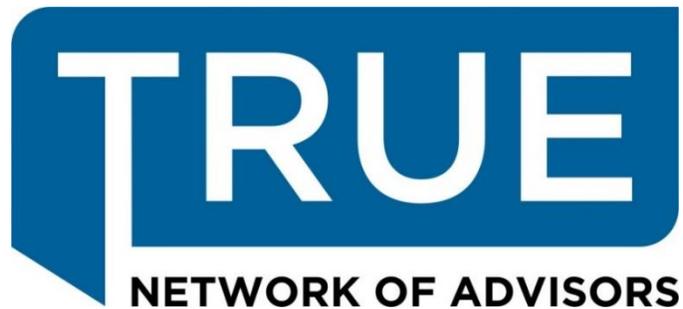


# Employee Benefits Outlook: End of Year 2020 and Beyond

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Presented By  
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Maynard, Cooper & Gale, P.C.  
December 2020

Best Lawyers | 

The logo for Maynard Cooper & Gale. It features the word "MAYNARD" in large, grey, sans-serif capital letters with a small red triangle above the letter "A". Below it, the words "COOPER GALE" are written in smaller, grey, sans-serif capital letters.

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# AGENDA

- ▼ Return to Work Considerations
- ▼ COVID-19 and OSHA Investigations
- ▼ Transparency Regulations
- ▼ GHP Vaccine Coverage
- ▼ Updates to ACA Reporting Forms
- ▼ Implications of 2020 Elections



# Assessing Return to Work Risks

## ▼ Legal Standards for Unprecedented Claims:

- ▼ **Negligence:** What would a reasonably prudent employer in the same position as you do to ensure the safety/health of employees (customers) in the workplace?
- ▼ **Prudent Employers:**
  - ▼ Follow the law
  - ▼ Follow public health authority guidelines and recommendations
  - ▼ Have leadership that sets a good example
  - ▼ Avoid politicizing the health issue
  - ▼ Collaborate with other leaders in the industry to ensure consistent practices
  - ▼ Build consensus with trusted advisors: insurance/risk, health/medical, finance/accounting, and legal

# Assessing Return to Work Risks

- ▼ There is **no one-size-fits-all** approach to re-open and manage risks
- ▼ Employers will **have to assess risks** based on:
  - ▼ State and local orders
  - ▼ OSHA/CDC recommendations
  - ▼ Industry
  - ▼ Work environment and culture
  - ▼ Employment exposure history
  - ▼ Interaction with customers
  - ▼ **\*Employee reaction to employer compliance**
- ▼ Have a **designated COVID-19 response officer** (probably HR) who:
  - ▼ Is familiar with **employee benefits and policies** and has regular access to **CDC and OSHA websites**
  - ▼ Has **benefits consultant and employment lawyer** on speed dial

# Evolving CDC Guidelines for Employers

- ▼ The more the experts learn about COVID-19, their guidance changes. Make sure you use the most recent CDC recommendations for employers and businesses:

<https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/businesses-employers.html>

- ▼ Or OSHA's guidance for employers:

<https://www.osha.gov/Publications/OSHA3990.pdf>

# How to Assess Leave or Accommodation Requests in Return to Work

- ▼ Start with **FFCRA** and **special state/local ordinances** (if any) mandating COVID-19-related leave
- ▼ Then **FMLA**
- ▼ Then **ADA**
- ▼ Then **other benefit plans** and policies
- ▼ Workplace culture and **retention** considerations

The **Families First Coronavirus Response Act (FFCRA or Act)** requires certain employers to provide their employees with paid sick leave and expanded family and medical leave for specified reasons related to COVID-19. These provisions will apply from April 1, 2020 through December 31, 2020.

#### ▶ **PAID LEAVE ENTITLEMENTS**

**Generally, employers covered under the Act must provide employees:**

Up to two weeks (80 hours, or a part-time employee's two-week equivalent) of paid sick leave based on the higher of their regular rate of pay, or the applicable state or Federal minimum wage, paid at:

- 100% for qualifying reasons #1-3 below, up to \$511 daily and \$5,110 total;
- $\frac{2}{3}$  for qualifying reasons #4 and 6 below, up to \$200 daily and \$2,000 total; and
- Up to 10 weeks more of paid sick leave and expanded family and medical leave paid at  $\frac{2}{3}$  for qualifying reason #5 below for up to \$200 daily and \$12,000 total.

A part-time employee is eligible for leave for the number of hours that the employee is normally scheduled to work over that period.

#### ▶ **ELIGIBLE EMPLOYEES**

In general, employees of private sector employers with fewer than 500 employees, and certain public sector employers, are eligible for up to two weeks of fully or partially paid sick leave for COVID-19 related reasons (see below). *Employees who have been employed for at least 30 days prior to their leave request may be eligible for up to an additional 10 weeks of partially paid expanded family and medical leave for reason #5 below.*

#### ▶ **QUALIFYING REASONS FOR LEAVE RELATED TO COVID-19**

An employee is entitled to take leave related to COVID-19 if the employee is unable to work, including unable to **telework**, because the employee:

- |   |   |
|---|---|
| <ol style="list-style-type: none"><li><b>1.</b> is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;</li><li><b>2.</b> has been advised by a health care provider to self-quarantine related to COVID-19;</li><li><b>3.</b> is experiencing COVID-19 symptoms and is seeking a medical diagnosis;</li><li><b>4.</b> is caring for an individual subject to an order described in (1) or self-quarantine as described in (2);</li></ol> | <ol style="list-style-type: none"><li><b>5.</b> is caring for his or her child whose school or place of care is closed (or child care provider is unavailable) due to COVID-19 related reasons; or</li><li><b>6.</b> is experiencing any other substantially-similar condition specified by the U.S. Department of Health and Human Services.</li></ol> |
|---|---|

# EEOC Cautions Against Discrimination

- ▼ **Employer Strategies are Implicating:**
  - ▼ **Americans with Disabilities Act**
    - ▼ Health tests/questionnaires
    - ▼ Direct threat analysis
    - ▼ Individuals with heightened health risks/co-morbidities
    - ▼ Requests for accommodations
  - ▼ **Age Discrimination in Employment Act**
    - ▼ Advanced age co-morbidity
  - ▼ **Pregnancy Discrimination Act**
    - ▼ Pregnancy heightened risk
    - ▼ Requests for accommodations
  - ▼ **Title VII (primarily religious discrimination/accommodation)**
- ▼ **<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>**

# Evolving CDC Guidelines for Employers

## ▼ What hasn't changed:

- ▼ Employees who have been exposed (in “close contact,” which is less than 6 feet for 15 minutes or more) to an individual with symptoms or a confirmed case of COVID-19 should be instructed to **home isolate for 14 days and self-monitor** for symptoms
  - ▼ Rule applies regardless of whether positive or symptomatic case was wearing a mask or other PPE
- ▼ Immediately obtaining a test result based on exposure **should not be required and is unlikely to be conclusive** due to variations and biological delays in the ability to detect the virus

# Evolving CDC Guidelines for Employers

## ▼ What has changed:

- ▼ Negative test results as part of return-to-work strategies are **no longer recommended by CDC (more on this in a minute)**
- ▼ Rather, employees who have symptoms, have been diagnosed with COVID-19, or tested positive may discontinue home isolation if:
  - ▼ At least 10 days have passed since symptom onset and
  - ▼ At least 24 hours have passed since resolution of fever without fever-reducing meds, and
  - ▼ Other symptoms have improved

**CDC notes: “A limited number of persons with severe illness may produce replication-competent virus beyond 10 days, that may warrant extending duration of isolation for up to 20 days after symptom onset.”**

# Evolving CDC Guidelines for Employers

▼ May an employer **still require negative test results** (RT-PCR testing for detection of SARS-CoV-2 RNA) as part of its return to work program?

▼ **Probably, yes**

▼ EEOC still authorizes employers to require COVID testing: See A.6 and A.7 updated 9/8/20 at <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

▼ EEOC updated its FAQs this month to explain, “**Testing administered by employers consistent with current CDC guidance will meet the ADA’s ‘business necessity’ standard.**”

▼ CDC suggests that testing may be used for “**persons who are severely immunocompromised**” or “**to discontinue isolation or other precautions earlier than would occur under the symptom-based strategy**”

▼ Doctors offices may contradict employer requirements, citing CDC guidelines

# COVID-19 and OSHA Investigations

- ▼ DOL OSHA announces \$3,301,932 in Coronavirus Violations
- ▼ OSHA inspections have resulted in the agency citing employers for violations, including failures to:
  - ▼ Implement a written respiratory protection program;
  - ▼ Provide a medical evaluation, respirator fit test, training on the proper use of a respirator and personal protective equipment;
  - ▼ Report an injury, illness or fatality;
  - ▼ Record an injury or illness on OSHA recordkeeping forms; and
  - ▼ Comply with the General Duty Clause of the Occupational Safety and Health Act of 1970

# COVID-19 Vaccine Coverage Requirements

- ▼ **New rules speed up the timeline for ACA's required coverage of preventive services with respect to COVID vaccines**
  - ▼ Normal timeline is the first plan year that is at least 12 months after the CDC preventive recommendation
  - ▼ COVID Vaccine = 15 days
- ▼ **Coverage required whether it is provided by an in-network or out-of-network provider**
- ▼ **Plans must also cover the cost of a vaccine's administration, even if the cost of the vaccine itself is paid by a third party such as the federal government**
- ▼ **Self-funded plans should coordinate with TPAs and stop-loss carriers**
- ▼ **ERISA Notice Requirements**

# ACA Reporting Update

- ▼ Deadline extended for providing employee statements (1095-C) from January 31, 2021 to March 2, 2021
- ▼ Filing deadline **NOT extended**
- ▼ Good Faith Transition Relief Extended
  - ▼ **Likely to be the final year**

# ACA Reporting

## 2021 ACA Reporting Deadlines

### To IRS

#### Paper Filers

**February 28, 2021**

#### Electronic Filers

**March 31, 2021**

### To Employees

**March 2, 2021**

# ACA Reporting Update

- ▼ **New Codes for Form 1095-C**
  - ▼ Related to individual coverage HRAs
  - ▼ Also requires employee's age, if offered ICHRA
- ▼ **Plan Start Month (now required)**
- ▼ **1095-B Transition Relief – Does not apply to Part III of 1095-C for full-time employees**
- ▼ **New Line 17 – Zip Code**

# COBRA Litigation

- ▼ Recent trend of employers being sued over allegedly deficient COBRA notices
  - ▼ Purported deficiencies were relatively minor
  - ▼ At least one court held that minor errors should not result in liability – essentially, *"no harm, no foul"*
- ▼ New DOL Model COBRA Notice (May 2020)
  - ▼ Good time to review and update COBRA notices
  - ▼ Consider including brief attachment summarizing COVID extensions

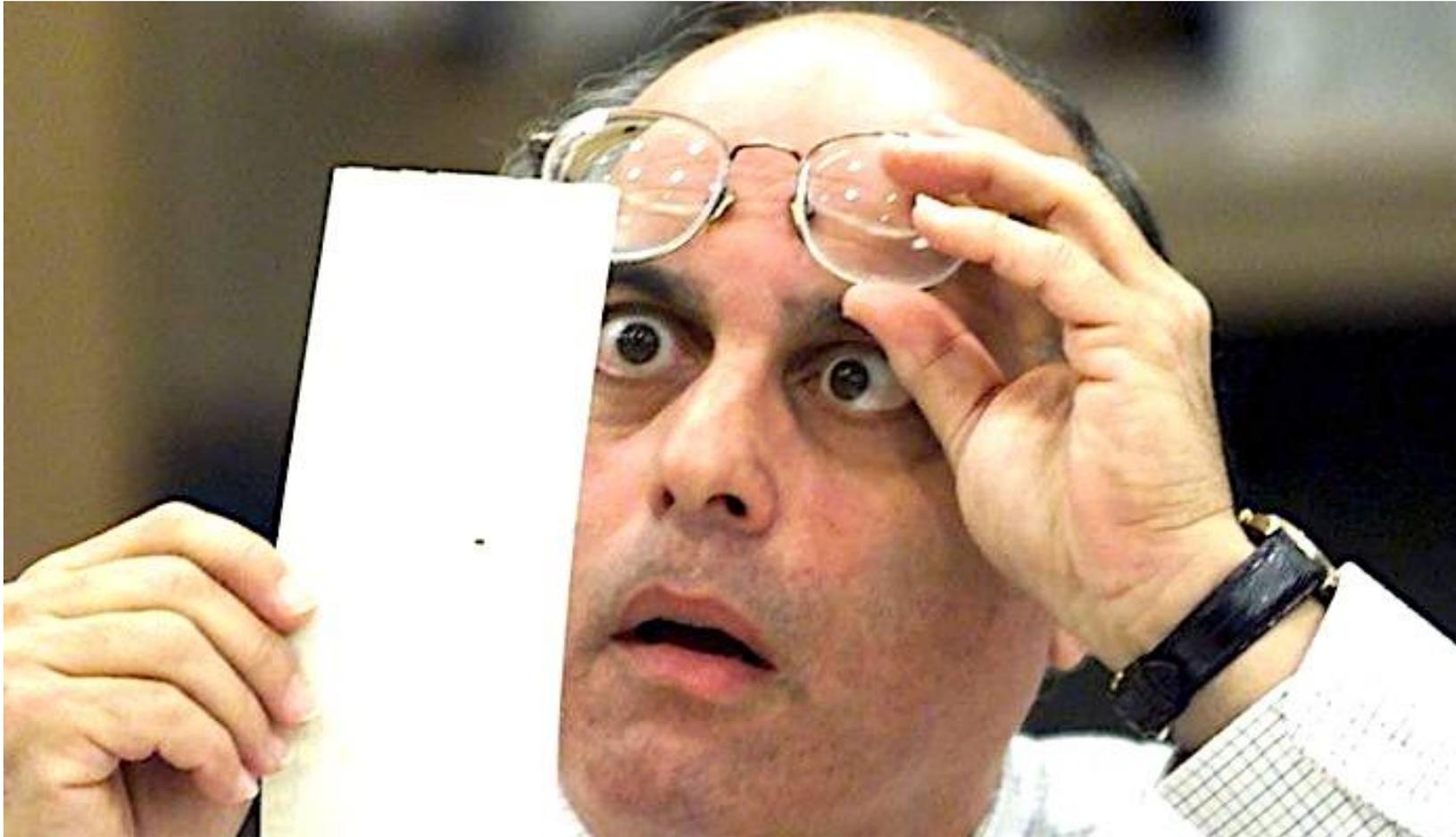
# Transparency Regulations

- ▼ Requires insurers and group health plans to disclose a variety of cost data and member cost sharing to plan enrollees, including posting information on website (publicly available?)
  - ▼ Information must be made available prior to participant obtaining the items or services
- ▼ Ultimate liability for group health plans falls on employer-plan sponsors
  - ▼ Exception: For insured plans, employer may enter into written agreement with insurance carrier to provide disclosures
  - ▼ No similar exception for self-funded plans to make agreement with TPA
- ▼ Effective dates - Phased Approach
  - ▼ Initial disclosures for plan or policy years beginning on or after 1/1/2022
  - ▼ Initial list of 500 common medical items and services must be available by 1/1/2023
  - ▼ ALL items and services by 1/1/2024

# MHPAEA Self-Compliance Tool and Enforcement

- ▼ DOL and other agencies recently updated its [MHPAEA Self-Compliance Tool](#) for group health plans
- ▼ MHPAEA remains an enforcement priority for DOL EBSA
  - ▼ Often included as an “add on” in unrelated plan audits
- ▼ MHPAEA generally requires that financial requirements and treatment limitations on mental health and substance use disorder benefits must be comparable to, and applied no more stringently than those that apply to medical and surgical benefits
- ▼ Considerations for ABA Therapy, Wilderness Therapy, Residential Treatment

# Post-Election Briefing



# Election Results Uncertain

- ▼ Presidential election results may not be certain until litigation has run its course
- ▼ **States must certify election results by December 8**
- ▼ **Electoral college decision on December 14**
- ▼ **Note: 2000 election result was not final until December 12 announcement of U.S. Supreme Court's *Bush v. Gore* decision**

# Election Results Uncertain

## ▼ U.S. Senate Up for Grabs

- ▼ **Current composition is 53 Republicans to 47 Democrats (including 2 Independents)**
- ▼ **Election result composition is 50 Republicans and 48 Democrats (including 2 Independents) with two Georgia Senate seats headed to runoffs on January 5, 2021**

## ▼ U.S. House Margin Narrows

- ▼ **Current composition is 232 Democrats to 197 Republicans, 1 Independent**
- ▼ **Election result composition is 219 Democrats to 204 Republicans, with 12 seats undecided**

# Biden Labor Agenda

***“If I have the honor of becoming your president, I’m going to be the strongest labor president you have ever had.”***

– Joe Biden, speaking at September 7, 2020,  
AFL-CIO Labor Day Event

# Biden Labor Agenda - **Unions**

- ▼ **Protecting the Right to Organize Act (“PRO Act”)**
  - ▼ **Employee Free Choice Act - take 2**
  - ▼ **Passed House in 2019, 224-194**
    - ▼ **Card check versus secret ballot elections**
    - ▼ **Broaden joint employer rule**
    - ▼ **Federalize CA “ABC test” which says anyone performing services for remuneration is an employee, not independent contractor**
    - ▼ **Water down the statutory exemption for “supervisors”**
    - ▼ **Eliminate employer ability to permanently replace strikers**
    - ▼ **Prohibit employers from having captive audience meetings during union campaigns**
    - ▼ **Order first contract negotiations to arbitration if no agreement reached**

# Biden Labor Agenda – **Wage & Hour**

## ▼ **Minimum Wage**

- ▼ Biden supports a \$15/hr minimum wage
- ▼ Also supports using the same minimum wage for work on federal contracts – Overall agenda may hit federal contractor first
- ▼ Minimum Salary?

## ▼ **Independent Contractors**

- ▼ Implementation at Wage and Hour of CA “ABC Test”
- ▼ Eliminate Trump Administration’s Joint Employer Rule

## ▼ **National Legislation for Predictive Scheduling**

## ▼ **Revisiting of FLSA Exemption Minimum Salary**

# Biden Labor Agenda – **Health & Safety**

- ▼ **OSHA rule on mask-wearing**
- ▼ **Additional OSHA temporary COVID-19 standards**
- ▼ **Other airborne infections disease standards**
- ▼ **OSHA standards on workplace violence**
- ▼ **Potential change on post-accident drug/alcohol testing policies**

# Biden Labor Agenda – **Discrimination & Harassment Law**

## ▼ **EEOC**

- ▼ Likely to reinstate Obama Era EEO-1 reporting on employee compensation

## ▼ **Legislation**

- ▼ Paycheck Fairness Act would require nationwide reporting on compensation data and prohibit employer pay confidentiality agreements/policies
- ▼ The Paycheck Fairness Act has passed the House twice already

# Biden Labor Agenda – **Discrimination & Harassment Law cont'd**

## ▼ **Ending the Monopoly Over Workplace harassment through Education and Reporting (EMPOWER Act)**

- ▼ Prohibit non-disparagement and nondisclosure clauses that cover workplace harassment
- ▼ Establish confidential toll free federal tip line to report harassment to EEOC
- ▼ Require public companies to report harassment and discrimination claims as part of SEC filings
- ▼ Prohibit business deductions for costs and attorneys fees spent defending harassment cases
- ▼ Impose annual employer training obligations

# Biden Labor Agenda – **Discrimination & Harassment Law cont'd**

## ▼ **Bringing an End to Harassment by Enhancing Accountability and Rejecting Discrimination in the Workplace (BE HEARD Act)**

- ▼ Would extend coverage under the federal anti-discrimination statutes (which are currently generally applicable only to employers with 15 or more employees) to all employers, regardless of size
- ▼ Lower the legal standard for claims of harassment
- ▼ Restrict the use of employment arbitration agreements

## ▼ **Pregnant Workers Fairness Act**

- ▼ Would codify the Supreme Court's guidance on reasonable accommodation for pregnant workers

# Biden Labor Agenda – **Discrimination & Harassment Law cont'd**

## ▼ **Equality Act**

- ▼ Would codify the U.S. Supreme Court's June 2020 ruling in *Bostock v. Clayton County*, in which the Court ruled that Title VII's prohibitions of discrimination and harassment on the basis of sex extend to sexual orientation and gender identity
- ▼ Statute would operate separate from Title VII
- ▼ Also means Title VII's religious freedom exemptions would not apply

# Biden Labor Agenda – **Paid Leave**

## ▼ **HEROES Act**

- ▼ Would expand the Families First Coronavirus Response Act to virtually all employers, no exemptions
- ▼ Expand FFCRA benefits through 12/31/21

## ▼ **National Paid Sick Leave**

- ▼ Federal employee model?
- ▼ Dovetail with FMLA

## ▼ **Work Sharing Programs**

- ▼ Prorated unemployment insurance program
- ▼ 27 states have already implemented their own

# Biden Labor Agenda – **Benefits**

- ▼ **Recommitment to Affordable Care Act**
- ▼ **Securing a Strong Retirement Act of 2020**
  - ▼ Would require employers to automatically enroll employees in the company's 401(k) plan

# Closing Thoughts

- ▼ **EEOC Charges were way down on March 1, 2020 and seem to have their own V-shaped curve, spiking as of October 1, 2020**
- ▼ Poor employer communication around furloughs, layoffs, and recalls
- ▼ Unreasonable expectations about work-from-home disruptions – health, childcare, etc.
- ▼ Gender stereotypes
- ▼ Age claims in reductions in force
- ▼ EEOC collected a record \$535 million for victims of discrimination/harassment/retaliation in FY19

# Closing Thoughts

- ▼ **Employer pandemic responses continue to be more about workplace cultural/ethical choices than compliance obligations**
  - ▼ What is the right thing to do here?
  - ▼ What seems fair?
  - ▼ What is the best way to communicate it

**\*\*\*Consider short-term re-evaluations of strategies:  
“We will try this for the next pay period and follow up after that.”**



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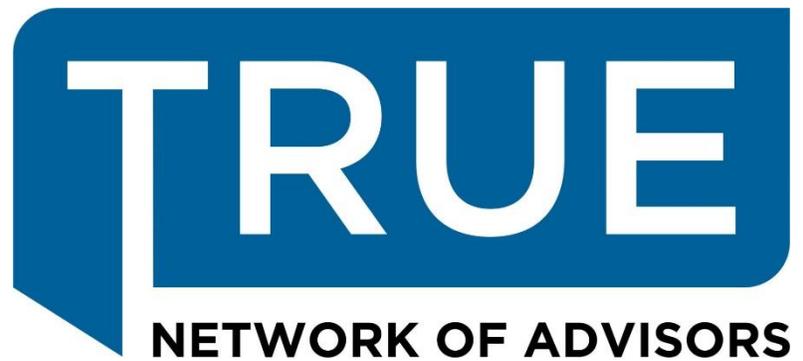


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