

2023 Compliance Calendar: Employee Benefits



Presented by
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Best Lawyers



New Year's News

MaynardNexsen

▼ **Maynard Cooper** Announces Merger with **Nexsen Pruet**.

- ▼ On January 5, 2023, the law firms of Maynard Cooper & Gale and Nexsen Pruet announced their merger to be completed by April 1, 2023.
- ▼ The result of the combined firm, to be re-named **MaynardNexsen**, will be over 500 lawyers in 23 different offices coast to coast.
- ▼ Clients of the firms will benefit from the combined growth in substantive and geographic experience, while maintaining their existing relationships and client-service expectations.

- **Alabama:** Birmingham, Huntsville, Mobile, Montgomery
- **California:** Los Angeles, San Francisco
- **Florida:** Miami, Orlando
- **Georgia:** Atlanta
- **Iowa:** Des Moines
- **New York:** New York City

- **North Carolina:** Charlotte, Greensboro, Raleigh
- **South Carolina:** Charleston, Columbia, Greenville, Hilton Head/Bluffton, Myrtle Beach
- **Tennessee:** Nashville
- **Texas:** Austin, Dallas
- **Washington, D.C.**

New Year's News

▼ FTC moves against noncompete agreements

- ▼ Federal Trade Commission (“FTC”) proposed regulations that would make employer use of a noncompete clause in an agreement with an employee an unfair method of competition.
- ▼ The proposed rules would extend to independent contractors, consultants, paid and unpaid employees, and other workers.
- ▼ Proposed rules would also require employers to notify workers that the noncompete provisions of their pre-existing agreements are no longer enforceable.

▼ Exception in connection with sale of business

- ▼ Proposed rules include an express carve-out for non-disclosure agreements and non-competition clauses related to the sale of a business, but only as applied to someone who is “a substantial owner of, or substantial member or substantial partner in, the business entity at the time the person enters into the non-compete clause.”
- ▼ Similar contractual commitments, such as nonsolicitation and nondisparagement obligations, are not expressly prohibited under the proposed rule, but could still be treated as unlawful if the effect of those obligations is “so broad in scope that they function as noncompetes.”

▼ Rules are still *proposed* and not final

- ▼ Consider submitting comments if this may affect your business.

New Year's News

- ▼ President Biden signed the Fiscal Year 2023 Consolidated Appropriations Act (“CAA 2023”)
 - ▼ \$1.7 trillion, 4,155-page spending bill
- ▼ Pregnant Workers Fairness Act (“PWFA”)
- ▼ PUMP for Nursing Mothers Act
- ▼ FTC proposes rules to limit use of noncompete agreements
- ▼ Extensions for pre-deductible telemedicine benefits
- ▼ Funding for MHPAEA enforcement

New Year's News

- ▼ **Pregnant Workers Fairness Act** (“PWFA”) provides new statutory rights for pregnant workers.
 - ▼ Statutorily imposes on employers obligations toward pregnant workers that parallel their obligations to disabled employees under the Americans with Disabilities Act.
 - ▼ Applies to employers with 15 or more employees
- ▼ PWFA must provide reasonable accommodations to employees with known limitations in their ability to work resulting from “pregnancy, childbirth, or related medical conditions.”
- ▼ Employers are expected to engage in the “interactive process” to determine what reasonable accommodations may be available to such employees, and to provide those accommodations where doing so would not cause an undue hardship.
- ▼ Reasonable accommodation analysis has generally been the best practice since the U.S. Supreme Court’s 2015 decision in *Young v. UPS*.
- ▼ Employers should consider policy language that adds “pregnancy, childbirth, and related medical conditions” to the circumstances eligible for reasonable accommodation.
- ▼ Likely makes sense to add these three classes to employer non-discrimination and harassment policies, as well.

New Year's News

▼ PUMP for Nursing Mothers Act

- ▼ ACA amended the FLSA to require employers to provide reasonable breaks and space (other than a bathroom) to express breastmilk for up to one year after the birth of a child. The original rule under the ACA only applied to employers with 50 or more employees.
- ▼ CAA 2023 expands the original rule.

▼ CAA 2023 expansions:

- ▼ Applies requirements to employers with fewer than 50 employees – unless they can establish that compliance would pose an undue hardship.
- ▼ Extends the duration of the right for up to two years after the birth of a child.
- ▼ Applies to all workers (ACA rule only applied to non-exempt workers).

▼ Evaluate necessary changes to employment practices

- ▼ Most employers covered by the ACA rule already provide this break time to both exempt and non-exempt employees, but expansion required if not.
- ▼ For employers with fewer than 50 employees, assess whether this is a benefit you are able to provide without an undue hardship.
- ▼ Note: Any time spent working while expressing milk must be treated as compensable time.

New Year's News

▼ Telemedicine and HSA/HDHP Relief

- ▼ Rumored to be bipartisan support for making previous relief for employers who combine telemedicine with HSA/HDHP benefits permanent
- ▼ CAA 2023 provides a temporary extension of the Covid-era exceptions that allow individuals to receive pre-deductible telemedicine benefits without being disqualified from contributing to an HSA.
- ▼ The legislation extends the exception by providing that telemedicine and other remote care services will be considered “disregarded coverage” during plan years beginning after December 31, 2022 and before January 1, 2025.
- ▼ In addition, CAA 2023 provides that HDHPs may provide coverage for telemedicine and other remote care services during those plan years before the minimum deductible is satisfied without losing their HDHP status.

New Year's News

- ▼ **Funding for State-enforcement of MHPAEA**
 - ▼ CAA 2023 includes funding to assist states in their enforcement of the CAA 2021 requirement that health plans and insurers prepare comparative analyses of any nonquantitative treatment limitations (NQTLs) on mental health or substance use disorder coverage.
- ▼ **NOT Included: DOL's requested authority to impose civil monetary penalties for violations of the MHPAEA comparative analyses requirements**
 - ▼ DOL must still rely on "name and shame" enforcement.
 - ▼ Penalty provisions may resurface in future legislation.
- ▼ **MHPAEA NQTL Comparative Analyses now a standard request in DOL investigations (formal or informal).**

New Year's News

▼ Prescription Drug Reporting Relief

- ▼ In response to confusion over the new prescription drug reporting (“RxDC”) requirements, federal agencies issued new guidance on December 23, 2022.

▼ Good Faith Relief: The agencies will not take enforcement action with respect to any group health plan that uses a good faith, reasonable interpretation of the rules in making its submission of 2020 and 2021 calendar year reports.

▼ Grace Period: Guidance also includes a submission grace period for such reports through January 31, 2023 (the reports were previously due by December 27, 2022).

▼ Additional Flexibility

- ▼ Allows multiple reporting entities to submit separate data files of the same type (D1-D8) for the same plan
- ▼ Allows plan sponsors submitting only limited parts of the reports to do so via email to CMS, rather than through an HIOS account

Forms W-2 – January 31

▼ Benefit information to include:

- ▼ HSA - report all employer and employee HSA contributions made through payroll as a single aggregated amount on the employee's Form W-2 in Box 12 using code W
- ▼ Imputed Income:
 - ▼ group-term life insurance and long-term disability coverage in most cases
 - ▼ Health coverage for non-dependents (e.g., non-dependent domestic partners and their children)
- ▼ Health Plan coverage: must report the cost of coverage under an employer-sponsored group health plan
 - ▼ Transition relief continues to apply for employer filing fewer than 250 Forms W-2 for the preceding calendar year.

2023 ACA Reporting Deadlines

To IRS

Paper Filers

February 28, 2023

Electronic Filers

March 31, 2023

To Employees

March 2, 2023

Medicare Part D Creditable Coverage Reporting

- ▼ **Group health plan sponsors must submit annual notice of creditable and/or non-creditable coverage to Centers for Medicare and Medicaid Services (CMS)**
 - ▼ **ERISA and non-ERISA plans must certify to CMS that prescription drug coverage offered under the plan is either Medicare Part D creditable or non-creditable.**
- ▼ **The filing is made on the CMS.gov website.**
- ▼ **Deadline:**
 - ▼ **March 1 for calendar year plans**
 - ▼ **Non-calendar year plans must submit within 60 days following the first day of the plan year**

Medicare Part D Creditable Coverage Notice

- ▼ Paper or electronic (if satisfy DOL safe harbor or CMS guidance)
- ▼ When Are Disclosure Notices Required to Be Provided to Part D Eligible Individuals?
 - ▼ Prior to commencement of the annual coordinated election period (ACEP) for Part D (i.e., before **October 15** each year)
 - ▼ Prior to an individual's initial enrollment period (IEP) for Part D
 - ▼ Prior to the effective date of coverage for any Part D eligible individual that enrolls in the employer's prescription drug coverage
 - ▼ Whenever the employer no longer offers prescription drug coverage or changes it so that it is no longer creditable or becomes creditable
 - ▼ Upon request by the Part D eligible individual

Form M-1 Annual Report for Multiple Employer Welfare Arrangements (MEWAs)

- ▼ Applies to most MEWAs
 - ▼ Limited exceptions that apply for excepted benefit MEWAs, MEWAs that do not offer health coverage, certain circumstances related to corporate transactions
- ▼ Beware: Accidental MEWAs
 - ▼ Evaluate ownership and controlled groups
 - ▼ Affiliated Service Group implications..?

ERISA Annual Report and Summary Annual Report

- ▼ Form 5500 – Annual Report
 - ▼ Due the last day of the 7th month following the end of the plan year (July 31 of the following year for calendar year plans)
 - ▼ Up to 2½ month *automatic* extension available with Form 5558
- ▼ Summary Annual Report (SAR)
 - ▼ Summarizes the data in the 5500
 - ▼ Must be distributed to all participants by the later of (i) 9 months after the end of the plan year, or (ii) 2 months after the due date for filing the 5500 (including approved extensions)
- ▼ Are you required to file a Form 5500 for your welfare plan(s)?
 - ▼ Depends on **PLAN SIZE** and **FUNDING METHOD**
 - ▼ **Yes:** Large Plans
 - ▼ **Yes:** Funded Plans
 - ▼ **No:** Small AND fully-insured, unfunded, or combination fully-insured & unfunded

PCORI Fee – July 31

- ▼ **Patient-Centered Outcomes Research Institute (PCORI) fees for self-insured group health plan sponsors**
 - ▼ **For plan years ending 10/1/2022 through 9/30/2023 → \$3.00**
 - ▼ **2023 PCORI fee = \$3.00 x Average Number of Covered Lives**
 - ▼ **Reported annually on Form 720 no later than 7/31 of subsequent calendar year**



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