EMPLOYMENT LAW

CASES AND MATERIALS

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CHAPTER 1

WORK AND LAW

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8. Throughout history the employment relationship has been shaped by major societal events, such as the abolition of slavery and indentured servitude, labor shortages during wars, changing attitudes about civil rights, and catastrophic health events. Indeed, the start of English labor law is often considered to be the Ordinance of Labourers, enacted in 1349, during the "Black Death" caused by bubonic plague (1347-1351). The plague, which killed 20-25 million people in Europe (about one-third of the population), greatly reduced the number of available workers and thus wages soared, and crops went unharvested. The Ordinance of Labourers (1349) and the Statute of Labourers (1351) fixed wages, regulated other terms of the labor contract, prohibited the enticing away of another's servants, and compelled workers to accept employment.

The coronavirus pandemic of 2020-2021 also had major implications for employment, including greater recognition of the value of "essential workers," expansion of remote work arrangements, use of virtual communications instead of in-person meetings, increased role for employers in health promotion, and inducements to attract and retain employees in the post-pandemic labor shortage. What, if any, of these employment trends adopted in response to the pandemic are likely to continue – and with what consequences?

CHAPTER 2

THE DEVELOPMENT OF EMPLOYMENT LAW

Page 27. Please replace *O'Connor* with the following case.

Razak v. Uber Technologies, Inc.
951 F.3d 137 (3d Cir. 2020),

GREENAWAY, JR., Circuit Judge.

This case is an appeal from a grant of summary judgment on the question of whether drivers for UberBLACK are employees or independent contractors within the meaning of the Fair Labor Standards Act (''FLSA''), 29 U.S.C. §§ 201–219, and similar Pennsylvania state laws. For the following reasons, we will vacate the District Court's grant of summary judgment and remand for further proceedings.

I. Facts

Plaintiffs Ali Razak, Kenan Sabani, and Khaldoun Cherdoud (collectively, ''Plaintiffs'') are Pennsylvania drivers who utilize Defendant Uber Technologies' ride-sharing mobile phone application (''Driver App''). Plaintiffs bring this action on behalf of a putative class of all persons who provide limousine services, now known as UberBLACK, through Defendant's Driver App in Philadelphia, Pennsylvania. Plaintiffs bring individual and representative claims against Uber Technologies, Inc. and its wholly-owned subsidiary, Gegen, LLC, (''Gegen,'' and collectively, ''Uber'') for violations of the federal minimum wage and overtime requirements under the FLSA, the Pennsylvania Minimum Wage Act (''PMWA''), and the Pennsylvania Wage Payment and Collection Law (''WPCL'').

Plaintiffs Razak, Sabani, and Cherdoud each own and operate independent transportation companies (''ITCs'') Luxe Limousine Services, Inc. (''Luxe''), Freemo Limo, LLC (''Freemo''), and Milano Limo, Inc. (''Milano''), respectively. In order for drivers to contract to drive for Uber-BLACK, they must form ITCs. Each ITC, in turn, enters into a Technology Services Agreement with Uber. The Technology Services Agreement includes a Software License and Online Services Agreement that allows UberBLACK drivers to utilize the technology service Uber provides to generate leads, as well as outlines the relationship between ITCs and Uber riders, ITCs and Uber, and ITCs and their drivers. Additionally, it describes driver requirements, vehicle requirements, financial terms, and contains an arbitration clause for dispute resolution between ITCs and Uber.

Uber also requires that drivers sign a Driver Addendum, which is a legal agreement between the ITC and the for-hire driver, before a driver can utilize the Driver App. The Driver Addendum allows a driver to receive ''lead generation and related services'' through Uber's Driver App. The Addendum also outlines driver requirements (such as maintaining a valid driver's license), insurance requirements, dispute resolution, and the ''Driver's Relationship with Uber,'' in which Uber uses clear language to attempt to establish the parameters of the Driver's working relationship with Uber.

* * *

Plaintiffs claim that they are employees, and sue Uber for violations of minimum wage and overtime requirements under federal and state laws. Under the FLSA, employers must pay employees the applicable minimum wage for each hour worked, and, if an employee works more than forty hours in a given week, the employer must pay one and a half (1 1⁄2) times the regular rate for each hour subsequently worked. 29 U.S.C. §§ 206–207. Plaintiffs contend that time spent online on the Uber Driver App qualifies as compensable time under the FLSA. Principal among Plaintiffs' arguments is that Uber controls the access and use of the Driver App.

To access Uber services, drivers open the Driver App on a mobile device, log in, and tap a button to be online. Once online, a driver can choose to accept a trip, but if the driver does not accept the trip within fifteen seconds of the trip request, it is deemed rejected by the driver. The Driver App will automatically route the trip request to the next closest driver, and if no other driver accepts the trip, the trip request goes unfulfilled, as Uber cannot require any driver to accept a trip. UberBLACK drivers are free to reject trips for any reason, aside from unlawful discrimination. However, if a driver ignores three trip requests in a row, the Uber Driver App will automatically move the driver from online to offline, such that he cannot accept additional trip requests.

Uber sets the financial terms of all UberBLACK fares, and riders pay by having their credit cards linked to the App. After a ride is completed, Uber charges the rider's credit card for the fare. Uber then deposits the money into the transportation company's Uber account with a commission taken out by Uber. The transportation company then distributes the payment to the driver who provided the ride.

* * *

II. Procedural History

* * *

After discovery was fully complete, Uber filed its motion for summary judgment on the dispositive question of whether Plaintiffs are employees or independent contractors. The District Court granted Uber's motion for summary judgment determining that Plaintiffs do not qualify as ''employees'' of Uber under the FLSA and PMWA. As a matter of law, the District Court found that Plaintiffs did not meet their burden to show that they are employees of Uber. Plaintiffs timely appealed from the summary judgment order.

II. Applicable Law: Donovan v. DialAmerica Marketing, Inc.

The minimum wage and overtime wage provisions at issue all require that Plaintiffs prove that they are ''employees.'' Although Plaintiffs' case includes claims under the PMWA, Pennsylvania state courts have looked to federal law regarding the FLSA for guidance in applying the PMWA. The FLSA defines ''employer'' as ''includ[ing] any person acting directly or indirectly in the interest of an employer in relation to an employee,'' and ''employee'' as ''any individual employed by an employer.'' 29 §§ 203(d), (e)(1). Given the circularity of the definitions, federal courts, with guidance from the Department of Labor, have established standards to determine how to define employee and employer.

The Third Circuit utilizes the test outlined in Donovan v. DialAmerica Marketing, Inc., 757 F.2d 1376 (3d Cir. 1985), to determine employee status under the FLSA. This seminal case acknowledges that when Congress promulgated the FLSA, it intended it to have the ''broadest

definition of 'employee.''' In *DialAmerica*, we used six factors—and indeed adopted the Ninth Circuit's test—to determine whether a worker is an employee under the FLSA:

> 1) the degree of the alleged employer's right to control the manner in which the work is to be performed; 2) the alleged employee's opportunity for profit or loss depending upon his managerial skill; 3) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; 4)whether the service rendered required a special skill; 5) the degree of permanence of the working relationship; [and] 6) whether the service rendered is an integral part of the alleged employer's business.
>
> Id. (quoting Donovan v. Sureway Cleaners, 656 F.2d 1368 (9th Cir. 1981)).

Our decision in *DialAmerica* is consistent with the Supreme Court's general guidance in Rutherford Food Corp. v. McComb, 331 U.S. 722, (1947). In *Rutherford*, the Supreme Court first determined ''employee'' status under the FLSA. And in *DialAmerica*, we agreed with *Sureway Cleaners* that ''neither the presence nor absence of any particular factor is dispositive.''. Therefore, ''courts should examine the circumstances of the whole activity,'' determining whether, ''as a matter of economic reality, the individuals are dependent upon the business to which they render service.''). The burden lies with Plaintiffs to prove that they are employees.

* * *

VI. Analysis

A. Genuine Disputes of Material Fact Exist

For summary judgment to have been appropriate, there must have been no genuine disputes as to any material facts on the record, entitling Uber to judgment as a matter of law. As such, if there is a genuine dispute of material fact, the question of which *DialAmerica* factors favor employee status is a question of fact that should go to a factfinder. Here, the ultimate question of law is whether Plaintiffs are employees or independent contractors, which is for a judge to decide. But, if a court finds that there are any issues of fact that remain in dispute, it must resolve those disputes prior to granting summary judgment.

* * *

B. The ''Right to Control'' Factor

To illustrate that there are genuine disputes remaining, we look to the first *DialAmerica* factor: ''the degree of the alleged employer's right to control the manner in which the work is to be performed.'' While not dispositive, this factor is highly relevant to the FLSA analysis. The District Court in this case held that the first factor supported a finding of independent contractor status. Actual control of the manner of work is not essential; rather, it is the right to control which is determinative.

The parties contest whether Uber exercises control over drivers. While Uber categorizes drivers as using the Uber App to ''connect with riders using the UberBLACK product,'' which may imply that drivers independently contract with riders through the platform, Plaintiffs contend that this is not so. Uber also contends that drivers can drive for other services while driving for Uber, however Plaintiffs contend that while ''online'' for Uber, they cannot also accept rides through other platforms. Plaintiffs reference Uber's Driver Deactivation Policy that establishes that ''soliciting payment of fares outside the Uber system leads to deactivation'' and ''activities conducted outside of Uber's system—like anonymous pickups—are prohibited.''

Uber also asserts that it does not control the ''schedule start or stop times'' for drivers or ''require them to work for a set number of hours.'' Again, Plaintiffs dispute this, stating that the Uber Owner/Operator Agreement states, ''[the] frequency with which [Uber] offers Requests to [the driver] under this Agreement shall be in the sole discretion of the Company'' and ''the number of trip requests available to Plaintiffs is largely driven by Uber.''

The above factual disputes all go to whether Uber retains the right to control the Plaintiffs' work. The District Court in its analysis acknowledged what the Plaintiffs asserted, but assigned little value to their assertions in light of Uber's contractual agreement with Plaintiffs, Uber's assertion that Plaintiffs are permitted to hire subcontractors, and that ''plaintiffs and their helpers are permitted to work for competing companies.'' However, whether Plaintiffs are considered to ''work'' for a competing company while being ''online'' on the Uber Driver App is also a disputed factual issue. This illustrates why summary judgment was inappropriate at this stage.

Further, these and other disputed facts regarding control demonstrate why this case was not ripe for summary judgment. For example, Plaintiffs assert that ''Uber does punish drivers for cancelling trips,'' and ''Uber coerces UberBLACK drivers to go online and accept trips by making automatic weekly deductions against their account.'' Plaintiffs additionally assert that they derived all of their income for their respective businesses from Uber in certain years, which Uber disputes.

Although both parties argue that there are no genuine disputes regarding control, the facts adduced show otherwise. While Uber determines what drivers are paid and directs drivers where to drop off passengers, it lacks the right to control when drivers must drive. UberBLACK drivers exercise a high level of control, as they can drive as little or as much as they desire, without losing their ability to drive for UberBLACK. However, Uber deactivates drivers who fall short of the 4.7-star Uber- BLACK driver rating and limits the number of consecutive hours that a driver may work.

* * *

VII. Conclusion

In reviewing the District Court decision de novo, we determine summary judgment was inappropriate because genuine disputes of material facts remained. We do not opine on whether the disputed facts should be resolved by a jury or the District Court through a Rule 52 proceeding, as was the case in *Dial America*. However, these material factual disputes must be resolved. For the foregoing reasons, we will remand the matter for further proceedings.

NOTES

1. California, which led the way in establishing a broad definition of "employee" (see note 4 on p. 32), has changed course. On November 3, 2020, California voters overwhelmingly approved Proposition 22, Cal. Lab. Code § 2750.3, clarifying the legal status of workers at Transportation Network Companies (e.g., Uber, Lyft) and Delivery Network Companies (e.g., DoorDash, Grubhub). Therefore, Proposition 22 applies to a subset of the companies and workers subject to the 2019 legislation. Pursuant to the proposition, app-based drivers are independent contractors and not employees of their network company if the company does not unilaterally prescribe their schedule of a minimum number of hours, does not require drivers to accept any specific ride or delivery, and allows drivers to work for other network-based companies or hold other jobs. Proposition 22 guarantees that drivers are paid at least 120% of the minimum wage for the time

they are engaged, as well as payment per mile. The companies are also required to provide health care subsidies and insurance coverage to drivers, develop anti-harassment policies, provide drivers with mandatory safety training, and conduct criminal background checks on drivers.

2. One of the federal government's actions in the pandemic was to extend unemployment assistance to gig workers in the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), P.L. 116-136, 116th Cong., 2nd Sess. (2020). Previously, unemployment insurance benefits were only available to employees. See Chapter 12. Thus, these two developments arguably are the first steps in establishing a new category of quasi-employee between the traditional categories of employee and independent contractor.

3. In New York, gig economy companies are working with some unions to enact state legislation that would allow drivers and food delivery workers to negotiate wages and caps on company commission fees and provide unemployment insurance in some circumstances. The new, hybrid relationship would give gig employees some benefits, but less than the full rights afforded "employees." Why would employers support this legislation? Why would employees?

Page 76. Please add to note 6.

In December 2020, the Ninth Circuit heard the oral argument on California's appeal of a district court ruling that AB 51 was preempted by the Federal Arbitration Act.

CHAPTER 3

THE HIRING PROCESS

Page 102.

7. The federal government implemented immigration and travel restrictions in response to the COVID-19 pandemic. Among other measures, the Trump administration froze the issuance of certain work visas, arguing that immigrant workers would "present a risk to the US labor market following the coronavirus outbreak." The Biden administration allowed this freeze to lapse on March 31, 2021.

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8. May employers screen employees for COVID-19 symptoms each time they enter the workplace? Generally yes. The EEOC issued a guidance expressing its view that employers may ask employees about symptoms associated with the virus, take employees' body temperatures, administer mandatory COVID tests, and require employees who have been home because of illness to produce a doctor's note or negative COVID test. However, employers may not require COVID antibody testing, because antibody testing is a medical examination that – due to its unreliability – is not "job related and consistent with business necessity." See EEOC, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#C.

In addition, employers may be required to offer COVID-related reasonable accommodations. For example, an employee with a disability that places them at unusual risk of the virus may be entitled to telework, as long as that accommodation does not cause the employer undue hardship. "Long COVID" may also qualify as a disability, meaning that employers would be required to provide accommodations. For example, an employee who suffers from shortness of breath may be entitled to a chair at their workstation or more frequent breaks. *See* Maeve Sheehey & Rebecca Rainey, Biden Administration Says Long Covid Can Be Considered a Disability Under Law, Politico, July 26, 2021, https://www.politico.com/news/2021/07/26/biden-administration-long-covid-disability-500739. The ADA is also discussed in Chapter 4.

CHAPTER 4

DISCRIMINATION

Page 226.

2A. As a threshold matter in a disparate treatment case, the plaintiff must show an adverse employment action, which is a significant change in employment status, such as hiring, firing, failing to promote or reassignment with significantly different responsibilities. For the purposes of retaliation actions under Title VII, adverse actions need not be employment-related but must produce an injury or harm that could dissuade a reasonable worker from making a claim of discrimination. In Chambers v. District of Columbia, 988 F.3d 497 (D.C. Cir. 2021), the D.C. Circuit held that a lateral transfer—or the denial of such—without diminution in pay or benefits did not qualify as an adverse action for the purposes of either a discrimination or a retaliation claim. A concurring opinion made clear, however, that the court ruled the way it did only because of circuit precedent that the panel thought should be overturned. In May 2021, the D.C. Circuit agreed to rehear the case en banc. 2021 WL 1784792 (May 5, 2021)

Page 268. Please add to the end of note 8.

For example, Collier v. Dallas County Hospital District, 827 Fed. Appx. 373, 377-78 (5th Cir. 2020), raised the question of whether an African American employee's exposure to the N-word in the workplace is severe enough to send his Title VII hostile work environment claim to a jury. The Fifth Circuit held that "two instances of racial graffiti and being called 'boy' – are insufficient to establish a hostile work environment."

Page 280. Please add to the end of note 4.

Enacted in 2019, and effective January 1, 2020, the Illinois Workplace Transparency Act requires employers to provide annual sexual harassment prevention training to employees.

Page 420. Please add to the end of the Note.

In Our Lady of Guadalupe School v. Morrissey-Berru, 140 S. Ct. 2049, 2066 (2020), the Supreme Court consolidated two cases brought by teachers in Catholic elementary schools. In the first case, the teacher alleged she was demoted, and her contract not renewed because of her age. In the second case, the teacher alleged she was discharged because of illness in violation of the Americans with Disabilities Act. The Court held that the ministerial exception barred the teachers' discrimination claims emphasizing that both teachers not only taught their students religion "but they were also expected to guide their students, by word and deed, toward the goal of living their lives in accordance with the faith."

Page 437. Please add to the end of note 9.

However, in Babb v. Wilkie, 140 S. Ct. 1168 (2020), the Supreme Court held that in cases involving federal sector employees, the ADEA requires that "personnel actions be untainted by any consideration of age." A showing of "but for" causation is not required for liability. Nonetheless, only plaintiffs who can show but for causation may obtain relief in the form of hiring, reinstatement, backpay, and compensatory damages. Plaintiffs who are unable to show but for causation may receive other forms of relief such as an injunction. Following the Supreme Court's decision in *Babb*, the Eleventh Circuit in Durr v. Secretary of Department of Veterans Affairs, 843 Fed. Appx. 246, 247 (11th Cir. 2021) reiterated that an age discrimination claim by a federal sector employee survives if age played any part in the way the decision was made and explained that "[t]he relevant question is whether the protected characteristic was the 'but-for cause of *differential treatment*,' not whether it was the 'but-for cause of the *ultimate decision*." (emphasis in original).

Page 462. Please add "and Gender Identity" to the section 5 heading.

Page 462. Please replace *Hively* with the following.

Bostock v. Clayton County Georgia
140 S. Ct. 1731 (2020)

Justice GORSUCH delivered the opinion of the Court.

Sometimes small gestures can have unexpected consequences. Major initiatives practically guarantee them. In our time, few pieces of federal legislation rank in significance with the Civil Rights Act of 1964. There, in Title VII, Congress outlawed discrimination in the workplace on the basis of race, color, religion, sex, or national origin. Today, we must decide whether an employer can fire someone simply for being homosexual or transgender. The answer is clear. An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.

Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. Likely, they weren't thinking about many of the Act's consequences that have become apparent over the years, including its prohibition against discrimination on the basis of motherhood or its ban on the sexual harassment of male employees. But the limits of the drafters' imagination supply no reason to ignore the law's demands. When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit.

I

Few facts are needed to appreciate the legal question we face. Each of the three cases before us started the same way: An employer fired a long-time employee shortly after the employee revealed that he or she is homosexual or transgender—and allegedly for no reason other than the employee's homosexuality or transgender status.

* * *

While these cases began the same way, they ended differently. Each employee brought suit under Title VII alleging unlawful discrimination on the basis of sex. 78 Stat. 255, 42 U.S.C. § 2000e–

2(a)(1). In Mr. Bostock's case, the Eleventh Circuit held that the law does not prohibit employers from firing employees for being gay and so his suit could be dismissed as a matter of law. 723 Fed. Appx. 964 (2018). Meanwhile, in Mr. Zarda's case, the Second Circuit concluded that sexual orientation discrimination does violate Title VII and allowed his case to proceed. 883 F.3d 100 (2018). Ms. Stephens's case has a more complex procedural history, but in the end the Sixth Circuit reached a decision along the same lines as the Second Circuit's, holding that Title VII bars employers from firing employees because of their transgender status. 884 F.3d 560 (2018). During the course of the proceedings in these long-running disputes, both Mr. Zarda and Ms. Stephens have passed away. But their estates continue to press their causes for the benefit of their heirs. And we granted certiorari in these matters to resolve at last the disagreement among the courts of appeals over the scope of Title VII's protections for homosexual and transgender persons. 587 U.S. ——(2019).

II

This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment. ***

With this in mind, our task is clear. We must determine the ordinary public meaning of Title VII's command that it is "unlawful ... for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." § 2000e–2(a)(1). To do so, we orient ourselves to the time of the statute's adoption, here 1964, and begin by examining the key statutory terms in turn before assessing their impact on the cases at hand and then confirming our work against this Court's precedents.

A

The only statutorily protected characteristic at issue in today's cases is "sex"—and that is also the primary term in Title VII whose meaning the parties dispute. Appealing to roughly contemporaneous dictionaries, the employers say that, as used here, the term "sex" in 1964 referred to "status as either male or female [as] determined by reproductive biology." The employees counter by submitting that, even in 1964, the term bore a broader scope, capturing more than anatomy and reaching at least some norms concerning gender identity and sexual orientation. But because nothing in our approach to these cases turns on the outcome of the parties' debate, and because the employees concede the point for argument's sake, we proceed on the assumption that "sex" signified what the employers suggest, referring only to biological distinctions between male and female.

* * *

When it comes to Title VII, the adoption of the traditional but-for causation standard means a defendant cannot avoid liability just by citing some *other* factor that contributed to its challenged employment decision. So long as the plaintiff 's sex was one but-for cause of that decision, that is enough to trigger the law.

No doubt, Congress could have taken a more parsimonious approach. As it has in other statutes, it could have added "solely" to indicate that actions taken "because of " the confluence of multiple factors do not violate the law. Cf. 11 U.S.C. § 525; 16 U.S.C. § 511. Or it could have written "primarily because off" to indicate that the prohibited factor had to be the main cause of the

defendant's challenged employment decision. Cf. 22 U.S.C. § 2688. But none of this is the law we have. If anything, Congress has moved in the opposite direction, supplementing Title VII in 1991 to allow a plaintiff to prevail merely by showing that a protected trait like sex was a "motivating factor" in a defendant's challenged employment practice. Civil Rights Act of 1991, § 107, 105 Stat. 1075, codified at 42 U.S.C. § 2000e–2(m). Under this more forgiving standard, liability can sometimes follow even if sex *wasn't* a but-for cause of the employer's challenged decision. Still, because nothing in our analysis depends on the motivating factor test, we focus on the more traditional but-for causation standard that continues to afford a viable, if no longer exclusive, path to relief under Title VII. § 2000e–2(a)(1).

* * *

B

* * *

The statute's message for our cases is equally simple and momentous: An individual's homosexuality or transgender status is not relevant to employment decisions. That's because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex. Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer's mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague. Put differently, the employer intentionally singles out an employee to fire based in part on the employee's sex, and the affected employee's sex is a but-for cause of his discharge. Or take an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth. Again, the individual employee's sex plays an unmistakable and impermissible role in the discharge decision.

That distinguishes these cases from countless others where Title VII has nothing to say. Take an employer who fires a female employee for tardiness or incompetence or simply supporting the wrong sports team. Assuming the employer would not have tolerated the same trait in a man, Title VII stands silent. But unlike any of these other traits or actions, homosexuality and transgender status are inextricably bound up with sex. Not because homosexuality or transgender status are related to sex in some vague sense or because discrimination on these bases has some disparate impact on one sex or another, but because to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex.

* * *

Reframing the additional causes in today's cases as additional intentions can do no more to insulate the employers from liability. Intentionally burning down a neighbor's house is arson, even if the perpetrator's ultimate intention (or motivation) is only to improve the view. No less, intentional discrimination based on sex violates Title VII, even if it is intended only as a means to achieving the employer's ultimate goal of discriminating against homosexual or transgender employees. There is simply no escaping the role intent plays here: Just as sex is necessarily a but-for *cause* when an employer discriminates against homosexual or transgender employees, an employer who discriminates on these grounds inescapably *intends* to rely on sex in its

decisionmaking. Imagine an employer who has a policy of firing any employee known to be homosexual. The employer hosts an office holiday party and invites employees to bring their spouses. A model employee arrives and introduces a manager to Susan, the employee's wife. Will that employee be fired? If the policy works as the employer intends, the answer depends entirely on whether the model employee is a man or a woman. To be sure, that employer's ultimate goal might be to discriminate on the basis of sexual orientation. But to achieve that purpose the employer must, along the way, intentionally treat an employee worse based in part on that individual's sex.

An employer musters no better a defense by responding that it is equally happy to fire male *and* female employees who are homosexual or transgender. Title VII liability is not limited to employers who, through the sum of all of their employment actions, treat the class of men differently than the class of women. Instead, the law makes each instance of discriminating against an individual employee because of that individual's sex an independent violation of Title VII. So just as an employer who fires both Hannah and Bob for failing to fulfill traditional sex stereotypes doubles rather than eliminates Title VII liability, an employer who fires both Hannah and Bob for being gay or transgender does the same.

At bottom, these cases involve no more than the straightforward application of legal terms with plain and settled meanings. For an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex. That has always been prohibited by Title VII's plain terms—and that "should be the end of the analysis." 883 F.3d at 135 (Cabranes, J., concurring in judgment).

***

III

What do the employers have to say in reply? For present purposes, they do not dispute that they fired the plaintiffs for being homosexual or transgender. Sorting out the true reasons for an adverse employment decision is often a hard business, but none of that is at issue here. Rather, the employers submit that even intentional discrimination against employees based on their homosexuality or transgender status supplies no basis for liability under Title VII.

* * *

A

* * *

Next, the employers turn to Title VII's list of protected characteristics—race, color, religion, sex, and national origin. Because homosexuality and transgender status can't be found on that list and because they are conceptually distinct from sex, the employers' reason, they are implicitly excluded from Title VII's reach. Put another way, if Congress had wanted to address these matters in Title VII, it would have referenced them specifically. Cf. *post*, at —— – —— (ALITO, J., dissenting); *post*, at —— – —— (KAVANAUGH, J., dissenting).

But that much does not follow. We agree that homosexuality and transgender status are distinct concepts from sex. But, as we've seen, discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second. Nor is there any such thing as a "canon of donut holes," in which Congress's failure to speak directly to a specific case that falls within a more general statutory rule creates a tacit exception.

Instead, when Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule. And that is exactly how this Court has always approached Title VII. "Sexual harassment" is conceptually distinct from sex discrimination, but it can fall within Title VII's sweep. Same with "motherhood discrimination." Would the employers have us reverse those cases on the theory that Congress could have spoken to those problems more specifically? Of course not. As enacted, Title VII prohibits all forms of discrimination because of sex, however they may manifest themselves or whatever other labels might attach to them.

* * *

B

Ultimately, the employers are forced to abandon the statutory text and precedent altogether and appeal to assumptions and policy. Most pointedly, they contend that few in 1964 would have expected Title VII to apply to discrimination against homosexual and transgender persons. And whatever the text and our precedent indicate, they say, shouldn't this fact cause us to pause before recognizing liability?

It might be tempting to reject this argument out of hand. This Court has explained many times over many years that, when the meaning of the statute's terms is plain, our job is at an end.

* * *

Still, while legislative history can never defeat unambiguous statutory text, historical sources can be useful for a different purpose: Because the law's ordinary meaning at the time of enactment usually governs, we must be sensitive to the possibility a statutory term that means one thing today or in one context might have meant something else at the time of its adoption or might mean something different in another context. And we must be attuned to the possibility that a statutory phrase ordinarily bears a different meaning than the terms do when viewed individually or literally. To ferret out such shifts in linguistic usage or subtle distinctions between literal and ordinary meaning, this Court has sometimes consulted the understandings of the law's drafters as some (not always conclusive) evidence. For example, in the context of the National Motor Vehicle Theft Act, this Court admitted that the term "vehicle" in 1931 could literally mean "a conveyance working on land, water or air." But given contextual clues and "everyday speech" at the time of the Act's adoption in 1919, this Court concluded that "vehicles" in that statute included only things "moving on land," not airplanes too. Similarly, in *New Prime*, we held that, while the term "contracts of employment" today might seem to encompass only contracts with employees, at the time of the statute's adoption the phrase was ordinarily understood to cover contracts with independent contractors as well. 586 U.S., at 1825-26. Cf. *post*, at ——– – ——– (KAVANAUGH, J., dissenting) (providing additional examples).

The employers, however, advocate nothing like that here. They do not seek to use historical sources to illustrate that the meaning of any of Title VII's language has changed since 1964 or that the statute's terms, whether viewed individually or as a whole, ordinarily carried some message we have missed. To the contrary, as we have seen, the employers *agree* with our understanding of all the statutory language—"discriminate against any individual ... because of such individual's ... sex." Nor do the competing dissents offer an alternative account about what these terms mean either when viewed individually or in the aggregate. Rather than suggesting that the statutory language bears some other *meaning*, the employers and dissents merely suggest that, because few in 1964 expected today's *result*, we should not dare to admit that it follows ineluctably from the statutory text. When a new application emerges that is both unexpected and important, they would

seemingly have us merely point out the question, refer the subject back to Congress, and decline to enforce the plain terms of the law in the meantime.

* * *

If anything, the employers' new framing may only add new problems. The employers assert that "no one" in 1964 or for some time after would have anticipated today's result. But is that really true? Not long after the law's passage, gay and transgender employees began filing Title VII complaints, so at least *some* people foresaw this potential application. And less than a decade after Title VII's passage, during debates over the Equal Rights Amendment, others counseled that its language—which was strikingly similar to Title VII's—might also protect homosexuals from discrimination.

Why isn't that enough to demonstrate that today's result isn't totally unexpected? How many people have to foresee the application for it to qualify as "expected"? Do we look only at the moment the statute was enacted, or do we allow some time for the implications of a new statute to be worked out? Should we consider the expectations of those who had no reason to give a particular application any thought or only those with reason to think about the question? How do we account for those who change their minds over time, after learning new facts or hearing a new argument? How specifically or generally should we frame the "application" at issue? None of these questions have obvious answers, and the employers don't propose any.

* * *

With that, the employers are left to abandon their concern for expected applications and fall back to the last line of defense for all failing statutory interpretation arguments: naked policy appeals. If we were to apply the statute's plain language, they complain, any number of undesirable policy consequences would follow. Cf. *post*, at —— – —— (ALITO, J., dissenting). Gone here is any pretense of statutory interpretation; all that's left is a suggestion we should proceed without the law's guidance to do as we think best. But that's an invitation no court should ever take up. The place to make new legislation, or address unwanted consequences of old legislation, lies in Congress. When it comes to statutory interpretation, our role is limited to applying the law's demands as faithfully as we can in the cases that come before us. As judges we possess no special expertise or authority to declare for ourselves what a self-governing people should consider just or wise. And the same judicial humility that requires us to refrain from adding to statutes requires us to refrain from diminishing them.

What are these consequences anyway? The employers worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination. And, under Title VII itself, they say sex-segregated bathrooms, locker rooms, and dress codes will prove unsustainable after our decision today. But none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today. Under Title VII, too, we do not purport to address bathrooms, locker rooms, or anything else of the kind. The only question before us is whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual "because of such individual's sex." As used in Title VII, the term "'discriminate against'" refers to "distinctions or differences in treatment that injure protected individuals." Firing employees because of a statutorily protected trait surely counts. Whether other policies and practices might or might not qualify as unlawful discrimination or find justifications under other provisions of Title VII are questions for future cases, not these.

Separately, the employers fear that complying with Title VII's requirement in cases like ours may require some employers to violate their religious convictions. We are also deeply concerned with preserving the promise of the free exercise of religion enshrined in our Constitution; that guarantee lies at the heart of our pluralistic society. But worries about how Title VII may intersect with religious liberties are nothing new; they even predate the statute's passage. As a result of its deliberations in adopting the law, Congress included an express statutory exception for religious organizations. § 2000e–1(a). This Court has also recognized that the First Amendment can bar the application of employment discrimination laws "to claims concerning the employment relationship between a religious institution and its ministers." And Congress has gone a step further yet in the Religious Freedom Restoration Act of 1993 (RFRA), 107 Stat. 1488, codified at 42 U.S.C. § 2000bb *et seq.* That statute prohibits the federal government from substantially burdening a person's exercise of religion unless it demonstrates that doing so both furthers a compelling governmental interest and represents the least restrictive means of furthering that interest. § 2000bb–1. Because RFRA operates as a kind of super statute, displacing the normal operation of other federal laws, it might supersede Title VII's commands in appropriate cases. See § 2000bb–3.

But how these doctrines protecting religious liberty interact with Title VII are questions for future cases too.

* * *

The judgments of the Second and Sixth Circuits in Nos. 17–1623 and 18–107 are affirmed. The judgment of the Eleventh Circuit in No. 17–1618 is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice ALITO, with whom Justice THOMAS joins, dissenting.

There is only one word for what the Court has done today: legislation. The document that the Court releases is in the form of a judicial opinion interpreting a statute, but that is deceptive.

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on any of five specified grounds: "race, color, religion, sex, [and] national origin." 42 U.S.C. § 2000e–2(a)(1). Neither "sexual orientation" nor "gender identity" appears on that list. For the past 45 years, bills have been introduced in Congress to add "sexual orientation" to the list, and in recent years, bills have included "gender identity" as well. But to date, none has passed both Houses.

Last year, the House of Representatives passed a bill that would amend Title VII by defining sex discrimination to include both "sexual orientation" and "gender identity," H.R. 5, 116th Cong., 1st Sess. (2019), but the bill has stalled in the Senate. An alternative bill, H.R. 5331, 116th Cong., 1st Sess. (2019), would add similar prohibitions but contains provisions to protect religious liberty. This bill remains before a House Subcommittee.

Because no such amendment of Title VII has been enacted in accordance with the requirements in the Constitution (passage in both Houses and presentment to the President, Art. I, § 7, cl. 2), Title VII's prohibition of discrimination because of "sex" still means what it has always meant.

But the Court is not deterred by these constitutional niceties. Usurping the constitutional authority of the other branches, the Court has essentially taken H.R. 5's provision on employment discrimination and issued it under the guise of statutory interpretation. A more brazen abuse of our authority to interpret statutes is hard to recall.

The Court tries to convince readers that it is merely enforcing the terms of the statute, but that is preposterous. Even as understood today, the concept of discrimination because of "sex" is different from discrimination because of "sexual orientation" or "gender identity." And in any event, our duty is to interpret statutory terms to "mean what they conveyed to reasonable people *at the time they were written*." A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 16 (2012) (emphasis added). If every single living American had been surveyed in 1964, it would have been hard to find any who thought that discrimination because of sex meant discrimination because of sexual orientation—not to mention gender identity, a concept that was essentially unknown at the time.

The Court attempts to pass off its decision as the inevitable product of the textualist school of statutory interpretation championed by our late colleague Justice Scalia, but no one should be fooled. The Court's opinion is like a pirate ship. It sails under a textualist flag, but what it actually represents is a theory of statutory interpretation that Justice Scalia excoriated—the theory that courts should "update" old statutes so that they better reflect the current values of society. See A. Scalia, A Matter of Interpretation 22 (1997). If the Court finds it appropriate to adopt this theory, it should own up to what it is doing.

Many will applaud today's decision because they agree on policy grounds with the Court's updating of Title VII. But the question in these cases is not whether discrimination because of sexual orientation or gender identity *should be* outlawed. The question is *whether Congress did that in 1964*.

It indisputably did not.

* * *

Page 469. Please replace existing note 1 with the following.

1. Traditionally, federal courts distinguished discrimination based on sex from discrimination based on sexual orientation and held that the latter did not constitute actionable sex discrimination under Title VII. Under the Obama Administration, the EEOC argued that discrimination based on sexual orientation was a form of discrimination based on sex. See EEOC Press Release, EEOC Files First Suits Challenging Sexual Orientation Discrimination as Sex Discrimination (3/1/16), available at https://www.eeoc.gov/eeoc/newsroom/release/3-1-16.cfm. The Trump Administration rescinded Obama era guidance regarding the scope of Title VII's sex discrimination prohibition and took the position that discrimination based on sexual orientation did not constitute discrimination because of sex under Title VII. See U.S. Dept's of Educ. & Justice, Dear Colleague Letter (Feb. 22, 2017), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf. In Hively v. Ivy Tech Community College of Indiana, 853 F.3d 339 (7th Cir. 2017), the en banc Seventh Circuit reversed its own precedent to become the first circuit court to agree with the EEOC and hold that discrimination based on sexual orientation is actionable sex discrimination.

Page 469. Please replace existing note 2 with the following.

2. Bostock v. Clayton Cty, Ga., consolidated three cases: Bostock v. Clayton Cty. Bd. of Commissioners, 723 Fed. Appx. 964 (11th Cir. 2018); Zarda v. Altitude Express, Inc., 883 F.3d 100 (2nd Cir. 2018) (en banc); and EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018). *Bostock* and *Zarda* raised the question of whether Title VII prohibited discrimination based on sexual orientation. *R.G. & G.R. Harris Funeral Homes* raised the question of whether Title VII prohibited discrimination based on transgender status. In *Bostock*, the Supreme Court held that Title VII's prohibition on discrimination because of sex prohibits discrimination because of sexual orientation and transgender status. The *Bostock* decision significantly expands the scope of Title VII's coverage, yet the opinion leaves several questions unanswered. First, as Justice Alito notes in dissent, the Court does not define what it means by "transgender status." This leaves open the question of whether courts will defer to plaintiffs' own self-definition or whether they will rely on medical experts to determine status. In early cases providing protection to transgender individuals using the sex-stereotyping rationale, courts did the latter relying extensively on medical expert testimony. See, e.g., Barnes v. City of Cincinnati, 401 F.3d 729 (6th Cir. 2005); Smith v. City of Salem, Ohio, 378 F.3d 566 (6th Cir. 2004). Second, the Court explicitly sidestepped the question of what its decision means for transgender individuals' access to sex-segregated spaces like bathrooms and locker rooms or with respect to sex-specific dress codes. Third, the Court recognizes employers' fear that complying with the Court's decision "may require some employers to violate their religious convictions" but holds for future cases the question of how the Religious Freedom Restoration Act interacts with its interpretation of Title VII's antidiscrimination mandate.

Page 470. Please delete notes 3, 4 and 5 and renumber remaining notes accordingly.

CHAPTER 5

WAGES AND HOURS

Page 497.

Add the following to the end of note 3. The Trafficking Victims Protection Act of 2000 imposes civil liability on anyone who "knowingly provides or obtains the labor or services of a person" by certain coercive means. The Fifth Circuit held that this statute applies to private immigration detention facilities, and therefore allowed an immigrant detainee to proceed with a lawsuit claiming that the detention facility forced her to work, on pain of "more severe living conditions, including solitary confinement, physical restraints, and deprivation of basic human needs such as personal hygiene products." Gonzalez v. CoreCivic, Inc., 986 F.3d 536 (5th Cir. 2021).

Page 506.

2A. Vocational schools can present difficult questions when students provide services to customers as part of their training. In Eberline v. Douglas J. Holdings, Inc., 982 F.3d 1006 (6th Cir. 2020), the Sixth Circuit considered an FLSA claim brought by cosmetology school students who were required to perform janitorial tasks in the salons where they trained. The court asked "which party derives the primary benefit from the relationship," focusing on the tasks at issue at issue in the case. The court added that a "segmented" approach that considered the janitorial tasks in isolation was necessary to prevent "the type of exploitation that the FLSA was designed to prevent." That was because an approach that asked whether the overall mix of educational and janitorial duties primarily benefitted the students or the school would necessarily allow schools to require students to perform a significant amount of janitorial work, up to a tipping point where "the value of the labor to the school" exceeded "the value of the overall relationship to the students."

Page 524.

7A. "Any employee employed in agriculture" is also exempted from the FLSA's maximum hours law. 29 U.S.C. § 213(b)(12). The Act defines "agriculture" as "farming in all its branches," as well as "practices . .. . performed by a farmer or on a farm as an incident to or in conjunction with such farming operations."

Federal law requires employers of temporary foreign guest workers ("H-2A" visa holders) to provide access to amenities such as cooking and laundry facilities. An agricultural employer satisfied this requirement by instructing crew leaders to drive guest workers to a grocery store, laundromat, and bank on a regular basis. The Eleventh Circuit held that crew leaders were entitled to overtime pay for the time they spent on these driving trips. Ramirez v. Statewide Harvesting & Hauling, 997 F.3d 1356 (11th Cir. 2021). The court rejected the argument that these driving trips should be treated as "agricultural" work because the trips were not "performed by a farmer," nor did they take place "on a farm."

In general, state minimum wage laws may be more protective of employees than federal law. For example, state law overtime requirements may apply to farmworkers. In Martinez-Cuevas v.

DeRuyter Bros. Dairy, 475 P.3d 164 (Wash. 2020), the Washington Supreme Court held that the state Minimum Wage Act's exemption of dairy workers from the statute's maximum hours provision violated the state constitution because the legislature did not provide a reasonable justification for the exclusion. Shortly after that decision, the state amended the Minimum Wage Act to phase in overtime for agricultural workers.

Page 532.

Add the following to the end of note 8.

App-based delivery companies like DoorDash and Instacart have faced both public criticism and lawsuits based on their handling of tips. For example, DoorDash settled a lawsuit brought by the District of Columbia that alleged that the company violated the District's consumer protection laws by making "misleading representations to consumers regarding how their tips were distributed to Dashers," including that "their tips did not change Dasher pay in the vast majority of circumstances." DoorDash settled the case, agreeing to pay $2.5 million to Dashers and various charities, and to an injunction requiring it to clarify its pay practices. Consent Order & Judgment, District of Columbia v. DoorDash, Inc., Case No. 2019 CA 007626 B (Nov. 24, 2020), available at https://oag.dc.gov/sites/default/files/2020-11/DoorDash-Consent-Order.pdf.

Page 541.

6A. Does California wage and hour law apply to oil drilling platforms located off the coast, on the Outer Continental Shelf? The Supreme Court answered no in a case requiring it to interpret the Outer Continental Shelf Lands Act. Parker Driling Management Servs. v.Newton, 139 S.Ct. 1881 (2019). The case was important because "standby" time is more likely to be compensable under California law than the FLSA. The plaintiff alleged that his employer failed to compensate him and his coworkers properly for 14-day shifts on this oil rig, during which employees cycled between 12 compensated hours on-duty and 12 uncompensated hours on "standby."

CHAPTER 6

HEALTH BENEFITS

Page 607. According to one national survey, about 157 million Americans in 2020 obtained health insurance through an employer-sponsored group health plan. The average annual premium for single coverage under employer plans was $7,470, and the average annual premium for family coverage was $21,342. That average annual family coverage premium for family coverage represented a staggering increase of 55% over the past decade. The coverage numbers do not reflect the impact of the COVID-19 pandemic on employment status and related benefit coverage.

Replace the third paragraph of the section entitled "INTRODUCTION" with the following.

The Patient Protection and Affordable Care Act of 2010 (ACA) made sweeping changes to the U.S. health care system. The laws was structured to build upon the existing U.S. system of employment-based health insurance, with a complex web of provisions intended to phase in over multiple years. Although the ACA overall has survived numerous challenges since its passage, a number of its original provisions have been repealed or significantly altered by Congress over the past decade, and other portions continue to be subjected to attack through the courts. This chapter contains materials reflecting key statutory provisions and case law as of 2021.

Page 608. Delete the last sentence of the second to last paragraph on the page (the sentence beginning "Today, there are over ….").

Page 609. Add the following at the top of the page, immediately before the section entitled "ERISA."

In 2020, the U.S. Census reported that more than 298 million Americans had some form of health insurance coverage. Approximately 110 million of those obtained coverage through a public plan (Medicare, Medicaid, or the military's VA and CHAMPVA plans). The numbers of those with health insurance are expected to decline once data is collected that reflects the impact of COVID-19.

Replace the third paragraph of the section on ERISA with the following.

ERISA has been especially important to large employers that employ workers in different states because the federal statute preempts most state law relating to employee benefit plans. As long as an employer health insurance plan is self-insured (meaning that the employer, not an insurance company, bears the risk of claim expenses that exceed collected premiums), ERISA preemption means that the employer plan does not need to comply with diverse state laws governing the content of health insurance policies. ERISA's preemption provisions have been a source of much important case law covered later in the chapter. The ACA's health reform provisions retain the overarching structure and legal effect of ERISA, including its preemption rules.

Page 610. Replace the final paragraph of the section on COBRA with the following.

Before health reform under the ACA (discussed below) passed Congress in 2010, COBRA continuation coverage met a critical need by bridging the period between termination of an individual's health insurance coverage through a prior employer and commencement of coverage through a different employer (or through a public program such as Medicare). COBRA also provided beneficiaries of active workers with a reasonable, albeit limited, period of coverage following loss of coverage through the active worker for any of a variety of reasons (such as death of the worker or divorce). In theory many of the ACA's intended health care system reforms should have made COBRA largely irrelevant. The ACA as initially enacted included mandates for employers to provide adequate and affordable health insurance to employees, requirements for individuals to maintain a minimum specified level of coverage, subsidies to assist low-income individuals with the cost of coverage, expansion of Medicaid coverage for impoverished individuals, and creation of government-run health insurance marketplaces through which any individual could obtain adequate and affordable health coverage. Taken collectively, those changes if fully implemented should have meant that the need for COBRA's continuation of prior employer coverage would vanish over time. However, as discussed below, implementation of many of the ACA's intended reforms has turned out to be both bumpy and slow, and COBRA coverage remains valuable in certain circumstances.

In May 2020, the Departments of Labor and Treasury announced disaster relief extensions of certain COBRA requirements, including the period during which an eligible individual may elect COBRA coverage, in response to the COVID-19 pandemic. See EBSA Disaster Relief Notice 2021-01. The American Rescue Plan Act of 2021 (ARP) provides temporary premium assistance for certain individuals electing COBRA continuation coverage during the period from April 1, 2021 through September 30, 2021, among other adjustments to the normal COBRA rules.

Separate from the federal COBRA requirements and ERISA, many states have enacted their own versions of continuation coverage requirements, often referred to as "mini-COBRA" statutes. State-based continuation coverage rules may resemble the federal COBRA statute, but are not the same, creating an additional level of complexity for employers. Unlike the federal COBRA statute, mini-COBRA statutes generally do not exempt employers with 20 or fewer employees. Mini-COBRA statutes escape ERISA preemption by falling under state insurance law, which ERISA does not preempt. However, employers that self-insure do not buy insurance policies from state-regulated insurers and can thereby avoid mini-COBRA statutes. The ARP 2021 premium assistance is available for certain continuation coverage elected under state mini-COBRA statutes as well as for federal COBRA coverage.

Page 610. Replace the first five paragraphs (all but the final paragraph) of the section titled "HIPAA" with the following.

The Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. No. 104-191 (1996), had two main focuses when enacted: portability of health insurance and health information privacy. Key provisions relating to portability have largely been rendered obsolete by the ACA (discussed below), but other provisions – including the health information privacy rules – remain in force and relevant. HIPAA includes special employer health plan enrollment rights for eligible

individuals (employee or dependent) who did not enroll when first eligible but later experience one of various life events (such as loss of other coverage, marriage, or birth or adoption of a new dependent) and want to enroll in coverage at the later time. In 2020, special enrollment time periods under HIPAA were extended temporarily in response to the COVID-19 pandemic. 85 Fed. Reg. 26351 (2020). HIPAA applies to employer-sponsored group health plans, including plans that provide insurance through state-regulated insurers.

One of the original goals of HIPAA was to end perceived "job lock" due to health insurance. The concern was that workers were unwilling to leave existing jobs, even for positions that offered expanded opportunities and potentially more pay, if the worker or a family member had any kind of health condition for which coverage might be excluded under a new employer's plan. In the early 1990s group health insurance plans commonly excluded coverage for extended periods for any preexisting health condition a plan participant might have before joining the new plan. HIPAA imposed strict limits on the extent to which a group health plan may impose preexisting condition limits on coverage. 29 U.S.C. § 1181. Employer plans were limited to a one-time 12-month maximum exclusion from coverage for illnesses or health conditions that were diagnosed or treated within the six months before enrollment in a new plan, but also required to give credit for time an individual was covered under another group health plan. Thus, as long as a worker maintained continuous coverage for at least one year under a prior group health plan, the worker and any dependents were eligible immediately for coverage under a new plan without regard to any preexisting health conditions. No preexisting condition exclusions were permitted for pregnancy, newborns, or adopted children. HIPAA required employers to provide "certificates of creditable coverage" for former employees to use to establish eligibility under a new employer's plan. Effective beginning in 2014, the ACA prohibits any preexisting condition limitations on essential health benefits, thereby superseding the preexisting condition rules under HIPAA. The regulatory requirement for employers to provide certificates of creditable coverage was eliminated effective December 31, 2014. 79 Fed. Reg. 10296 (2014).

HIPAA also bars discrimination with regard to eligibility, enrollment, premiums and coverage based on a number of factors, including genetic information (in the absence of diagnosis of a condition), individual health history and risk factors, and participation in certain heightened risk activities (e.g., no increase in premium rates due to motorcycle riding, but alligator wrestling could result in a premium surcharge). Many of these provisions are superseded in effect by the nondiscrimination, guaranteed issue/renewal, prohibition on rescission and other rules under the ACA (discussed below). The ACA also fills other gaps in HIPAA's rules, including the fact that many of HIPAA's rules applied only to an otherwise existing employer health plan and HIPAA's failure to regulate the content or cost of employer coverage beyond requiring that it not discriminate among similarly situated individuals or on the basis of specified factors (noted above).

Page 612. Replace the section titled "EMPLOYER RESPONSIBILITIES," beginning on page 612 and continuing through page 615, in its entirety with the following.

EMPLOYER RESPONSIBILITIES

Before the ACA, federal regulation of employee health plans took a largely hands-off approach, with no requirement that any employer offer any form of coverage – and no penalties for failing to offer health insurance. Only after an employer chose to offer health insurance to employees did

ERISA's limited health plan regulation take effect. The same applied to statutes like COBRA and HIPAA. Passage of the ACA marked a reversal in that long-standing hands-off approach. The ACA not only required substantive changes in the terms of existing employer health plans, but also created what is inherently a mandate for at least larger employers (generally, those with more than 50 employees) to offer their employees affordable health insurance that satisfies specified basic criteria for adequate coverage.

Employer Mandate. The employer mandate, euphemistically called a "shared responsibility" provision in the ACA and commonly referred to as the employer "play-or-pay" rule, takes the form of tax penalties for "applicable large employers" that do not offer "minimum essential coverage" (MEC) at an affordable price to employees. An "applicable large employer" is defined as an employer that "employed an average of at least 50 full-time employees on business days during the prior calendar year." In general, a "full-time employee" for ACA purposes means an employee employed on average at least 30 hours per week, with special rules for seasonal workers and rules to aggregate part-time employees to determine the number of full-time equivalent employees. 26 U.S.C. § 4980H(c)(2).

Generally, to satisfy the MEC requirement, a plan must at a minimum provide coverage of the following categories of health-related expenses:

(A) Ambulatory patient services;
(B) Emergency services;
(C) Hospitalizations;
(D) Maternity and newborn care;
(E) Mental health and substance use disorder services, including behavioral health treatment;
(F) Prescription drugs;
(G) Rehabilitative and habilitative services and devices;
(H) Laboratory services;
(I) Preventive and wellness services and chronic disease management;
(J) Pediatric services, including oral and vision care. 45 C.F.R. § 156.110.

For an employer plan to satisfy the MEC rules, the plan must also comply with a range of other requirements described below (including guaranteed issue and renewals, no dollar limitations on essential health benefits, and nondiscrimination).

In addition to offering MEC, an employer subject to the shared responsibility mandate must also make coverage available at affordable premium rates to employees and ensure that it provides at least a minimum value to covered employees. To be "affordable" a covered employee's premium must not exceed a specified percentage of the employee's household income (9.5% when the ACA passed, but adjusted over time; in 2021, the threshold is 9.83%). To provide "minimum value" the plan's share of the cost of benefits must be at least 60% of the total cost. 26 U.S.C. § 36B(c)(2)(C).

The ACA uses tax penalties under the Internal Revenue Code to enforce its employer mandate rules. There are two alternative penalties that may apply. First, if an employer subject to the mandate fails to offer MEC as described above to at least a specified percentage of its full-time employees and at least one of those employees obtains subsidized coverage through a government-managed health insurance marketplace (described below), the employer must pay a penalty of up to $2,700 annually (computed monthly and indexed annually for inflation; $2,000 when the ACA passed) per full-time employee (after the first 30 full-time employees). 26 U.S.C. § 4980H(a). Second and alternatively, if an employer subject to the mandate offers MEC as described above to at least a specified percentage of its full-time employees, but that MEC fails the affordability or

minimum value tests with at least one full-time employee, the employer must pay a penalty of up to $4,060 per year (determined monthly and indexed annually for inflation; $3,000 per year when the ACA passed) for each full-time employee who qualifies for a subsidy (in the form of a premium tax credit) and obtains coverage through a government-managed insurance marketplace. 26 U.S.C. § 4980H(b). Employers are subject to only the greater of the two alternative penalties, not to both, and various exemptions and limitations apply, including one for large employers with workforces composed primarily of seasonal workers. For these purposes, a "seasonal worker" is defined as a "worker who performs labor or services on a seasonal basis as defined by the Secretary of Labor" and "retail workers employed exclusively during holiday seasons." 26 C.F.R. § 54.4980H-2.

The employer mandate described above was originally scheduled to take effect in 2014, but was delayed under the Obama Administration until 2015. See IRS Notice 2013-45. Regulations provided additional transition relief through calendar year 2015 (and plan years that began in 2015 but ended in 2016) for employers with at least 50 but fewer than 100 full-time employees. 79 Fed. Reg. 8544, 8574 (2014). Beginning in 2017, despite numerous Congressional efforts to repeal or replace key portions (or all) of the ACA, the IRS began enforcing the ACA employer mandate.

Cadillac Plan Tax Repeal. Although the main employer plan mandate described above finally took effect in 2017, an additional ACA employer plan penalty tax was repealed in late 2019. Originally, the ACA included an excise tax of 40% to be imposed on the annual value of employer plan coverage in excess of certain amounts ($10,200 for employee-only coverage and $27,500 for family coverage, with various adjustments). The so-called "Cadillac Plan Tax" was to be paid by employers and was expected to cause those with generous health plan coverage to trim that coverage to avoid the penalty tax. An extremely unpopular provision of the ACA, implementation of the Cadillac Plan Tax was delayed several times, and the Setting Every Community Up for Retirement Enhancement (SECURE) Act repealed the tax altogether at the end of 2019 before it became effective in 2020.

Other Employer Plan Changes. The ACA made numerous changes to common employer health plan practices. Some of the key changes are described below. Except as otherwise noted, these changes took effect in September 2010.

(A) Elimination of lifetime and annual dollar limits on essential health benefits. Elimination of lifetime dollar limits became effective in September 2010; annual dollar limits were initially permitted to a specified degree, but prohibited altogether beginning in 2014.

(B) Coverage of dependents to age 26. Group health plans providing coverage of dependent children are required to make coverage available until the child attains age 26.

(C) No exclusion of coverage for preexisting conditions. Group health plans providing coverage of dependent children were initially prohibited from excluding coverage for preexisting conditions for children up to age 18. Beginning in 2014, no exclusion of coverage for preexisting conditions is permitted. This provision effectively renders obsolete HIPAA's portability coverage.

(D) Guaranteed issue and renewal. Group health plans cannot deny enrollment in or renewal of health plan coverage for any health status reasons. Plans subject to this rule cannot deny enrollment for any reason other than non-payment of premiums.

(E) No waiting period in excess of 90 days. Beginning in 2014, group health plans cannot impose waiting periods of more than 90 calendar days before coverage takes effect. Some group health plans may also be subject to shorter waiting periods under applicable state law.

(F) No rescission of coverage. Group health plans cannot rescind coverage other than for fraud or intentional misrepresentation of material fact.

(G) Disclosure of value of health insurance. Beginning in 2011, employers are required to disclose on employee Form W-2s the value of the employer plan health coverage.

(H) Limitations on employee contributions to healthcare flexible savings accounts (FSAs). The ACA reduced to $2,500 (indexed for inflation; for 2021, the limit is $2,750) the amount of employee pre-tax contributions that may be made annually under a cafeteria plan to a healthcare FSA. The reduction took effect with the first plan year beginning on or after January 1, 2013.

(I) Appeals process. The ACA expanded and strengthened the appeals processes already applicable to plans under ERISA.

Auto-enrollment in employer health plans. The ACA initially amended the Fair Labor Standards Act (FLSA) to require employers to which the FLSA applies and that have more than 200 full-time employees and sponsor one or more group health plans for employees to automatically enroll new full-time employees in one of the employer's plans. The ACA auto-enrollment requirement was repealed by the Bipartisan Budget Act of 2015 without ever taking effect.

Nondiscrimination. The ACA includes a number of provisions designed to prohibit discrimination in health plan coverage, building on the HIPAA nondiscrimination rules applicable to employment-based group health plans as discussed above. Most are directed broadly at insurers, shaping rules ranging from enrollment eligibility to marketing. Effective beginning in 2014, insurers are prohibited from basing eligibility to enroll on health status, medical conditions (including physical or mental illnesses) or medical history, claims experience, receipt of health care, genetic information, disability, evidence of insurability or any other factor HHS specifies. Additional restrictions prohibit basing health benefit eligibility on wages or applying rules that have the effect of discriminating in favor of higher wage employees. Insurers are prohibited from determining premium rates on factors other than family composition, age, tobacco use, and geographic area. Effective beginning in 2014, no rating variation is allowed based on health, race, or gender. Insurers also may not employ marketing practices that have the effect of discouraging enrollment by individuals with significant health needs.

Litigation over contraceptive coverage. The ACA's coverage provisions include a requirement that health plans cover "preventive health services without cost sharing." 42 U.S.C. § 300gg-13(a)(4). HHS in 2012 issued regulations specifying that "preventive health services" include all FDA-approved contraceptive methods and sterilization methods, including the so-called "morning-after pill." 77 Fed. Reg. 8725 (2012). The regulation includes an exemption from the requirement for religious employers (45 C.F.R. § 147.130(a)(1)(iv)(A)-(B)), and the Obama Administration created a complicated accommodation process to permit employees of religiously affiliated nonprofit organizations to obtain insurance coverage that included contraceptive coverage without direct employer involvement. (The accommodation permitted insurers to provide the coverage directly to affected employees and their covered dependents.) Neither the regulatory exemption for religious employers nor the accommodation procedure for religiously affiliated nonprofit employers extended to for-profit businesses.

In Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014), the Supreme Court in a 5-4 decision held that "closely held," for-profit companies run on religious principles can challenge government actions pursuant to the Religious Freedom Restoration Act and that such companies can seek an exemption from the ACA's contraceptive coverage requirement. In Zubik v. Burwell, 136 S. Ct. 444 (2016), nonprofit organizations that provide health insurance to their employees challenged the accommodation for religiously affiliated nonprofit organizations that allowed employees of such organizations to obtain contraceptive coverage directly from insurers instead

of through their employer health plan. The accommodation required an employer seeking exemption from providing coverage directly to submit a form either to its insurer or to the federal government indicating the employer's objection on religious grounds. The nonprofit organizations argued that this form submission requirement substantially burdened the exercise of their religion in violation of the Religious Freedom Restoration Act of 1993, 42 U.S.C. §20000bb et seq. In a per curiam opinion, the Supreme Court vacated decisions of the lower courts and remanded the case to allow the parties to resolve the issues themselves. Many commentators believed that this sidestepping action was taken to avoid a 4-4 split between the justices following the unexpected death of Justice Scalia in February 2016.

In 2018, the DOL, HHS and the Treasury Department issued joint regulations that expanded eligibility for religious belief exemptions and added a "moral conviction" exception to the contraceptive mandate rules. 83 Fed. Reg. 57536 (2018); 83 Fed. Reg. 57591 (2018). The effect is that any entity with a "sincerely held religious belief" or a "sincerely held moral conviction" can avoid the ACA contraceptive mandate. In January 2019, two federal district courts (in California and Pennsylvania) issued nationwide injunctions against implementation of the new regulations; the Third Circuit affirmed the injunction in Pennsylvania v. President U.S., 930 F.3d 543 (3d Cir. 2019). Joined by a nonprofit, the federal government appealed the decision to the Supreme Court. In July 2020, in Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, 140 S. Ct. 2367 (2020), the Supreme Court upheld the 2018 regulations, thereby allowing the broad religious belief and moral conviction exemptions from the contraceptive mandate to go forward.

There is reason to expect the Supreme Court to continue to support religious exemptions in a range of contexts, potentially include benefit plans. Although not an employee benefits case and possibly a narrow ruling on the facts, the Supreme Court's decision in Masterpiece Cake v. Colorado Civil Rights Commission, 138 S. Ct. 1719 (2018), dealt with a cake shop owner's claim that his religious freedom should allow him to refuse customers who wanted a cake for a same-sex wedding. The Court in a 7-2 decision reversed a state commission's decision against the shop owner, holding that the decision violated the cake shop owner's right to freedom of expression. While a number of commentators have suggested that the *Masterpiece Cake* ruling may be limited to its facts, the Supreme Court in Fulton v. City of Philadelphia, 141 S. Ct. 1868 (2021) ruled in favor of a Catholic social services agency that challenged the City of Philadelphia's refusal to continue to contract with the agency for foster care services unless the agency agreed to certify same-sex couples as foster parents. The Court held that Philadelphia's policy violated the Free Exercise Clause of the First Amendment. Again, the decision turned on a specific set of facts, but what happens when an employer argues for plan coverage limitations based on religious beliefs? For example, could a plan limit coverage for gender confirmation treatment for transgender individuals?

Page 615. Replace the section titled "INDIVIDUAL RESPONSIBILITY," beginning on page 615 and continuing through page 617, in its entirety with the following.

INDIVIDUAL MANDATE

In addition to the employer mandate discussed above, the ACA included two significant provisions intended to interlock with the employer mandate and increase health insurance coverage across the population. The first of these was the individual mandate, discussed in this section. The

other was the implementation of government-managed health insurance marketplaces or exchanges, discussed in the next section.

Under the ACA's individual mandate, most individuals are required to maintain minimum essential health coverage for themselves and their dependents, beginning in 2014. The individual mandate does not apply to individuals with a "religious-conscience exemption" or to incarcerated individuals or those not lawfully present in the United States. Individuals subject to the mandate can satisfy it by obtaining coverage from a variety of sources, including through a government program such as Medicare, through an employer-sponsored plan that meets ACA requirements, or through a health plan purchased under one of the ACA's government-managed health insurance marketplaces/exchanges.

Under the individual mandate as passed, individuals who failed to maintain minimum essential health coverage were subject to a tax penalty, computed as the greater of a percentage of an individual's household income or a flat dollar amount, but subject to caps. For 2014, the maximum penalty for an individual was $204 per month ($2,448 annually); for a family with five or more members, the maximum penalty was $1,020 per month ($12,240 annually). The penalty did not apply to individuals in a number of categories, including members of federally recognized American Indian tribes and low-income individuals meeting specified criteria (for example, individuals with household income below the federal poverty line). The ACA offers premium tax credits and cost-sharing subsidies to low-income individuals with household income above the federal poverty line (but below specified levels) to assist with purchasing insurance through one of the government-managed health insurance marketplaces/exchanges. The American Rescue Plan Act of 2021 (ARP) expands eligibility for premium tax credit assistance for 2020 and 2021 in light of the COVID-19 pandemic.

Along with much of the rest of the statute, the individual mandate was challenged almost immediately following the ACA's enactment. In the first major challenge to the ACA, National Federation of Independent Business v. Sibelius, 567 U.S. 519 (2012), the Supreme Court in a 5-4 decision, with the majority opinion written by Chief Justice Roberts, rejected various challenges to the constitutionality of the ACA. The majority specifically rejected a challenge to the individual mandate. The argument was that the individual mandate is not a valid exercise of Congressional power under the Commerce Clause. Although a majority of the Court agreed that the Commerce Clause did not permit regulation of individuals who were doing nothing (i.e., not buying insurance), a majority also held that the individual mandate represented a legitimate exercise of Congress' taxing power. A separate challenge decided in *National Federation of Independent Business* involved parts of the ACA that sought to force expansion of Medicaid, the joint federal-state program that provides health care coverage for the impoverished. That challenge succeeded, and the ACA's Medicaid expansion became entirely voluntary for each state. As of July 2021, 38 states plus the District of Columbia have elected to expand Medicaid in accordance with the ACA.

Another Supreme Court case challenging the legality of the ACA focused on a different aspect of the individual mandate: the premium tax credits available to individuals who purchase coverage through a government-managed health insurance marketplace/exchange. In King v. Burwell, 135 S. Ct. 2480 (2015), the plaintiffs lived in Virginia, a state that at the time had not created a state marketplace/exchange. State residents who wanted to use ACA premium tax credits to purchase insurance were forced to do so through the federal marketplace/exchange. The plaintiffs based their argument on a strict, literal reading of section 36B of the ACA, which describes the use of premium tax credits for exchanges "established by the State." Because their state had not

established an exchange, the plaintiffs argued that no tax credits should be available. The Supreme Court, 6-3, rejected the plaintiffs' argument. In another ACA opinion by Chief Justice Roberts, the Court held that the challenged portion of the ACA text should be considered in light of the statute's context and structure and that the plaintiffs' reading would mean that the lack of a state exchange would deny tax credits and health coverage to residents of that state, threatening the basic goals of the ACA.

> Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter. Section 36B can fairly be read consistent with what we see as Congress's plan, and that is the reading we adopt.

135 S. Ct. at 2496. In a characteristically animated – and textually based – dissent, Justice Scalia wrote:

> The Act that Congress passed makes tax credits available only on an "Exchange established by the State." This Court, however, concludes that this limitation would prevent the rest of the Act from working as well as hoped. So it rewrites the law to make tax credits available everywhere. We should start calling this law SCOTUScare.

135 S. Ct. at 2506.

Congress repealed the associated financial penalties for failure to comply with the individual mandate as part of a comprehensive tax reform package in December 2017. Tax Cuts and Jobs Act (TCJA), Pub. L. No. 115-97 (2017). The penalty repeal became effective January 1, 2019, ending the key enforcement mechanism for the individual mandate. The repeal itself became the basis of yet another lawsuit attacking the ACA and the individual mandate. In a case brought against federal officials by two private individuals and multiple states (including Texas), the plaintiffs argued that the individual mandate was no longer constitutional following the TCJA's repeal of the related tax penalty and that the individual mandate could not be severed from the rest of the ACA. Following the inseverability reasoning, they sought an injunction against enforcement of the ACA in its entirety. A Texas district court in December 2018 ruled in favor of the plaintiffs, and the Fifth Circuit in December 2019 upheld the ruling on the unconstitutionality of the individual mandate, but remanded parts of the case relating to severability. Texas v. United States, 945 F.3d 355 (5th Cir. 2019). California, and various other states that had intervened in prior proceedings to support constitutionality of the ACA, then appealed to the Supreme Court. The Court in June 2021, in California v. Texas, 141 S. Ct. 2104 (2021), avoided the question of constitutionality and relied on standing to rule against Texas and other plaintiffs seeking to overturn the individual mandate and by extension the entire ACA. The 6-3 majority opinion observed that "[n]either the individual nor the state plaintiffs have shown that the injury they will suffer or have suffered is 'fairly traceable' to the 'allegedly unlawful conduct' of which they complain." 141 S. Ct. at 2113. The Court majority declined to go beyond the standing determination. Justice Thomas concurred in that result. Justices Alito and Gorsuch dissented, with Justice Alito writing:

> Today's decision is the third installment in our epic Affordable Care Act trilogy, and it follows the same pattern as installments one and two. In all three episodes, with the Affordable Care Act facing a serious threat, the Court has pulled off an improbable rescue.

141 S. Ct. at 2123.

The ACA's individual mandate thus survives as of mid-2021, but without federal teeth. At the state level, however, individuals may face penalties for failing to carry a specified minimum level of health insurance. Massachusetts has had a state insurance mandate since before the ACA; California, the District of Columbia, New Jersey, Rhode Island and Vermont have all introduced

their own mandates following the repeal of the federal penalties, with various effective dates (mainly in 2020). Other states are reported to be considering this path. The states' goal is to ensure adequate individual participation in the state-run health insurance marketplaces/exchanges created under the ACA.

One twist on the effort to ensure individuals maintain adequate health insurance coverage came from the Trump Administration in 2019. President Trump issued a proclamation to deny visas to immigrants unless they were able to demonstrate either that they would be covered by "approved health insurance" within 30 days of entry to the United States or that they "possess[] the financial resources to pay for reasonably foreseeable medical costs." 84 Fed. Reg. 53991, 53992. For these purposes, "approved health insurance" specifically excluded coverage under Medicaid or subsidized coverage in a plan obtained through an ACA government-managed health insurance marketplace/exchange. The Ninth Circuit upheld the legality of the proclamation in a decision issued on December 31, 2020. Doe #1 v. Trump, 984 F.3d 848 (9th Cir. 2020). The Biden Administration, however, on May 14, 2021, issued a proclamation revoking the Trump Administration proclamation.

Page 617. Replace the section titled "HEALTH EXCHANGES" in its entirety with the following.

HEALTH INSURANCE MARKETPLACES

The third component of the ACA's comprehensive overhaul of the U.S. health insurance system is the introduction of government-managed health insurance "marketplaces" – referred to in the ACA as "exchanges" – through which individuals without other affordable health insurance options can purchase affordable insurance with at least minimum essential coverage. The ACA authorized both a federal marketplace and individual state ones. The marketplaces take three forms: entirely state-based, hybrids that are state-managed but use the federal Healthcare.gov website for participant eligibility and enrollment, and completely federal (managed entirely by HHS and using the federal Healthcare.gov website for participant eligibility and enrollment). As of 2021, the majority of states (30) have chosen not to create their own exchanges and rely entirely on the federal government marketplace managed by HHS. A total of approximately 12 million Americans are obtaining health insurance coverage in 2021 through a plan purchased through one of the marketplaces.

In an effort to encourage insurers to offer plans through the marketplaces, the ACA created a so-called "risk corridors program" for certain insurers whose losses with marketplace plans exceeded certain limits. The underlying concern was that marketplace plans might attract a disproportionate share of unhealthy – and thus expensive – plan participants, causing insurer costs to rise to unsustainable levels. The ACA payments were intended to stabilize insurer costs within so-called "risk corridors" during the first few years of marketplace operation (2014-2016). Despite the ACA's risk corridor promises, no government funds were earmarked to support the payments, and no payments were made to insurers. Eventually, several insurers sued the federal government for payment. The Supreme Court in Maine Community Health Options v. U.S., 140 S. Ct. 1308 (2020), in an 8-1 decision, held that the federal government did owe insurers payment under the risk corridors program.

Page 617. Delete the section entitled "TIMELINE," beginning on page 617 and continuing through page 621, in its entirety.

Page 623. Add at the end of the first paragraph (the carryover from page 622) the following.

A national employer health benefits survey conducted starting before the COVID-19 pandemic in 2020 found that most firms offering health insurance to their employees also offered some type of wellness program. More than 80% of large firms (those with 200+ employees) reported offering a wellness program in at least one of the following: smoking cessation, weight management, and behavioral or lifestyle coaching; 44% of large employers offering a wellness program also reported that offered incentives to encourage employee participation. See Kaiser Family Foundation Employer Health Benefits Survey (2020).

Replace the third paragraph (the paragraph beginning "In January 2018") in its entirety with the following paragraphs.

In January 2018, the U.S. District Court for the District of Columbia vacated the EEOC's wellness rule effective January 1, 2019. AARP v. EEOC, 292 F. Supp.3d 238 (D.D.C. 2017). The EEOC in December 2018 removed the vacated provisions from its regulations and has not yet issued revised regulatory guidance. Other wellness program litigation in recent years has focused on surcharges for tobacco use, imposed by employers in conjunction with wellness programs, in light of nondiscrimination provisions under various statutes (including HIPAA and GINA). See Acosta v. Dorel Juvenile Group, Inc., Case No.1:18-cv-02993 (S.D.Ind. 2018) and Dittman v. Quest Diagnostics, Inc., 756 F. Appx. 616 (7th Cir. 2019).

The Departments of Labor, HHS and Treasury in June 2020 issued informal guidance that included provisions addressing a wide range of health plan issues arising due to the COVID-19 pandemic. The guidance specifically provided that employers could waive standards for obtaining a health incentive reward under an employer wellness program if participants or beneficiaries encountered difficulty meeting the standards due to COVID-19. The EEOC in mid-2021 also provided guidance answering a range of questions for employers that want to offer incentives to encourage employees and their families to receive COVID-19 vaccinations. The guidance specifically clarifies what is permissible under the ADA and GINA as well as EEO rules.

Add the following to the end of the last paragraph in the section on Employer-Sponsored Wellness Programs.

See also Samuel R. Bagenstos, The EEOC, the ADA, and Workplace Wellness Programs, 27 Health Matrix 81 (2017); Elizabeth A. Brown, Workplace Wellness: Social Injustice, 20 N.Y.U. J. Legis. & Pub. Pol'y 191 (2017); Kathryn Kennedy, Workplace Wellness Incentive Plans: The Legal Labyrinth Employers Must Navigate, 22 Quinnipiac Health L. J. 335 (2019); Camila Strassle & Benjamin E. Berkman, Workplace Wellness Programs: Empirical Doubt, Legal Ambiguity, and Conceptual Confusion, 61 Wm. & Mary L. Rev. 1663 (2020).

Page 624. Replace the last sentence of the first paragraph on page 624 (the sentence beginning "As further discussed in Chapter 13") with the following.

As further discussed in Chapter 13, the typical defined contribution retirement plan today is a 401(k) plan in which an eligible employee may elect to have pre-tax contributions made on the employee's behalf by the employer to an individual plan account, sometimes with matching pre-tax contributions from the employer and/or additional after-tax contributions from the employee. The employee usually controls the investment of the account among options provided by the employer, and the employee is entitled only to the balance in the account after investment. Because the employee makes the investment choices, the employee has control over the outcome.

Add the following before Section B.

MULTIPLE EMPLOYER HEALTH PLANS

ERISA has long permitted multiple employers to band together to offer group health insurance to their employees, but subject to a number of restrictions that have limited the attractiveness of the arrangements. Under ERISA, the definition of an "employer" that may sponsor an "employee welfare benefit plan," such as a group health plan, includes a "group or association of employers acting for an employer." 29 U.S.C. § 1002(5). The umbrella term for health plan arrangements that involve multiple unrelated employers – outside the collective bargaining context – is a "multiple employer welfare arrangement" (MEWA); a group plan sponsored this way is often called "association health plan" (AHP). 29 U.S.C. § 1002(40)(A). The benefit of qualifying as a MEWA is that multiple separate employers – usually small businesses – can be treated as sponsoring a single group health plan. The larger plan size that results from having multiple employers (and more employees) gives the MEWA plan the ability to negotiate better insurance rates and reduce administrative costs. ERISA DOL regulations require that employers seeking to take advantage of a MEWA must have some "commonality of interest." 29 C.F.R. § 2510.3-5(b)(5). As a result, MEWAs have often been offered through third party organizations like trade associations.

In part because of diffuse organizational structures and lax oversight inherent in the structure, MEWAs have historically struggled with recurring financial mismanagement and fraud. The ACA imposes a number of new requirements on MEWAs, including expanded reporting and disclosure obligations and the imposition of criminal penalties on any person who knowingly makes false statements in the marketing of a MEWA about the MEWA's financial condition, benefits or regulatory status. 29 U.S.C. §§ 1131(b) and 1149.

Despite the history of problems related to MEWAs, the concept of allowing unrelated employers, particularly small ones, to band together to achieve increased economies of scale and enhanced bargaining power remains a popular idea. In October 2017, President Trump issued an executive order that urged expansion of association health plans (as well as increased use of certain defined contribution health plan arrangements). 82 Fed. Reg. 48385 (2017). The Department of Labor followed in 2018 with regulatory guidance that (1) expanded the "commonality" requirement under ERISA to permits unrelated employers in a similar geographic area to join together in an AHP and (2) allowed certain self-employed individuals to be treated as employers under appropriate circumstances. 83 Fed. Reg. 28912 (2018). The DOL similarly issued regulations in 2019 expanding when unrelated employers can join together as a single "employer" for purposes of sponsoring a multiple employer retirement plan, referred to as a "MEP." MEPs are discussed in Chapter 13.

A number of states and the District of Columbia challenged the 2018 DOL AHP regulations, attacking both the expansion of the commonality standard to include similar geography and the expansion of the definition of employer to include certain self-employed individuals. In 2019, a federal district court agreed and vacated parts of the 2018 regulations, including the two expansions noted above, remanding other parts to the DOL to reconsider. New York v. U.S. Department of Labor, 363 F. Supp.3d 109 (D.D.C. 2019). In the wake of the court decision, the DOL announced a nonenforcement policy and appealed. The appeal remains pending at the D.C. Circuit. In January 2021, President Biden issued an executive order repealing President Trump's executive order on AHPs. 86 Fed. Reg. 7793 (2021).

Page 638. Replace the third sentence (beginning "ERISA, however, contains") of the introductory paragraph in Section C with the following.

ERISA, however, for much of its history contained substantive federal standards primarily for pension plans, with very limited regulation of welfare plans before the ACA.

Page 647. Add at the end of note 8 the following.

A similar exemption to QDROs from ERISA's preemption rules applies to employer health plans subject to "qualified medical child support orders" (QMCSOs), which are state domestic court orders that meet certain requirements and provide "for child support with respect to a child of a participant under a group health plan or provide[] for health benefit coverage to such a child." 29 U.S.C. § 1169. Just as with QDROs and retirement plans, QMCSOs are enforceable against employer group health plans subject to ERISA, and state domestic court orders issuing QMCSOs are not preempted.

9. In late 2020, the Supreme Court unanimously held in favor of an Arkansas law aimed at regulating pharmacy benefit managers, which are entities that function as intermediaries between health insurance plans and pharmacies. Rutledge v. Pharmacy Care Management Association, 141 S. Ct. 474 (2020). Pharmacy benefit managers, or PBMs, often manage almost all aspects of client drug plans, including routine administrative claims processing as well as negotiation of financial terms and benefit coverage. The Arkansas law targets certain industry practices that can result in a pharmacy being reimbursed at money-losing rates in order to participate in a PBM's preferred pharmacy network. A PBM trade association challenged the Arkansas statute on the basis of ERISA preemption, the district court agreed, and the Eighth Circuit affirmed the district court's holding. Arkansas then appealed to the Supreme Court. Relying on the logic of *Travelers*, the Supreme Court reversed, characterizing the Arkansas PBM law as a form of cost regulation. The Court did not view the statute's connection to employee benefit plans as sufficient to trigger preemption because the law applies to all PBMs without regard to whether they contract with ERISA-governed plans.

Page 654. Add at the end of Section C (ending immediately before Section D on Family and Medical Leave) the following.

4. In a Ninth Circuit case in 2019, Hawai'i statutes limiting an insurer's subrogation recovery rights under a plan were saved from ERISA preemption by the savings clause. In Rudel v.

Hawai'i Management Alliance Association, 937 F.3d 1262 (9th Cir. 2019), cert. denied, 140 S. Ct. 1114 (2020), an insured individual suffered severe injuries in a motorcycle accident and obtained a tort settlement against the driver of the vehicle that hit his motorcycle. The insured's health plan sought reimbursement from a fund protected from such recovery by applicable state law, and the insured sued to prohibit the reimbursement based on state law. While finding that the state law claim was preempted by ERISA, the Ninth Circuit found that the state law itself was saved from preemption by the savings clause. Key factors in the decision were (1) that the state law was specifically directed at entities engaged in insurance and "grounded in policy concerns specific to the insurance industry," including regulation of terms insurance companies are permitted to include in their policies, and (2) that the state law substantially affected the risk pooling arrangement between insurer and insured.

Add after the first paragraph of the introductory section on Family and Medical Leave the following.

The Emergency Family and Medical Leave Expansion Act, 29 U.S.C. § 2620, temporarily amended the FMLA to expand eligibility for FMLA leave due to circumstances arising as the result of the COVID-19 pandemic. Among other changes, the temporary rules amended the definition of "eligible employee" to include an employee who had been employed only for at least 30 calendar days by the employer and added a "qualifying need related to a public health emergency" that permitted an employee to qualify for FMLA leave for childcare reasons arising out of COVID-19. The expanded rules applied to employees with fewer than 500 employees and expired December 31, 2020. Exemptions were available for small businesses with fewer than 50 employees if "imposition of such requirements would jeopardize the viability of the business as a going concern."

Page 662. Add at the end of note 6 the following.

In Gardiner v. City of Philadelphia, 809 F. Appx. 92 (3d Cir. 2020), an employee's email to her supervisor, stating only that the employee's doctor had suggested she take sick leave for a few days due to her "stressful work environment" and "having other medical issues," was held insufficient notice that the employee was taking FMLA leave.

Add at the end of note 8 the following.

Courts have held that "petty slights and minor annoyances" do not give rise to a claim for retaliation under the FMLA. See Beckley v. St. Luke's Episcopal-Presbyterian Hospitals, 923 F.3d 1157 (8th Cir. 2019), and Sosa v. New York City Department of Education, 819 F. Appx. 30 (2d Cir. 2020).

Page 664. Add at the end of note 15 the following.

Additional states adopting various levels of paid leave since 2018 include Maryland, Michigan, Nevada, Maine, and Colorado. The Families First Coronavirus Response Act (FFCRA), Pub. L. No. 116-127 (2020), required certain employers (generally those with fewer than 500 employees) to provide two weeks (up to 80 hours) of paid sick leave at full pay for workers quarantined due

to COVID-19 or experiencing COVID-19 symptoms and seeking diagnosis, as well as two weeks of paid sick leave at two-thirds regular pay rate for workers needing to care for someone in quarantine or dealing with childcare responsibilities due to COVID-19 school or childcare closures. The FFCRA paid sick leave requirements expired December 31, 2020.

CHAPTER 7

EMPLOYEE LIBERTY

Page 684. Please add to note 7.

In 2020, the House of Representatives passed H.R. 5309, Creating a Respectful and Open World for Natural Hair Act (CROWN Act). The legislation would prevent employers from discriminating against individuals with diverse hair textures or race-specific hairstyles, including Afros, locs, twists, Bantu knots, cornrows, and braids. It also would prohibit discrimination in federal assistance programs, housing programs, or other public accommodations and institutions. A companion bill is pending in the Senate. At least eight states and 17 cities also have enacted legislation banning race-based natural hair discrimination. See generally Wendy K. Greene, Splitting Hairs: The 11th Circuit's Take on Workplace Bans against Black Women's Natural Hair in EEOC v. Catastrophe Management Solutions, 71 Miami L. Rev. 987 (2017).

Page 726.

2A. *Garcetti* did not address the issue of free speech related to scholarship or teaching. In Meriwether v. Hartop, 992 F.3d 492 (6th Cir. 2021), a professor at Shawnee State University, a public university in Portsmouth, Ohio, was disciplined for refusing to address a transgender student in class by her preferred pronoun, asserting that doing so would violate his deeply held religious views. Instead, he addressed the student only by her last name. After being disciplined by the university and exhausting his institution's grievance process, the professor filed suit in district court asserting that the university had violated his First Amendment rights. The district court granted a motion to dismiss, but the Sixth Circuit reversed and remanded the case. It created an academic freedom exception to *Garcetti* covering "all classroom speech related to matters of public concern, whether that speech is germane to the contents of the lecture or not." Id. at 507. The Sixth Circuit said it was following similar reasoning of the Fourth, Fifth, and Ninth Circuits. "If professors lacked free-speech protections when teaching, a university would wield alarming power to compel ideological conformity. A university president could require a pacifist to declare that war is just, a civil rights icon to condemn the Freedom Riders, a believer to deny the existence of God, or a Soviet émigré to address his students as 'comrades.'" Id. at 506. Is academic free speech absolute? If not, what speech would not be protected?

Page 727.

6A. In Bennett v. Metropolitan Government of Nashville & Davidson County, 977 F.3d 530 (6th Cir. 2020), an emergency telecommunicator for the government was discharged when she included a racial slur in a comment posted on her public Facebook page on the evening of the 2016 presidential election. The district court held that the *Pickering* balance weighed in her favor, but the Sixth Circuit reversed, finding that the district court's statement that the employee merely used a single word "demonstrates its failure to acknowledge the centuries of history that make the use

of the term more than just a 'single word.'" Id. at 543. In addition, the employee's position in emergency response was significant. "The diverse constituents of Metro Government need to believe that those meant to help them in their most dire moments are fair-minded, unbiased, and worthy of their trust." Id. at 544.

CHAPTER 8

OCCUPATIONAL SAFETY AND HEALTH

Page 762.

For 2021, OSHA penalties are as follows:

De minimis notice	$0
Nonserious	$0-$13,653
Serious	$1-$13,653
Repeated	$0-$13,653
Willful	$9,753-$136,532
Failure to abate	$0-$13,653 per day

Page 789 (after first paragraph).

Mark A. Rothstein, OSHA's Fatal Flaws Exposed by COVID-19 Pandemic
The Hill, May 4, 2020
https://thehill.com/opinion/civil-rights/495999-oshas-fatal-flaws-exposed-by-covid-19-pandemic

This year marks the 50th anniversary of the enactment of the Occupational Safety and Health Act of 1970 (OSH Act). Unquestionably, there has been an improvement in important measures of occupational fatalities, injuries, and illnesses. Workplace fatalities have declined from an estimated 14,000 in 1970 to 5,250 in 2018, with clear gains in hazardous occupations, such as construction.

Nevertheless, employers still report more than 3 million workplace injuries per year, and the Bureau of Labor Statistics regards this figure as a "significant undercount." Each year there are an estimated 50,000 deaths attributable to prior workplace exposures to toxic substances. The Occupational Safety and Health Administration (OSHA), which enforces the law, historically has been underfunded, and recent budget cuts have further limited the agency's effectiveness. For example, according to calculations in 2019, it would take OSHA's staff of 752 safety and health inspectors 165 years to visit every workplace within their jurisdiction.

The coronavirus pandemic is not only a public health crisis; it is also an occupational health crisis. Millions of workers have been exposed to the coronavirus without adequate personal protective equipment, testing, contact tracing, isolation, and other essential measures to lessen exposure and reduce risk.

The illnesses and deaths from workplace exposures have been especially pronounced for health care professionals and nursing home staff, retail food and grocery employees, and workers in meat and poultry plants. An executive order issued on April 28, 2020, directed closed meat and poultry plants to reopen, and all facilities to remain open, despite rates of coronavirus infection at some plants approaching 50 percent, and escalating numbers of deaths.

Workers in meat and poultry operations have been placed in a cruel and precarious position. If they refuse to return to work, they are likely to be fired and to be declared ineligible for unemployment benefits. If they return to work, they risk largely unavoidable exposure to extremely hazardous conditions.

Interim guidance issued by OSHA and the Centers for Disease Control and Prevention "recommends" social distancing in processing lines, asks employers to consider installing plexiglass between workers, proposes staggered start and break times, and suggests that employers regularly sanitize shared tools and encourage employees to wear cloth masks and to stay home if they are sick.

After 50 years of groundbreaking workplace safety and health law, is this the best we can do, force workers to toil in demonstrably perilous conditions, and "recommend" that employers consider certain protective measures? How did we get in such a position, and is there a way out?

The OSH Act provides that employers have the responsibility for ensuring safe and healthful workplaces primarily through compliance with occupational safety and health standards. Congress realized that enacting standards for the numerous workplace hazards would take time and therefore permitted OSHA to adopt without time-consuming rulemaking existing safety and health standards developed by other federal agencies and private consensus standards, but this authority ended in 1973.

New standards, including new health standards, are subject to a detailed, costly, and glacial rulemaking process that usually takes several years. The beryllium standard took 20 years. An OSHA standard requiring drinking water, handwashing facilities, and portable toilets for farmworkers languished for 15 years before a court took the unusual step of ordering OSHA to issue the standard within 30 days.

The OSH Act actually contains a provision stating that if the Secretary of Labor determines that workers "are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards," OSHA may issue an emergency temporary standard (ETS).

An ETS may remain in effect for six months, after which a permanent standard must be promulgated. In a 1984 case involving asbestos, however, the court imposed such a stringent burden on establishing the need for and benefits of an ETS that OSHA has since declined to use its limited resources for attempting to enact another ETS.

The COVID-19 pandemic has been declared an emergency by the federal government and all 50 states, resulting in schools being closed, public events being canceled, and people being directed to shelter-in-place at home. Where is the declaration of emergency to protect essential workers? In the absence of an existing coronavirus standard, OSHA and CDC have merely published recommendations for employers to consider.

Congress should amend the OSH Act to authorize OSHA to require safe and healthful working conditions for all workplaces in an emergency. If necessary, OSHA should be permitted to adopt and enforce new safety and health measures immediately. It would be a fitting way for the nation to recommit to its 50-year-old goal of ensuring safe and healthful workplaces for all workers.

NOTES

1. In re AFL-CIO, 2020 WL 3125324 (D.C. Cir., June 11, 2020), involved a petition for mandamus file by the labor organization in the D.C. Circuit to compel the Department of Labor to issue an emergency temporary standard (ETS) addressing the workplace transmission of COVID-19. In denying the petition, the court deferred to OSHA's assertion that an ETS is not necessary "at this time." Nevertheless, several OSHA state plans, including Virginia and California, issued emergency temporary standards to address the significant hazards associated with COVID-19.

2. On June 10, 2021, nearly one year from the date of the D.C. Circuit's decision in *AFL-CIO*, OSHA announced the issuance of an ETS for COVID-19 applicable only to health care workplaces. ___ Fed. Reg. ___ (2021), 29 C.F.R. §§ 1910.502-.509. Covered employers must develop a plan to identify and control hazards in the workplaces, including patient screening and management, personal protective equipment such as facemasks and respirators, controls for aerosol-generating procedures, physical distancing of at least six feet when feasible, physical barriers, cleaning and disinfection, and ventilation. The standard encourages vaccination by requiring employers to provide reasonable time and paid leave for employees to be vaccinated as well as recovery for any side effects.

Page 804 (at the end).

Mark A. Rothstein, Wendy E. Parmet, & Dorit R. Reiss
Employer-Mandated Vaccination for COVID-19
111 Am. J. Pub. Health 1061 (2021).

* * *

EMPLOYER MANDATES

Many private-sector employers want their employees to be vaccinated against COVID-19 to prevent the spread of the virus, reassure employees and customers that the premises are safe, avoid potential liability for transmission

of the virus, and advance public health. Private-sector employers are generally free to use any hiring criteria and impose any condition of employment unless doing so violates federal or state law (public employers are subject to the constitutional limits applicable to states). Bills introduced in more than a dozen state legislatures would prohibit employers from mandating vaccination for COVID-19.

The Americans with Disabilities Act (ADA) and its state law analogs prohibit discrimination in employment because of disability. If employees assert that the vaccine would cause a severe adverse reaction, they would first have to prove that they are covered under the ADA by having a physical or mental impairment that constitutes a substantial limitation of a major life activity, such as breathing. Even if the mandate burdens employees who are covered under the ADA, an employer can still mandate vaccination to prevent a direct threat to the employee or others. Courts are likely to find this in many work settings if a vaccine reduces infectiousness. Even if a lack of vaccination creates a direct threat, the employer would need to provide covered employees who are unable to be vaccinated for medical reasons with "reasonable accommodation," such as working remotely or using additional personal protective equipment. Reasonable accommodation is not required if it would cause an undue hardship to the employer, which is defined as "significant difficulty or expense." For example, an employer is not required to create new positions or fundamentally alter job duties.

According to the EEOC, if an unvaccinated employee cannot be accommodated, an employer may "exclude" the employee from the workplace. Exclusion is especially appropriate for health care workers and other employees who have direct contact with the public. Granting leave without pay for the duration of the direct threat is preferable to discharge.

Employees might also assert that a vaccination requirement conflicts with their religion and is therefore in violation of Title VII of the Civil Rights Act of 1964 or similar state laws, which prohibit religious discrimination and require employers to provide reasonable accommodations to an employee's religious beliefs. The courts have interpreted reasonable accommodation under Title VII as less demanding on employers than under the ADA, only requiring employers to incur de minimis costs. Although the employee need not be a member of a traditional religion, a "personal philosophy" (such as veganism) does not qualify. Furthermore, the accommodation must be reasonable—not unduly burdensome for the employer. Recent decisions of the Supreme Court, however, indicating a heightened concern for religious liberty, could presage decisions requiring employers to make greater accommodation to employees' religious beliefs and practices.

Under the National Labor Relations Act, private sector employers with unionized workforces are required to "bargain" with the union before making unilateral changes in working conditions. A vaccination requirement would be considered a mandatory subject of bargaining. Even nonunionized employees are protected from discharge or discipline if they engage in "concerted activity for their mutual aid or protection," as when employees submit a list of COVID-19 concerns to their employer. All employers would be wise to consult with their employees before formulating and implementing a vaccination plan.

OSHA-MANDATED VACCINATIONS

* * *

Under the Occupational Safety and Health Act, the Secretary of Labor may issue an emergency temporary standard "if employees are exposed to grave danger from substances or agents determined to be toxic or physically harmful or from new hazards."

An OSHA standard requiring employers to ensure that all employees are vaccinated might face two types of legal challenges. First, a court might hold that there is no "grave danger" justifying the requirement for workers who do not face heightened risks of exposure. Second, a standard could be challenged if it does not generally permit employees to decline vaccinations or does not include medical and religious exemptions. OSHA's blood-borne pathogen standard requires employers to offer vaccination for hepatitis B to exposed health care employees, but employees can decline vaccination for any reason. Although a verified medical exemption from COVID-19 vaccination probably would involve a small number of employees, religious exemptions might be claimed more broadly, and not allowing them might raise issues under the First Amendment and RFRA.

PUBLIC HEALTH STRATEGY

The development of multiple safe and effective vaccines in record time provides hope that the horrible human and economic consequences of the coronavirus pandemic may begin to abate and,

ultimately, end. Many employers may view mandated universal employee vaccination as a way to keep their workplaces safe and mitigate their financial losses, but premature and inflexible vaccination mandates raise numerous legal issues. Employment policies on vaccination also need to align with public health strategies.

Without a sufficient uptake of the vaccine, it will be impossible to develop the herd immunity necessary to end the pandemic. Yet those reluctant to be vaccinated have a variety of reasons, including concerns about safety and efficacy. Pregnant women, children younger than 16 or 18 years (depending on the vaccine), elderly people in nursing homes or similar facilities, and immunocompromised individuals and those with severe allergies were excluded from vaccine trials. In addition, the first approved vaccines have been shown to prevent moderate and severe cases of COVID-19, but it is not known whether they prevent infection or whether a vaccinated person can infect others. These determinations go to the heart of employer mandates—the ability to protect others—and are critical for deciding the law and ethics of vaccine mandates.

We believe that rigid, coercive approaches enforced by employers could harden the opposition of individuals who are currently unsure about the vaccine. Rather than rushing to compel vaccination, employers should help educate their employees about the benefits of vaccination, and help employees, to the extent possible, get vaccinated (e.g., offering on-site vaccination or giving employees time off for vaccination).

The most hopeful scenario is that support for vaccination will continue to grow with the lack of serious adverse events and additional evidence of the vaccine's effectiveness as shown in declining rates of infection, serious illness, and death. Support from vaccinated peers and family members—together with consistent, positive messaging from the government, public health officials, and employers—may appeal to all but those with the most entrenched views.

Americans frequently have demonstrated an ability to change their prevailing opinions in a short time, and a sound public health strategy for workplace-based vaccination should be predicated on prevention and persuasion grounded in science before resorting to compulsion.

NOTES AND QUESTIONS

1. Health care workers, especially those working in hospitals and other institutions, have been required to be vaccinated for various diseases, including seasonal influenza. These requirements have been generally upheld. With COVID-19, the FDA granted the first three vaccines an "emergency use authorization (EUA)," which still requires FDA scrutiny of data to determine whether the vaccine is safe and effective. The expedited approval allows it to be used in an emergency without a longer period of review for possible later-developing adverse reactions. Some health care workers and other employees have seized on the EUA of the vaccines to argue that it is unethical and unlawful to require that employees be compelled to take part in an "experiment." The EEOC has rejected the notion that the vaccines are experimental. By the second half of 2021, most experts believe that the FDA will grant permanent approval.

2. The authors of the article suggest that "public health strategy" should avoid employer vaccine mandates. Besides requiring vaccination, what can an employer do to encourage employees to get vaccinated? Can an employer give cash benefits or other inducements? If so, should the amount be limited to prevent coercion? EEOC has approved the concept of employer "incentives," but it has not provided any guidance about the type or amount. See EEOC, What You Should Know

About the ADA, the Rehabilitation Act, and Other EEO Laws (May 28, 2021), available at https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws.

CHAPTER 9

DISABLING INJURY AND ILLNESS

Page 818.

5A. Kim Goulding worked as a cook for Friendship House, a non-profit organization that assisted people with developmental disabilities. She fell and was injured while volunteering as a cook at "Family Fun Day," an event Friendship House held for its clients. Is Goulding prohibited from compensation because she was a volunteer at a recreational or social activity? See Goulding v. NJ Friendship House, Inc., 244 A.3d 725 (N.J. 2021) (held: no; she did not attend the event in a recreational or social role but to facilitate the event, and even if she was not compelled to attend, it was to advance the interest of her employer).

Page 834.

3A. Can a claimant recover the costs of medical marijuana used to treat chronic pain resulting from work-related injuries? Compare Wright's Case, 156 N.E.3d 161 (Mass. 2020) (held: no; based on express provision in state medical marijuana law) with Hager v. M & K Construction, 247 A.3d 864 (N.J. 2021) (held: yes; competent medical testimony could show that medical marijuana is "reasonable and necessary" care for a particular worker).

Page 867.

5. If an "essential worker," such as someone working in a meat processing plant, becomes ill with COVID-19, then allegedly infects their spouse, may the spouse (or the spouse's estate) recover from the worker's employer? See Mark A. Rothstein & Julia Irzyk, Employer Liability for "Take-Home" COVID-19, 49 J.L. Med. & Ethics 126 (2021).

CHAPTER 10

DISCHARGE

Page 893. Please add the following after note 2.

3. Effective July 4, 2021, New York City has expanded its Fair Workweek Law to provide that fast food employers may not discharge an employee who has completed the employer's probation period except for "just cause" or for a "bona fide economic reason." The law defines just cause as unsatisfactory job performance or misconduct and imposed procedural protections with regard to both. See N.Y.C. Admin. Code §20-1272.

Page 925. Please add to the citation list after the third sentence of note 1.

Hlatky v. Steward Health Care System, LLC, 144 N.E.3d 229 (Mass. 2020)

Page 926. Please add to the end of note 4.

Amazon uses an algorithm to assess the performance of its contract delivery drivers and automatically terminates drivers whom the algorithm identifies as poor performers. The employees are not told how their performance fell short and are required to pay a fee to bring their case to arbitration. See Spencer Soper, Fired by Bot at Amazon: "It's You Against the Machine," Bloomberg (June 28, 2021), available at https://www.bloomberg.com/news/features/2021-06-28/fired-by-bot-amazon-turns-to-machine-managers-and-workers-are-losing-out. Does the covenant of good faith and fair dealing provide these workers with any protections? Should it? Might any other wrongful discharge doctrines apply?

CHAPTER 11

EMPLOYEES' DUTIES TO THE EMPLOYER

Page 1038. Please add after the fourth sentence in note 6.

The Workforce Mobility Act was re-introduced in both the House and the Senate in February 2021. The Biden administration has expressed support for bans on non-compete agreements. Indeed, in December 2020, President-elect Biden released a *Plan for Strengthening Worker Organizing, Collective Bargaining, and Unions* which pledged to "eliminate all non-compete agreements, except for the very few that are absolutely necessary to protect a narrowly defined category of trade secrets, and outright ban all no-poaching agreements." See https://joebiden.com/empowerworkers/.

Page 1038. Please replace the last sentence of note 6 with the following.

For up-to-date discussion of various statutory and judicial developments concerning non-competes, see Orly Lobel, Noncompetes, Human Capital Policy and Regional Competition, 45 J. Corp. L. 931 (2020).

Page 1039. Please add to the end of note 7.

In January 2021, the District of Columbia enacted the Ban on Non-Compete Agreements Amendment Act of 2020, which bans virtually all non-competes for employees in the District. North Dakota and Oklahoma also ban non-compete clauses with limited exceptions.

Page 1039.

7A. Other states have enacted legislation to ban covenants not to compete for low wage workers. In 2016, Illinois passed the Illinois Freedom to Work Act that banned the use of noncompete agreements with low-wage workers. In 2021, the Illinois Senate and House of Representatives passed a bill which expanded the ban on non-competes to cover any employee earning $75,000 or less annually. Illinois Governor J.B. Pritzker is expected to sign the bill into law. Maine, Maryland, Massachusetts, New Hampshire, Rhode Island, Virginia, and Washington have similar low-wage restrictions.

CHAPTER12

UNEMPLOYMENT

Page 1087.

15. In addition to the unforeseen business circumstances, the WARN Act also contains an exception for layoffs caused by natural disasters. At least one district court has held that the COVID-19 pandemic qualified as a natural disaster. *Easom v. US Well Servs.*, -- F.Supp. 3d --, 2021 WL 1092344 (S.D. TX. Mar. 22, 2021).

Page 1090.

Add a new note after the unnumbered note at the bottom of the page. Several cities and the state of California have passed statutes creating recall rights for certain employees who were laid off during the COVID-19 pandemic. This means that a covered employer must offer laid off employees the option to return to their jobs before hiring new candidates to fill these slots. *See, e.g.*, Cal. Labor Code § 2810.8.

Page 1100.

3. The COVID-19 pandemic led to widespread layoffs. Congress responded by increasing and extending existing unemployment insurance (UI) payments, and also making new categories of workers eligible. The March 2020 Coronavirus Aid, Relief, and Economic Security (CARES) Act created three UI programs. First, the Pandemic Unemployment Compensation (PUC) program provided state UI recipients an extra $600 per week through July 31, 2020. (In August 2020, President Trump signed an executive order repurposing Federal Emergency Management Administration aid to provide an extra $400 per week for most UI recipients for several weeks.) Second, the Pandemic Emergency Unemployment Compensation program (PEUC) extended state UI benefits for an additional 13 weeks, meaning that laid off workers in most states could receive 39 weeks of benefits. Finally, the Pandemic Unemployment Assistance (PUA) program funded UI benefits for workers who were out of work for a COVID-related reason, and who would usually be ineligible for UI, including independent contractors, those whose work history is too short to qualify for UI, and those seeking part-time work.

PEUC and PUA benefits were initially scheduled to sunset on December 31, 2020, but the American Rescue Plan, enacted in March 2021, extended these programs until September 6, 2021. The American Rescue Plan also provides an extra $300 per week, and exempted recipients' first $10,200 of UI from federal income taxes. About half the states (mainly those with Republican-controlled governments) have opted out of federally funded unemployment benefits, and litigation about the legality of that choice is ongoing.

Page 1147.

7. The Pandemic Emergency Unemployment Compensation program, which provides an additional 13 weeks' of unemployment benefits, requires recipients to look for work. However,

the statute also instructs states to “provide flexibility” in recognition of the difficulty of searching for work during a global pandemic.

CHAPTER 13

RETIREMENT

Page 1173. In the first paragraph of note 4, line 6, insert a period between the phrases "Medicare-eligible retirees" and "The Third Circuit," and add the following sentence at the end of the paragraph.

At the time of *Erie*, ADEA's equal cost/equal benefit standard was generally interpreted as allowing an employer to offer different plans to different groups, such as an active employee plan and a retiree plan, only as long as the aggregate costs or benefits of the different plans were the same.

Page 1175. In note 5, insert the word "or" between "ceasing" and "reducing benefits."

Page 1181. The correct name of the law referenced at the top of the page is the "Worker, Retiree and Employer Recovery Act."

Add the following before the last paragraph on the page.

PBGC insurance premiums and maximum benefit guarantees are updated annually. In 2021, the flat-rate premium was set at $86 per participant in a single-employer plan and at $31 per participant in a multi-employer plan. The maximum insured benefit for an unmarried employee retiring at age 65 in 2021 is $72,409.08 per year.

Page 1183. Replace the discussion of defined contribution plans in the first full paragraph on the page with the following.

Defined contribution plans, on the other hand, do not specify a guaranteed monthly pension benefit to be paid at retirement. Instead, the employer – typically based on an election by the employee – contributes pre-tax funds to an individual account with the plan during the employee's time working for that employer. Depending on the plan's terms, the employee may elect to make additional post-tax contributions to the account; the employee usually has the ability to direct investment of the individual account funds among a range of investment options selected by the plan's fiduciaries; and the employee is entitled to whatever the balance of the account is when the employee terminates employment. If the account's value grows over time due to successful investments, the employee enjoys the success of the investments, not the employer. Similarly, if the account's value declines due to a downturn in the investments, the employee suffers the loss, not the employer. The most common private sector defined contribution plan is called a 401(k) plan after the main Internal Revenue Code section that governs the tax treatment of such plans; in the public sector, the comparable defined contribution plan is a 403(b) plan, again so called due to the primary governing Internal Revenue Code section.

References in the second and third paragraphs on 1183 page to ERISA's regulation of defined contribution plans should generally be interpreted as referencing both ERISA and the Internal

Revenue Code, both of which impose significant requirements on defined contribution and defined benefit plans that seek preferential tax treatment (which almost all broad-based retirement plans do). However, Section 404(c) of ERISA, referenced in the third paragraph, does not have a parallel Internal Revenue Code provision.

Page 1184. Add the following at the end of the first paragraph on the page.

Morningstar reported in March 2021 that, as of February 2021, assets in target-date mutual funds had reached $1.6 trillion in assets.

Replace the last two paragraphs of subsection *(i)* with the following.

The DOL's initial QDIA regulations raised a number of concerns, including issues with a perceived preference for equity-based investments over investments in so-called stable value investment funds. Stable value funds typically are weighted toward bonds and other non-equity/low-risk investments. Commentators noted that, while stable value funds might be inappropriate for younger employees with many years left before retirement, employees nearing retirement age may be better served with asset allocations that emphasize security over appreciation. The DOL attempted to clarify and address concerns with subsequent guidance, including a Field Assistance Bulletin issued in late April 2008 in conjunction with amended regulations. The revised guidance clarified and expanded certain grandfathering rules with regard to existing account investments in stable value funds.

The 2008 financial crisis underscored the risks inherent in retirement plan investments that do not adequately take into account individual beneficiary characteristics. Experts have estimated that employees with 20 or more years of service lost, on average, about a quarter of their retirement savings in 2008. The reported loss in U.S. 401(k)s and IRAs for the last two quarters of 2008 was around $2.4 trillion, a devastating hit for individuals who anticipated retirement in the near term and whose savings suffered commensurate losses.

Despite the concerns raised by the QDIA guidance and the aftermath of the 2008 recession, the PPA's automatic enrollment and default investment provisions seem likely to improve the retirement savings prospects of many American workers. A study released in February 2021 by Vanguard Research found that new hire participation rates in employer-sponsored defined contribution plans reached 91% with automatic enrollment as opposed to a measly 28% in plans with only voluntary enrollment, with the vast majority remaining invested in default investment options after three years of participation.

Page 1189. Delete note 2.

Page 1190. In the last paragraph of note 4, the short name for the Setting Every Community Up for Retirement Enhancement Act of 2019 is the SECURE Act.

Replace the last sentence of note 4 with the following.

SECURE Act changes to the required minimum distribution timetable for inherited IRAs apply only to accounts inherited upon the death of an IRA holder who dies after 2019. While limiting

the availability of extended deferrals of distributions for inherited accounts, the SECURE Act separately extended until age 72 the earliest date on which an individual plan participant or initial IRA holder must start to receive minimum account distributions, applicable to individuals attaining age 70-1/2 after 2019. 26 U.S.C. §401(a)(9).

Page 1191. Replace note 6 with the following.

6. An estimated 71 percent of private industry and state and local government workers had access to some form of employment-based retirement benefits in 2020, leaving around 40 million American workers without access. Efforts to increase access have included state-level legislation to require or permit certain employers that do not otherwise provide retirement plans for their employees to automatically enroll workers in state-administered IRA programs funded by automatic payroll deductions from the workers' pay. Affected workers can affirmatively elect not to participate. During the last year of the Obama Administration, the Department of Labor issued a rule to encourage state payroll deduction savings programs with automatic enrollment, with particular attention to avoiding ERISA preemption of relevant state laws. The following year, however, Congress passed, and President Trump signed into law, a joint resolution to "disapprove" the Obama era rule so that "such rule shall have no force or effect." P.L. 115-35, 115th Congress. Despite the failure of the DOL rule, a number of states – including California, Colorado, Connecticut, Illinois, Maryland, New Jersey and Oregon, and at least one city (Seattle Washington) – have persevered. In May 2021, the Ninth Circuit became the first appellate court to address the issue of whether ERISA preempts state-administered IRA programs in a case involving the CalSavers program. In Howard Jarvis Taxpayers Association v. California Secure Choice Retirement Savings Program, 997 F.3d 848, 857 (9th Cir. 2021), the Court specifically addressed the Congressional disapproval of the DOL rule, finding that the Congressional action did not provide "any definitive answer [] on whether ERISA preempts programs like CalSavers." Concluding that the CalSavers program is neither an ERISA plan itself nor a plan that otherwise relates to ERISA benefit plans, the Court held that ERISA preemption does not apply.

Page 1196. In note 1, the short name for the Setting Every Community Up for Retirement Enhancement Act of 2019 is the SECURE Act.

Page 1198. Replace the second paragraph on the page (the last paragraph of note 5) with the following.

The Supreme Court in Thole v. U.S. Bank, 140 S. Ct. 1615 (2020), in a 5-4 decision, resolved a split between circuits as to whether a plan participant must suffer individual financial loss to have Article III standing to bring a lawsuit against a plan sponsor and plan fiduciaries under ERISA sections 502(a)(2) and 502(a)(3). In *Thole*, two retired participants in a defined benefit pension plan sought to bring a putative class action lawsuit against the plan sponsor and plan fiduciaries. The participants alleged breach of fiduciary duties and mismanagement of plan assets, including investment of plan assets in mutual funds managed by the plan sponsor and related entities. The participants sued after the plan lost $1.1 billion in the 2008 financial crisis. While the lawsuit was pending, the defendants made $311 million in voluntary excess contributions to the pension plan, which caused the plan to become overfunded. The defendants then moved to dismiss the lawsuit on the basis that the plan participants did not have standing because they had not suffered any

financial loss. Throughout the periods at issue, the plan participants continued to receive their full pension benefits in accordance with plan terms. Particularly after the plan became overfunded, there did not appear to be any substantial risk that the participants were at risk of not receiving future benefits as promised, nor did the plaintiffs claim they faced such a risk. Observing that the outcome of the suit "would not change the plaintiffs' monthly pension benefits," the majority of the Court concluded that the plaintiff plan participants had "no concrete stake" in the dispute and thus lacked standing under Article III. 140 S. Ct. at 1619.

The decision in *Thole* was specific to the context of a defined benefit pension plan, where individual participants are guaranteed only their vested pension benefit. How might the result in *Thole* have differed if the plaintiffs had been participants in a defined contribution plan?

Page 1199. Replace the second paragraph of note 7 with the following.

The Department of Labor has long grappled with the potential conflict between (1) ERISA's fiduciary commandment to evaluate investments "solely in the interest" of plan participants and (2) other considerations that plan fiduciaries might want to take into account in making plan asset investment decisions. Terms used to describe a range of other considerations have included economically targeted investing (ETI), socially responsible investing (SRI), and more recently environmental, social and corporate governance investing (ESG investing). See Max Schanzenbach & Robert Sitkoff, Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee, 72 Stan. L. Rev. 381, 392-397 (2020). The DOL first issued broad guidance on these issues in 1994 with interpretive guidance that economically targeted investments were not inherently incompatible with ERISA's fiduciary obligations as long as such investments served participants equally well as other investments. 29 C.F.R. § 2509-94.1. In 2015, the DOL reiterated this position, concluding that the "fiduciary standards applicable to ETIs are no different than the standards applicable to plan investments generally" and that selecting an ETI that otherwise satisfied ERISA's fiduciary standards would not violate ERISA. 29 C.F.R. § 2509.2015-01. In 2020, however, the DOL issued regulatory guidance effective January 12, 2021, entitled "Financial Factors in Selecting Plan Investments," that would require plan fiduciaries to focus only on financial considerations in determining appropriate investments and would have the effect of limiting ESG investing by plan fiduciaries. 85 FR 72846. In March 2021, the DOL announced that it would not enforce the 2020 final rule.

Page 1201. Add the following at the end of note 9.

In Bafford v. Northrop Grumman Corp., 994 F.3d 1020 (9th Cir. 2021), a group of retirees sued the plan sponsor, the plan administrator and the company hired by the plan administrator to assist with plan recordkeeping and participant communications. The retirees, while still employed, requested estimates as to their future pension benefit amounts. The estimates were generated through an online platform provided by the recordkeeping company. After the individuals retired, they discovered that an error in the online system had resulted in a significant miscalculation of their monthly benefit payments upon retirement, a miscalculation that continued when they began receiving benefits and a miscalculation that resulted in an overpayment of more than $35,000 to one retiree. The retirees' suit alleged breach of fiduciary duties by the company and the plan administrator and negligence by the recordkeeping company. The district court dismissed the

ERISA claim for failure to state a cause of action and the state law negligence claims on the basis of ERISA preemption. The Ninth Circuit affirmed the district court's dismissal of the ERISA claims, determining that the recordkeeping company was not performing a fiduciary function when it miscalculated and communicated the erroneous benefit amounts (which the Ninth Circuit characterized as a "ministerial function that does not have a fiduciary duty attached to it"). 994 F.3d at 1028. The Court did find, however, that the state law negligence claims were not preempted because they did not have a "reference to or connection with" an ERISA plan.

Page 1202. Replace note 15 in its entirety with the following.

15. Recent years have seen a flurry of what are sometimes called "stock-drop" cases involving defined benefit contribution plans that hold investments in employer stock. The cases usually involve situations where a plan fiduciary who is also a company officer and has access to inside information fails to use that inside information to direct plan investments away from the employer stock before the employer stock suffers a decline in value. Issues arise from the conflict between fiduciary duties to the plan and securities laws regulating corporate officer actions based on inside information.

Traditionally, plan fiduciaries were believed to enjoy a presumption of prudence with regard to plan investments in employer stock. In Fifth Third Bancorp v. Dudenhoeffer, 573 U.S. 409 (2014), however, the Supreme Court unanimously held that plan fiduciary decisions to invest in employer stock were not entitled to a presumption of prudence and instead established a new standard: "To state a claim for breach of the duty of prudence on the basis of inside information, a complaint must plausibly allege an alternative action that the defendant could have taken, that would have been legal, and that a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it." In Amgen Inc. v. Harris, 136 S. Ct. 758 (2016), the Court clarified that the plaintiff bears a significant burden of proposing an alternative course of action so clearly beneficial that a prudent fiduciary could *not* conclude that it would be more likely to harm the fund than to help it. A number of cases since *Dudenhoeffer* have resulted ultimately in losses for the participants, including a 2016 case against BP that resulted from losses in the BP employee stock ownership plan (ESOP) after BP's stock price dropped in the aftermath of the 2010 Deepwater Horizon oil spill. Whitley v. BP, P.L.C., 838 F.3d 523 (5th Cir. 2016). Similarly, in Rinehart v. Lehman Bros. Holdings Inc., 817 F.3d 56 (2d Cir. 2016), cert. denied, 137 S. Ct. 1067 (2017), participants in an ESOP invested in Lehman common stock filed suit against the plan sponsor and plan fiduciaries for breach of fiduciary duties under ERISA for continuing to permit investment in Lehman common stock in circumstances arguably foreshadowing the company's bankruptcy in 2008. The Second Circuit affirmed the district court's judgment in granting the defendants' motion to dismiss because plaintiffs failed to plead plausibly that defendants breached their fiduciary duties. Applying *Amgen* standards, the Second Circuit observed that a "prudent fiduciary could have concluded that divesting Lehman stock, or simply holding it without purchasing more, 'would do more harm than good.'" 817 F.3d at 68.

In a more recent and closely watched case involving IBM's 401(k) plan, the Second Circuit initially gave participants some hope by reversing a district court's dismissal of a claim by plan participants against plan fiduciaries for breach of fiduciary duty under ERISA. The participants argued that the plan fiduciaries, who included senior IBM corporate officers, should have disclosed information about the potential overvaluation of a company division. The Second Circuit in Jander

v. Retirement Plans Committee of IBM, 817 F.3d 56 (2d Cir. 2018), concluded that the plan participants had met the standard for filing a claim and remanded the case. Eventually, the case made its way back to the Second Circuit and then to the Supreme Court, with much anticipation as to whether the Supreme Court might relax the *Dudenhoeffer* standards. In Retirement Plans Committee of IBM v. Jander, 140 S. Ct. 592 (2020), however, the Court declined to change the standards or resolve the key question as to "what it takes to plausibly allege an alternative action 'that a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it.'" 140 S. Ct. at 594. Instead, the Court remanded the case to the lower courts and invited them to consider securities law arguments. The Second Circuit declined to do so, the Supreme Court refused to hear the case a second time, and in 2021 reports are that the IBM Retirement Plans Committee settled the case following mediation.

Pages 1203. Replace note 18 in its entirety with the following.

18. Another pension arrangement involving more than one employer is a multiple employer plan (MEP). Despite the similar names, a MEP is not the same as a multi-employer plan. Multi-employer plans exist solely in the collective bargaining context and are maintained, usually by unions, under collective bargaining agreements with multiple employers. Multiple employer plans include two or more unrelated employers but do not involve a collective bargaining agreement. So-called "closed MEPs" have long been permitted, but require some kind of clear commonality between employers (such as belonging to the same trade association). In August 2018, President Trump issued an executive order that directed federal agencies to take action to expand access to MEPs. The DOL followed with regulatory guidance in 2019 that expanded the definition of "employer" to permit increased participation in closed MEPs. 84 Fed. Reg. 37508. The SECURE Act in 2019 removed additional barriers to MEPs by allowing a new "pooled employer plan" to be treated as a single employer plan under ERISA beginning in 2021. Such pooled plans are in effect "open MEPs" that permit completely unrelated employers to act as a single employer for retirement plan purposes, gaining the benefits of increased availability of low-cost investment options (due to pooling more assets) and reduced administrative costs (due to maintaining only a single large plan).

Page 1204. Replace note 19 in its entirety with the following.

19. Early in 2016 the Department of Labor issued new fiduciary standards for those who provide retirement investment advice, replacing regulatory guidelines that had been in place since 1975. The new DOL fiduciary rule expanded the definition of fiduciary under ERISA section 3(21)(A) to include a wider array of individuals and entities providing various types of investment advice for a fee to ERISA-covered plans and their participants and beneficiaries, as well as to individual retirement account (IRA) holders. By increasing the breadth of the ERISA fiduciary umbrella, the rule sought to limit conflicts of interest on the part of those who provide retirement investment advice.

The Fifth Circuit, however, in Chamber of Commerce of the United States of America v. United States Department of Labor, 885 F.3d 360 (5th Cir. 2018), found that the DOL exceeded its statutory authority under ERISA in promulgating the new fiduciary rule and vacated the rule in its entirety, in effect returning to the definition of an investment advice fiduciary under the 1975 regulations. The DOL in 2020 issued a technical amendment to implement the Fifth Circuit's

actions and proposed a prohibited transaction class exemption (PTE) that would allow certain individuals and entities providing fiduciary investment advice to plan participants and beneficiaries to receive compensation for their services subject to certain requirements. PTE 2020-02 became effective in February 2021.

Page 1221. Delete the last sentence of note 4.

Page 1222. Delete the last sentence of note 10.

Page 1222. Replace note 11 in its entirety with the following.

11. In addition to satisfying requirements under ERISA applicable to retirement plans, plans that seek to enjoy preferential tax treatment must satisfy detailed and extensive requirements under the Internal Revenue Code. These requirements include provisions that prohibit discrimination in favor of "highly compensated employees." The Internal Revenue Code defines a "highly compensated employee" for these purposes as an employee (1) who was a 5% owner during the current or preceding year or (2) who received compensation in the preceding year in excess of a specified amount ($130,000 for 2021 determinations) and, if the employer so elects, was in the top-paid group of employees in that preceding year. 26 U.S.C. § 414(q). The Internal Revenue Code's non-discrimination provisions prohibit discrimination in favor of highly compensated employees as to both coverage and benefits and impose extremely complex regulatory standards that tax-qualified retirement plans must meet. See 26 U.S.C. §§ 401(a)(4) and 410(b).

Employers seeking to provide additional compensation to their executives often resort to the use of non-qualified retirement plans to supplement the benefits available to executives under broad-based qualified retirement plans. Structured correctly, non-qualified plans may be exempt from ERISA, but do not receive the preferential tax treatment that qualified retirement plans receive under the Internal Revenue Code.

Page 1236. In the second paragraph, line 6, please note that in 2021, a worker earned one Social Security "credit" for each $1,470 of earnings, up to a maximum of 4 credits per year.

Delete the asterisk footnote at the bottom of the page.

Page 1237. In the first full paragraph, please note that for an individual retiring in 2021 at full retirement age (66 years and 2 months), the maximum allowable benefit is $3,148. An individual retiring in 2021 at age 62 (the earliest retirement age) is eligible for a maximum benefit of $2,324, and an individual retiring in 2021 at age 70 is eligible for a maximum benefit of $3,895.

The Social Security tax rate on wages remains at 6.2% in 2021, but the Social Security taxable wage base has increased to $142,800.

The 2020 Annual Report of the Board of Trustees of the Federal Old-Age and Survivors Insurance and Federal Disability Insurance Trust Funds, commonly referred to as the OASDI Trustees Report, stated that the OASI trust fund (which pays retirement and survivors' benefits) is expected to be able to pay scheduled benefits on a timely basis until 2034. The Trustees Report noted that

estimates had not been revised to take into account any impact from the COVID-19 pandemic starting in 2020.

Page 1250. In their 2020 report, the OASI (Social Security) trustees predicted that the fund will be able to pay full benefits until 2034, at which time the fund will be depleted and benefits will be paid based on incoming tax funds. They estimated further that continuing tax income will suffice to pay only 76% of scheduled benefits once the trust fund is depleted.

The average monthly Social Security benefit in 2021 is approximately $1,430 ($17,160 per year). A study by the National Institute on Retirement Security in 2020 found that Social Security benefits constituted the only source of income for 40.2% of Social Security beneficiaries.

The Social Security wage base, on which the 6.2% Social Security tax is levied, has increased to $142,800 in 2021.