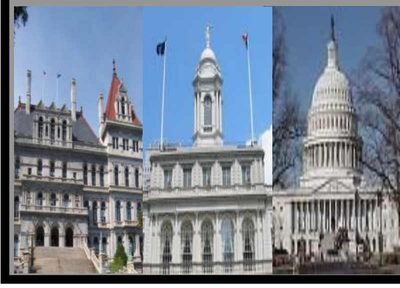
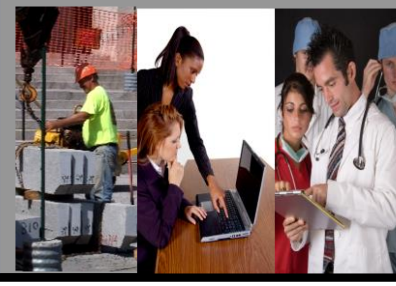


Employee Benefits
In Focus

Pitta LLP
For Clients and Friends
March 17, 2022 Edition



DOL ANNOUNCES THE AVAILABILITY OF MILLIONS OF DOLLARS FOR REGISTERED APPRENTICESHIP PROGRAMS

Recently, the U.S. Department of Labor ("DOL") Employment and Training Administration announced the establishment of a new grant program intended to boost, modernize, develop and diversify their Registered Apprenticeship Programs ("RAPs") to help more employees "learn while they earn" while discovering attainable pathways to the middle class.

The program created under the grant, named "Apprenticeship Building America" ("ABA"), is part of President Joe Biden's ongoing commitment to bolster Registered Apprenticeships. The DOL announced that the program will consist of $113 million available in funding.

Under the program, grant recipients will work alongside a number of partners to strengthen and develop the RAP ecosystem and applicants will have the opportunity to apply for funding across four categories: (i) building and modernizing the state apprenticeship system; (ii) expanding RAP opportunities for youth; (iii) ensuring equitable RAP pathways exist through pre-apprenticeships, resulting in RAP enrollment and equity partnerships; and (iv) creating Registered Apprenticeship Hubs. An Apprenticeship Hub is an organization that helps employers develop and deliver RAPs.

The following applicants may be eligible for the program: county governments, public and state institutions of higher education, labor organizations, and nonprofit organizations. The DOL has indicated, however, that "additional eligibility requirements will be included," and that finalists will receive awards ranging in monetary value from $1 to $8 million dollars. Applications are due no later than April 25, 2022 at 11:59 p.m. Eastern Standard Time. For more information, including Frequently Asked Questions regarding the ABA Grant Program as well as a pre-recorded Prospective Applicant Webinar (both recently released by the DOL), visit: https://www.dol.gov/agencies/eta/grants/apply/find-opportunities.

MULTIEMPLOYER PLANS IN AN ON-GOING PANDEMIC ENVIRONMENT

As the pandemic hopefully eases, multiemployer plans must gear up to determine whether any of their contributing employers have incurred a partial withdrawal due to reductions in operations or workforce. Multiemployer plans are required to monitor and follow-up with contributing employers who have either gradually or abruptly reduced their workforce and, consequently, their plan contributions. As a result of the ongoing pandemic's impact on certain industries, multiemployer plans may find that a contributing employer has incurred a partial cessation or a significant decline in plan contributions. The Employee Retirement Income Security Act of 1974, as amended

("ERISA"), defines partial withdrawal as (i) a partial cessation of an employer's contribution obligation or (ii) a 70-percent contribution decline over a three-year consecutive period. *See* 29 U.S.C. §1385(a).

One form of a partial cessation, which may result in partial withdrawal liability, occurs when a contributing employer ceases to have an obligation to contribute for one, but not all, of the facilities covered by the plan, but continues to perform the same type of work at the facility. In addition, a partial cessation can occur when the employer ceases to have an obligation to contribute under one or more, but not all, collective bargaining agreements, while either continuing to perform the same type of work in the union's jurisdiction or transferring work to another location or to another entity owned or controlled by the employer. Accordingly, the employer incurs partial withdrawal when the plan determines that the employer has not been making contributions for a facility or for a bargaining unit upon which it was previously contributing. Note, a sale, transfer or change in corporate structure, including a merger, does not delete the employer contribution history and in fact, the successor employer inherits the former employer's contribution history, unless the former employer contractually agrees to retain the liability.

Also, ERISA prescribes that an employer incurs a partial withdrawal when the employer experiences a "70-percent contribution decline" over a three-year period. *See* 29 U.S.C. § 1385(b)(1). Specifically, a 70% contribution decline partial withdrawal occurs when an employer has a decline of 70% or more of its contribution base units ("CBUs") in the most recent three-year period. A CBU is a unit under which the employer has an obligation to contribute (*e.g.*, hours worked, weeks worked or months worked). Under ERISA, every year begins a new three-year testing period looking at participation levels compared to a "base year," which is the average of the two highest years in the five plan years before the testing period. Therefore, if an employer had at least a 70% decline in contributions in the past two consecutive years, a 70% contribution decline for a third consecutive year would trigger partial withdrawal liability. Note, the 70% partial withdrawal rule is a very strict standard. By way of example, for the three-year period starting in 2020, if an employer reduces its contributions by 73% in 2020, 75% in 2021, and 68% in 2022, this although it may be impactful to the plan, would not trigger a partial withdrawal because for 2022 the employer did not experience a 70% decline in contributions.

Multiemployer plans should monitor contributing employers who have struggled during the pandemic and who may have incurred a partial cessation or whose contributions have declined by at least 70% in the last two to three years. Plan administrators who suspect that a contributing employer may have experienced a partial withdrawal should contact their actuary and legal counsel.

DOL RESPONDS TO COURT DECISION INVALIDATING CERTAIN PORTIONS OF THE "NO SURPRISES ACT" INTERIM FINAL RULE

On February 28, 2022, following the District Court decision in *Texas Med. Ass'n v. United States Dep't of Health & Hum. Servs*., No. 6:21-CV-425-JDK, 2022 WL 542879 (E.D. Tex. Feb. 23, 2022), the U.S. Department of Labor ("DOL") published a "Memorandum Regarding Continuing Surprise Billing Protections for Consumers" (the "Memorandum"). The court decision invalidated certain parts of the federal independent dispute resolution ("IDR") process created pursuant to the No Surprises Act (the "NSA"). Specifically, the court invalidated provisions contained in the Interim Final Rule Part II ("IFR Part II"), which is one of three IFRs issued by the Department of Health and Human Services, the Department of Treasury, and the DOL (the "Departments") that created standards and presumptions at arbitration of claims.

Enacted as part of the Consolidated Appropriations Act, 2021, the NSA went into effect on January 1, 2022 with the main goal of preventing health plan participants from receiving surprise medical bills. In fact, the NSA sought to curb the amount billed for medical care arising from unexpected out-of-network care such as those in emergency facilities. On October 7, 2021, as part of the NSA implementation guidance, the Departments published IFR Part II which contained safeguards against surprise medical bills. In addition, IFR Part II established the rules for the IDR process which is crucial for deciding charges for payers, providers, and patients. Under the IDR process, providers and payers could initiate a 30-day open negotiation period to settle out-of-network claims. Part of the negotiation process includes the exchange of offers and counteroffers. However, if no resolution is reached after the 30-day open negotiation period, the parties may pursue IDR arbitration. At IDR arbitration, arbitrators are required to consider the qualifying payment amount ("QPA") (*i.e*., median in-network rate for similar services in the geographic region within the same insurance market as of January 31, 2019, adjusted forward by the Consumer Price Index for All Urban Consumers), in addition to five other statutory factors in determining which offer to accept.

In *Texas Med. Ass'n,* plaintiff healthcare providers argued that certain provisions of IFR Part II should be vacated as IFR Part II "deprives [plaintiffs] of the arbitration process established by the [NSA]" because instead of having an arbitrator analyze *all* factors provided by the NSA, IFR Part II "puts a substantial thumb on the scale in favor of the QPA." The court found plaintiffs' challenges credible, holding that IFR Part II adds "several key words not in the statute" and favors the QPA, "requiring arbitrators to presume the correctness of the QPA and then imposing a heightened burden on the remaining statutory factors to overcome that presumption." In so doing, the court explained, IFR Part II unlawfully changes the statutory language of the NSA by including other important terms and thus conflicts with the same. The court vacated the conflicting provisions pursuant to the Administrative Procedure Act ("APA") and held that in addition to the unlawful provisions, in issuing IFR Part II, the Departments failed to follow the APA's requirement of notice and comment, providing another reason for vacatur of the provisions.

The Departments' responsive Memorandum indicates that the Departments will take specific steps to come in line with the court's order, including (i) withdrawing guidance documents that refer to or are based on portions of IFR Part II which the court invalidated, (ii) providing "training on the revised guidance for certified IDR entities and Disputing Parties[,]"and (iii) opening "the IDR process for submissions through the IDR Portal." Regarding (iii) above, the Memorandum further provided that "[f]or disputes for which the open negotiation period has expired, the Departments will permit submission of a notice of initiation of the IDR process within 15 business days following the opening of the IDR Portal."

The Memorandum states that because the court order did not impact any of the other rulemaking issued by the Departments under the NSA, "consumers continue to be protected from surprise bills for out-of-network emergency services, out-of-network air ambulance services, and certain out-of-network services received at in-network facilities." The court ruling, which has nationwide impact, marks the first of six lawsuits filed in five district courts concerning the IDR process. Despite the ruling vacating portions of IFR Part II, health plans are still expected to comply with other applicable sections of the NSA.

A FEW REMINDERS

(Based on calendar-year plans)

These reminders are for informational purposes only and are not intended to replace your regular compliance calendar as they do not include all deadlines which may be applicable to your plan.

MARCH

ALL PLANS

- **Form 1099-MISC (Report of Miscellaneous Information)**
    - Plans must file with the Internal Revenue Service ("IRS") by March 31, 2022 if filed electronically.

HEALTH PLANS

- **Form 1095-C (Employer-Provided Health Insurance Offer and Coverage) & Form 1094-C (Transmittal of Employer-Provided Health Insurance Offer and Coverage Information Returns)**
    - Applicable Large Employers ("ALEs") (*i.e.*, employers with 50 or more full-time employees) must file both forms with the IRS by March 31, 2022 if filed electronically.
    - ALEs must furnish the Form 1095-C to full-time employees by March 2, 2022.
- **Form 1095-B (Health Coverage) & Form 1094-B (Transmittal of Health Coverage Information Returns)**

- Plan administrators (if a plan is self-insured) must file both forms with the IRS by March 31, 2022 if filed electronically.
- Plan administrators (if a plan is self-insured) must furnish the Form 1095-B to employees by March 2, 2022.

DC PLANS

- **Corrective Distributions for failed ADP/ACP Test**
  - March 15, 2022 is the deadline for most plans to process corrective distributions for failed actual deferral percentage ("ADP")/actual contribution percentage ("ACP") tests without incurring a 10% excise tax.
- **Form 5330 Excise Tax Return**
  - March 31, 2022 is the deadline to file the Form 5330 excise tax return and payment for excess ADP/ACP contributions (or Form 5558 to request a one-time extension of time to file the Form 5330).

DB PLANS

- **Minimum Funding Waiver Request**
  - March 15, 2022 is the deadline for a single-employer plan to make a minimum funding waiver request to the IRS for the 2021 plan year. (A request for a waiver with respect to a multiemployer plan generally must be submitted no later than the close of the plan year following the plan year for which the waiver is requested.)
- **Zone Status Certification for Multiemployer Plans**
  - March 31, 2022 is the deadline for an actuary to certify a plan's Zone Status.

APRIL

DC PLANS

- **Required Minimum Distributions ("RMDs")**
  - April 1, 2022 is the deadline for first minimum required distributions to participants who reached their required beginning date in 2021.
- **Refunds of 2021 Elective Deferrals Exceeding 402(g) Limit**
  - April 15, 2022 is the deadline for plans to return 2021 excess elective deferrals contributed to a 401(k) plan (*i.e.*, elective deferrals that exceeded 402(g) limit).

DB PLANS

- **Actuary's Certification of 2022 Adjusted Funding Target Attainment Percentage ("AFTAP")**
  - April 1, 2022 is the deadline for an actuary to certify a single-employer plan's 2022 AFTAP.
- **RMDs**

- April 1, 2022 is the deadline for first minimum required distributions to participants who reached their required beginning date in 2021.

- **Pension Benefit Guaranty Corporation ("PBGC") Form 4010 (Notice of Underfunding)**
  - April 15, 2022 is the deadline for certain underfunded single-employer plans to file the Form 4010 with PBGC.
- **Endangered Status or Critical Status Notice**
  - A plan in either Endangered, Critical or Critical and Declining Status must furnish the notice of its status no later than thirty (30) days after the actuary's zone certification.
- **Annual Funding Notice**
  - April 30, 2022 is the deadline for plans to furnish the Annual Funding Notice for the 2021 plan year.

To Our Clients: If you have any questions regarding any of the matters addressed in this newsletter, or any other labor or employment related issues in general, please contact the Pitta LLP attorney with whom you usually work.

To Our Clients and Friends: To request that copies of this publication be sent to a new address or fax number, to unsubscribe, or to comment on its contents, please contact Aseneth Wheeler-Russell at arussell@pittalaw.com or (212) 652-3797.