



# WEBINAR

Tues, Mar. 14<sup>TH</sup>, 2023 | 11 am – 12 pm ET

## Compensation & Benefits Legislative and Regulatory Update

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Professional  
Development  
Credit

with



### Scott Wagner, Partner, Morris, Manning & Martin

Scott counsels clients to address and solve a wide-range of employee benefits issues, including retirement plan, executive compensation, and health and welfare plan matters. Scott has extensive experience with executive compensation and equity matters, and various other federal and state laws related to health and welfare plans. Scott also often works with clients on employee benefits and executive compensation issues involved in mergers and acquisitions and other corporate transactions.

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## CONFERENCE PRESENTATION HIGHLIGHTS

### GENERAL SESSION



**ERISA Litigation Update**  
Johnny Wentzell,  
Jackson Lewis PC



**Ethics Presentation**  
Julie Sharp,  
FEI Workforce Resilience

### HEALTH & WELLNESS BREAKOUT PANEL DISCUSSION

**PERSONALIZED MEDICINE:  
FORCING CHANGE ON HEALTHCARE BENEFITS FINANCE & MANAGEMENT**



**Moderator**  
Dr. Randy Vogenberg,  
EPIC



Dr. Ira Klein,  
Tempus



Alasdair Roe,  
Turtle Glass

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## CONFERENCE PRESENTATION HIGHLIGHTS

### GENERAL SESSION Trends in Cybersecurity



Trish McGinity,  
EMPOWER



Audrey Odonkor,  
Crenshaw, Ware & Martin

### Retirement Plans Legislative & Regulatory Update



Sam Henson,  
Creative Planning

### Correction of Retirement Plan Errors



Scott Wagner,  
Morris, Manning  
& Martin, LLP



Chelesa Deppert,  
Morris, Manning  
& Martin, LLP

Everyone that attends today's webinar will receive a special attendee rate to attend the SBEN Annual Education Conference. The discounted rate is: \$300 and available through March 29<sup>th</sup>. You will receive an email following the presentation with details on how to register.

# Compensation & Benefits: Legislative and Regulatory Update

SBEN/AACA

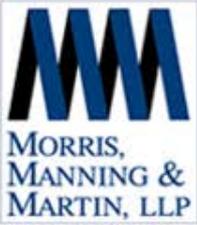
March 14, 2023  
Scott Wagner





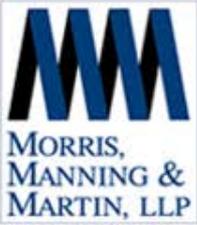
# Agenda

- Secure Act 2.0
- Pay Transparency Developments
- DOJ / Antitrust Compensation Update
- ESG and Proxy Rule Updates and Trends
- Reminders:
  - Outbreak Period / Health Plan Deadlines
  - Speak Out Act



# SECURE Act 1.0

- Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act 1.0)
- At its time, the most significant retirement plan legislation in over a decade
- Key changes from SECURE Act 1.0:
  - Increased required minimum distribution age from 70.5 to 72
  - Full distribution required for participant accounts within 10 years of participant death (certain exceptions)
  - Part-time employees who work more than 500 hours in 3 consecutive years must be eligible to defer to 401(k) plans
  - Simplified nonelective 401(k) plan safe harbor rules and notice requirements
  - Penalty-free withdrawals permitted for birth/adoption of child



# SECURE Act 2.0

- Several years of competing SECURE Act 2.0 bills in both chambers
- SECURE Act 2.0 enacted as a part of Consolidated Appropriations Act on December 29, 2022
- 350 pages of legislation, including 90 provisions impacting private sector retirement plans
- Deadline to amend plans: December 31, 2025 (calendar year plans); December 31, 2027 for governmental plans



# SECURE Act 2.0: 6 Key Provisions to Know

1. Changes to required minimum distribution requirements
2. Roth employer matching contributions
3. Increased catch-up contribution limits for 60-63
4. Roth catch-up contributions for higher earners
5. Student loan repayments and matching contributions
6. Increased part-time worker coverage



# #1: Increase Age for RMDs

## What

REQUIRED: Further increases the age at which required minimum distributions (RMDs) are required to be taken

## When

January 1, 2023 for age 73; January 1, 2033 for age 75

## Note

- RMDs target the tax subsidy of qualified retirement savings to ensure the funds are used for retirement income rather than estate planning
- Excise tax for failure to take RMDs reduced to 25% (10% if corrected within two years after year of missed RMD)



## #2: Optional Treatment of Employer Contributions as Roth Contributions

### What

OPTIONAL: Allows defined contribution plans to provide participants with the option of receiving matching or non-elective contributions on a Roth basis

### When

Effective upon enactment of SECURE 2.0

### Note

- If implemented, plan sponsors would need to work with their recordkeepers regarding communications, education, elections, and other administrative issues
- Contributions must be 100% vested



# #3: Higher Catch-up Limits for 60-63

## What

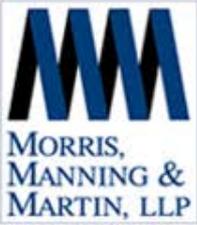
OPTIONAL: Increases catch-up contributions limit for people age 50 and over to the greater of \$10,000 or 50% more than the regular catch-up amount in 2025 for those aged 60, 61, 62, and 63

## When

Effective for taxable years beginning after December 31, 2024

## Note

The increased amounts are indexed for inflation after 2025



# #4: Roth Catch-Up Contributions for Higher Earners

## What

REQUIRED (if catch up offered): Catch-up contributions for participants who earned more than \$145,000 in the prior year (indexed for inflation) must be made on a Roth basis

## When

Effective for taxable years beginning after December 31, 2023

## Note

- Other participants must be given the option to make Roth catch-up contributions
- Plan sponsors may want to consider having all catch-up contributions made on a Roth basis to ease administrative burden
- Implementation will be burdensome for plans that don't currently allow Roth contributions



# #5: Student Loan Payments

## What

OPTIONAL: Plan sponsors can treat employees' qualifying student loan payments as elective deferrals for matching contribution purposes

## When

Effective for contributions made for plan years beginning after December 31, 2023

## Note

- Debt must be higher education-related and participants must certify annually that loan payments have been made
- Match rate, vesting and eligibility must be the same as deferrals
- Separate nondiscrimination testing rules apply so that ADP testing isn't an issue
- Loan repayments count towards annual 402(g) deferral limit



# #6: Expanding Coverage for Part-Time Workers

## What

REQUIRED: Reduces the 3 consecutive years of service rules for long-time, part-time employees (500 hours+ per year) to 2 years

## When

Effective as if included in SECURE Act 1.0 and for plan years beginning after December 31, 2024

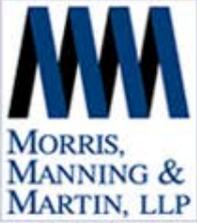
## Note

- Requires enrollment for purposes of deferrals (but not employer contributions)
- Pre-2021 service is disregarded for eligibility and vesting purposes



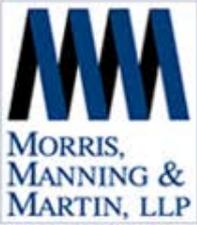
# Pay Transparency

- An increasing number of states are passing pay disclosure and transparency rules. Several states have adopted previously:
  - Washington (July 28, 2019)
  - Maryland (Oct. 1, 2020)
  - Colorado (Jan. 1, 2021)
  - Connecticut (Oct. 1, 2021)
  - Nevada (Oct. 1, 2021)
- New state requirements:
  - California (Jan. 1, 2023)
  - Rhode Island (Jan. 1, 2023)
  - Washington – new requirements (Jan. 1, 2023)
  - New York (Sep. 17, 2023)
- Several local municipalities have passed similar rules



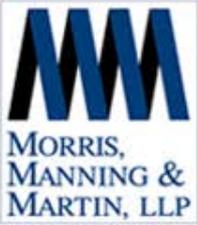
# California

- Effective January 1, 2023, Employers must:
  - Provide applicants with the pay scale for a position on an applicant's reasonable request
    - “Reasonable request” – before Jan. 1, 2023 meant after first interview
  - Provide employees with the pay scale for their current position on request
    - “Pay scale” is the salary or hourly wage range the employer reasonably expects to pay for the position
    - Does NOT include bonuses, commissions, tips, or other benefits
    - Exception: if commission factors into rate, then must be included
  - If the employer has 15 + employees (with at least one in CA), include the pay scale for a position in any job posting
- “Any job posting” as referring to any job posting for a position that may ever be filled in CA, either in-person or remotely from CA
- Must be in the actual posting – not in a separate link
- Enforcement through complaints to CA Labor Commission and civil action (retaliation claims) + civil penalties



# Rhode Island

- Effective January 1, 2023, employers must provide the wage range for a position:
  - To an applicant upon request
  - Or to applicant prior to discussing compensation
  - To employees:
    - at the time of hiring;
    - when an employee moves into a new position; and
    - on an employee's request
  - Employers prohibited from relying on wage history of applicant in deciding to hire, requiring applicant's prior wages satisfy min. or max. criteria, relying on wage history to set wage, and seeking wage history of applicant
  - Employers MAY rely on wage history to support a higher wage AFTER offer
  - Workplace poster requirements



# Washington

- Effective January 1, 2023, employers with 15 or more employees (with at least one WA employee) must disclose, in each job posting for each job opening:
  - The wage scale or salary range
  - A general description of all benefits and other compensation
- Employees offered an internal transfer or promotion, the wage scale or salary range disclosure requirement remains "on request"
- Pay range must extend from the lowest to the highest pay established by the employer before posting the job. Cannot say - \$50k +
- If different salary offered depending on years of experience, the job posting should clearly define the lowest to highest pay established for each range of years of experience
- Exception for worksites that are outside of the state



# New York

- Effective September 17, 2023
- Employers with at least 4 employees (not clear if all need to be in NY)
- When advertising a job, promotion, or transfer opportunity that will be physically performed (at least in part) in NY, or reporting to a supervisor, office, or other work site in NY, covered employers must disclose the following:
  - Compensation or range of compensation for the job, promotion, or transfer opportunity
    - Minimum and maximum annual salary or hourly range that the employer in good faith believes
    - For commission positions, a general statement, in writing, that compensation is based on commission is sufficient
  - The job description, if one exists
- “Advertise” means internal or external posting
- Prohibits retaliation
- Does NOT preempt local laws – NYC employers must comply with both



# Antitrust Update

- On Feb. 3, 2023, the DOJ withdrew 3 policy statements it and the FTC issued between 1993 and 2011 related to antitrust enforcement in the healthcare industry
- Prior policy statements addressed the permissibility of information sharing
- DOJ called the policies “outdated”
- Case by case approach going forward



# Antitrust Update

- By withdrawing policies, the DOJ effectively eliminates safe harbors for info sharing in the health care industry for:
  - Price and cost information
  - Participation in surveys about prices for services or compensation if:
    - 3<sup>rd</sup> party
    - More than 3 months old
    - At least 5 providers contributed
    - No provider's data represented more than 25%
    - Aggregated, not identifiable



# Antitrust Update

- Current withdrawal only applies to healthcare policies
- Concern is that this action will affect other policies for non-healthcare policies
- Withdrawal does not change law: exchange of competitively sensitive info, without an agreement to fix prices, is not a violation of law
  - Rule of Reason (balancing test that takes into account all facts and circumstances and determined whether the anticompetitive effects outweigh procompetitive benefits of the exchange)
  - Concentrated industries have received higher scrutiny
- Actual finding of harm necessary?
- Increased scrutiny expected
- Heightened concern with respect to AI tools



# New Reporting Requirements

- Regulations issued in November 2020:
  - Most health plans and insurers (individual and group markets) must make transparency in coverage cost-sharing disclosures that include:
    - (1) in-network provider negotiated rates,
    - (2) historical out-of-network allowed amounts for providers, and
    - (3) in-network negotiated rates and historical net prices for all covered prescription drugs at the pharmacy-location level.
- The regulations required the files to be made public for plan years that begin on or after January 1, 2022 – Extended enforcement until July 1, 2022.



# Reporting Requirements

- In-network and out-of-network rate disclosures must be made through 3 MRFs posted on an internet website in a standardized format, updated monthly.
- MRF means a digital representation of data or information in a file that can be imported or read by a computer system for further processing without human intervention, while ensuring no semantic meaning is lost.
- Each MRF must use a non-proprietary, open format to be identified in technical implementation guidance (for example, JSON, XML, CSV). A PDF file, for example, would not meet this definition due to its proprietary nature.
- The MRFs are also required to comply with technical, non-substantive implementation guidance provided by the agencies. The disclosures are intended to allow the public to access health insurance coverage information that can be used to understand health care pricing.



# Reporting Requirements (cont.)

- Regulations also require plans and insurers to disclose individualized cost-sharing information to a participant, beneficiary, or enrollee (or his or her authorized representative) upon request, including an estimate of the individual's cost-sharing liability for covered items or services furnished by a particular provider.
- Disclosures must be available through an internet-based self-service tool and on paper, are required for an initial list of 500 items and services for plan years that begin on or after January 1, 2023, with all items and services to be disclosed for plan years that begin on or after January 1, 2024.



# RxDC Reporting

- Group health plans and insurers offering group or individual coverage must submit info about Rx drugs to HHS, DOL, and Treas
- 2020 and 2021 data is due December 27, 2022
- The data is very granular on Rx Drugs, costs, ID codes, etc.
- 1 or plan lists, and 8 data files for plan per year with a narrative response
- Plan sponsors are relying heavily on PBMs and TPAs here, but some are verifying all data
- For self-insured plans, requirement falls on sponsor



# Proxy Trends

- ESG expected trends in 2023:
  - Climate expected to be top
  - Social issues including diversity, equity, and inclusion (DEI) also expected to be in focus
  - Reproductive health and related costs/risks of federal and state regulations (following overturning of *Roe v. Wade*)
- Changes in proxy voting
  - Universal proxy rule in contested elections
  - Greater availability / ease for individuals to vote
- Say on pay (challenges given economy and ESG)



# DOL ESG Rules

- Most terms effective Feb. 1, 2023
- Certain terms related to proxy voting – effective Dec. 1, 2023
- 2020 guidance – economic interests are primary (investments and voting)
- March 2021 – new guidance recognizing ESG factors; prior guidance chilling effect?
- New Guidance Summary:
  - Specifically recognizes that ESG factors may be relevant to the risk-return analysis of potential investment
  - “Reasonable determination” standard
  - QDIAs included
  - Modifies tie breaker rule for collateral benefits – alternative investment must equally serve interests of the plan (but doesn’t have to be indistinguishable)
  - Tie breaker documentation - removes specific separate requirements
  - Consideration of participant preferences when constructing a menu of investment options for participant-directed accounts does not itself violate the duty of loyalty



# DOL ESG Rules

- Impact for Proxies:
  - 2020 rule: “the fiduciary duty to manage shareholder rights appurtenant to shares of stock does not require the voting of every proxy or the exercise of every shareholder right.”
    - New guidance: Removed.
  - 2020 rule: specific monitoring obligations of third parties authorized to vote
    - New guidance: Same standard as selection/monitoring of other service providers



# DOL ESG Rules

- Prior rule: 2 safe harbors for voting policies (1 – permitted policy to limit voting to proposals that were substantially related to the issuer’s business activities or were expected to have material effect on value; 2 – permitted policy of refraining from voting on proposals where the plan’s holding in a single issuer relation to plan assets was below a certain threshold)
  - New guidance removes safe harbors for certain types of policies
  - DOL generally concerned about abstentions
- New guidance also eliminates recordkeeping requirements – proxy voting to generally be treated the same as other fiduciary functions (generally requires proper documentation)



# Outbreak Period

- Save the date: May 11, 2023 is the “End of the COVID-19 Outbreak”
- Outbreak Period began on March 1, 2020 and continues through 60 days after the end of the COVID-19 national emergency
- Included deadline extensions for COBRA, special enrollment, and benefit claims and appeals procedures
- One year deadline extensions are applied on a rolling basis (e.g., if an individual’s original deadline for electing COBRA was 11/1/2020, that date is extended to 11/1/2021)
- Example:
  - For example, if an individual elected COBRA outside of the initial 60-day COBRA election timeframe, they have one year and 105 days (60 days + 45 days) after the date the COBRA notice was provided to make the initial COBRA premium



# Speak Out Act

- Effective Dec. 7, 2022
- Prohibits judicial enforcement of:
  - pre-dispute non-disclosure or
  - non-disparagement clausesin a sexual assault or sexual harassment dispute that prohibit discussions or disclosures of sexual assault or sexual harassment.
- Does not prohibit an employer from protecting trade secrets or proprietary information.
- The Act covers more than just agreements between employers and employees
- Practically, this means a court will not enforce a provision in an agreement that (1) would otherwise prohibit disclosure of conduct constituting sexual assault or harassment and (2) was entered into before the dispute arose. Accordingly, the Act does not include penalties beyond non-enforcement of those provisions.



# Questions



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