

# Welcome back to **HRLCS 2021!**



## **HR LEADERS** COMPLIANCE SUMMIT

February 10, 2021 | *Day #2*



# HR LEADERS

## COMPLIANCE SUMMIT

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We are thrilled to have you attending this year's  
**HR Leaders Compliance Summit!**

**HRLCS 2021** is an expanded virtualization of a longstanding on-site gathering of **Acrisure Agency Partner** offices and the transformational **HR professionals** they support.

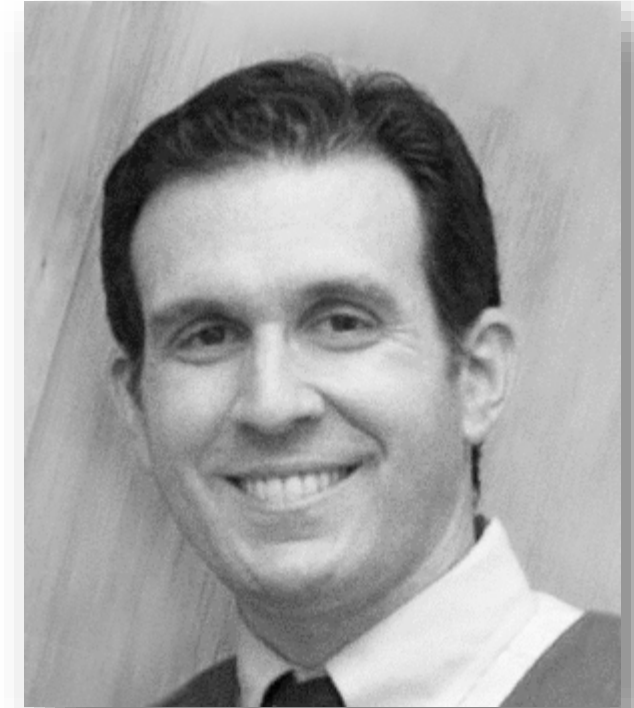
## "MC" & Featured Speaker

### **Jeremy Hertz, JD, SPHR, SHRM-SCP**

*Acrisure Compliance Solutions*

- Sr. Deputy General Counsel
- Director of HR Consulting

Jeremy's main focus is to consult with Acrisure Agency Partners and their clients on employee benefits and Human Resources-related matters including the Affordable Care Act, FMLA and other forms of employee leave, ADA, COBRA, Wage and Hour, and all forms of discrimination, harassment and retaliation issues. He also trains client and industry groups, and actively participates in the marketing and sales process to prospective clients.



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## Others You Will Hear From Today



**Sarah Kline**

*Welcome & Introduction*

Acrisure Agency Partner



**Deborah Hyde**

*Featured Speaker*

Acrisure Compliance  
Solutions



**RJ Gray**

*General Session Panelist*

Mutual of Omaha



**Christine DeLair**

*General Session Panelist*

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**Brad Urhausen**

*Event Production*

Acrisure Employee Benefits



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## Sophisticated resources for today's complex environment



- The legislative and regulatory landscapes of employee benefits and human resources have never been more complicated.
- Acrisure Compliance Solutions provides Acrisure Agency Partners and their clients with sophisticated compliance resources to navigate the complexities and meet the needs of your organization.



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# Acrisure Compliance Solutions

**Sophisticated resources for  
today's complex environment**



**Jeremy Hertz, JD,  
SPHR, SHRM-SCP**

Sr. Deputy General Counsel  
and Director of HR  
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Sr. Associate General  
Counsel



**Andrea Keeley,  
SHRM-SCP**

Sr. HR Consultant



**Devan Levandoski**

Director of Programs &  
Projects



**Rosalind Thompson**

Compliance Services  
Coordinator



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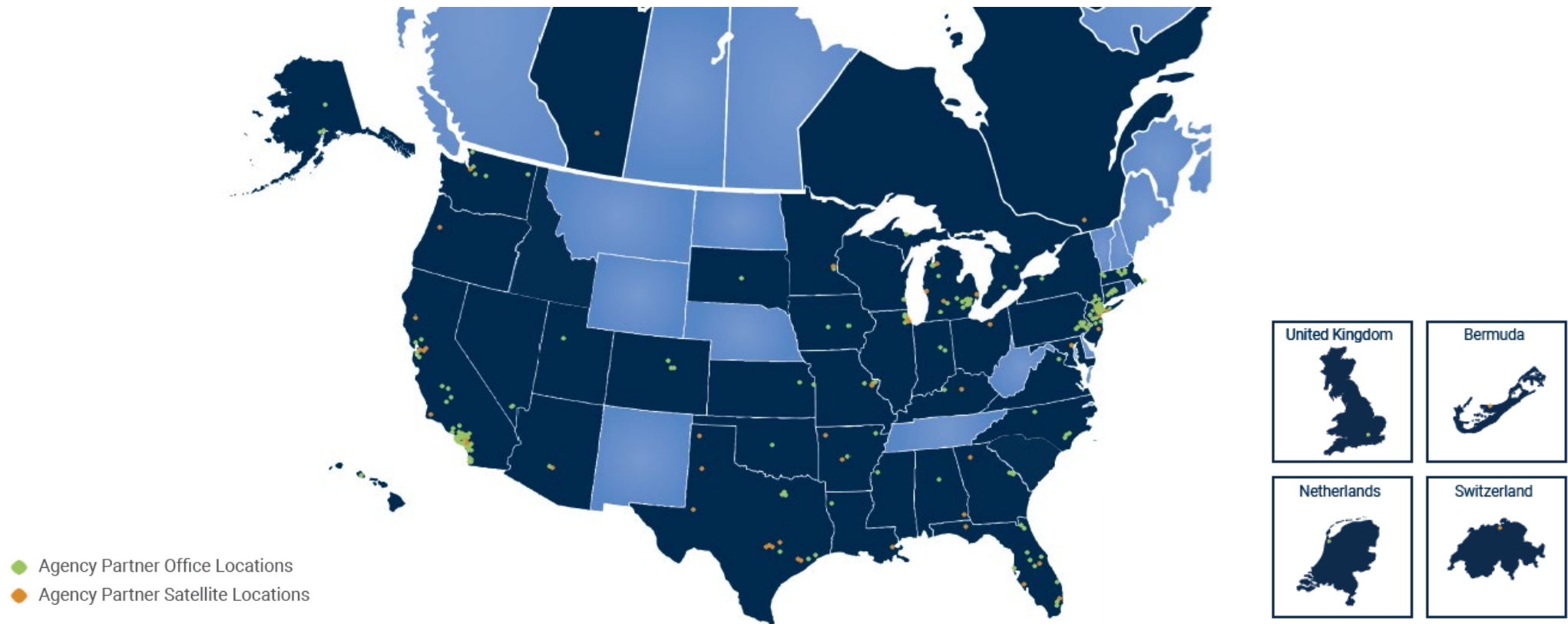
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# February 10, 2021

## General sessions for all attendees\*

*(Please note that all times are PST)*

7:45am – 8:00am

**Virtual Lobby**  
Sponsor Showcase

8:00am – 9:20am

**General Session**  
Best Practices  
For Managing a  
Remote Workforce

**General Session**  
Compliant Employer  
Websites Under  
the ADA

9:20am – 9:30am

**Coffee Break**  
Sponsor Showcase

9:30am – 10:45am

**General Session**  
Benefits Compliance  
in 2021: Preparing  
for the Year Ahead

\*Pre-approved by SHRM/HRCI for 2-hours of continuing education credit each day!

# General Session

## Best Practices for Managing a Remote Workforce

*Presented by Jeremy Hertz*



**HR LEADERS**  
COMPLIANCE SUMMIT

February 10, 2021





## Disclaimer:

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# Agenda

The Changing Paradigm

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Wage and Hour

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Discrimination

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Workers Compensation

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Tax/Payroll

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Proprietary Assets

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Miscellaneous

This is not a discussion  
about the pandemic!!!





# Changing Paradigm – Workplace Impact

## Recent polls during the pandemic:

- 60% of workers that worked from home during the pandemic want to continue<sup>1</sup>
- Deloitte poll in June 2020 found that 40% of businesses were evaluating strategies and roles for determining which jobs/teams could work remotely permanently<sup>2</sup>
- A majority of that 40% said the reasons were not due to COVID but instead due to attracting talent and improving productivity
- Almost 75% of CFOs surveyed by Gartner intend to shift 5% of on-site workers to permanently remote positions and nearly 25% of CFOs plan to shift at least 20%<sup>3</sup>

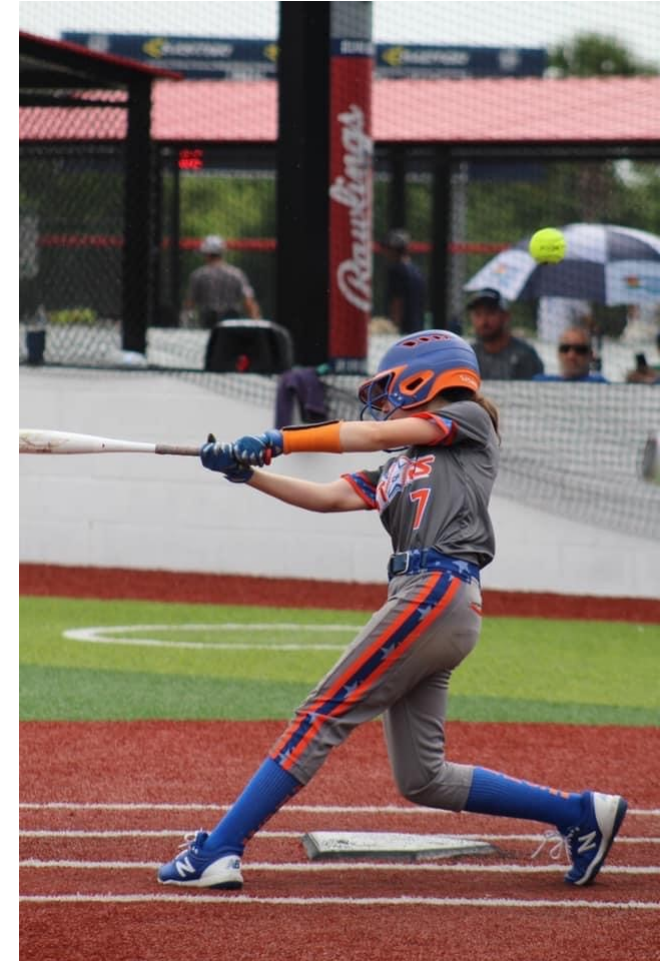


# Changing Paradigm – Workplace Impact

- Completely different engagement model when working remotely
- Two key areas to assess:
  - ❑ General practical and compliance issues regardless of location
  - ❑ Specific needs related to company presence in more states
- Workers Compensation example
- General practical considerations are obvious: workplace injuries can extend to the home office (or anywhere remote work is done)
- Specific considerations: state/local rules; insurance; costs; retaliation concerns, different injury standards, etc.
- HR Professionals are the most significantly impacted portion of the workforce as a result of the increase in remote workers due to concerns in the areas of compliance and morale
- Only solution: BE PROACTIVE, BE PROACTIVE, BE PROACTIVE

# Changing Paradigm – Non-Compliance Hurdles

- High-Level travel sports – two types of teams
  - ❑ Local all-star teams
  - ❑ Inter-state superteams
- In-person work attendance is simple...is the employee present?
- “Attendance” becomes much more nebulous in a remote work environment
- Breeds distrust between managers and direct reports
- May require more invasive monitoring
- Could lead to adversarial relationships



# Poll question!

Does your organization have hourly employees currently working from home?



# Overtime

- Employers should state in a remote work policy that non-exempt employees: (1) maintain and submit an accurate record of all hours worked; (2) not engage in “off-the-clock” work; (3) obtain written supervisor approval before OT; (4) affirm that submitted time records are accurate and reflect all hours worked; and (5) not engage in non-company work during the employee’s agreed upon “working hours”
- Some options for recording include electronic timesheets, documenting hours via personal or group spreadsheet or asking employees to email managers when they clock in or clock out
- Meal and rest break laws apply equally to remote work arrangements
- Keep in mind that some states have specific overtime provisions that are applicable only in their state which employers need to recognize (i.e., Colorado requires daily overtime so if a worker relocates to CO for remote work the employer must know to apply that rule)
- Remote work may require a reallocation of job duties; verify that historically exempt employees are not now performing more non-exempt duties affecting their status

# Minimum Wage

- The law of the state in which the worker resides generally determines minimum wage for that employee
- Some states are at \$15/hour, whereas others mirror the federal minimum wage of \$7.25/hour
- If the Biden Administration creates a federal floor of \$15/hour it will simplify this issue dramatically for employers
- If out-of-state employees and in-state employees perform the same job but minimum wages are different in the two states, you may consider creating uniformity
- If employee is required to purchase equipment/furniture in order to work remotely avoid deductions from an employee's pay as it may bring their wages below minimum wage and result in an FLSA violation



# Independent Contractor Classification

- Classifying an individual as an independent contractor rather than an employee can reduce payroll taxes and other labor costs
- Employees having more autonomy by working remotely should not mislead employers into thinking they are now more likely to be considered Ics
- Lack of control over a worker's daily activities is only one factor amongst many that could decide a worker's classification
- Consider also that some states will have different standards for ICs than others (i.e., AB5 in CA is extremely onerous for employers to prove a worker is an IC rather than an employee)
- The Biden Administration will likely enforce proper classification aggressively at the federal level, possibly modeling their approach after AB5

## Poll question!

Do you have departments/teams that have some employees allowed to work remotely and others that must be in the office?



## Title VII, ADA, EPA, ADEA

- **Everyone should be treated consistently**
- Remote employees who perform the same tasks as on-site employees are likely entitled to the same terms and conditions of employment
- This could include training (NY/CA harassment), mentoring and advancement; failure to provide these opportunities could lead to claims of discriminatory treatment
- Employers should analyze who can work from home on a departmental or position basis rather than on an individual employee basis
- Equal pay laws generally require that employees who perform the same work be paid the same and this is a hot button area for the Biden Administration
- Employees with disabilities are still able to receive accommodations under the ADA for their home work environment

# Family and Medical Leave Act

- Remote employees are also entitled to FMLA leave
- FMLA regulations state that an eligible employee must be “employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite”
- According to the regulations an employee’s personal residence is not a worksite
- An employee’s worksite “is the office to which the employee reports and from which assignments are made”
- Example: Employee works from home in MA but receives all of her work assignments from her supervisor in NY where the company employs 50+ employees
- Employee is likely eligible for FMLA

# Hiring

- Employers should implement an online application portal and a secure videoconferencing platform for interviews
- Some employers have expressed an interest in recording interviews to show other interested stakeholders; applicant permission is required in two party states
- Be cautious about not hiring someone who refuses to work onsite even though there is no requirement to accommodate a general fear of COVID
- If an applicant requests a medical-related accommodation or discloses an underlying health condition that may place him/her at higher risk the employer should be prepared to engage in the interactive process under the ADA
- Employers may not unilaterally postpone a start date or withdraw a job offer because the applicant is part of a high risk or vulnerable population (as defined by the CDC).
- Employers should not ask applicants if they are part of a high risk or vulnerable population

# Firing

- Employers should consider offering severance or providing job placement services as well as telling employees you will efficiently help them secure unemployment
- Perform terminations via secure video rather than telephone if possible; consider mailing employees their office belongings rather than meeting in person
- Collect any company-owned equipment and terminate access to company servers and email; consider paying for shipping or providing a courier service
- Some jurisdictions require employers to provide information regarding unemployment compensation immediately upon termination; be prepared for this
- Understand final paycheck rules



## Poll question!

Have you had any worker's compensation claims made from injuries that allegedly occurred at an employee's home?



# Workers' Compensation

- Workers' compensation laws apply to workplace injuries that occur while an employee is working remotely
- When the remote work environment is voluntary (not mandated by order during a pandemic) employers may consider reserving the right to inspect an employee's home-work space
- Best practice for an employer is to create a checklist to provide to remote employees for maintaining a safe workspace in their home as well as including the same information in the employer's remote work policy
- Employers should ask employees to certify, in writing, that their home office complies with the safety requirements set forth in the checklist
- Employers should communicate with their workers' compensation, EPLI and general liability carriers about any potential issues arising from employees working remotely including whether each employee's work location must be disclosed
- During the pandemic, many remote employees didn't work in their own home but quarantined with family in other states; could affect coverage so employees should be told to inform HR if they are working somewhere other than their home

# Workers' Compensation

The employer's remote work policy should include the following regarding WC:

- 1) Guidelines for a home office, such as a designated work area, and training related to workstation setup and safety including ergonomics
- 2) Require employer approval of the employee's workstation once it's set up
- 3) Set fixed work hours and meal and rest periods for remote workers, which can help establish whether an injury was "in the course of" employment
- 4) Disclaim liability for any injury or damage to the employee's family members, home or third parties who may visit the employee's worksite



## Withholdings for State Income Tax, Disability and Paid Family Leave/Sick Leave

- The general rule for withholding state income tax (the “physical presence rule”) is for employers to withhold according to the location where the work was performed
- In some states, however, remote employees can be liable for income tax in both the state they reside as well as the state in which the employer operates (e.g., if an employee works in NY, they must pay NY income tax and may have to pay income tax in the state in which they reside)
- Employees can also be liable for income tax in two states if their home office and work office are in two different states
- CA, HI, NJ, NY and RI all have state-mandated disability insurance requirements
- Paid family leave and sick leave statutes are also on the rise nationwide and require proper deductions to be taken from employees; must determine if the nexus is tied to the location where the employee works, where the employee resides or where the home office is located

## Licensing/Registration Concerns

- Many municipalities require that home-based workers obtain a home occupation permit
- Some have been suspended for COVID, but you should verify what the standards will be after the pandemic subsides
- If a remote worker relocates to a state in which the employer wasn't previously doing business the new state may require the employer to register to do business in that state and/or retain a registered agent for service in the state; assessment of whether a "tax nexus" exists
- Remote employees that maintain professional licenses in one state but relocate to another state may have difficulty practicing their profession in the new state (i.e., lawyers)
- The employee also may be subject to different requirements and ethical obligations



### Poll question!

Do you have remote workers that are handling confidential information or trade secrets of your organization?





## Privacy / Security

- Employers should ensure that remote workers understand that they remain bound by all company policies applicable to the on-site workforce, including information technology and data security policies
- Remote workers should be subject to policies which ensure:
  - 1) Usage of only designated high security devices to transport information (i.e., laptops/computers, or encrypted portable devices, such as flash drives or external hard drives)
  - 2) Protection of company data from theft, loss, or unauthorized access during transit and at the remote work location
  - 3) Approved firewalls and anti-virus software are installed on all laptops/computers and are updated regularly
  - 4) Flash drives or other portable drives must be encrypted and scanned for viruses before uploading or downloading data



## Privacy / Security

- 5) Sensitive information should not be printed at the remote location without approval and must be shredded immediately after usage
  - 6) All work must be saved and backed up according to company procedures
  - 7) The company's network is not accessed from the remote location without approval
  - 8) Laptops/computers and any remote access tools/portals are properly logged out of and/or shut down when the employee is away from the device or not in use
- Employers will also want to monitor employee's digital activity
  - Employees should update their IT policies to ensure that the employer has express permission to monitor/review anything the employee sends, receives, or creates through employer-owned equipment and networks and that the employee waives any rights of privacy

# Proprietary Assets

- Employees must be made aware of company policies on confidential information and information security and how those policies apply in a remote work setting
- Employers should make clear to employees what physical items are acceptable to be taken from the workplace and what precautions should be taken for confidential documents and information (i.e., keeping them out of public spaces or maintaining a folder or box for documents to be disposed of securely)
- Employers that require protected remote access should remind employees that “workarounds” regarding security are prohibited
- Confidentiality agreements in a non-remote environment are helpful but are supported by in-person controls
- In a remote environment the oversight is removed and thus an enforceable confidentiality agreement (with possible non-solicitation and non-compete provisions) becomes much more important

## Miscellaneous

- Non-Compete Agreements
- Training & Posted Notices
- Venue
- Benefits/Health Insurance
- Expense and Equipment Reimbursements



# Next Up: General Session

Compliant Employer Websites Under the ADA

*Presented by Jeremy Hertz*



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# Agenda

Title III ADA background

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Current Title III Standards for Websites

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Benefits of Compliance

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Avoidance of Penalties and Liability

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Best Practices

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# Title III of the Americans with Disabilities Act

- Originally drafted in 1990 and amended in 2008
- Prohibits discrimination against individuals with disabilities in employment, public accommodations, transportation, state and local government services and telecommunications
- Places of public accommodation include 12 specified categories (e.g., places of lodging; food and drink establishments; places of recreation; sales or rental establishments, etc.)
- The categories have always centered around brick-and-mortar locations which was the status quo in 1990 because the internet as we know it was in its infancy





## Title III of the Americans with Disabilities Act

- To recover under Title III, a plaintiff must prove: (1) that he/she is disabled within the meaning of the ADA; (2) that defendants own, lease, or operate a place of public accommodation; and (3) that defendants discriminated against him/her by denying him/her a full and equal opportunity to enjoy the services defendants provide.
- THE ADA DOES NOT EXPLICITLY ADDRESS WEBSITE/MOBILE APP/JOB APPLICATION INTERFACE COMPLIANCE DESPITE HAVING BEEN AMENDED IN 2008
- Numerous federal court decisions have created a general consensus that the brick-and-mortar principles of the ADA are applicable to websites (as well as mobile apps and job application interfaces)
- The arguments generally take two forms:
  - 1) Private company websites qualify as places of public accommodation; and
  - 2) Websites with access barriers (e.g. websites without compatible screen-reading software) deny plaintiffs the right of equal access



### Poll question!

Has your organization created a Title III ADA compliant website?



# Current Title III ADA Standards for Websites

- There is not currently a true legal standard for determining website accessibility under the ADA
- The Department of Justice advised on September 25, 2018 that it was “evaluating whether promulgating specific web accessibility standards through regulations is necessary and appropriate to ensure compliance with the ADA.”
- This approach supported the DOJ’s longstanding position that the ADA, as is, applies to public accommodations’ websites and the absence of a specific regulation doesn’t serve as a basis for noncompliance
- Very similar to how the Department of Labor has not promulgated new regulations to address the ongoing problem of addressing the inability of non-exempt employees to “unplug” due to drastic advancements in technology
- They noted that the lack of one standard allows for flexibility to comply with the ADA’s general requirements of nondiscrimination and effective communication

# Web Content Accessibility Guidelines - WCAG

- Although a formal legal standard does not currently exist, the “Web Content Accessibility Guidelines (WCAG)” have been widely accepted as providing for full and equal access in accordance with the ADA
- Currently on WCAG version 2.1AA
- WCAG 2.1AA includes about 50 recommendations to improve the accessibility of an organization’s website or mobile app
- The WCAG are published by the World Wide Web Consortium’s (W3C) Web Accessibility Initiative (WAI).
- Four principles: a website must be “perceivable, operable, understandable, and robust”
- Four principles broken into twelve guidelines with “success criteria” for web developers which include tangible goals to work towards
- Various levels within the WCAG for compliance but “AA” addresses the major barriers encountered by the visually impaired

## Different Levels of Conformance

### Level A

The minimum  
level of  
conformance

### Level AA

The level  
generally relied  
upon by the  
DOJ and the  
courts

### Level AAA

The maximum  
level of  
conformance



# The Four Principles

1. **Perceivable:** Content is presented in an easily perceivable manner that allows visually-impaired individuals to perceive content (e.g., alternative tags, captions, audio alternatives or assistive technology)
  2. **Operable:** Navigation is easy to operate so disabled users can easily and safely navigate the website and access content (e.g., offering keyboard accessibilities, adequate time to read and use content, and not using content that causes seizures)
  3. **Understandable:** Content is easy to understand which includes making content readable and predictable and offering input assistance if needed
  4. **Robust:** Content can be interpreted by various devices and platforms to ensure the content is compatible with user agents like assistive technologies
- Meeting these standards will improve accessibility, mainly for individuals with vision or hearing impairments, but also those with cognitive, language or learning disabilities
  - Here is a link to a good example of these principles being utilized on the [CA.gov](https://www.ca.gov) website

# Common Ways to Address Accessibility Issues on a Website

- **Create alt tags for all images, videos and audio files:** Alt tags allow users with disabilities to read or hear alternative descriptions of content they might not otherwise be able to view. Alt tags describe the object itself and, generally, the purpose it serves on the site. Search engines and other robots cannot interpret images, but images can play a crucial part in how people interpret a particular web page. Alt tags solve for this by providing text which is read by the search engines thus providing accessibility.
- **Create text transcripts for video and audio content:** Text transcripts help hearing-impaired users understand content that would otherwise be inaccessible to them
- **Identify the site's language in the header code:** Making it clear what language the site should be read in helps users who utilize text readers. Text readers can identify those codes and function accordingly.
- **Offer alternatives and suggestions when users encounter input errors:** If a disabled user is encountering input errors because of their need to navigate the website differently, the site should automatically offer recommendations to properly direct the user to successfully navigate
- **Create a consistent, organized layout:** Menus, links and buttons should be organized in such a way that they are clearly delineated from one another, and easily navigated throughout the site

# Benefits of Compliance - Why Should You Care?

- Increasing Your Target Audience
- Improving Your Search Engine Optimization (SEO) Efforts
- Helping Your Business Reputation
- Avoidance of Penalties and Liability





# Increasing Your Target Audience

- Around 15% of the global population is classified as disabled
- Of this 15%, an estimated 190mm people experience significant disabilities<sup>1</sup>
- Over 4.57 billion people are active internet users<sup>2</sup>
- In the U.S. alone, consumers spent an estimated \$517.36 billion online<sup>3</sup>
- In total, individuals with disabilities spent an estimated \$490 billion in the U.S.
- If the website isn't accessible, that is excluding 60 million Americans
- 69% of customers with disabilities will instantly leave the site if it does not meet their accessibility needs<sup>4</sup>
- Another 80% of customers with disabilities have stated that they will spend more on a website that has improved accessibility features
- The WebAIM project at the Center for Persons with Disabilities at Utah State ran accessibility tests on homepages of the top 1 million websites and 98.1% of homepages had detectable WCAG 2 failures

## Improving Your SEO Efforts

- Search Engine Optimization increases your businesses' chances of being found on the internet
- Screen readers crawl website pages like search engines to find websites
- A key element of WCAG is accessibility to screen readers
- If your website meets WCAG guidelines it will appeal to users, search engines and screen readers, improving your SEO efforts
- The creation of Meta tags (snippets of text that describe a page's content; the meta tags don't appear on the page itself, but only in the page's source code), alternative image text and video transcripts will both help your SEO efforts as well as help make your website WCAG compliant

# Helping Your Business Reputation

- Not only will compliance allow your website to be shopped by millions of otherwise disenfranchised customers but will also add goodwill to your brand name
- Compliance and access send a signal to those customers that they are valuable to your business and that you want to do business with them
- Competitors that are not accessible not only have legal liability to be concerned with but also will simply not be able to communicate properly with customers that cannot utilize their website due to a disability
- There are badges and other logos that you can put on your website not only to advertise your ability and willingness to make your website accessible but also to scare away potential plaintiffs that troll the internet looking for inaccessible businesses to sue



## Poll question!

Has your organization been approached for lacking an ADA-compatible website?

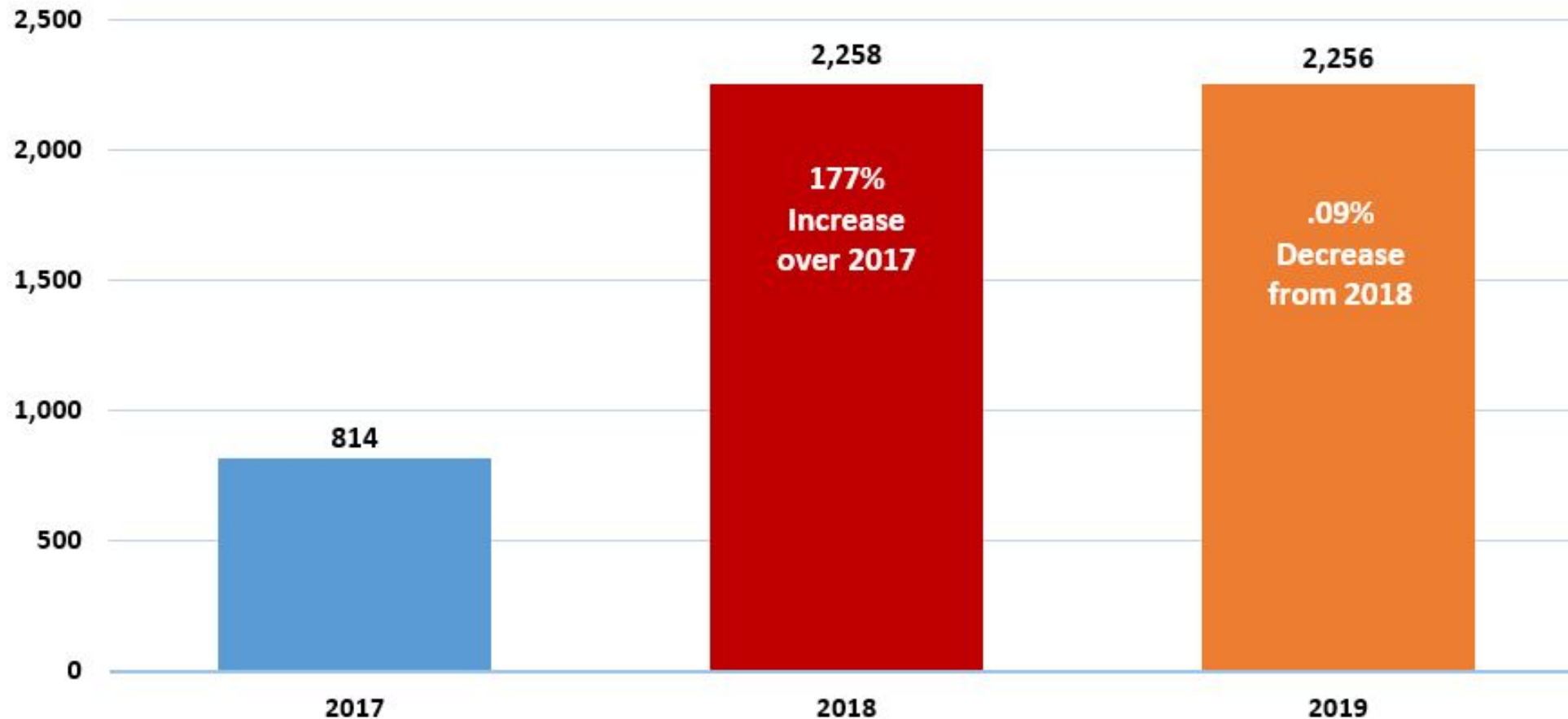
# Avoidance of Penalties and Liability

- The lack of clarity regarding regulations has created a “cottage industry” of lawsuits for aggrieved plaintiffs
- A single plaintiff’s attorney and sometimes the same disabled individual will file dozens or more lawsuits against many different companies alleging technical violations of Title III<sup>1</sup>
- They will seek injunctive relief (e.g., for the company to make its website accessible) and attorneys’ fees that are authorized by statute
- They often target a specific business sector/industry (e.g., restaurants, retail stores, health care providers and e-commerce companies)
- Several lawsuits have been focused on larger businesses with deeper pockets with the likely intent of forcing smaller settlements quickly (e.g., Fordham University, Foot Locker, Brooks Brothers, Kylie Jenner)
- Many smaller businesses have opted to take a wait and see approach to potential legislation before spending the money to make their website compliant



# Avoidance of Penalties and Liability

ADA Title III Website Accessibility Lawsuits in Federal Court  
(2017 - 2019)



# Avoidance of Penalties and Liability

- There are two main costs associated with remediation: (1) cost to remediate and (2) litigation and attorney's fees
- Remediation takes time and should be accomplished by a reputable firm that fully understands the current WCAG standards
- Recommend to first reach out to your existing labor and employment counsel who will either be able to handle the entire project in-house or will be able to oversee the project through a relationship with a reputable remediation firm to handle the technical aspects of the project
- It is very likely that there will be true regulatory guidelines at some point that will be a roadmap to compliance so starting that process now is simply getting ahead of the curve
- It also allows a business to remove the threat of a lawsuit (and the accompanying attorney's fees) from the equation
- Attorney's fees usually range anywhere from \$5,000 to \$50,000 depending on how much the defendant chooses to fight back, the size of the defendant and the forum

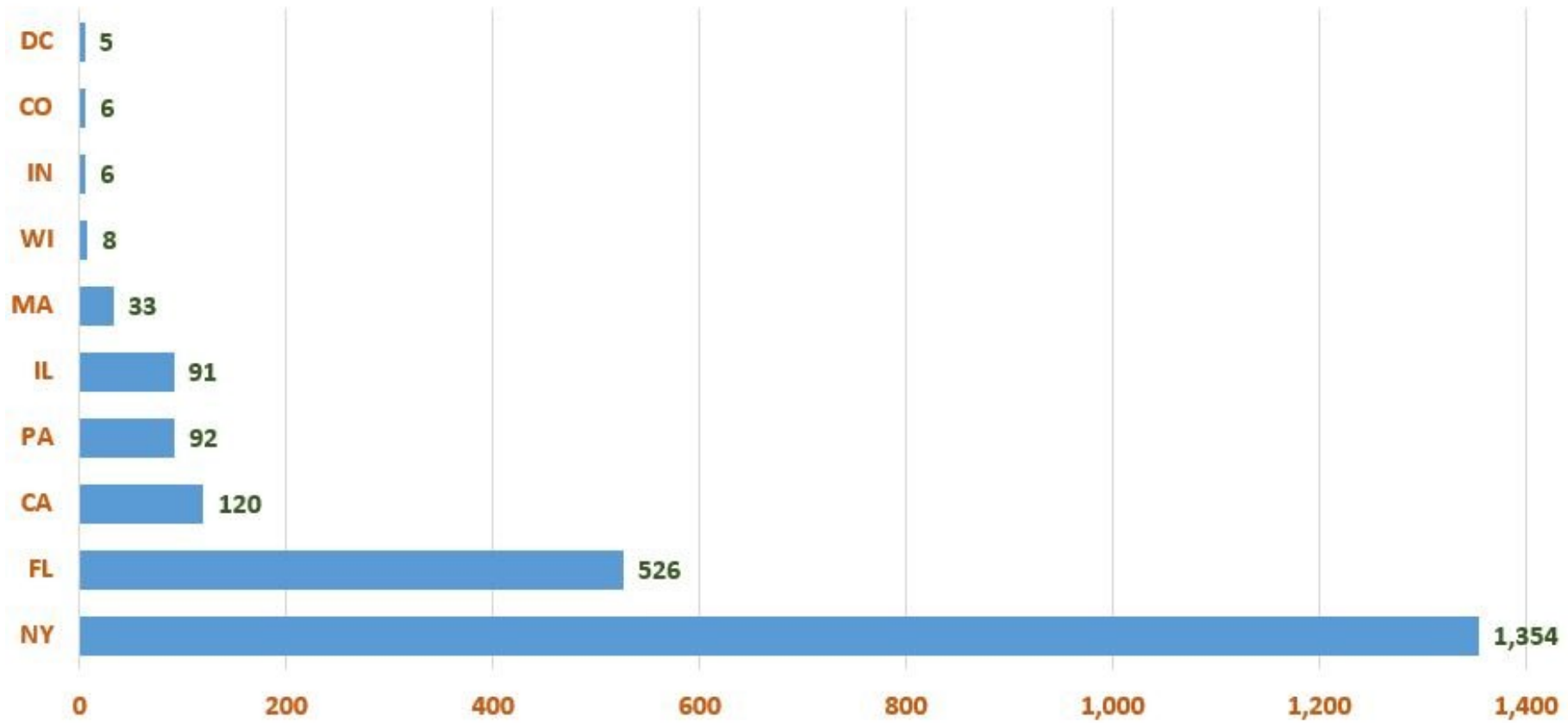
## Website Accessibility in the Courts – Forum Shopping

- Due to the lack of clear guidelines much of the existing law is based on the court decisions within the jurisdiction in which the lawsuit is brought
- The Plaintiff's search for a favorable jurisdiction to sue in is also called "forum shopping" and is a significant strategic component of the significant rise in litigation
- The overall uncertainty surrounding ADA cases due to a lack of clear statutory/regulatory authority has created a beneficial environment for plaintiff's counsel to take advantage of the lack of clarity regarding websites/apps and the ADA
- Once clear laws exist, it will likely provide a roadmap for employers to clearly come into compliance and will greatly diminish the benefit of lawsuits for plaintiff's counsel
- In the meantime, the courts are akin to the "wild west" as it pertains to Title III liability for defendants



# Website Accessibility in the Courts – Forum Shopping

Top 10 States for Federal ADA Title III Website Accessibility Lawsuits  
2019



## Forum Shopping – ADA Applicability to Websites in Different Circuits

### Nexus to a Physical Place

- Some jurisdictions have ruled that to be covered by the ADA, a website or mobile app must have a nexus to a physical place of public accommodation
- In 2019, the Ninth Circuit reaffirmed in the Robles v. Domino's Pizza case that there must be a nexus to a physical place of public accommodation
- Does not mean that the nexus argument will automatically win the litigation, but it does serve to potentially frustrate plaintiff's counsel from bringing suits for web-based only employers
- New York is one of the most plaintiff-friendly forums as they do not require a nexus to a physical location in order for a defendant to be covered under the ADA
- Has led to thousands of lawsuits in NY in the past two years

# Forum Shopping – Damages in Different Jurisdictions

## Monetary Damages

- Under the ADA only injunctive relief is permitted, although many states have adopted statutory schemes predicated on the ADA which provide for monetary damages
- In CA, the Unruh Act provides that all persons in the jurisdiction are free and equal and regardless of disability they are entitled to full and equal accommodations, advantages, facilities, privileges or services in all business establishments
- The Ninth Circuit has held that violating the ADA is a per se violation of the Unruh Act
- Under Unruh, a plaintiff is entitled to a minimum of \$4,000 for each time he or she visits an establishment that contains barriers that deny the plaintiff full and equal enjoyment of the premises (or website)
- Even though the “nexus” requirement in the Ninth Circuit can be a deterrent, the potential for the penalties under Unruh can still provide the basis for the effort

# Forum Shopping – Defenses Available in Different Jurisdictions

## Existence of WCAG Guidelines

- In the Robles case, Domino's argued that its due process rights would be violated under the ADA in the absence of legal technical standards for public accommodation websites/apps and that under the primary jurisdiction doctrine, courts should not rule where enforcement agencies with special expertise (here, the DOJ) had not weighed in
- The court rejected this argument stating that the DOJ's 1996 position that all places of public accommodation must provide effective communication was sufficient and waiting for the DOJ to institute a formal regulation would just "needlessly delay" resolution of the claim
- Several jurisdictions have utilized the WCAG guidelines, even though they are technically voluntary and not applicable to private websites/apps by any law or regulation, to assess compliance
- This allows defendants to argue that they have met WCAG guidelines and thus are in compliance with Title III

# Forum Shopping – Defenses Available in Different Jurisdictions

## Maximum Flexibility

- The Robles case further expanded this potential defense when it stated “the ADA and its implementing regulations are intended to give public accommodations maximum flexibility in meeting the statute’s requirements”
- This statement seems to provide the basis for an argument that 100% compliance with potentially applicable technical guidance is not required

## Alternative Means of Access

- This could also mean that alternative means of access in some cases will be sufficient, such as being able to provide the information by phone to users who cannot obtain it online
- In the Gorecki v. Dave & Busters, Inc. case, the court recognized that providing a disability assistance telephone number may be an alternative means to comply with the ADA but that the employer needed to make sure that such notice and phone number themselves were accessible (could be read via screen-reader software)

# Forum Shopping – Defenses Available in Different Jurisdictions

## Intent to Return

- In the Garner v. VIST Bank case the defense argued that the plaintiff did not sufficiently establish the intent to return to the website
- Intent to return is a standard defense issue in physical ADA cases
- The court noted that there must be a reasonable inference that the discriminatory conduct will continue and based on past patronage, physical proximity to the business or personal connections to the area, that the plaintiff intends to return
- Unfortunately, it is much easier for a plaintiff visiting a website to make that argument than one that would have to return to a physical location

## Case is Moot

- Some defendants have argued that the case is moot because the defendant has already taken action to remedy the alleged access barriers, leaving nothing to adjudicate (in essence, the problem has been solved already)
- This has been successfully argued in Title III physical location cases and has been applied sparingly in website cases
- This is another reason to consider preemptively fixing your website to avoid excessive litigation costs

## Best Practices – What Do I Do Now?

- The most conservative approach is to conduct a 3-factor WCAG 2.1 A, AA audit and then remediate accordingly
- The 3-factor approach includes:
  1. Automated WCAG Testing – entire website crawl to capture clear deficiencies
  2. Manual WCAG Testing – Manual review of code and use-cases for unique pages
  3. Assistive Technology Testing – Using tools that people with disabilities use for use-cases on unique pages
- It isn't a guarantee that a business will avoid getting sued although it certainly minimizes the target and helps with litigation defense
- First step is to find a reputable firm that can oversee the process
- Recommend starting with labor and employment counsel to establish the attorney/client privilege; they may work with a non-lawyer firm to handle technical aspects of the review
- Be careful with only utilizing automated tools to assess your website as they appear to only detect a maximum of about 30% of WCAG issues

# Best Practices – What Do I Do Now?

- Utilize a consultant that maintains expertise in the following areas:
  - The numerous combinations of use-cases for users with disabilities
  - The assistive technologies used by people with disabilities
  - The website code
  - The WCAG
  - The legal awareness of which issues have the greatest likelihood of triggering legal activity
- The goal is to receive an in-depth WCAG audit report that not only identifies what WCAG violations exist, but also how to fix them
- Once you have the audit, have your internal team(s) or an outside party break-down the tasks and implement the recommended solutions
- If the audit is well-drafted then there is potential savings by utilizing internal teams to perform the remediation rather than paying an outside party
- Once remediated, schedule periodic audits to assess compliance for new content added to the website/app
- Set up a web accessibility committee and implement mandatory training for everyone involved in development of website/app content



## Best Practices – What Do I Do Now?

- Invite feedback from customers including instituting a 24-hour monitored assistance telephone number (and possibly an email address as well) to facilitate use of your website/app for individuals with disabilities
- Adopt and publish an outward-facing digital accessibility policy as plaintiff's attorneys are specifically noting an absence of a policy as a detraction from the accessibility of a website
- Don't forget about mobile applications and job-application interfaces when assessing compliance
- If you are settling a case in one jurisdiction it is recommended that you immediately remediate in other jurisdictions because "copycat" lawsuits are common

# General Session

## Benefits Compliance in 2021: Preparing for the Year Ahead

*Presented by Deborah Hyde*

*Special Guests: Christine DeLair (Aflac) & RJ Gray (Mutual of Omaha)*



**HR LEADERS**  
COMPLIANCE SUMMIT

February 10, 2021

A spiral-bound notebook with a wooden frame is centered in the image. It has a white page with a black spiral binding at the top. The page contains a disclaimer. On either side of the notebook, there is a small white pot containing a snake plant (Sansevieria). The background is a plain, light-colored wall.

## Disclaimer:

The information in this presentation is intended for informational purposes only and should not be considered legal advice. You are strongly encouraged to consult your own legal counsel to ensure compliance with applicable law in your specific state, municipality or jurisdiction.



# Agenda

Ongoing COVID-19 Relief Measures

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The State of the Affordable Care Act

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Trends in Employee Benefits

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Annual Compliance Requirements

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## CARES Act

Signed into law in March 2020, the CARES Act delivered a trillion-dollar economic stimulus and contained a multitude of provisions intended to provide assistance in response to the COVID-19 public health emergency.

- **Coverage for COVID-19 Testing and Vaccinations**
  - All health insurance plans must provide no-cost coverage for FDA and non-FDA approved COVID-19 tests and related services
  - Vaccinations are considered preventive care under the ACA and must be covered without cost-sharing
- **Impact of No-Cost Telehealth on HDHPs**
  - To encourage the use of telehealth services over in-person visits, the Act provides relief for HDHPs that allow pre-deductible coverage for telehealth services
  - Applies for plan years that begin on or before December 31, 2021
- **HSA and FSA Coverage for OTC Products**
  - The Act eliminates the prohibition on the use of HSA and FSA funds on over-the-counter drugs without a prescription
  - Recognizes menstrual care products as account-eligible expenses
  - This change is indefinite, not temporary



## DOL Administrative Relief

In April 2020, the U.S. DOL released guidance for employee benefit plans that temporarily requires the extension of certain administrative timeframes. The goal is to minimize the possibility of individuals losing benefits during the public health emergency.

Plan sponsors must **disregard the period of time from March 1, 2020, until 60 days following the announced end of the national health emergency** when determining the following periods:

- **COBRA Timeframes**
  - The 60-day election period
  - Premium payment deadlines
  - Notifications to the plan of a qualifying event or disability determination
  - The distribution of an Election Notice to a qualified beneficiary



## **DOL Administrative Relief (continued)**

- **HIPAA Special Enrollment Timeframes**
- **Claims Procedure and External Review Process Timeframes**
  - The date within which individuals may file a claim
  - The date within which claimants may file an appeal
  - The date within which a claimant may file a request for an external review or file information to perfect such a request

**How should employer-sponsors (continue to) administer these timeframe extensions?**



## Poll question!

Has your organization found it challenging to administer the DOL's group health plan timeframe extensions?

- A. Yes, particularly the COBRA timeframe extensions
- B. Yes, particularly the HIPAA Special Enrollment Rights extension
- C. Yes, particularly the claims and appeals timeframe extensions
- D. No, we've not had any challenges





## IRS Relief

In May 2020, the IRS issued flexibility guidelines for Cafeteria Plans, Health FSAs, and DCAPs. These guidelines were temporary for calendar year 2020 and were permissive rather than mandatory:

- **Cafeteria Plan Elections**
  - **Group Health Plans**
    - Employees may enroll mid-year or make mid-year changes to coverage options absent a qualifying event
    - Employees may altogether drop coverage mid-year absent a qualifying event so long as the employee is enrolled, or intends to enroll, in other health coverage
  - **Health FSAs and DCAPs**
    - Employees may elect to participate, or terminate participation, mid-year absent a qualifying event
    - Employees may increase or decrease election amounts mid-year absent a qualifying event



## IRS Relief (continued)

- **Claims Periods for Health FSAs and DCAPs**
  - To minimize the risk of loss to employee-participants in Health FSAs and DCAPs, plans had the option to extend the claims period in which eligible expenses can be incurred
  - Applied to unused amounts as of the end of a grace period of plan year ending in 2020
  - Amounts could be applied to claims incurred through 2020

These temporary provisions have expired but employer-sponsors that adopted these measures, in whole or in any part, must ensure appropriate plan amendments are executed. **Amendments must be adopted on or before December 31, 2021.**



## New COVID-19 Relief Bill

Signed into law on December 27, 2020, the new relief bill is a follow-up to the CARES Act. It provides a second round of stimulus dollars, as well as provisions regarding employee benefits and health coverage.

- **Temporary Provisions for FSAs**

1. **Balance Carryovers:** For 2020 and 2021 plan years, participants may carry over unused balances of any amounts in both a Health FSA and DCAP
2. **Grace Periods:** As an alternative to carryovers, Health FSAs and DCAPs can provide a grace period of up to 12 months for plan years ending in 2020 and 2021
3. **Mid-Year Election Changes:** Plan years ending in 2021 may continue to permit mid-year election changes for Health FSAs and DCAPs absent a qualifying event
4. **Eligible Dependents:** DCAPs may temporarily raise the age of eligible dependents from age 13 to 14
5. **Terminated Employees:** Health FSA participants who terminate employment in 2020 or 2021 may spend down account balances through the end of the plan year



## New COVID-19 Relief Bill (continued)

- **Surprise Billing Measures**
  - The relief bill includes legislation aimed at preventing surprise medical bills for both emergency and non-emergency care
  - Effective January 2022, providers will be prevented from issuing surprise medical bills to patients; patients will be responsible for only the deductibles and co-payments that they would normally pay for in-network care
  - Providers and insurers must agree to a payment rate or submit to arbitration to set a fair payment amount
  - New rules will be issued by federal agencies ahead of 2022 and will apply to insured and self-insured plans
- **Transparency in Health Coverage**
  - Also effective January 2022, insurers and group health plans will be required to comply with transparency-related requirements
  - Plans will be required to provide price comparison tools, disclose more detailed cost-sharing amounts, and issue advanced EOBs

### **Premium Credits Issued by Insurance Carriers**

In response to the diminished access to care and services during the public health emergency, some health insurance carriers have issued premium credits to employer-policy-holders. Generally, these credits are in the form of a reduced premium for one or more future months of coverage.

### **How should an employer handle a premium credit?**

- Unlike an MLR rebate, a premium credit is not a plan asset per se
- However, ERISA plan sponsors have a fiduciary duty to act in the best interests of plan participants
- Therefore, if participants contribute towards the cost of the premium for coverage, the credit should be reflected in the amount of the participants' payroll deductions



# The State of the Affordable Care Act

## 2020 Reporting under IRC Secs. 6055 and 6056

- **Extended Deadline**
  - As in prior years, the IRS issued a deadline extension for the distribution of Forms 1095-B and 1095-C to individuals, from January 31, 2021 to **March 2, 2021**
  - The deadline for filing Forms 1094-B/C and 1095-B/C with the IRS remains unchanged; hard copy submissions are due by **March 1, 2021** and electronic submissions are due by **March 31, 2021**
- **Relief from Penalties**
  - Good faith effort relief remains available for the 2020 reporting year but does not apply to late filings or failures to file
  - The IRS does not anticipate extending this relief to future years
- **State-Level Reporting**
  - California, Massachusetts, New Jersey, Rhode Island, Vermont, and Washington, D.C. have state-level reporting requirements
  - Many of these states' requirements piggy-back on the federal filing process, including the forms and deadlines



## IRS Action Letters

- **Letter 5699**
  - The IRS continues to issue Letter 5699 to employers it determines were ALEs that failed to complete ACA reporting in a prior year
  - Employers must timely fulfill the 2020 reporting requirements and maintain accurate records in order to successfully response to this inquiry
- **Letter 1865C**
  - Notice to employers that previously submitted reporting forms are unable to be processed by the IRS due to filing error (commonly, errors relate to forms that were submitted in portrait rather than landscape mode, redacted SSNs/TINs, and illegible handwriting)
  - The employer must correct the error(s) by re-submitting the forms in accordance with the IRS's instructions in order to avoid any late filing penalties



## IRS Action Letters (continued)

- **Letter 226J**
  - The IRS continued to issue Letter 226J to inform ALEs of proposed employer shared responsibility penalties for failure to comply with the provisions in prior years
  - The pace of Letters 226J issued in 2020 appeared slower than prior years, likely due to COVID-19; but ALEs should expect the IRS to begin using 2018 assessments this year
- **Response Strategies**
  - Employers have 30 days to respond to the IRS but may request an extension
  - To disagree in whole or in part with the proposed penalty, an employer is required to submit a written response detailing its position
  - Errors made in the reporting process can cause the IRS to rely on inaccurate information in calculating its proposed penalty; these errors can be corrected as part of the employer's response





## Poll question!

To date, has your organization received a Letter 226J from the IRS?

- A. Yes, and we were able to decrease or entirely eliminate the proposed penalty assessment
- B. Yes, and we were not able to decrease or entirely eliminate the proposed penalty assessment
- C. No, we have not received a Letter 226J



## Exchange Subsidy Notices

- Exchanges continue to send employers notice to inform them that an employee has been found eligible for a premium tax credit
- The notice does not make an assessment of the employer's compliance with the employer shared responsibility provisions, nor does it propose a penalty
- Employers have the option of appealing the Exchange's finding regarding eligibility for a premium tax credit
  - An appeal is **never** required
  - If the employee identified in the notice was not offered affordable, minimum value coverage, no appeal should be submitted
  - If the employee identified in the notice was offered affordable, minimum value coverage, the employer may choose to appeal, which *could* help the employer avoid a later proposed assessment of an employer shared responsibility penalty



## *California v. Texas*

- **What is this case about, and why is it so important?**
  - The suit originated in 2018 when 20 states' attorneys general, led by Texas, argued that because the individual mandate penalty had been reduced to \$0, it is no longer a tax as originally characterized by the U.S. Supreme Court and is therefore unconstitutional in its current form
  - 21 states' attorneys general, led by California, defended the law
  - Lower federal courts found in favor of the Plaintiffs and raised the question of whether the mandate can be severed from the rest of the ACA, or whether the entirety of the law will be invalid without it
- **How did this case end up in front of the U.S. Supreme Court?**
  - In January 2020, the Defendants formally petitioned the U.S. Supreme Court to hear the case on appeal and decide on the issue of the constitutionality of the mandate and its severability from the ACA as a whole
  - Oral arguments were heard on November 10, 2020
  - A decision will be issued in May or June 2021



## *California v. Texas (continued)*

- **What are the likely outcomes?**
  - From comments and questions posed by the Justices during oral arguments, **the Court is widely expected to uphold the ACA** even if it finds the individual mandate to be unconstitutional; in other words, the Court may agree that the individual mandate is unconstitutional but it will sever it from the rest of the law, leaving the ACA intact
  - Until an opinion is issued, the ACA remains in full effect, including the employer shared responsibility provisions
  - Regardless of the Court's decision, it will have no impact on similar individual mandate-like laws enacted by some states
  - While the federal government's role in the litigation has been somewhat limited and in opposition to the ACA, the new administration's agenda is completely opposite; this won't affect the Court's decision but will drive federal legislative initiatives that will either enhance or replace the ACA

# Poll question!

In response to the COVID-19 public health emergency, has your organization made changes to the benefit offerings under your group health plan?

- A. Yes, we've added new benefit programs, or enhanced existing benefit programs
- B. Yes, we've scaled back our offering by eliminating some benefit programs
- C. No, we've made no changes to our benefit offering in response to COVID-19



### Telemedicine

Telemedicine refers to the delivery of health care services where the provider and the patient are not present together, whether carried out via email, phone call, or a visual web meeting.

This benefit steadily gained popularity over the last several years but because of the access-to-care issues created by COVID-19, telemedicine is now a feature of most group health plans.

- Can be offered as part of the existing medical plan, such as through an add-on offered by an insurance carrier, or on a stand-alone basis through an entirely separate policy or contract
- Temporary relief measures provided through the CARES Act and by the IRS **permit pre-deductible or no-cost telemedicine services to be offered by an HDHP without impacting HSA eligibility** (for plan years ending on or before December 31, 2021)



## Telemedicine

### *Compliance Considerations*

- **ERISA and COBRA**
  - Telemedicine benefits are considered employer-sponsored health plans under ERISA
  - Details of the program must be included in the Plan Document, the Summary Plan Description, and annual 5500 reports (if applicable)
  - As an employer-sponsored health plan, telemedicine coverage must be offered to COBRA qualified beneficiaries on either a stand-alone basis or as part of the medical coverage
- **ACA**
  - Telemedicine does **not** meet the definition of a HIPAA excepted benefit and therefore must meet the ACA market reform measures, including out-of-pocket limits, first-dollar preventive care coverage, and the prohibition on annual and lifetime limits
  - To comply with these reforms, telemedicine can be integrated with the employer-sponsored medical plan or offered on a stand-alone basis to medical plan participants; it cannot be offered on a stand-alone basis to employees not enrolled in medical coverage



### Fertility Benefits

Most insurance carriers offer limited, if any, coverage for infertility care and services. An increasingly popular solution for employers who wish to offer more robust fertility benefits is to set up a health reimbursement arrangement (HRA) to provide tax-free reimbursement of medical expenses related to infertility treatment.

### *Compliance Considerations*

- **HSA Eligibility**
  - To preserve HSA eligibility, the HRA cannot provide coverage (or reimbursements) prior to satisfaction of the HDHP deductible
  - The HRA must be structured as a post-deductible HRA, which requires participants to first satisfy the minimum statutory deductible (\$1,400 for self-only coverage in 2021) before eligible medical expenses can be reimbursed





## Fertility Benefits

### *Compliance Considerations (continued)*

- **ACA**
  - In order for HRAs to comply with the ACA's market reforms, such as the prohibition on annual and lifetime limits, HRAs must be integrated with employer-sponsored medical coverage
  - Integration requires that participation in the HRA be limited to those employees who are also enrolled in the employer's medical plan(s) or to employees who demonstrate enrollment in another employer's medical plan
- **ERISA and COBRA**
  - HRAs, including infertility HRAs, are considered group health plans subject to ERISA, which requires inclusion in the SPD, annual 5500 filings, etc.
  - Because of its group health plan status, COBRA applies to these arrangements, as well



### **Prescription Drug Copay Assistance Programs**

In an effort to assist employees manage prescription drug costs, employers can implement copay assistance programs. These programs leverage funds made available through manufacturer assistance for the purchase of specialty medication. The program is paired with the employer's existing prescription drug plan and is managed through a third party.

### ***Compliance Considerations***

- **HDHPs and HSA Eligibility**
  - To be an HDHP, a medical plan must satisfy both the statutory minimum deductible and provide no benefits (other than preventive care) prior to satisfaction of the deductible
  - Copay assistance programs that provide pre-deductible benefits cannot be paired with a medical plan that intends to be HDHP
  - Further, such programs that provide pre-deductible benefits will be disqualifying for purpose of HSA eligibility
  - Finally, HDHPs cannot count manufacturer assistance coupons towards the annual deductible



# Trends in Employee Benefits

## Individual Coverage HRAs

Effective January 2020, employers are permitted to provide tax-free reimbursements to employees for individual medical policy premiums through an Individual Coverage HRA (ICHRA). While ICHRAs are subject to various compliance and design requirements, the arrangement is an appealing option to employers that have a growing remote workforce.

## *Compliance Considerations*

- **ACA**
  - The ICHRA qualifies as MEC; ALEs can satisfy employer shared responsibility requirements by offering the ICHRA at a cost deemed affordable under one of the three safe harbor methods
  - Offers of ICHRA coverage must be reported by ALEs on Form 1095-C; coverage under ICHRA must be reported by non-ALEs on Form 1095-B
- **ERISA and COBRA**
  - ICHRAs are considered group health plans subject to ERISA, which requires an SPD, annual 5500 filings, etc.
  - As a group health plan, the ICHRA is also subject to COBRA and must be offered to qualified beneficiaries



# Trends in Employee Benefits

## Mental Health Programs

Similar to telemedicine, mental health programs have garnered increasing interest because of COVID-19.

- Typically, the programs are offered on a stand-alone basis through a separate vendor or contract, and provide services through a virtual format
- Importantly, the number of visits in a plan year are often capped – much like an Employee Assistance Plan (EAP) – but some programs may offer unlimited visits or benefits

## *Compliance Considerations*

- **HSA Eligibility**
  - Programs that do not provide significant benefits in the nature of medical care or treatment will not jeopardize HSA eligibility
  - Programs that are limited to virtual therapy services and that place a cap on the number of available visits in a year likely qualify as insignificant and will therefore not interfere with HSA eligibility
  - Programs that provide unlimited visits or more significant care will not meet this exception, but can rely on the **temporary** COVID-19 relief for telemedicine benefits



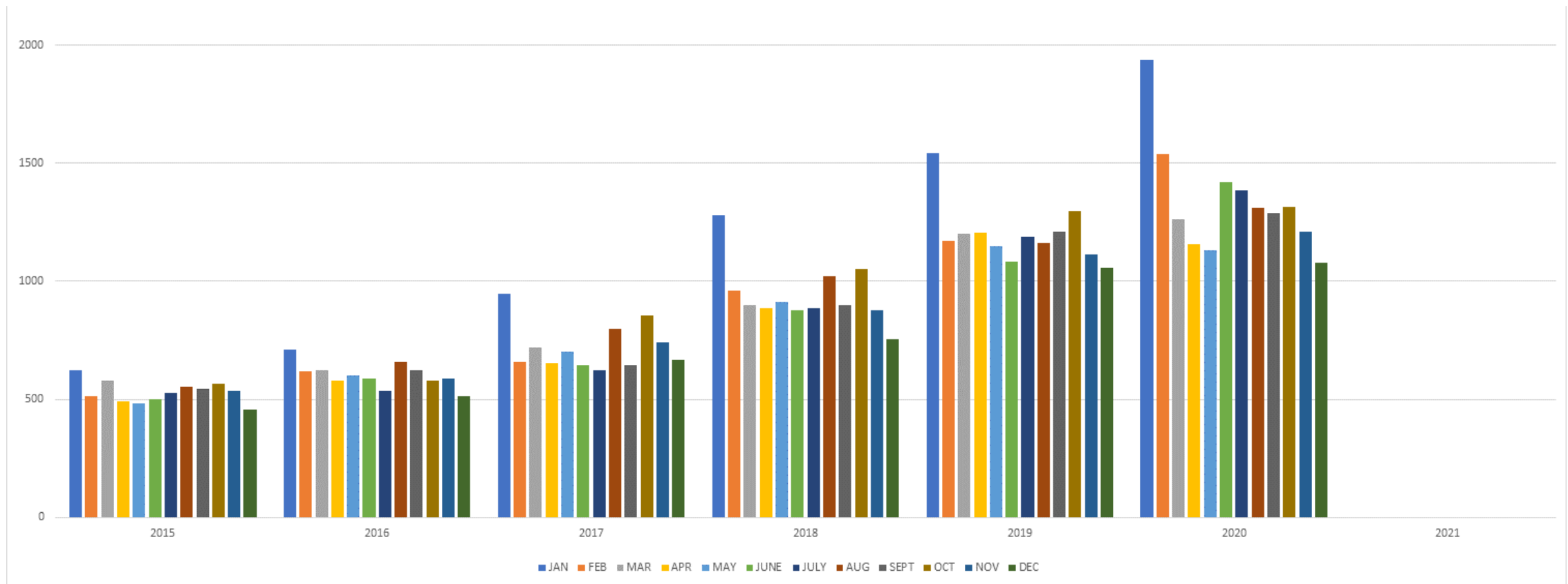
## Mental Health Programs

### *Compliance Considerations (continued)*

- **ACA**
  - So long as the program does not provide significant benefits in the nature of medical care and requires no employee cost-sharing or contribution, the program will likely qualify as an excepted benefit EAP
  - An excepted benefit EAP is not subject to the ACA market reforms and may therefore be offered to employees regardless of their enrollment in the medical plan
- **ERISA and COBRA**
  - Regardless of whether the program provides significant benefits in the nature of medical care, group health plan status under ERISA will apply, which requires inclusion in SPDs, 5500 filings, etc.
  - COBRA also applies to mental health programs; these programs must be offered to qualified beneficiaries



## Trends in Employee Benefits



### Employee Assistance Programs

EAP Volume increased 25% for the 2020 calendar year, mostly as a result of Covid-19 & the affects of the virus on employees such as financial needs, legal needs, concerns for health, loneliness & isolation.



## Trends in Employee Benefits

- From the onset of the pandemic, we initially saw a drop in STD claims. (Limited diagnosis). Claims have steadily been on the rise since early summer.
- There were weeks when COVID claims were the top diagnosis. This is a first; Historically, the top STD diagnosis has always been pregnancy.
- Challenges COVID presents in managing disability claims:
  - *No jobs for employees to return to work to*
  - *Telemedicine visits are up significantly. This does prevent carriers from gathering the essential information needed to process and/or manage claims*
  - *Some areas of the country still are limiting elective and simple surgeries, which impacts an employees ability to return to work and extends benefit durations*
- COVID has had had minimal impact on LTD Claim volumes. However, due to employees seeing their doctors less frequently, it makes it difficult to manage LTD claims as effectively as we'd like. We are not getting nearly the amount of employees back in the workplace via Return To Work or Vocational Rehabilitation programs as we normally would.



### What we're seeing in the market:

Employers choose supplemental insurance and benefits advisors to meet evolving workforce needs and demands.

For the **31%** of employers offering supplemental insurance, their plans include:

60%	Long-term disability insurance	38%	Cancer or other specified disease insurance
57%	Short-term disability insurance	37%	Supplemental vision insurance
52%	Supplemental life insurance	36%	Supplemental dental insurance
49%	Accident insurance	33%	Supplemental hospital insurance
48%	Critical illness insurance	22%	COVID-19 or other pandemic insurance

Does supplemental insurance help your company recruit employees?

50%

Yes

26%

No

24%

Not sure

Does supplemental insurance help your company retain employees?

60%

Yes

21%

No

19%

Not sure

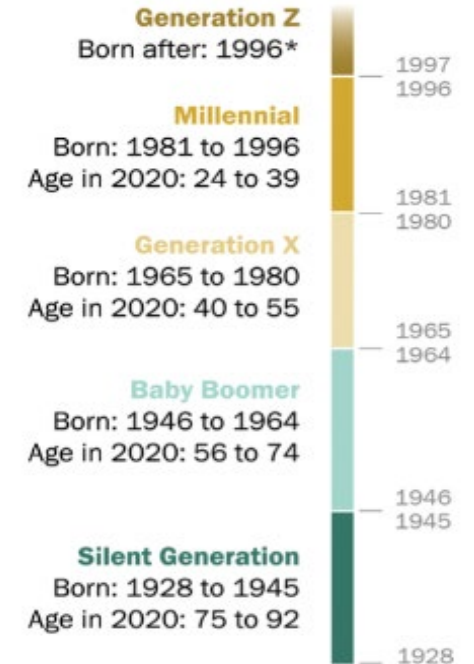




### What do we know about Generation Z?

- Born after 1996, most members of this generation are not yet old enough to vote, but as **the oldest among them turned 23 in 2020**, and roughly 24 million had the opportunity to cast a ballot in the 2020 elections.\*
- Members of **Gen Z are more racially and ethnically diverse** than any previous generation, and they are on track to be the most well-educated generation yet.\*
- They are also **digital natives** who have little or no memory of the world as it existed before smartphones.\*
- **When it comes to their views on key social and policy issues, Gen Zers look very much like Millennials.** Gen Zers are progressive and pro-government, most see the country's growing racial and ethnic diversity as a good thing, and they're less likely than older generations to see the United States as superior to other nations.\*
- These younger generations are more likely than their older counterparts to say the earth is getting warmer due to human activity.\*

#### The generations defined



\*No chronological endpoint has been set for this group.  
“On the Cusp of Adulthood and Facing an Uncertain Future: What We Know About Generation Z So Far”

\*PEW RESEARCH CENTER



# Annual Compliance Requirements

## ACA Form W-2 Reporting

- Who: Employers that filed 250 or more Forms W-2 for 2019
- What: Report the total cost of employer-sponsored health coverage (including employee and employer-paid portions) in Box 12 using Code DD
- When: **January 31, 2021**

## IRC Secs. 6055 and 6056 ACA Reporting

- Who: Applicable Large Employers and employers of any size that sponsored self-insured health coverage in 2020
- What: Complete Forms 1094-B/C and 1095-B/C for the 2020 calendar year
- When: Forms must be submitted to the IRS by **March 1, 2021** if filing hard copies or by **March 31, 2021** if filing electronically (if filing 250 or more forms, electronic filing is mandatory); distribute forms to employees and covered individuals by **March 2, 2021**



## State-Level Health Coverage Reporting

- Who: Employers with covered employees residing in:
  - California
  - Massachusetts
  - New Jersey
  - Rhode Island
  - Washington, D.C.
- What: To ensure compliance with the state-enacted individual health coverage requirements, some employers are required file with the state, and provide to employees, an information return that provides details of coverage provided.
- When: The earliest deadline imposed by a state is **January 31, 2021**



# Annual Compliance Requirements

## Medicare Part D Disclosure to CMS

- Who: Employers that sponsor prescription drug coverage for employees
- What: Report online to CMS whether the prescription drug coverage is considered creditable or non-creditable
- When: Within 60 days following the start of the plan year (by **March 1, 2021** for calendar-year plans)

## PCORI Fee

- Who: Insurance carriers and employer-sponsors of self-insured health coverage
- What: Use Form 720 to report and pay the fee, which has increased to \$2.66 per covered life
- When: **July 31, 2021**

## Form 5500 Filing

- Who: Employer-sponsors of group health plans that either covered at least 100 participants as of the first day of the plan year or are considered funded
- What: File Form 5500 with the U.S. Department of Labor
- When: No later than the last day of the seventh month following the end of the plan year (**July 31, 2021** for calendar-year plans)



## Summary Annual Report

- Who: Employer-sponsors of insured or funded plans that were required to file a Form 5500
- What: Distribute to plan participants a short statement (called the Summary Annual Report) summarizing the financial condition of the plan
- When: Within nine months of the end of the plan year, or two months following the Form 5500 filing (**September 30, 2021** for calendar-year plans)

## Medicare Part D Notice of Creditable or Non-Creditable Coverage

- Who: Employers that sponsor prescription drug coverage for employees
- What: Distribute the Medicare Part D Notice to Medicare-eligible individuals to provide information on the plan's creditable or non-creditable status
- When: No later than **October 14, 2021**



## Closing Thoughts

- Don't neglect **recurring compliance requirements**, such as ACA reporting obligations and 5500 filings. Failure to timely satisfy these requirements can lead to significant monetary penalties, and government agencies have in place existing mechanisms to evaluate compliance.
- **Major initiatives in healthcare** are unlikely to take shape or gain traction until at least late spring with the Supreme Court's decision in *California v. Texas*. The primary focus of the Biden Administration, as well as Congress and most state lawmakers, will be aimed at COVID-19 relief.
- When determining how best to administer health plans in light of the various COVID-19 relief measures that have been issued, **engage insurance carriers and TPAs** at every step.



## **This concludes Day #2 of HRLCS 2021.**

We sincerely thank you for your time and partnership! To get in touch, please contact the **Acrisure Agency Partner** who invited you to attend.

***Also, please take the attendee survey now.***

*The link is posted in your control panel, and you will also be redirected to it immediately upon the conclusion of this call.*

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For those of you with **California operations**, we look forward to seeing you again tomorrow morning at **7:45 AM PST (10:45 AM EST)** for a state-specific dive into the regulatory landscape!



# HR LEADERS

## COMPLIANCE SUMMIT

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For any questions, please contact  
**[hrlds2021@acrisure.com](mailto:hrlds2021@acrisure.com)**.