

2021 Spring Labor & Employment Seminar

Labor & Employment Practice Group

May 25th, 2021

**BERN
STEIN
SHUR**

Introduction & Agenda

- Benefits Update
- Racial Bias and Discrimination Investigations
- Return to Work Considerations Q&A

Employee Benefits Update

Steve Gerlach – Shareholder, Bernstein Shur

Molly Gilligan – Of Counsel, Bernstein Shur

Relevant Laws and Agency Guidance

Mar 13, 2020

President Trump Declares COVID-19 a National Emergency

Mar 18, 2020

Families First Coronavirus Response Act (FFCRA):

Expanded Paid Sick Leave (EPSLA)
Expanded Family and Medical Leave (EFMLA)

Mar 27, 2020

Coronavirus Aid, Relief, and Economic Security (CARES) Act
Paycheck Protection Program (PPP) and Loan Forgiveness
Expanded Unemployment Benefits
Employee Retention Credit

Jun 5, 2020

Paycheck Protection Program Flexibility Act of 2020

May 4, 2020

IRS and EBSA Joint Notice - Extension of Timeframes
Special Enrollment Periods, COBRA and other timeframes extended.

May 12, 2020

IRS Notice 2020-29 - Employers with Section 125 Plans can permit mid-year election changes including Health, FSA, or DCA contributions. HDHPs can pay first dollar expenses related to COVID-19
IRS Notice 2020-33 - Increases FSA Carry Over amounts and clarifies ICHRA Premium Payment timing.

Dec 28, 2020

Consolidated Appropriations Act of 2021

Extended FFCRA Payroll Tax Credits
Additional PPP Funding
Extended Employee Retention Tax Credits
No Surprises Act - Healthcare Transparency, MHPAEA Enforcement

Feb 26, 2021

DOL's EBSA Disaster Relief notice 2021-01 (Guidance on the "Joint Notice" and EBSA 2020-01)
Timeframes are calculated individually.

Mar 11, 2021

American Rescue Plan Act of 2021

Extends and Updates CARES Act and FFCRA
Extends Employee Retention Tax Credits
Supplements and Extends Unemployment Compensation
Expands Premium Tax Credits and Marketplace subsidies
Dependent Care Assistance Increases
COBRA Premium Assistance

Feb 28, 2021

IRS Notice 2021-15 - Clarifies application of the CAA. Allows mid-year election changes for health FSAs and DCA programs under section 125 as well as increasing carry-over amounts for plan years 2020 and 2021

JAN
2020

JULY
2020

Timeframe Extensions for 2021

May 2020

- IRS and EBSA published “Extension of Certain Timeframes for Employee Benefit Plan Participants, and Beneficiaries Affected by the COVID-19 Outbreak.”
- EBSA published Disaster Relief Notice 2020-01

What did this mean?

- Extension of Special Enrollment Periods
- Extension for election of COBRA coverage and for payment of premiums.
- Extension of timeframe for notifications to the plan

February 2021- EBSA Disaster Relief Notice 2021-01

What does this mean now?

- Extensions remain in place for the earlier of 12 months *or* 60 days from the end of the National Emergency ("The Outbreak Period").
- Extensions are calculated on *individual* dates of eligibility.

Overview of IRS Proposed Rules regarding “Certain Medical Care Arrangements”

- Define Medical Care and Medical Insurance (for purposes of the Tax Code only)
- Define Direct Primary Care Arrangement
- Define Health Sharing Ministry
- Discuss Reimbursement of DPC Arrangements by HRAs (permitted) and HSAs (not permitted)
- Discuss Reimbursement of Health Sharing Ministries and HRAs (reimbursement permitted, not integration) and HSAs (not permitted)

Section 125 / Cafeteria Plans

May 2020 – IRS Notice 2020-29

Section 125 Plans may be amended to permit mid-year elections and to cover expenses related to COVID retroactive to January 1, 2020, through December 31, 2020

Employers could permit employees to elect health coverage, change FSA and DCA contributions regardless of basis.

December 27, 2020 – Consolidated Appropriations Act (CAA)

- Partially extended relief allowances under Notice 2020-29
 - Continued Flexibility for FSA and DCAPs not Health Plans
- Permits FSA and DCAP remaining balances to roll over into the following year.
- Voluntary for employers and may require a plan amendment.
- FSAs are permitted to allow terminating employees to spend balances without electing COBRA.
- Age increase for DCAP.

Consolidated Appropriations Act of 2021 – No Surprises Act

- Bipartisan effort to eliminate “surprise medical billing.”
 - Seeks to prevent medical bills from out-of-network providers or facilities where patients do not have prior notice and have not consented to the charges.
- The Act contains requirements for Plans & Providers including advanced EOBs, cost requirements and notice and consent to out of network costs.
- Plans and Issuers must publish price comparison guidance.
- HHS, DOL and Treasury are preparing regulations

Consolidated Appropriations Act of 2021 – No Surprises Act

- **Transparency Requirements**
 - No Gag Clauses prevents plans and issuers from agreeing not to disclose provider cost and quality information
 - Brokers and consultants must disclose direct or indirect compensation received.
- **Increased Mental Health Parity Enforcement**
 - Require group health plans and issuers to provide detailed analysis of compliance with MHPAEA's non-quantitative treatment limitations rule.

The American Rescue Plan Act

In addition to Extensions and Updates to CARES and FFCRA, ARPA includes:

- Unemployment compensation subsidies
- Tax credits for employee retention
- Premium Tax Credits/Marketplace Subsidies
- Dependent Care Assistance Program increases
- COBRA Premium Assistance – 100% subsidy from 4/1/21 to 9/30/21
- Among other provisions...

ARPA - COBRA Premium Assistance

1. Limited Period of Premium Assistance: April 1, 2021 to September 30, 2021.
2. Option for enrollment in lower cost plan if permitted by the Employer.
3. Premium Assistance ends if eligible for coverage, or if COBRA ends.
4. Extended election period for AEIs who haven't elected COBRA.
5. Requires Plan Sponsors to send NOTICES to individuals.
6. The “person to whom premiums are payable” is eligible for a tax credit.

ARPA - COBRA Premium Assistance

Who Is Eligible?

“Assistance Eligible Individual”

A qualified beneficiary for a “period of coverage” between April 1, 2021 and September 30, 2021, who is eligible for COBRA because of a qualifying event that is an involuntary termination or a reduction in hours, and elects COBRA.

ARPA - COBRA Premium Assistance

Updates



DOL Model Notices



DOL FAQs on ARPA
(or “the ARP”)



IRS Guidance

ARPA - COBRA Premium Assistance

DOL Model Notices (Released April 8, 2021)

Model General Notice and COBRA Coverage Election Notice

Applies to all Qualified Beneficiaries as of 4/1/2021

Model Extended Election Period Notice

Applies to AEs who are currently enrolled in COBRA and those who would be AEs if they had elected and/or maintained COBRA.

Model Alternative Notice

Applies to employers not subject to federal COBRA but are subject to state “mini-COBRA” (<20 employees)

Summary of COBRA Premium Assistance Provisions

(Contains form Request for Treatment as an AEI)

Must be provided along with the applicable Notice

Notice of Premium Assistance Expiration Premium

AEIs must receive notice that the premium assistance is ending

ARPA - COBRA Premium Assistance

Review of Required Notice Deadlines

REQUIRED NOTICE	RECIPIENT	DEADLINE
Election Notice, Summary of Provisions/Request for AEI Treatment	<i>All</i> Qualified Beneficiaries	Use as of 4/1/2021
Extended Election Period Notice, Summary of Provisions/Request for AEI Treatment	<i>All</i> AEIs eligible for an EEP	By 5/31/2021
Notice of Premium Assistance Expiration Premium	AEIs must receive notice that premium assistance is ending within 15-45 days prior to the COBRA premium subsidy end date	Between August 16th and September 15th 2021

COBRA Premium Subsidy

IRS Guidance (Notice 2021-31 issued May 18, 2021)

- Confirmed general understanding of ARPA's COBRA premium assistance administration.
- Contains 86 Q&As with examples.
- Employers claim the quarterly credit on Form 941 (generally) Employers may reduce deposits of federal employment taxes based on anticipated credits.

Racial Bias and Discrimination Investigations

Talesha Saint-Marc – Shareholder, Bernstein Shur

Amber Attalla – Attorney, Bernstein Shur

Black Lives Matter: Adjusting Workplace Policies and Practices



Response to Racial Bias & Discrimination

Businesses have responded by:

- making statements about racial injustice,
- Updating their anti-harassment policies,
- Training or retraining their workforce, and
- Reviewing internal complaint procedures.



We've also seen major shifts in policy:

- NASCAR banning the confederate flag
- NBA permitting players to kneel during the anthem
- Redskins changing team name to Washington Football Team



Business Justification for DEI

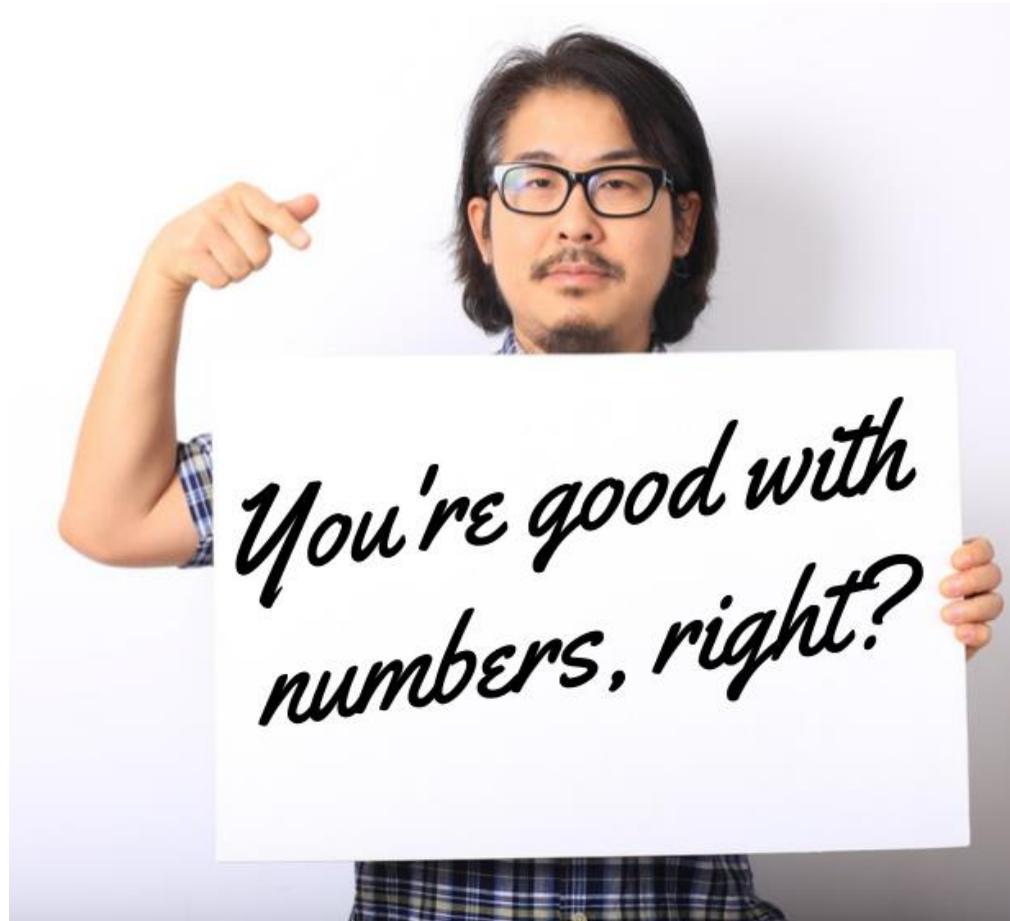
Diverse businesses:

- Make better decisions,
- Have a more positive profile in the community, and
- Gain respect in the marketplace

Responding to Racial Bias & Discrimination

- Consider unconscious bias training,
- Evaluate new opportunities for recruiting and retention,
- Evaluate diversity at all levels of the organization

Implicit Biases and Microaggressions



Implicit Bias

- The term “implicit bias” (also known as “unconscious bias” or “unconscious stereotyping”) refers to the role unconscious cognitive responses play in decision-making.
- Everyone has it.
- How our brains evolved for survival and to store information – “Mental shortcuts” – tying shoes or driving.
- Do not necessarily align with our declared beliefs or reflect stances we would explicitly endorse.
- Implicit bias in all areas – employment, policing, judiciary.
- Good news – it can be unlearned over time – awareness and a desire to be fair.

What are Microaggressions?

- “A statement, action, or incident regarded as an instance of indirect, subtle, or unintentional discrimination against members of a marginalized group such as a racial or ethnic minority or protected class.”
- Often outcome of implicit biases



Example

A group of colleagues are talking in the hallway of the office about sports. A manager says to a Black employee, “You must be a good basketball player.” The employee laughs and shrugs his shoulders. Another employee approaches him later and asks if he felt comfortable with the comment. The employee responds that he was not offended.

- *What – if anything – is the implicit bias in the comment?*
- *Does it matter that the person making the comments was a manager rather than an employee?*
- *Would it matter if the manager were Black?*
- *Should the individuals who overheard the comment do anything?*
- *Does the company have any obligations to the employee at this point?*

Notice of Biased-Based Incidents

A company/organization might learn of an incident via:

- An employee may tell another employee, manager, officer/director, or client;
- An employee, manager, officer/director or client may observe interactions;
- It may be discussed among members of the community or in local media;
- Social media posts;
- An anonymous report

Addressing Anonymous Complaints



When is there a Duty to Investigate?

Duty to Investigate

Employers have an affirmative duty to investigate all claims of harassment, discrimination, and retaliation.

The duty to investigate arises:

- for formal complaints
- for informal complaints
- when a supervisor/manager observes inappropriate comments/conduct
- when there's general office knowledge of harassing behavior or a "culture problem"

Investigation Tips and Takeaways

- Define Investigation Protocol and Provide Proper Training
- Define Scope of Investigation
- Conduct Prompt, Thorough, Equitable Investigations
- Eliminate Conflict of Interest & Bias
- Credibility Assessments

Assigning an Investigator

Return to Work Considerations Q&A

Shiloh Theberge – Shareholder, Bernstein Shur

Hilary Holmes Rheume – Attorney, Bernstein Shur

How far we have come since March 16, 2020!

- Lockdown
- Layoff/Furlough
- Unemployment
- FFCRA (a/k/a Alphabet Soup)
 - EPSLA
 - EFMLA
- Reopening guidance
- COVID policies
- Return to work
- Face mask mandates
- Cleaning protocols
- Travel restrictions
- Sick leave banks
- Zoom overload
- Oh my!

Where we are today....

- FFCRA Revisited
- Unemployment
- Return to Work
- Hesitation
- ADA Implications
- Vaccinations
- Masking

Families First Coronavirus Response Act:

Emergency Paid Sick Leave Act

Emergency Family & Medical Leave Expansion Act

- Expired December 31, 2020
- Paid leave (both EPSL and EFMLA) now voluntary
- Employers still able to receive dollar-for-dollar tax credit for paid leave through September 30, 2021
- New bank of EPSL (10 days) on April 1, 2021 (EFMLA less clear)
- EPSL and EFMLA (now fully paid) reasons expanded to include employee:
 - subject to governmental isolation or quarantine order
 - advised by healthcare provider to self-quarantine
 - experiencing symptoms consistent with COVID-19 and seeking diagnosis
 - caring for individual subject to federal, state, or local isolation or quarantine order (2/3)
 - caring for a child for whom school or childcare is closed or unavailable (2/3)
 - experiencing similar condition specified by DHHS Secretary (2/3 rate of pay)
 - **obtaining immunization for COVID-19**
 - **recovering from injury, disability, illness, or condition related to immunization after “medical diagnosis”**
 - **seeking or awaiting results of diagnostic test or medical diagnoses and *either* employee has been exposed *or* employer has requested**

Unemployment

- UPDATE: ARPA – increases weekly supplement of \$300 per week through September 6, 2021
- ARPA continues CARES Act program to allow independent contractors and self-employed individuals to obtain unemployment through September 6, 2021
- ARPA clarifies that first \$10,200 in state or federal unemployment in 2020 not taxable for households with an annual gross income of less than \$150,000
- One week waiting period eliminated
- Benefits sought are not charged against the employer's experience rating during period of emergency
- Defined COVID-19-related reasons:
 - He or she is under a temporary medical quarantine or isolation restriction to ensure that the individual has not been affected by COVID-19 and is expected to return to work; or
 - He or she is temporarily laid off due to a partial or full closure of the individual's place of employment as a result of the state of emergency and is expected to return to work once the emergency closure is lifted
 - He or she is on a temporary leave of absence continues to remain able and available to work for and maintains contact with the relevant employer due to:
 - medical quarantine or isolation restriction,
 - a demonstrated risk of exposure or infection, or
 - a need to care for a dependent family member as a result of COVID-19

Return to Work: Hesitation

Employee has symptoms of COVID, when can they return to work (*i.e.*, “discontinue home isolation”)?

- CDC guidance prefers the “symptom-based strategy”
 - At least 24-hours have passed since last fever without the use of fever-reducing medications
 - Improvement in symptoms
 - For severe cases, 20 days after symptom onset may be warranted
 - For persons who never develop symptoms, isolation and other precautions can be discontinued 10 days after first positive PT-PCR test for SARS-CoV-2 RNA.
- Can require them to work from home if possible (both physically and work-wise)

Employee does not want to return to work because they are afraid of getting COVID-19?

- You do not have to take this at face value
- Ask questions about why they are fearful
- Explain what you are doing to ensure a safe work environment
- Without more, this may not be good cause to refuse work

Return to Work: ADA Implications

What if employee does not want return to work because they have a medical condition that makes them at risk if they acquire COVID-19?

- Establish medical condition is a disability
- Conduct the “interactive process” under the ADA to determine if there are any reasonable accommodations
- Possible reasonable accommodations:
 - Continued remote work
 - Staggering work shifts
 - Providing different office environment
 - Additional leave?

Return to Work: COVID-19 Vaccinations

CAN we make the vaccination mandatory for employees?

- Currently, legally permissible for employers to mandate under **federal** law
- EEOC guidance indicates vaccine can be mandatory if it is “job related and consistent with business necessity”
- Exceptions (accommodations) must be made for individuals with a disability and/or sincerely held religious belief and be documented
- Must determine whether there is a reasonable accommodation
 - Remote work
 - Masking/social distancing
 - Reassignment
 - Leave
- Do not automatically assume that you can terminate employment
- Remember to pay employees

You need to have a policy!

Return to Work: COVID-19 Vaccinations

SHOULD we make the vaccination mandatory for employees?

- Employee Relations considerations (composition of workforce)
- EUA
 - FDA approved under Emergency Use Authorization
 - EUA states recipients must be allowed to refuse the vaccine
 - Does not mean private employers have to allow employees to work without vaccine
 - Possibly higher litigation potential
- You must be prepared to lose employees

What are my options?

- Encouragement, communication, information
- Consider incentives
- Consider **soft** mandate with declination form

Return to Work: COVID-19 Vaccinations

What are other employers doing?

- Seeing very few mandating vaccine
- New masking rules may increase mandatory vaccine requirements
- More likely in certain industries
 - agriculture
 - construction
 - healthcare
 - hospitality
- Less likely in certain industries
 - government
 - professional services
 - finance
- Must make exceptions that are legally required
 - medical condition
 - religious belief

Return to Work: COVID-19 Vaccinations

Can we ask employees to provide proof of vaccination?

- Yes, this is not a disability related inquiry, BUT....
- Subsequent questions, particularly if they did not get a vaccine, could result in disability-related inquiries (such as, “why didn’t you get the vaccine?”)
- Warn employee not to provide any medical information or family history as part of proof of vaccine
- Treat as confidential medical record

Can I ask why employees are unvaccinated?

- Yes, but BE CAREFUL
- You may get more information than you wanted regarding medical condition(s) and/or religious beliefs

Return to Work: COVID-19 Vaccinations

Who should provide the vaccinations?

- Providing the vaccine is not a medical examination, but pre-screening question may require eliciting disability-related inquiries; screening questions must be “job-related and consistent with business necessity”
- Third party administration recommended: either having an agency come into the workplace or have the employee get vaccinated through their own health care provider

Should we offer incentives (cash or pto, e.g.) for vaccinating?

- Consider IRS requirements – tax/non-discrimination
- Consider wellness program requirements
- Consider employees who cannot be vaccinated for medical/religious reasons

Return to Work: Masking

What is current status on masking?

- CDC – May 13th – Interim Public Health Recommendations for Fully Vaccinated People – fully vaccinated individuals do not need to wear masks outdoors or indoors, and do not need to socially distance
- Exception for healthcare
- Fully vaccinated people are less likely to have asymptomatic infection and potentially less likely to transmit SARS-CoV-2 to others
- OSHA – follow CDC guidance – more to come
- EEOC – follow CDC guidance – more to come
- May be different under state or local laws
- ME – no masking required for vaccinated OR UNVACCINATED
- NH – state mask mandate lifted, but certain municipalities still have mask mandate in effect

Return to Work: Masking

Should I continue to require masks for vaccinated employees?

- Can continue requirement of masking and social distancing for all employees
- Can continue requirement of masking and social distancing for only unvaccinated employees
- Consider industry and level of contact with public
- Consider whether employees are high risk
- Have clear written policy either way
- Policy should include requirement that co-workers not ask one another about their vaccination status

Return to Work: Masking

How do I *maintain* confidentiality of vaccination status or disability if I have a policy of masking for only unvaccinated employees?

- Concern that individuals' disabilities will be revealed
- Make sure only necessary individuals have access to information
- May be masked for a variety of reasons – medical, religious, vaccinated but being careful – so not necessarily a disability
- Bigger risk is ensuring all employees (masked and unmasked) are treated equally and there is no harassment or retaliation

Pay Attention to the Changing Information

- Follow closely CDC's ever evolving guidance
- Follow closely OSHA's ever evolving guidance
- Follow closely EEOC's ever evolving guidance
- Monitor Maine's Reopening Website frequently (<https://www.maine.gov/covid19/restartingmaine>)
- Watch Dr. Shah's press conferences
- Monitor New Hampshire's Reopening Website frequently (<https://www.covidguidance.nh.gov/sites/g/files/ehbemt381/files/inline-documents/sonh/universal-best-practices.pdf>)
- If you don't receive Bernstein Shur's client alerts, let us know! We will put you on the list.

Questions?

Thank you!

**BERN
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