2021 HEALTH CARE EMPLOYMENT LAW YEAR IN REVIEW

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U.S. Labor, Employment, and Workplace Safety Alert

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Health care-related employment laws became a prevalent topic in 2021—the year of the COVID-19 vaccination mandates. States and the federal government continued to adopt differing approaches on mandates affecting different categories of employers. There were also several non-COVID-19-related employment laws affecting the health care industry in 2021. This alert provides an overview of these laws and provides recommendations for navigating them.

I. VACCINE MANDATES FOR HEALTH CARE WORKERS

California

On 26 July 2021, California Governor Gavin Newsom announced that all employees in health care and high-risk congregate settings must show proof of COVID-19 vaccination status or submit to weekly COVID-19 testing. On 5 August 2021, the California Department of Public Health issued an order that expressly mandated the COVID-19 vaccine for health care workers who work in certain enumerated health care facilities. On 28 September 2021, the California Department of Public Health issued an order requiring all adult and senior care facilities employees, hospice workers, and direct care workers to be fully vaccinated unless they have a medical or religious exemption, submit to weekly tests, and wear a surgical mask or higher-level respirator.

Colorado

The Colorado State Board of Health approved an emergency vaccine requirement rule (6 CCR 1101-1, Chapter 2 Part 12) for staff in health care settings with high-risk patients. It required all licensed health care facilities in Colorado to obtain 100% vaccination against COVID-19 among their employees, direct contractors, and support staff by 31 October 2021. The rule also required that health care facilities hire only fully vaccinated workers after 31 October. Colorado announced its intent to follow federal vaccination guidance, but after courts blocked the Centers for Medicare and Medicaid Services (CMS) vaccine mandate nationwide, Colorado opted to continue its statewide mandate. On 15 December 2021, the Board of Health voted to extend the emergency rule for an additional 120 days. As of this date, more than 92% of health care workers in Colorado have been vaccinated.

Connecticut

On 6 August 2021, Acting Governor/Lieutenant Governor Susan Bysiewicz issued Executive Order 13B, which required all “long-term health facility” employees to have both received their first COVID-19 vaccine dose and to have made an appointment for their second dose, by 7 September 2021, unless an employee qualifies for a medical or religious exemption. Facilities subject to the executive order face civil penalties of up to US$20,000 per

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day if they fail to maintain required documentation regarding an employee's vaccination status or continue to employ workers who do not satisfy the executive order's terms. On 19 August 2021, Connecticut Governor Ned Lamont issued Executive Order 13D, which required all state hospital employees (and others, as addressed in Section 2 of the order) to have received their first COVID-19 vaccine dose by 27 September 2021 and to have made an appointment for their second dose, unless an employee qualifies for a medical or religious exemption. There is no weekly testing alternative.

Delaware

On 12 August 2021, Delaware Governor John Carney and the Delaware Department of Health and Social Service (DHSS) announced that beginning 30 September 2021, they would require staff in long-term care and other health care facilities to provide proof of vaccination or to undergo regular testing to prevent the transmission of COVID-19 to vulnerable populations. The requirement covered certain types of long-term care facilities, as well as both acute and outpatient providers regulated by the DHSS Division of Health Care Quality, as set forth in the order.

Illinois

All health care workers in Illinois must either be fully vaccinated or submit to weekly testing (COVID-19 Executive Order Nos. 87 and 88) if they have valid medical or religious exemptions. Illinois requires all employees at state-operated congregate living facilities to be fully vaccinated by 30 November 2021 (COVID-19 Executive Order No. 92). There is no testing option for this category of employees.

Maine

On 12 August 2021, Maine's Center for Disease Control and Prevention and Department of Health and Human Services (Maine DHHS) issued an emergency rule requiring onsite health care workers to be fully vaccinated against COVID-19 by 29 October 2021. The emergency rule contains a medical exemption but does not contain a religious exemption. A group of health care workers challenged the emergency rule's lack of a religious exemption in the U.S. District Court for the District of Maine, but the court declined to block the rule from taking effect. The U.S. Court of Appeals for the First Circuit upheld the District of Maine's ruling, and the U.S. Supreme Court rejected an emergency appeal of the First Circuit's ruling. On 10 November 2021, Maine DHHS issued a final rule (10-144 CMR Chapter 264) (the DHHS Rule), which took effect on the same day. The DHHS Rule largely tracks the emergency rule with a few deviations. In a series of Health Care Worker Vaccination FAQs, Maine Governor Janet Mills's office has clarified the DHHS Rule's interaction with the U.S. Department of Health and Human Services' CMS interim final rule, which does allow for religious exemptions. The governor's office explained that (i) the DHHS Rule does not prohibit employers from providing religious accommodations under Title VII of the Civil Rights Act of 1964 (Title VII) or other federal civil rights laws; (ii) employers must comply with applicable federal anti-discrimination laws and civil rights protections, but they are not required to provide religious exemptions; and (iii) employers must comply with the DHHS Rule if they provide accommodations.

For more information on Maine's vaccination mandate for health care workers, see K&L Gates' prior alert on this topic.

Maryland

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On 5 August 2021, Maryland Governor Larry Hogan announced a vaccination mandate for state workers in congregate settings, effective 1 September 2021. Employees must show proof of vaccination or otherwise both submit to regular testing (at least once a week) and adhere to strict face covering requirements. On 18 August 2021, Governor Hogan announced a vaccination mandate for nursing home and hospital workers that requires employees to have received the vaccine or adhere to screening, testing, and strict face covering protocols.

Mississippi

On 14 June 2021, the Mississippi State Department of Health issued a State Health Officer's Order requiring all paid and unpaid Mississippi nursing home and assisted living health care workers, staff, and employees be either vaccinated or tested twice a week, effective 15 June 2021 until 30 September 2021. On 29 September 2021, the department extended the order until 31 December 2021, and it extended it again on 5 January 2022 to expire on 31 March 2022.

Nevada

On 14 September 2021, Nevada Governor Steve Sisolak signed the Nevada State Board of Health's emergency regulation requiring all state employees working in institutions for vulnerable individuals to become fully vaccinated against COVID-19 by 1 November 2021 unless they receive an approved religious or medical accommodation.

New Jersey

All workers in health care facilities and high-risk congregate settings in New Jersey must either be fully vaccinated or submit to once- or twice-weekly testing (Executive Orders Nos. 252, 253, and 264).

New Mexico

On 17 August 2021, the New Mexico Department of Health issued a public health order, which required, beginning 23 August 2021, all hospital and congregate care workers either to become fully vaccinated against COVID-19 or to submit to weekly COVID-19 testing and wear a mask at all times indoors. On 15 September 2021, the New Mexico Department of Health issued an amended public health order, which eliminated the weekly testing option for unvaccinated hospital and congregate care workers and required them to become fully vaccinated against COVID-19 unless they qualified for a medical or religious exemption, subject to masking requirements.

New York

In New York, both state workers and health care workers in facilities served by the Office of Mental Health and the Office for People with Developmental Disabilities must either be fully vaccinated or submit to weekly testing. Currently, under 10 N.Y.C.R.R. § 2.61, all health care workers, including staff in hospitals and long-term care facilities, must be fully vaccinated unless the employee has a valid medical exemption. On 13 December 2021, the U. S. Supreme Court refused to block New York's health care workers mandate, notwithstanding the fact that it does not provide for a religious exemption. *Dr.A v. Hochul*, 142 S. Ct. 552 (2021). This decision came on the heels of the Second Circuit's decision on 4 November 2021 in *We the Patriots USA, Inc. v. Hochul*, 17 F. 4th 266 (2d Cir. 2021) (clarified by *We the Patriots USA, Inc. v. Hochul*, 17 F.4th 368 (2d Cir. 2021)), which vacated a

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preliminary injunction issued by the Northern District of New York preventing enforcement of the health care worker mandate against individuals seeking a religious exemption.

North Carolina

North Carolina's Department of Health and Human Services, Division of State Operated Health Facilities, issued a vaccine requirement that applied to “all facility employees, volunteers, students, trainees” in addition to “contracted and temporary workers” at 14 state-run health care sites by 30 September 2021. All workers must be vaccinated unless they qualify for either a religious or a medical exemption.

Oregon

On 10 August 2021, Oregon Governor Kate Brown announced that executive branch employees in Oregon will need to be vaccinated, including public safety and health care employees employed by the state, unless they qualify for an exemption based on a disability or sincerely held religious belief. On 19 August 2021, Governor Brown also announced that health care workers and all teachers, educators, support staff, and volunteers in K-12 schools must be fully vaccinated or have a documented and approved medical or religious exemption. No testing options exist for these groups of employees.

Pennsylvania

All employees in state health care and high-risk congregate care facilities in Pennsylvania must either be fully vaccinated or submit to weekly testing.

Rhode Island

Under Rhode Island regulation 216-RICR-20-15-8, workers for both licensed health care facilities and health care providers must have received a complete series of the COVID-19 vaccine unless they obtain a medical exemption. Rhode Island's mandate is silent on religious exemptions. A group of health care workers asked the U.S. District Court for the District of Rhode Island to block the rule due to its lack of religious exemption. On 30 September 2021, the court denied the workers' request for a temporary restraining order because the mandate does not prevent an employer from providing a reasonable accommodation based on a sincerely held religious belief.

Vermont

Vermont requires state employees who work with vulnerable populations either to be fully vaccinated or to face regular testing or some other sort of “exit ramp.” No official order or date for compliance has been issued to date.

Washington, D.C.

All health care workers must be fully vaccinated unless they have a medical or religious exemption.

Washington

Health care providers—including public and private health care professionals and long-term care workers, as well as workers at residential long-term facilities, outpatient facilities, inpatient facilities, and other specialty facilities—must be fully vaccinated subject to exceptions for disabilities and religious beliefs. In late October 2021, a federal judge in the Eastern District of Washington denied a suit brought by first responders who wanted to halt the vaccination requirements on the ground that the requirements violated their civil rights.

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II. FEDERAL VACCINE MANDATE UPHELD FOR HEALTH CARE WORKERS

As health care employers navigate the first quarter of 2022, there is now much greater certainty regarding the various vaccination mandates issued following President Biden's 9 September announcement. Following the Supreme Court's rulings on 13 January 2022, CMS's Interim Final Rule with Comment Period (CMS IFR) has been reinstated in 24 states, while the Occupational Health and Safety Administration's (OSHA) emergency temporary standard (ETS) has been stayed. In a 6–3 decision, in *National Federation of Independent Business v. Department of Labor, Occupational Safety & Health Administration*, the Supreme Court blocked the OSHA ETS from going into effect, and the Biden administration subsequently announced it would withdraw the ETS (but continue with permanent rulemaking). By contrast, in *Biden v. Missouri*, the Supreme Court announced in a 5–4 decision that it would allow the CMS mandate to go into effect in 24 states where a stay had been imposed.

Pursuant to these rulings, large private health care employers are no longer required to comply with the vaccination and testing provisions of the OSHA ETS, while covered CMS facilities in all states must develop and implement a mandatory vaccination program in light of rapidly approaching initial compliance deadlines. The vaccine mandate for federal contractors pursuant to Executive Order 14042 (EO 14042) remains enjoined under a nationwide injunction issued by the Southern District of Georgia, along with four other injunctions (none of which are nationwide) from other district courts. Notably, however, the nationwide injunction was recently clarified to emphasize that the injunction applied to only the vaccine mandate and not the other requirements of EO 14042.

Pursuant to the CMS ruling, the CMS IFR is now in effect in the 24 states where it had been enjoined. Immediately following the release of the CMS ruling, CMS announced that health care providers subject to the CMS IFR in the 24 states where it had been enjoined[1] now need to establish plans and procedures for compliance with the vaccine mandate requirements as applicable to the providers' staff. As background, the CMS IFR establishes COVID-19 vaccination requirements for staff, which include both employees and non-employees at different types of Medicare- and Medicaid-certified providers and suppliers, including but not limited to hospitals, critical access hospitals, ambulatory surgical centers, hospices, and skilled nursing facilities/nursing homes. CMS will enforce the requirements through the existing survey process that applies to certified providers and suppliers, including the potential for CMS to impose penalties through that existing process.

CMS has broken down the compliance timeline into three separate phases, the deadline for which depends on the state where the provider operates:

- For the first phase, the facility must demonstrate within 30 days of the timeline's commencement that (1) the facility has developed and implemented policies and procedures for ensuring that all facility staff—regardless of clinical responsibility or patient or resident contact—are vaccinated for COVID-19; and (2) 100% of staff have either (a) received at least one dose of a COVID-19 vaccine, (b) have been granted a qualifying exemption or have a pending request for such an exemption, or (c) have been identified as having temporary delays as recommended by the Centers for Disease Control and Prevention (CDC). A facility that cannot meet both components is noncompliant with the rule, but a facility that is above an 80% vaccination rate and has a plan to achieve a 100% vaccination rate within 60 days would not be subject to additional enforcement action.
- For the second phase, the facility must demonstrate within 60 days of the timeline's commencement that (1) the facility has developed and implemented policies and procedures for ensuring all facility staff—

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regardless of clinical responsibility or patient or resident contact—are vaccinated for COVID-19; and (2) 100% of staff have either (a) received the necessary doses to complete a series of a COVID-19 vaccine, (b) have been granted a qualifying exemption or have a pending request for such an exemption, or (c) have been identified as having a temporary delay as recommended by the CDC. A facility that cannot meet both components is noncompliant with the rule, but a facility that is above a 90% vaccination rate and has a plan to achieve a 100% vaccination rate within 30 days would not be subject to additional enforcement action.

- For the third phase, facilities must maintain compliance with the 100% vaccination status requirement within 90 days of the timeline's commencement or else be subject to enforcement action.

For providers in the 24 previously enjoined states, the deadline for Phase 1 is 14 February 2022, the deadline for Phase 2 is 15 March 2022, and the deadline for Phase 3 is 14 April 2022. For providers in Texas, the deadline for Phase 1 is 21 February 2022, the deadline for Phase 2 is 21 March 2022, and the deadline for Phase 3 is 20 April 2022. For all other states, the deadline for Phase 1 was 27 January 2022, the deadline for Phase 2 is 28 February 2022, and the deadline for Phase 3 is 28 March 2022.

In addition to the OSHA ETS being effectively blocked by the Supreme Court, the prior health care emergency temporary standard issued in June 2021 (Health Care ETS) expired in December 2021, except for the recordkeeping obligations. Therefore, health care employers should continue to comply with the Health Care ETS's provisions as to recordkeeping despite the expiration of the standard. Also, OSHA has indicated that they are working on a permanent health care standard. Finally, although EO 14042's vaccine mandate is currently enjoined, the Office of Management and Budget (OMB) has drafted its guidance to permit it to enforce EO 14042 immediately to the extent the injunctions are lifted, which indicates that OMB may hold employers to tight compliance deadlines. Therefore, employers that currently have a clause implementing EO 14042 in their contracts may want to continue preparation for compliance despite the current injunction. If EO 14042 is ultimately enforceable, contractors will be required to follow its stricter provisions, exempting employees only on the basis of a disability or sincerely held religious belief.

With the rulings by the Supreme Court, health care employers should evaluate coverage under the CMS IFR and develop a plan for compliance, while monitoring legal developments as to EO 14042. A health care employer now covered by the CMS mandate should implement mandatory vaccination policies for all covered staff. Meanwhile, health care employers whom the Health Care ETS covered should continue to comply with the recordkeeping provisions of that standard, which were not withdrawn by OSHA.

III. COVID-19 WHISTLEBLOWER UPDATE

In our 2020 edition of this alert, we analyzed records of both whistleblowing reports and retaliation complaints regarding COVID-19 health and safety violations. As of 16 January 2022, OSHA has reported receiving a total of 6,279 COVID-19-related whistleblower complaints, a 38% increase from January 2021. Related to these complaints, OSHA also received 1,891 retaliation complaints in 2021. These statistics come on the heels of OSHA's recently published factsheet on COVID-19 whistleblower protections. The factsheet reminds employers that they are prohibited by Section 11(c) of the Occupational Safety and Health Act (OSH Act) (as well as other anti-retaliation rules) from retaliating against employees for exercising their protected rights under the OSH Act, including reporting a COVID-19 infection, COVID-19 exposure, or other unsafe working condition to their

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employer or OSHA. The factsheet includes several examples of activities that constitute retaliation. These include but are not limited to:

- Firing or laying off an employee.
- Demoting an employee.
- Reducing an employee's pay or hours.
- Denying an employee overtime work or a promotion.
- Intimidation or harassment.
- Isolating, ostracizing, or mocking the employee.
- Falsely accusing the employee of poor performance.
- Constructive discharge.

Employers should make sure they have updated policies and procedures regarding how to receive and act upon whistleblower complaints, train all managers on the handling of whistleblower complaints, consider implementing a whistleblower hotline, and ensure that any such complaints regarding COVID-19-related unsafe or unhealthy working conditions are responded to promptly, with appropriate action taken in response to the complaint.

IV. HEALTH CARE EMPLOYMENT DECREASES DUE TO PANDEMIC CAUSE CONCERN FOR FUTURE STAFFING

As the COVID-19 pandemic nears the beginning of its third year, health care facilities are fighting not just the COVID-19 disease but also staffing shortages that could escalate quickly. A recent marketplace survey performed by Morning Consult showed that 30% of health care workers had terminated their jobs in the health care industry since mid-February 2020, of which 18% said they had quit, and 12% reported being laid off or having experiencing a job loss. These respondents reported that the chief reasons for leaving were primarily due to the pandemic, receiving better opportunities with better pay and benefits, and burnout. In the same survey, of the respondents who remained in their jobs, another 31% were considering leaving their jobs for alternative employment, of which 12% reported leaving for another job in health care, and 19% reported considering leaving the industry altogether. Shortages have affected both the employees and the employers: While the survey noted that nearly 80% of respondents reported the shortages affecting their work and 41% considered it a “major impact,” a bulletin released by the American Hospital Association reported that the staffing shortages have also cost hospitals US$24 billion over the course of the COVID-19 pandemic. Enrollment at both medical schools and nursing schools has increased over the past several years, however.

V. OTHER STATE LAWS

Illinois Health Care Right of Conscience Act Will Not Apply to COVID-19 Measures

Enacted in 1977 in response to the *Roe v. Wade* decision, the Illinois Health Care Right of Conscience Act (the Illinois Act) establishes protections for health care workers who refuse to “perform, assist, counsel, suggest,

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recommend, refer or participate in any way in any particular form of health care service which is contrary to the conscience" of such worker. 745 ILCS 70/4. The Illinois Act defines conscience broadly, extending it to include "a sincerely held set of moral convictions arising from belief in and relation to God, or which, though not so derived, arises from a place in the life of its possessor parallel to that filled by God among adherents to religious faith." 745 ILCS 70/3(e). Further, the Illinois Act prohibits employers from discriminating against a health care provider who refuses on such grounds.

Following an executive order issued by Illinois Governor J.B. Pritzker in August 2021 mandating that health care workers in the state be fully vaccinated against COVID-19, many health care employees raised their "right of conscience" to challenge the immunization requirement. In response and to clarify the scope of the Illinois Act, Illinois enacted an amendment that provides a carve-out for certain COVID-19 mitigation measures. Specifically, the amendment clarifies that an employer will not violate the Illinois Act if it "takes any measures or impose any requirements . . . intended to prevent contraction or transmission of COVID-19 . . . or enforce such measures or requirements." Illinois Senate Bill 1169. Therefore, health care employers may impose COVID-19 masking, testing, and vaccination requirements upon health care workers and may take adverse action against those who refuse to comply without violating the Illinois Act. Though signed into law in 2021, the amendment does not become effective until 1 June 2022, which may allow employees time to raise such objections in the interim. However, to the extent an Illinois health care employer is subject to a federal vaccination mandate, such as the CMS IFR, before 1 June 2022, the Illinois Act may be preempted, leaving employees to proceed with requests for reasonable accommodations under the Americans with Disabilities Act or Title VII.

D.C. Non-Competition Law Becomes Effective

On 1 April 2022, the District of Columbia's new Ban On Non-Compete Agreements Amendment Act of 2020 (the D.C. Act) will become effective despite being passed in 2020. The D.C. Act prohibits employers from entering into non-compete provisions with any employee who performs work in Washington, D.C., or any prospective employee who an employer reasonably anticipates will perform work in Washington, D.C. The D.C. Act does not have a minimum salary threshold with respect to its applicability, but it does contain certain exceptions for unpaid volunteers, babysitters, lay members holding religious office, and certain medical specialists. The law is not retroactive, meaning that it does not invalidate lawful non-compete agreements with Washington, D.C. employees that were already in effect prior to 1 April 2022.

Under the D.C. Act, a "non-compete" is defined as a provision that "prohibits the employee from being simultaneously or subsequently employed by another person, performing work or providing services for pay for another person, or operating the employee's own business." This broad definition means that the D.C. Act bars an employer from placing any restrictions on a D.C. employee's ability to engage in outside employment or other work-related activities *during or after* the employee's employment—*even if such outside employment or activities would be competitive with the employer's business*. Accordingly, employers will not be able to include language in their policies, offer letters, or employment agreements with Washington, D.C. employees that would prohibit employees from moonlighting or other otherwise engaging in any outside work during employment.

Notably, the D.C. Act includes a carve-out that allows employers to enter into confidentiality agreements with Washington, D.C. employees that would prohibit employees from disclosing confidential, proprietary, or sensitive information; client lists; customer lists; or trade secrets. The D.C. Act also continues to allow parties to enter into sale or purchase agreements in which the seller agrees not to compete with the buyer. However, the D.C. Act is

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silent on non-solicitation provisions that would prevent an employee from soliciting an employer's customers or employees. For now, such provisions do not appear to be prohibited under the plain language of the D.C. Act, but this will remain an important area for employers to watch carefully moving forward.

The D.C. Act requires all employers with Washington, D.C. employees to provide a specific notice to all such Washington, D.C. employees within 90 calendar days after its effective date of 1 April. Employers must also provide the same notice to any new Washington, D.C. employee (including any employee that an employer anticipates will work in Washington, D.C.) within seven days after the individual starts employment.

In addition, under the D.C. Act, employers are prohibited from retaliating or threatening to retaliate against a Washington, D.C. employee if the employee: (1) refuses to agree to a non-compete provision; (2) refuses to comply with a non-compete provision or workplace policy that would be unlawful under the D.C. Act; (3) asks, informs, or complains about the existence, applicability, or validity of a non-compete provision or a workplace policy that the employee reasonably believes is prohibited under the D.C. Act; or (4) requests required notice information regarding the employee's rights under the D.C. Act. Employers of health care workers seeking to enforce non-compete agreements must show the workers against whom they seek enforcement meet several factors to qualify as an exempt medical specialist. The “medical specialist” exemption is limited to an employee who meets four factors: (1) the worker holds a license to practice medicine, (2) the worker is a physician, (3) the worker has completed a medical residency, and (4) the worker has total compensation of at least US$250,000 per year. Furthermore, if the worker meets all four factors, the provision is not enforceable unless the employer provides the non-compete provision directly to the worker at least 14 days before execution of the agreement containing the provision. Together with that provision, the employer must also provide a written notice to the worker containing specific information. This notice, contained in D.C. Code § 32-581.03, has been reproduced as follows:

The Ban on Non-Compete Agreements Amendment Act of 2020 allows employers operating in the District of Columbia to request non-compete terms or agreements (also known as “covenants not to compete”) from medical specialists they plan to employ. The prospective employer must provide the proposed non-compete provision directly to the medical specialist at least 14 days before execution of the agreement containing the provision. Medical specialists are individuals who: (1) perform work on behalf of an employer engaged primarily in the delivery of medical services; (2) hold a license to practice medicine; (3) have completed a medical residency; and (4) have total compensation of at least $250,000 per year.

The D.C. Act also restricts an employer from either retaliating against or threatening to retaliate against a medical specialist for either (1) asking, informing, or complaining about conduct required or prohibited under the D.C. Act to an employer (including the medical specialist's employer), a coworker, the medical specialist's lawyer or agent, or a governmental entity; or (2) requesting from the employer the information the D.C. Act requires the employer to provide to the medical specialist.

Employers with employees who perform work in Washington, D.C., should take the following steps to ensure compliance with the D.C. Act:

- Provide a notice to all Washington, D.C. employees containing the required language described above, no later than 90 calendar days after 1 April 2022. Employers should also plan to provide that same notice to any new Washington, D.C. employees within seven days of their start date (for example, consider including the language in template offer letters for Washington, D.C. employees).

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- Revise any form employment agreements or restrictive covenant agreements that will be signed by Washington D.C. employees who do not qualify for the medical specialist exemption on or after 1 April 2022 to ensure that they no longer contain non-compete covenants or restrictions on outside employment. Consider including more robust confidentiality provisions in these documents to ensure that trade secrets remain protected.
- Revise all handbooks, policies, or offer letters given to Washington, D.C. employees who do not qualify for the medical specialist exemption to remove any language restricting an employee's ability to "moonlight" or engage in any outside activity for pay during employment.
- Provide any non-competition agreements to medical specialists who qualify for the medical specialist exemption 14 days before execution of the agreement along with the notice required by the D.C. Act, in compliance with the D.C. Act's requirements.
- Monitor developments, especially as to the Amendment to the D.C. Act, which would allow employers to include "bona fide conflict of interest provisions" in agreements and is currently under consideration.

California Requires Implicit Bias Training Law for Nursing Students

As previously reported in our 2020 alert, California requires physicians, surgeons, nurses, and physician assistants to take implicit bias training as part of their continuing education requirements. Amended and signed into law on 1 October 2021, AB 1407 expands California's current law by requiring nursing schools and programs to include implicit bias education as part of their curriculum. The bill also requires hospitals to implement an evidence-based program on implicit bias as part of any new graduate training program that hires and trains new nursing program graduates. The training must consist of direct participation, and verification of implicit bias training will become part of the licensure requirement for all new California-registered nurses.

Oregon Extends Statute of Limitations for Filing Health and Safety Violations

The Oregon Legislature has extended the statute of limitations for employees to file a complaint with the Oregon Bureau of Labor and Industries (BOLI) alleging discrimination or retaliation for reporting workplace health and safety complaints, including those relating to COVID-19 health and safety policies. HB 2420 lengthened the statute of limitations from 90 days to one year, and this new timeline is consistent with the statute of limitations for other BOLI claims related to discrimination and retaliation. The new law went into effect on 1 January 2022.

Colorado HB21-1123: CAPS Checks for Substantiated Mistreatment of At-Risk Adult

Amidst growing public discourse surrounding the laws affecting conservatorships, Colorado enacted legislation that imposes additional requirements on individuals requesting appointment as either a conservator or a guardian of an at-risk adult.

On 7 May 2021, Colorado Governor Jared Polis signed into law HB21-1123, titled "CAPS Checks For Substantiated Cases of Mistreatment of an At-Risk Adult." The act, which took effect 1 January 2022, requires district and probate courts in Colorado to request a Colorado Adult Protective Services (CAPS) check on any proposed conservator or guardian prior to the appointment. The state department, which conducts the CAPS check, must report back to the requesting court within seven days to ensure that the petitioner has not been substantiated in a CAPS case of causing neglect, abuse, exploitation, or harmful acts to an at-risk adult. If there is

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a substantiated finding of one of these issues, the state department must provide the court with information regarding the mistreatment. The court retains its discretion to consider the findings and determine the weight of the information and its probative value.

The act also imposes additional requirements for health care providers. HB21-1123 requires CAPS, without a court order, to share information on substantiated findings of neglect, abuse, exploitation, or harmful acts to at-risk adults with the Department of Regulatory Agencies (DORA) or a regulator within a health oversight agency within 10 days if the person who caused the mistreatment is a licensed health care professional. Additionally, the law requires that the health care professional's employer, as well as a current or former employee, provide DORA, upon its request, with the professional license number of the health care provider who, as a result of the investigation, is substantiated in a case of mistreatment of an at-risk adult.

The act also requires a licensee, certificate holder, or registrant substantiated in a case of mistreatment of an at-risk adult to provide the person's professional license number to their county adult protective services.

The new requirements imposed by the act supplement prior procedures for appointing a conservator or guardian of an at-risk adult in Colorado.[2]

The K&L Gates Health Care Employment group comprises a distinctive set of lawyers from our Health Care; Labor, Employment, and Workplace Safety; Immigration; and Employee Benefits practice groups who work in concert to advise clients in the health care industry. Through building unique industry knowledge, this collaborative K&L Gates team has a proven track record of successful representations of health care industry players in all facets of employer-employee relations. K&L Gates's team of health care employment lawyers is available to answer any questions regarding these matters.

FOOTNOTES

[1] Alabama, Alaska, Arizona, Arkansas, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Utah, West Virginia, and Wyoming.

[2] Prior to HB21-1123's enactment, Colorado law required a name-based criminal history records check and a credit report to be filed with the court, as well as interviews to be conducted with the at-risk adult, the petitioner, and the proposed conservator.

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