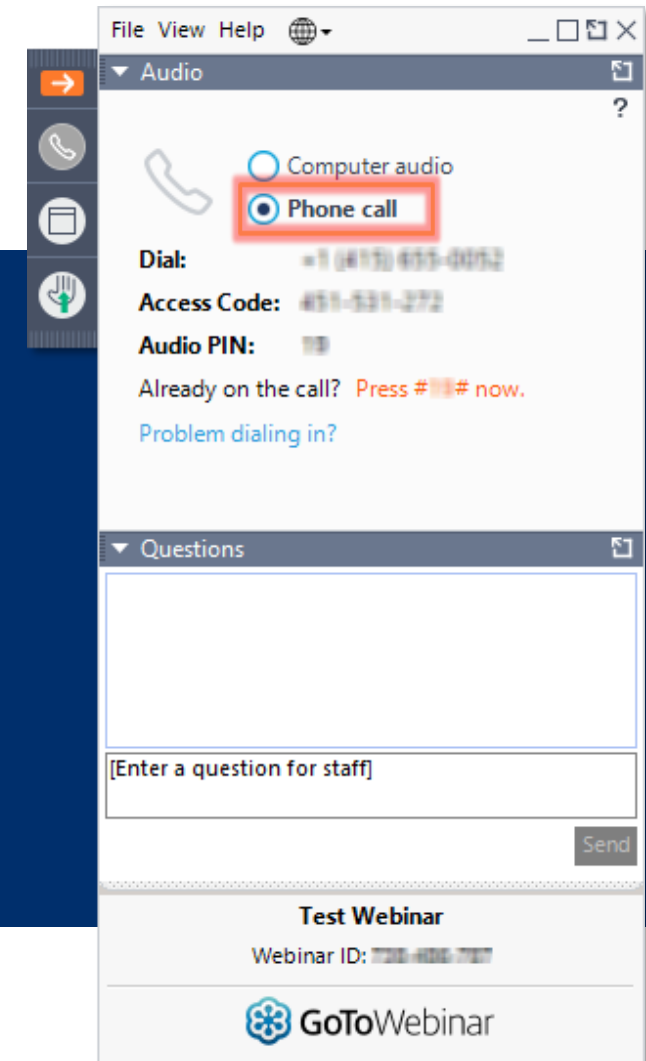




LIVE Webinar Part III: Continuing to Navigate COVID-Era Regulations For Employers

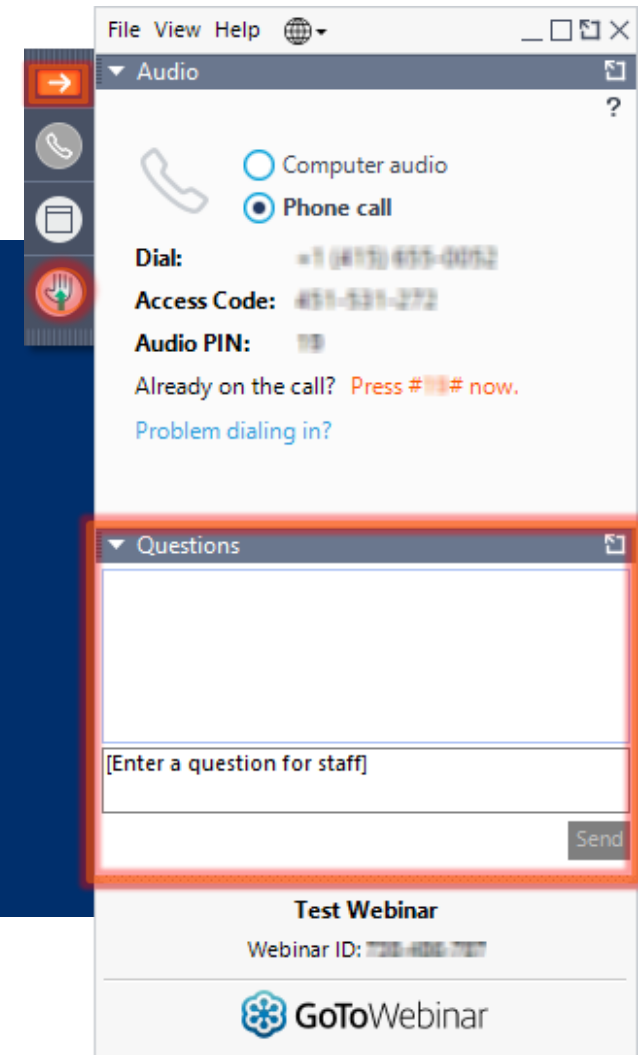
Thursday,
May 20, 2021
12:00 p.m. EST

- Select "Computer audio" to join via VOIP
- Select "Phone call" to dial in



Audio Instructions

- Grab Tab
- Handouts
- Questions



Control Panel



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Meet the Speakers



Objectives

Discuss the most up-to-date information and guidance for employers including:

- Update – New CDC Guidance on masks – what it means for employers
- New OSHA reporting requirements for employers requiring COVID-19 vaccines
- New U.S. Department of Labor guidance regarding COVID-19 wage and hour issues
- Roundup of state and local laws regarding COVID-19 and vaccines, including pending legislation
- COVID-19 litigation update
- Retirement plan cybersecurity best practices in light of the new DOL guidance
- Update on IRS guidance related to flexible spending accounts
- New DOL clarification on Mental Health Parity Compliance
- Update on Outbreak Period guidance and COBRA subsidy

Labor & Employment





Topics

- Update – New CDC Guidance on masks – what it means for employers
- New OSHA reporting requirements for employers requiring COVID-19 vaccines
- New U.S. Department of Labor guidance regarding COVID-19 wage and hour issues
- Roundup of state and local laws regarding COVID-19 and vaccines, including pending legislation
- COVID-19 litigation update



Update – New Guidance on Masks

CDC: Fully vaccinated people can resume activities without wearing a mask or physically distancing, except where required by federal, state, local, tribal, or territorial laws, rules and regulations, including local business and workplace guidance.

Fully Vaccinated:

- 2 weeks after second dose in a 2 dose-series, such as Pfizer or Moderna vaccines, or
- 2 weeks after a single-dose vaccine, such as Johnson & Johnson's Janssen vaccine



Update – New CDC Guidance on Masks

Ohio and other states and municipalities have adopted the new CDC standard:

“Ohio will be amending our remaining health orders to comply with the new CDC guidance, which says that those who have been vaccinated no longer need to wear masks, while those who have not been vaccinated should still wear a mask and socially distance.”

OSHA:

“OSHA is reviewing the recent CDC guidance and will update our materials on this website accordingly. Until those updates are complete, please refer to the CDC guidance for information on measures appropriate to protect fully vaccinated workers.”

Update – New CDC Guidance on Masks

| Employer Options: | Issues: |
|--|---|
| 1. Continue to require masks, social distancing, etc. | <ul style="list-style-type: none">• Employee morale• Enforceability |
| 2. Revoke masks, social distancing, etc. for vaccinated employees; <u>confirm</u> vaccination status of employees; | <ul style="list-style-type: none">• State/local laws• ADA• Religious discrimination and accommodation requests• Potential harassment and bullying• Employee morale• Enforceability |
| 3. Revoke masks, social distancing, etc. for vaccinated employees; <u>do not confirm</u> vaccination status of employees. | <ul style="list-style-type: none">• State/local laws• Workplace safety issues/OSHA• Potential harassment and bullying• Employee morale• Enforceability |



Update – New CDC Guidance on Masks

Additional Considerations:

- Consider all applicable state/local laws
- Note that vaccinated employees may continue to wear masks
- Note preventative measures that remain in place, if any
- Consider union issues if applicable



New OHSA Reporting Requirements

Guidance issued by OSHA in April answers the question:

- When must an employer record an adverse reaction to a COVID-19 vaccine on its OSHA 300 Logs?

Answer: “OSHA is exercising its enforcement discretion to only require the recording of adverse effects to **required vaccines** at this time.”



New OSHA Reporting Requirements

- If you **require** your employees to be vaccinated as a condition of employment, then any adverse reaction to the COVID-19 vaccine is work-related and must be reported.
- If you **recommend** vaccination but it is strictly **voluntary**, no reporting is required at this time.

Voluntary means:

- An employee's choice to accept or reject the vaccine cannot affect [his or her] performance rating or professional advancement, and
- An employee who chooses not to receive the vaccine cannot suffer any repercussions from this choice.



DOL Guidance Regarding COVID-19 Wage and Hour Issues

New DOL Initiative: Essential Workers –Essential Protections

Resources on a variety of topics including FMLA and FLSA

Link : <https://www.dol.gov/agencies/whd/pandemic>

Includes FAQs regarding wage and hour issues specific to COVID-19



DOL Guidance Regarding COVID-19 Wage and Hour Issues

Examples of wage and hour FAQs:

- My employer requires all employees to take their temperature to try to screen for people who might have COVID-19 before entering the job site. Do I need to be paid for the time spent taking my temperature?
- My employer is requiring me to undergo COVID-19 testing on my day off before I can return to the jobsite. Do I need to be paid for the time spent undergoing the testing?
- How are hours worked calculated for employees who work from home or no longer work at an employer's worksite?



State and Local Laws Regarding Vaccines

EEOC Guidance:

- Mandatory vaccinations for employees permitted
 - Exceptions for ADA/Religious Accommodations

State Laws— Governor's orders and pending legislation:

- Prohibit adverse action based on vaccination status
- Prohibit inquiries and/or requests for proof of vaccination



State and Local Law Regarding Vaccines

- Ohio
- Kentucky
- Indiana
- Michigan



COVID-19 Litigation Update

- FMLA
- Disability Discrimination
- Retaliation



Employee Benefits & Executive Compensation





DOL Guidance - Cybersecurity

Tips for hiring a service provider to satisfy ERISA duty to prudently select and monitor service providers:

1. Inquire about the information security standards, practices and policies, audit results, and compare with industry standards
2. Ask how practices are validated and what levels of security standards it has met and implemented
3. Evaluate track record in the industry
4. Inquire about past security breaches
5. Find out about insurance policies and whether they cover cybersecurity and identity theft losses



Tips for hiring a service provider, cont.

6. Ensure the service provider contracts require ongoing compliance with cybersecurity and information security standards and be aware of any limits
 - The service provider contract should include the following:
 - Require a third party audit to determine service provider compliance
 - Include clear provisions on confidentiality and the use and sharing of information by the service provider
 - Ensure cooperation and prompt notification of cybersecurity breaches
 - Specify the service provider's obligation to meet all applicable privacy laws
 - Consider requiring insurance coverage to provide protection for breach-related losses



Best Practices

For use by record keepers and other service providers responsible for plan-related IT systems and data and for plan fiduciaries evaluating what service providers to hire

1. Have a formal, well-documented cybersecurity program
2. Conduct prudent annual risk assessments
3. Have a reliable annual third party audit of security controls



Best Practices, cont.

4. Clearly define and assign information security roles and responsibilities
5. Have strong access control procedures
6. Ensure that any assets or data stored in a cloud or managed by a third party service provider are subject to appropriate security reviews and independent security assessments



Best Practices, cont.

7. Conduct periodic cybersecurity awareness training
8. Implement and manage a secure system development life cycle program ("SDLC")
9. Have an effective business resiliency program addressing business continuity, disaster recovery, and incident response



Best Practices, cont.

10. Encrypt sensitive data, stored and in transit
11. Implement strong technical controls in accordance with best security practices
12. Appropriately respond to any past security incidents



Online Security Tips

Tips are directed to participants and beneficiaries:

1. Careful registration and monitoring of online accounts
2. Use of strong and unique passwords
3. Keep personal contact information up-to-date
4. Close unused accounts



Online Security Tips, cont.

5. Avoidance of free Wi-Fi
6. Caution with respect to phishing attacks
7. Installation of antivirus software
8. Identification of FBI and DHS websites for reporting cybersecurity incidents



Action for Plan Sponsors

- First formal guidance from DOL – likely will be an audit focus for the DOL
- Provides specific guidelines for plan fiduciaries which should be carefully reviewed and considered when evaluating service providers and selecting new service providers
- Directed to retirement plans, but should be considered for ERISA welfare plans also



Flexible Spending Account Update

- IRS Notice 2021-26 and 2021-15
 - Clarifies federal tax treatment of DCAP benefits
- IRS Notice 2021-15
 - Age limit relief applicable to dependent care FSA carryover relief
 - Grace period extensions
 - Carryovers
 - Prospective election changes
 - Post-termination reimbursements from Health FSAs
 - HSA compatibility
 - Amendments



Action for Plan Sponsors

- Consider if any of these FSA changes are appropriate
- Work with advisors to implement, adopt and communicate changes
- Don't forget about the need for plan amendments



Mental Health Parity

- Consolidated Appropriations Act amended the Mental Health Parity and Addiction Equity Act of 2008
- FAQ guidance was released
- Expressly requires health plans that impose non-quantitative treatment limits (“NQTL”) on mental health and substance use disorder benefits to test for compliance and be prepared to prove compliance to the DOL



Mental Health Parity, cont.

- Plans and issuers must make their comparative analyses available to the Departments or State authorities upon request beginning February 10, 2021
- A general statement of compliance with conclusory references is not sufficient
- The comparative analyses must be sufficiently specific, detailed, and reasoned



Mental Health Parity, cont.

- Be prepared to make available documents that support the analyses
- If a determination of noncompliance is made, corrective action is required within 45 days
- If a final determination of noncompliance is made, notice to enrolled individuals must be given within 7 days



Mental Health Parity, cont.

- For ERISA plans, the comparative analyses and related information must be provided to participants and beneficiaries upon request
- Focus is on the following:
 - Prior authorization requirements for in-network and out-of-network inpatient services
 - Concurrent review for IN and OON inpatient and outpatient services
 - Standards for provider admission to participate in a network, including reimbursement rates
 - OON reimbursement rates and plan methods for determining UCR



Action for Plan Sponsors

- Review your plan to determine if there are NQTLs
- Work with insurers and TPA on comparative analysis and status of sufficient documentation
- It can be difficult to get this information from the TPA and evaluate whether it is correct and sufficient



ARPA - COBRA Subsidy

- FAQs issued April 7, 2021
- IRS Notice 2021-31 issued May 18, 2021
- Definition of involuntary termination of employment – facts and circumstances test – many examples provided in Notice



ARPA – COBRA Subsidy, cont.

- Reduction in hours of service qualifies for subsidy regardless of whether it is voluntary or involuntary or whether the employee agreed to the reduction
- An individual can become an AEI more than once
- Employers who claim the tax credit must substantiate claim for credit such as certifications from the AEI and employment records, and can be relied on unless Employer has actual knowledge the information is not correct



ARPA – COBRA Subsidy, cont.

- Eligibility to enroll under a spouse's group health plan may disqualify the AEI from the COBRA subsidy
- As long as the original qualifying event qualifies for the subsidy, the subsidy is available during extensions of COBRA due to a second qualifying event
- AEIs are eligible for the subsidy during eligibility waiting periods that overlap the subsidy period



ARPA – COBRA Subsidy, cont.

- The subsidy is available for vision, dental and HRA, but not health FSA
- Employers who are no longer subject to federal COBRA due to a reduction in the number of employees are still required to provide the extended COBRA election period to AEIs
- AEI with self-only COBRA can add a spouse/dependent under the extended election period and receive the subsidy for them if the spouse/dependent enrolled at time of the qualifying event



ARPA – COBRA Subsidy, cont.

- If the AEI elects retroactive COBRA coverage, the Outbreak Period extension applies to premium payments for the retroactive periods of coverage
- Details of claiming the credit are also included in this guidance
 - IRS Form 7200



Action for Plan Sponsors

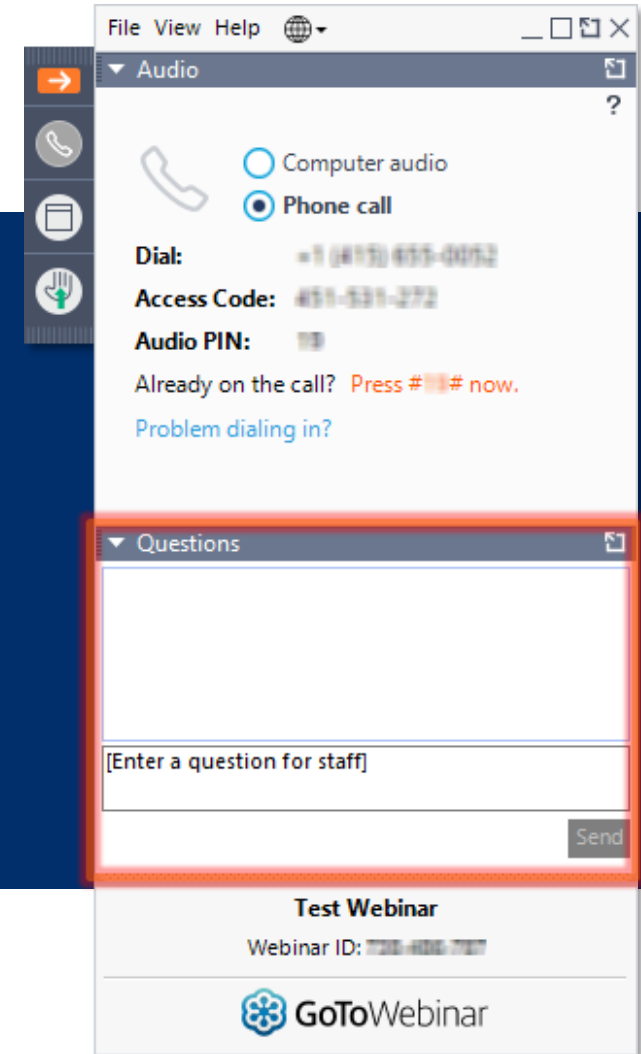
- Immediate attention to these COBRA rules
- Confirm that extended enrollment period notices being provided
- Deadline for providing notices is May 31, 2021



Outbreak Period

- EBSA Disaster Relief Notice 2021-01
- Outbreak Period relief will have the applicable periods disregarded until the earlier of (i) one year from the date they were first eligible for relief; or (ii) 60 days after the announced end of the National Emergency
- Action for Plan Sponsors: Continue to consider impact of Outbreak Period

- Please type your message/question in the window pane of the attendee control panel.



Questions



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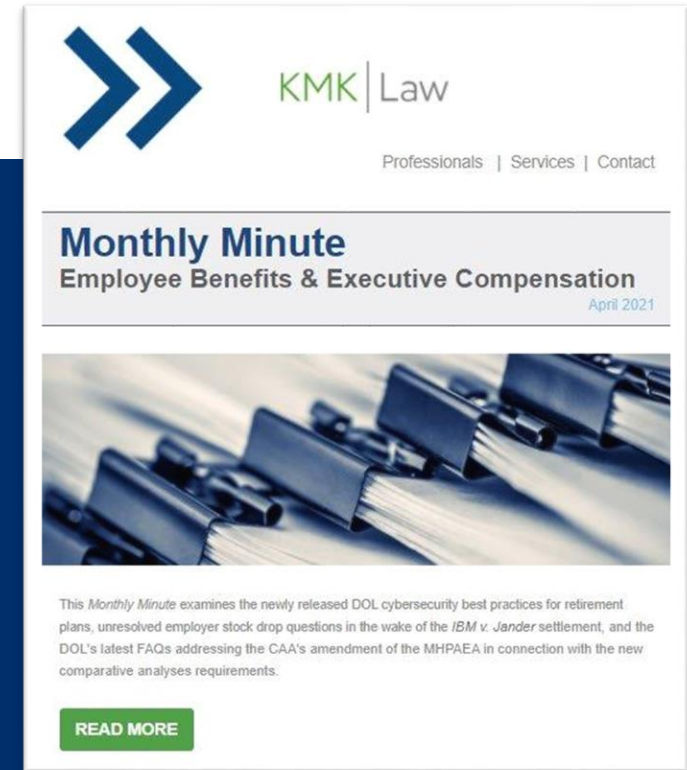
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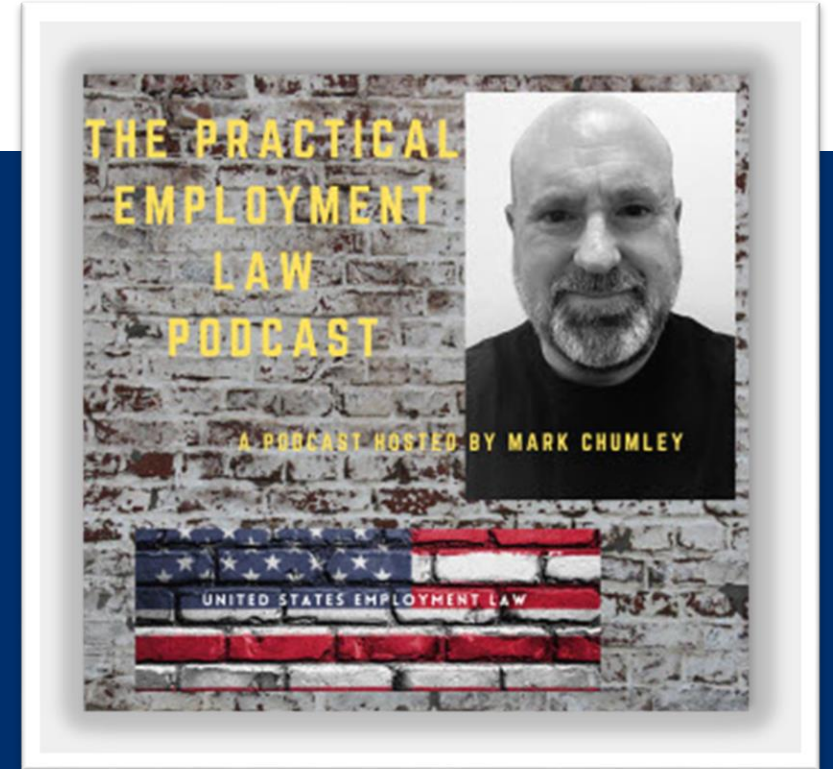
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- Visit kmklaw.com to find our COVID-19 Response Team's most recent insights and analysis under the News & Resources and Blogs tabs
- Subscribe to our Employee Benefits & Executive Compensation "Monthly Minute" Newsletter



Additional Resources

- Follow our Management Rights Blog
- Follow The Practical Employment Law Podcast if you are interested in learning about the employment law challenges facing businesses today



More

Additional Resources



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