

# 2021 Moving Fast: New Benefits Guidance for Employers



Presented By  
Matt Stiles, Matthew Cannova,  
Seth Capper, and Claire Martin  
Maynard, Cooper & Gale, P.C.  
February 2021



# AGENDA

- ▼ **FFCRA Update**
- ▼ **EEOC Guidance regarding Vaccines**
- ▼ **EEOC Proposed Wellness Regulations**
- ▼ **CAA Benefits Provisions**
- ▼ **Biden Administration Expectations**

# FFCRA Update

▼ The requirement for employers with fewer than 500 employees to provide **FFCRA leave and benefits ended on 12/31/20**

## ▼ Effect of Year-End Stimulus Bill

- ▼ The year-end stimulus legislation signed by the President Trump on 12/27/20 **did not extend FFCRA**
- ▼ It did, however, **re-authorize the same payroll tax credits through 3/31/21** for employers who **voluntarily offer FFCRA leave and benefits**

# FFCRA Update cont'd

## ▼ Effect of Expiration of FFCRA

- ▼ Affected employers will need to communicate with employees regarding COVID-19 related leave options for 2021
- ▼ It seems possible that FFCRA or something like it could be enacted as part of President Biden's stimulus package, but that is not currently a legislative line item
- ▼ Any employer decision to continue providing FFCRA benefits in 2021 should be (1) in writing, (2) specify it is temporary, and (3) explain that it terminates upon the implementation of any new law requiring a similar benefit

# EEOC Issues Guidance on Employer Vaccine Requirements

## ▼ EEOC Guidance on Employer Vaccine Requirements

- ▼ On December 16, 2020, EEOC issued updated FAQs on its COVID-19 page regarding employer vaccination requirements

<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> (see Section K)

- ▼ EEOC acknowledges that employers **may require employees to provide proof of vaccination**
- ▼ **To adequately document the requirement for ADA purposes**, the employer should have a **written policy** that specifies it is a qualification standard for employment that “an individual shall not pose a direct threat to the health or safety of individuals in the workplace.”
- ▼ **Reasonable accommodations** (health factor, pregnancy, religion)

# EEOC *Proposed* Wellness Rules

- ▼ In early January 2021, the EEOC (finally) issued new proposed wellness regulations
  - ▼ But...in accordance with the Memorandum for the Heads of Executive Departments and Agencies, issued by Chief of Staff Ronald A. Klain, the proposed regulations have been withdrawn for review by the Biden administration
- ▼ Background –
  - ▼ ADA and GINA
  - ▼ Do wellness incentive cause a wellness program to be *involuntary*?
  - ▼ Court required EEOC to revise regulations regarding incentives
- ▼ 2021 Proposed Regulations
  - ▼ Wellness incentives must satisfy *De Minimis Standard*
  - ▼ New ADA *Safe Harbor* for Health-Contingent Programs in Group Health Plans

# EEOC *Proposed* Wellness Rules

## ▼ New ADA “Safe Harbor” for Health-Contingent Programs in Group Health Plans

- ▼ Program is designed based on risks and not as a subterfuge to evade the purposes of the ADA’s equal employment provisions
- ▼ Program is a health contingent program that is **integrated** into (or independently qualifies as) a group health plan that is subject to the HIPAA Wellness Rules
  - ▼ Implicit acceptance of integration for **non-account-based plans?**
- ▼ Program satisfies the HIPAA Wellness Rules, including rules for the value of the incentive (30% of the cost of coverage, or 50% for programs designed to reduce tobacco use)

# EEOC Proposed Wellness Rules

## ▼ Safe Harbor does NOT apply to GINA

- ▼ De Minimis Standard applies whenever incentive conditioned on an employee providing family medical or other genetic information

## ▼ New ADA “Safe Harbor” for Health-Contingent Programs in Group Health Plans

- ▼ Implicit acceptance of integration for **non-account-based plans**?
  - ▼ Whether incentive is limited to employees enrolled in the plan, whether the incentive is tied to cost sharing or premiums under the plan, whether the program’s vendor has a contract with the plan, and whether the plan includes the welfare program as a term of coverage

## ▼ Waiting on you, Joe...



# CAA: Flexible Spending Account (FSA) Provisions

- ▼ Expansion of relief provided in IRS Notices 2020-29 and -33
- ▼ Optional FSA carryover or grace period extensions
- ▼ Increased Carryover:
  - ▼ Normally, carryovers are available to health FSAs only, and the maximum is \$550 (now indexed for cost of living changes under IRS Notice 2020-33).
  - ▼ CAA expands carryovers to dependent care FSAs and allows an unlimited amount to be carried over into 2021 and 2022 plan years.
- ▼ Extended Grace Period:
  - ▼ Normally, the maximum allowable grace period for an FSA is 2 ½ months.
  - ▼ This option increases the maximum grace period from 2 ½ months to 12 months for plan years ending in 2020 and 2021.

# CAA: Flexible Spending Account (FSA) Provisions

- ▼ **Health FSA spend-down for terminated participants**
  - ▼ Employees who cease participation in HFSA during 2020 or 2021 (e.g., due to termination) may continue to receive reimbursements from unused amounts through the end of the plan year for expenses incurred after termination
- ▼ **Special dependent care FSA carry forward for dependents who aged out during the pandemic**
  - ▼ Temporary increases of maximum age of qualifying dependent for DCFSA from under 13 to under 14 for the last plan year for which the annual open enrollment period was on or before 1/31/20 (and if the DCFSA is amended to allow carryover, the age increase will also apply to the next plan year)
- ▼ **Midyear election changes for FSAs during the 2021 plan year**
  - ▼ Employees may prospectively change existing HFSA and DCFSA elections during the 2021 plan year, without “change in status” event

# CAA: Health Transparency Rules and Reporting Requirements

## ▼ “No Surprises Act”

- ▼ Effective for plan years beginning on or after 1/1/22
- ▼ Prohibits individuals from being balance billed without consent when seeking emergency care, when transported by an air ambulance, or when receiving non-emergency care at an in-network hospital but unknowingly being treated by out-of-network providers
- ▼ Requires that certain participants who are receiving treatment from an in-network provider who moves out-of-network be able to continue to receive treatment from such provider for up to 90 days with continued coverage at in-network cost-sharing rates
- ▼ New ID card requirements, Advanced EOBs, price comparison tools, provider directories, and other patient protection measures

# CAA: Health Transparency Rules and Reporting Requirements

## ▼ Increased Mental Health Parity documentation/reporting

- ▼ Beginning 2/10/21, any group health plan that imposes non-quantitative treatment limitations (NQTLs) on mental health or substance use disorder (MH/SUD) benefits must perform and document a comparative analysis of NQTLs on MH/SUD benefits vs. medical/surgical benefits
- ▼ Analyses must be available to agencies upon request, and agencies must request at least 20 per year

## ▼ Reporting on pharmacy benefits and drug costs

- ▼ Group health plans must annually report on plan medical costs, prescription drug spending, premiums, and manufacturer rebates received by the plan (first reporting currently due 12/27/21; subsequent reporting by June 1 of each year)

## ▼ No “gag” clauses allowed on price on quality of care information

## ▼ Service provider compensation disclosures

# CAA: Retirement Plan Provisions

## ▼ Temporary Relief from Partial Plan Termination Rules

- ▼ High turnover will not result in partial plan termination for any plan year that includes the period beginning March 13, 2020 and ending March 31, 2021, as long as the number of active participants covered by the plan on March 31, 2021 is at least 80 percent of the active participants on March 13, 2020

## ▼ Qualified Disaster Relief for Distributions & Loans

- ▼ For plan participants affected by a non-COVID-19, federally-declared, qualified disaster between January 1, 2020 through February 25, 2021
  - ▼ Qualified Disaster Distributions
  - ▼ Increased Plan Loans & Repayment Delay
  - ▼ Hardship Distribution Repayment
- ▼ Amend by December 31, 2022 for calendar year plans

# CAA: Retirement Plan Provisions

- ▼ **Coronavirus-Related Distributions for Money Purchase Pension Plans**
  - ▼ Extends CARES Act coronavirus-related distribution provisions to money purchase pension plans
  - ▼ Available only for distributions between January 1, 2020 and December 30, 2020
- ▼ **Transfers of Excess Pension Assets**
  - ▼ Allows defined benefit plans to make a new election prior to December 31, 2021 to cancel a future transfer of excess amounts to retiree health and/or life insurance account and retain the excess funds in the plan
- ▼ **In-Service Distributions during Working Retirement for Certain Multiemployer Plans**
  - ▼ Lowers the minimum age for in-service distributions for certain multiemployer pension plan participants in the building and construction industry from age 59-1/2 to age 55

# Election Results

## ▼ U.S. Senate Power Sharing

- ▼ Current composition is **50 Republicans, 48 Democrats and 2 Independents** (who caucus with Democrats)
- ▼ Vice President Harris casts tie-breaking votes in Senate
- ▼ **Legislative filibuster preserved, for now**, meaning Democrats must get Republican votes (**10 if all Senators vote**) to move legislation forward

## ▼ U.S. House Margin Narrows

- ▼ House was **232 Democrats to 197 Republicans, 1 Independent** (and 5 vacancies)
- ▼ Election result is now **222 Democrats to 211 Republicans, 1 Independent** (and 1 vacancy)

# Initial Biden Administration Labor Actions

## ▼ **\$15/hr Minimum Wage Executive Order**

- ▼ Federal employee minimum wage raised to \$15/hr by Executive Order on January 22
- ▼ Does not raise federal contractor employee minimum wage—at least not yet

## ▼ **Memo to DOL re Unemployment**

- ▼ "consider clarifying that workers who refuse unsafe working conditions can still receive unemployment insurance"

## ▼ **Biden fired NLRB General Counsel**

- ▼ Breaks with tradition of appointees serving out term regardless of party. Is traditional party split of Board at risk, too?

# Initial Biden Administration Labor Actions

- ▼ **Executive Order Directing OSHA to Act on COVID Safety**
  - ▼ Nationwide mask wearing standard
  - ▼ Infectious disease safety standards
- ▼ **Public Transportation Mask Order**
  - ▼ Effective 2/2/21
  - ▼ Applies to all TSA regulated transportation
    - ▼ For hire passenger vehicles
    - ▼ Buses
    - ▼ Railcars
    - ▼ Airlines

# Initial Biden Administration Labor Actions

- ▼ **Racial “Equity” Measures**
  - ▼ Eliminate Trump Executive Order prohibiting federal contractor Critical Race Theory training
  - ▼ Executive Order for agencies, including HUD and HHS to eradicate “systemic racism” and “xenophobic” policies
- ▼ **Gender Identity and Sexual Orientation Executive Order** – policy statement
- ▼ **Immigration Orders** – Reversing Trump Orders

# Initial Biden Administration Labor Actions

## ▼ **\$1.9 Trillion Stimulus Legislation (as proposed)**

▼ \$15 federal minimum wage to be phased in between 2021 and 2025

▼ More than doubles current federal minimum wage of \$7.25

▼ U.S. Chamber of Commerce opposes increase at this time, based on the high unemployment rate and economic challenges of the pandemic (unemployed > 10 million)

▼ Poison pill to whole stimulus bill?

▼ House and Senate Democrats **re-introduced separate legislation, “Raise the Wage Act,”** last week

▼ 2021 - \$9.50

▼ 2023 - \$12.50

▼ 2024 - \$14

▼ 2025 - \$15



**MAYNARD**  
COOPER GALE

ALABAMA | CALIFORNIA | FLORIDA | NEW YORK | TENNESSEE | TEXAS | WASHINGTON DC

[MAYNARDCOOPER.COM](http://MAYNARDCOOPER.COM)