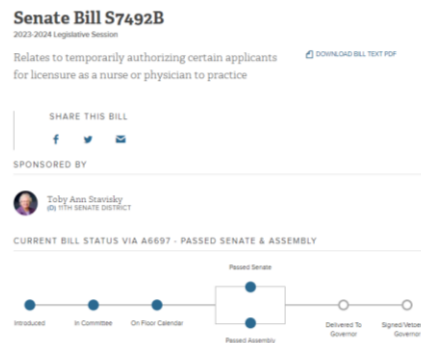
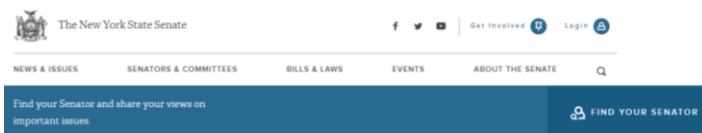
Credit: New York State Department of Health



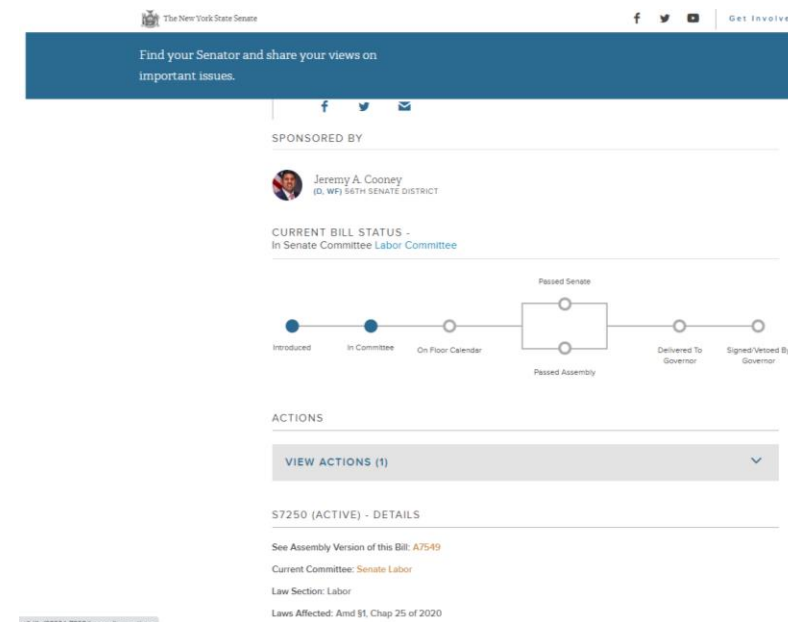
Credit: Federal Register

COVID Sick Leave... and Staffing

- COVID Sick Leave (S7250)
 - Will the bill move during the extended session?
- Existing standards remain in place –



Credit: New York State Senate



Credit: New York State Senate

- And what about nurses, physicians ... and staffing?
 - Bill passed by legislature (S7492B)
 - Executive Order 4.22 (June 8, 2023) continues staffing emergency through June 22, 2023

Health Commissioner Confirmed



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James V. McDonald M.D., M.P.H.



James V. McDonald M.D., M.P.H., was appointed Acting Commissioner of Health January 1, 2023 and confirmed as Commissioner by the State Senate on June 10th, 2023. Prior to joining the New York State Department of Health in July of 2022, Dr McDonald served at the Rhode Island Department of Health since 2012.

At the Rhode Island Department of Health, he served in multiple roles including, Interim Director of Health, Chief Administrative Officer of the Board of Medical Licensure and Discipline, Medical Director for the COVID unit, as well as the Medical Director for Center for Customer Services and the Drug Overdose prevention program. He was also a member of the Governor's task force on Preventing Overdose deaths. Dr. McDonald has faculty appointments at the Brown School of Public Health as well as the Warren Alpert Medical School of Brown University.

Dr. McDonald earned his M.D. from Loyola Stritch School of Medicine in Chicago, his pediatric residency in the US Navy, and his preventive medicine residency from the State University of New York. He earned his MPH from the University of North Carolina in Chapel Hill. He earned his B.S. in Biology from Siena College. Dr. McDonald is board certified in pediatrics as well as preventive medicine.

His diverse career includes officership in the U.S. Navy, as well as private practice in rural areas where health care shortages existed. Dr. McDonald also served in the Indian Health Service in the Navajo Nation, serving as Medical Director of Outpatient Medicine in Chinle, Arizona.

Revised: June 2023

- James V. McDonald M.D., M.P.H., formally confirmed by Senate on June 9, 2023, as Commissioner of NYS Dept. of Health
- Had been serving in acting capacity following resignation of former commissioner Dr. Mary Bassett
- Returned to NYS from Rhode Island's Dept. of Health

Credit: New York State Dept. of Health

NLRB Challenges Non-Compete Agreements



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National Labor Relations Act (NLRA)

- History and purpose of the Act
- Section 7
 - Guarantees employees' rights to self-organize, form, join and assist unions, bargain collectively and engage in “concerted activities” for the purpose of collective bargaining.
- Section 8(a)(1)
 - Makes it an unfair labor practice for employers to interfere with, restrain or coerce employees in connection with their Section 7 rights.

NLRB General Counsel Memo

- The National Labor Relations Board (NLRB) General Counsel issued a memo on May 30, 2023, on non-compete agreements.
- Non-compete agreements: limit employees from accepting certain jobs at the end of their employment.
- General Counsel position that “except in limited circumstances...the proffer, maintenance, and enforcement of such agreements violate Section 8(a)(1) of the Act.”

NLRB General Counsel Memo - Continued

- Non-compete agreements violate Section 8(a)(1) because they reasonably tend to chill employees in the exercise of their Section 7 rights.
- Concertedly threatening to resign
- Concertedly threatening to demand better working conditions
- Seeking/accepting employment with competitor

What Employers Should Know

- Not all non-compete agreements are deemed illegal so --
 - Narrowly tailored provisions such as protect proprietary information and trade secrets, to restrict individuals' managerial or ownership interests in competing businesses, or “true” independent contractor interests may constitute lawful non-compete agreements.

HOWEVER

- The following examples “**are unlikely to ever**” justify non-compete agreements:
 - A desire to avoid competition from former employees, an interest in retaining employees or in protecting special investments in training employees.

What Employers Should Know - Continued

- Although the General Counsel's memo is not binding on the Board, it does provide direction to the NLRB regional offices that investigate and prosecute unfair labor practice charges.
 - Regions are instructed to “seek make-whole relief for employees who, because of their employer's unlawful maintenance of an overbroad non-compete provision, can demonstrate that they lost opportunities for other employment, even absent additional conduct by the employer to enforce the provision.”

What Employers Should Know - Continued

- The General Counsel's memo is not an absolute ban on non-compete agreements, but they must be narrowly tailored.
- Very carefully consider the arguments and opinions in the memo when:
 - Evaluating the need for non-compete agreements with different categories of employees
 - Drafting the terms of those agreements
 - Assessing the specific business interests that the agreements are designed to protect.

McLaren Macomb

- February 21, 2023
- NLRB Decision
- Severance Agreements
 - confidentially provisions
 - nondisparagement provisions
- Broad Confidentiality and/or Nondisparagement Provisions

McLaren Macomb - Continued

- Agreement is unlawful if “its terms have a reasonable tendency to interfere with, restrain or coerce employees in the exercise of their Section 7 rights...”
- Nondisparagement – employees’ ability to discuss workplace, breadth of provision, lack of time limitation.
- Confidentiality –prohibited disclosing terms to “any” person, coerce employees from filing ULP, talking to union.

McLaren Macomb - Some Parameters

- Not Absolute Ban
- Narrowly-tailored
- Restrict Dissemination of Proprietary or Trade Secrets
- Time Limited
- Business Justified
- Limited to Statements that meet Definition of defamation
 - Knowledge of falsity
 - Reckless disregard for truth or falsity
- General Disclaimers/Savings Provisions
- Severability
- Retroactivity
- Supervisors
- No Waiver

U.S. Department of Education's Guidance on Third-Party Servicers



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Background

- Entities that fall under the definition of a third-party servicer are subject to U.S. Department of Education (“Department”) oversight and must abide by specified rules, and Institutions of Higher Education (IHEs) have long been required to ensure that their agreements with third-party servicers contain specified provisions, and to disclose their relationships with those vendors to the Department.
- Historically, these obligations had been limited to vendors assisting institutions with core Title IV administrative functions – processing student financial aid applications; originating loans; and loan collection services.

Background

- The Higher Education Act defines a third-party servicer as any individual, State, private, for-profit, or nonprofit organization which enters into a contract with an IHE to “administer, through either manual or automated processing, any aspect of the IHE’s student assistance programs” under Title IV.” 20 USC §1088(c)(1)
- In its regulations, the Department interprets this definition of a third-party servicer to include those that perform functions related to any aspect of the IHE’s *participation* in Title IV programs. 34 CFR §668.25, relating to contracts between an institution and a third-party servicer

34 CFR §668.2

- **Third-party servicer:**
- (1) An individual or a State, or a private, profit or nonprofit organization that enters into a contract with an eligible institution to administer, through either manual or automated processing, any aspect of the institution's participation in any Title IV, HEA program. The Secretary considers administration of participation in a Title IV, HEA program to—
- (i) Include performing any function required by any statutory provision of or applicable to Title IV of the HEA, any regulatory provision prescribed under that statutory authority, or any applicable special arrangement, agreement, or limitation entered into under the authority of statutes applicable to Title IV of the HEA, such as, but not restricted to—
- (A) Processing student financial aid applications;
- (B) Performing need analysis;
- (C) Determining student eligibility and related activities;
- (D) Originating loans;
- (E) Processing output documents for payment to students;
- (F) Receiving, disbursing, or delivering Title IV, HEA program funds, excluding lock-box processing of loan payments and normal bank electronic fund transfers;
- (G) Conducting activities required by the provisions governing student consumer information services in [subpart D of this part](#);
- (H) Preparing and certifying requests for advance or reimbursement funding;
- (I) Loan servicing and collection;
- (J) Preparing and submitting notices and applications required under [34 CFR part 600](#) and [subpart B of this part](#); and
- (K) Preparing a Fiscal Operations Report and Application to Participate (FISAP);

34 CFR §668.2

Third-party service definition, cont.

- (ii) **Exclude** the following functions—
 - (A) Publishing ability-to-benefit tests;
 - (B) Performing functions as a Multiple Data Entry Processor (MDE);
 - (C) Financial and compliance auditing;
 - (D) Mailing of documents prepared by the institution;
 - (E) Warehousing of records; and
 - (F) **Providing computer services or software**; and
- (iii) Notwithstanding the exclusions referred to in paragraph (1)(ii) of this definition, include any activity comprised of any function described in paragraph (1)(i) of this definition.

Department Guidance

- Over the past several years, the Department has issued Dear Colleague letters (DCL GEN-16-15; DCL GEN-15-01) on third-party servicers to provide guidance on the type of vendors that would be subject to third-party servicer regulatory oversight.
- This is significant because there are a number of regulatory requirements. For instance, the third-party servicer must be jointly and severally liable along with the IHE for any violation of Title IV requirements resulting from the functions performed by the servicer. Also, the third-party servicer must be required by contract to maintain appropriate safeguards to protect any consumer data, such as student information, shared by the IHE.

DCL GEN 23-03

- On February 15, 2023, the Department issued a Dear Colleague Letter (DCL GEN-23-03) on third-party servicers mainly to address issues concerning Online Program Managers or OPMs.
- This new guidance brought into the third-party servicer orbit the provision of software products and services involving Title IV administration activities, which as highlighted above, are generally exempt from the third-party servicer definition in regulation.
- DCL GEN-23-03 also highlighted the provision of educational content and instruction as a third-party servicer function.
- The Department also stated the new guidance was to be effective May 1, 2023; however, quickly revised the effective date to September 1, 2023.

DCL GEN- 23-08 & APRIL 11, 2023 BLOG POST

- The Department received over 1,000 comments to DCL GEN-23-03 and as a result issued a blog post on April 11, 2023 to clarify the types of functions that would not fall under third-party servicer rules and also to delay the effective date of compliance.
- The Department then issued DCL GEN-23-08 on May 16, 2023 that rescinded the September 1, 2023 effective date indefinitely and stated that any further effective date would be at least six months following a final Dear Colleague letter on third-party servicers.
- DCL GEN-23-08 also withdrew the Department's prohibition preventing IHEs from contracting with foreign entities. The original prohibition appeared in DCL GEN-16-15, which language the Department rescinded in DCL GEN-23-08. However, the Department cautioned there may be further oversight in this area as a result of negotiated rulemaking in the future.

April 11, 2023 BLOG POST

- In the April 11, 2023 Blog Post, the Department clarified that the following are not considered third-party servicer relationships:
- Study abroad programs;
- Recruitment of foreign students not eligible for Title IV aid;
- Clinical or externship opportunities that meet requirements under existing regulations because they are closely monitored by qualified personnel at an institution;
- Course-sharing consortia and arrangements between Title IV-eligible institutions to share employees to teach courses or process financial aid;
- Dual or concurrent enrollment programs provided through agreements with high schools and local education agencies, which are exempt because they do not involve students receiving Title IV aid; and
- Local police departments helping to compile and analyze crime statistics, unless they write or file a report on behalf of an institution for compliance purposes.

Conclusion

- Although updated guidance on third-party servicers is now delayed, IHEs are encouraged to review their relationships with third-party vendors in light of DCL GEN-23-03 as revised by DCL GEN 23-08 and as clarified by the Department's April 11, 2023 Blog Post. This will allow institutions not only to identify quickly those contracts that will most likely be considered third-party servicer agreements under updated guidance but will also afford adequate opportunity for institutions to discuss applicable contract requirements with their third-party vendors.

Remote Instruction for Students



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The Impact of the (Official) End of the COVID-19 National Emergency and Associated “Outbreak Period”



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End of the Public Health Emergency – Background

- March 13, 2020, COVID-19 National Emergency declared by then President Trump effective as of March 1, 2020
- On April 28, 2020, a final rule was issued jointly by the United States Department of Labor and the Department of Treasury
 - Referred to as the “Joint Notice”
 - The Joint Notice required that the period from March 1, 2020, until 60 days after the announced end of the National Emergency (“Outbreak Period”) be disregarded for certain employee benefit plan deadlines
- EBSA Disaster Relief Notice 2021-01 issued February 26, 2021
 - Clarified the disregarded period provided for by the Joint Notice
- January 30, 2023, President Biden announced his intent to end the National Emergency on May 11, 2023
- March 29, 2023 the agencies issued FAQs addressing the end of the National Emergency and the associated Outbreak Period
 - FAQs assumed that the Outbreak Period would end on July 10, 2023 (60 days after May 11, 2023)
- April 10, 2023 H.J. Res. 7 signed into law and ended the National Emergency effective immediately
 - Informal statement from the agencies that the dates used in the FAQs would still apply

End of the Public Health Emergency – Joint Notice

- The Joint Notice required that the Outbreak Period be disregarded for:
 - The deadline (generally 30 days) to request special enrollment under a group health plan
 - The deadline for a health plan participant or qualified beneficiary to notify the plan administrator of the occurrence of certain COBRA qualifying events
 - The 60-day election period for COBRA
 - The due date for making COBRA premium payments
 - The deadline by which an individual may file a claim for benefits under a plan's claim procedure
 - The deadline by which a claimant may file an appeal of an adverse benefit determination under the plan's claims procedure
 - The deadline by which a claimant may file a request for external review after receipt of an adverse benefit determination or final internal adverse benefit determination
 - The deadline by which a claimant may provide information to perfect a request for external review following a finding that the request was not complete
 - The date that a COBRA election notice must be provided to a qualified beneficiary by the plan administrator
- In short, complicated plan administration.

End of the Public Health Emergency – EBSA Disaster Relief Notice 2021-01

- Clarified the time period that deadlines are tolled pursuant to the Joint Notice
 - The tolling of deadlines applies on an individual-by-individual basis
 - Deadlines extended until the earlier of 60 days after the announced end of the National Emergency, or 1-year from the deadline that would have applied if not for the National Emergency

End of the Public Health Emergency – FAQ Examples

- COBRA Election Deadline Examples:
 - *Example 1:* Individual A works for Employer X and participates in Employer X's group health plan. Individual A experiences a qualifying event for COBRA purposes and loses coverage on May 12, 2023. Individual A is eligible to elect COBRA coverage under Employer X's plan and is provided a COBRA election notice on May 15, 2023. Because the qualifying event occurred on May 12, 2023, after the end of the COVID-19 National Emergency but during the Outbreak Period, the extensions under the emergency relief notices still apply. The last day of Individual A's COBRA election period is 60 days after July 10, 2023 (the end of the Outbreak Period), which is Sept. 8, 2023.
 - *Example 2:* Individual B works for Employer Y and participates in Employer Y's group health plan. Individual B experiences a qualifying event for COBRA purposes and loses coverage on July 12, 2023. Individual B is eligible to elect COBRA coverage under Employer Y's plan and is provided a COBRA election notice on July 15, 2023. Because the qualifying event occurred on July 12, 2023, after the end of both the National Emergency and the Outbreak Period, the extensions under the emergency relief notices do not apply. The last day of Individual B's COBRA election period is 60 days after July 15, 2023, which is Sept. 13, 2023.

End of the Public Health Emergency – Actions Items

- Plan sponsors should coordinate with plan administrators
- Review and revise participant communications regarding the new deadline as necessary
- Benefit claim denial correspondence should indicate the date that appeals must be submitted
- COBRA and other notices/communications should be similarly revised

Your Questions



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New York State Policy and Legislation (COVID / Data Privacy)

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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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