



Employment & Workplace Laws for 2023

Advanced Benefit Consulting's Lunch & Learn Program

January 24, 2023

Featuring Marilyn A. **Monahan**, Monahan Law Office and Kathy Ruffino, MSHR, SPHR, PHRca, SHRM-SCP, Vice President, Train Me Today



1

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2

2

Your Presenters



Kathy Ruffino,
Vice President
& HR
Consultant &
Trainer, Train
Me Today (left)
and
Marilyn
Monahan, ESQ,
Monahan Law
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3

Course Summary & Learning Objectives

Summary

▪ This course will examine the new and continuing laws and regulations that are effective in 2023. We will cover new California state laws related to employment and human resources, as well as federal laws and regulations. This course will focus heavily on California state laws and employment requirements, including AB 152, AB 257, AB 1401, SB 1044, AB 1601, AB 1751, AB 1949, AB 2693, SB 523 and SB 1162, and review other state related employment, benefits and insurance laws. We will also discuss the status of prior federal COVID laws and regulations, as well as the status of the Supreme Court of the United States *Dobbs v. Jackson Women’s Health* and *Davita vs. Murietta Hospital Health Plan* cases.

Learning Objectives/Takeaways

- Understanding the new employment and workplace laws effective in 2023 in California
- Understanding the continuing laws from 2022 in California as well as federal laws and regulations affecting human resources professionals
- Understanding other related employment, benefits and insurance new laws in California
- Understanding Federal and California COVID-related laws and regulations
- Understanding 2022 applicable SCOTUS cases, including *Dobbs v Jackson Women’s Health* and *Davita v Marietta* and their potential impact on HR professionals



4

4

Agenda

- I. New California State Employment and Workplace Laws in 2023 - KR
 - a. AB 257 – The Fast Act
 - b. AB 1041 expansion of current family leave under CFRA
 - c. SB 1044 Retaliation and “Emergency Situations”
 - d. AB 1601 employment protections for call centers
 - e. AB 1949 bereavement law update
 - f. SB 523 discrimination of applicants and/or employees based on reproductive health decision making
 - g. SB 1162 pay information in job ads and applicants
 - h. Other California new and existing laws changes or updates
 - i. Cal-OSHA (MM&KR)
- II. Federal and California COVID-related regulations Update - MM
 - a. Where do we stand now?
 - b. AB 152 Supplemental Paid Sick Leave Extension
 - c. AB 2693 COVID Notices
 - d. AB 1751 COVID and Workers Compensation
 - e. AB 2068 Cal/OSHA Notices
 - f. Emergency Temporary Standard Changes
- III. SCOTUS Updates - MM
 - a. Dobbs v. Jackson Women’s Health update
 - b. Davita v. Marietta Hospital Health Plan update
- IV. Questions & Answers from attendees/students



Latest Developments



New California State Employment and Workplace Laws in 2023



New California Legislation



7

7

AB 257 – The FAST Act

Two main goals:

- *Ensure employees are paid a “livable wage”*
- *Guarantee a safe working environment*
- Establishes a council that has certain authority, including setting wages, hours of work, and other working conditions and protects employees who disclose information to “watchdog” or community-based groups
- Franchisors are not liable for franchisees violations
- **Status:** On hold. The restaurant industry gathered signatures to support a referendum to put this on the ballot in 2024. California Superior Court of Sacramento issued an injunction to stay the implementation of A.B. 257 until the signature verification process is completed by March 2023



8

8

AB 1041 Expansion of Current Family Leave Under CFRA

- Summary: Expands the definition of “family member” to include a designated person
- The employee must identify this person at the time they request the leave
- Employers may limit employees to one designated person per 12-month period
- Eligibility for leave under CFRA remain the same
- **Action Item:** Review your Family Leave policy, update it to include the new language, and create a system for identifying and tracking the employee’s designated person, communicate new policy to employees



9

9

SB 1044 Retaliation and “Emergency Situations”

- Prohibits employers from taking adverse action against any employee for refusing to report to work or leaving work because the employee has a reasonable belief that the worksite or workplace is unsafe
- Emergency conditions are defined as:
 - *Condition of disaster or extreme peril to the safety of the persons or property at the workplace, caused by natural disaster or criminal act*
 - *An order to evacuate a workplace, worksite, worker’s home, or the school of the worker’s child due to a natural disaster or criminal act*
- Employers are also prohibited from preventing employees from using their personal mobile devices to seek emergency assistance, assess the safety of a situation, or communicate with a person to verify their safety



10

10

AB 1601 Employment Protections for Call Centers

- Expand the California Worker Adjustment and Retraining Act (Cal/WARN) which requires employers to provide advance written notice to employees in the event of mass layoffs, relocation, or termination of operations to include call centers
- Employers must now report such actions to the California Employment Development Department (EDD)
- EDD will now publish a list of employers and their relocation notices
- Failure to report can impact the employer through penalties, including a 5-year exclusion for claiming tax credits, receiving state grants or state-guaranteed loans



11

11

AB 1949 Bereavement Law Update

- Affects employers with 5 or more employees
- Employers must provide five (5) days of bereavement leave upon the death of a qualifying family member as defined under CFRA
- Applies to employees who have been employed at least 30 days prior to the start of the leave
- The leave may be taken consecutively or intermittently, BUT all 5 days must be taken within three (3) months of the family member's death
- Employees are entitled to leave for **each** qualifying event
- Employers may require proof of the family member's death
- Bereavement leave under A.B. 1949 is unpaid **unless** the employer has a current paid bereavement plan in place
- **Action Item:** Create and/or update bereavement leave policy to comply with new law, including pay requirements if applicable



12

12

AB 2188 Discrimination in Employment: Use of Cannabis

- Amends Government Code section 12945 to make it illegal for employers to discriminate against employees who use cannabis off the job and away from the workplace
- Employers are still permitted to test as a condition of employment as long as the tests are not based on the presence of non-psychoactive cannabis metabolites
- Does not permit employees to be impaired while at work
- Does not apply to building and construction trades, or positions requiring federal background investigations and/or security clearances through the DoD
- **Action Item:** Update your company policy and practice on drug testing



13

13

SB 523 Contraceptive Equity Act

- Expands birth control access regardless of gender or insurance coverage status by requiring health plans to cover certain over-the-counter birth control without cost-sharing
- Prohibits employers from discriminating against any employee based on the employee's reproductive health decisions
- Makes it illegal for employers to base employment decisions on an employee's reproductive health decisions and/or requiring the employee to disclose their reproductive health decisions as a condition of employment, continued employment or a benefit of employment.



14

14

SB 1162 Pay Transparency Act

- Employers with **15** or more employees must now post pay scales on all job posting, including internal postings, agency postings and job boards (e.g., Indeed)
- Current employees must be provided the pay scale for their position upon request
- All employers must retain pay data records for each employee that includes the employee's job title(s) and wage range history throughout their employment and for three (3) years after their termination
- Employers with **100** or more employees, and/or 100 or more workers from staffing agencies, must submit their pay data report no later than May 10, 2023, and must include median and mean hourly rate for each combination of race, ethnicity and sex in each job category



15

15

SB 1162 Pay Transparency Act

- Pay data records will be audited by the Labor Commissioner
- Employers who fail to submit to file the mandated report could receive fines of \$100 *per employee*
- Repeat violations will increase to \$200 *per employee*
- Employers who fail to publish pay ranges in job postings could be fined up to \$10,000 *per violation*
- Non-compliance could also lead to employees filing claims that could result in costly lawsuits and reputational damage
- **Action Item:** Develop compensation plan for all jobs within your organization, create records system to maintain pay data history, submit data report no later than May 10, 2023



16

16

Other California New and Existing Laws - Changes or Updates

- **Rest Periods (“breaks”):** Employees are entitled to paid breaks in minimum increments of 10 minutes; the frequency will depend on the number of hours the employee works
- **Meal Periods:** Employees must be provided the opportunity to take a 30-minute uninterrupted, duty-free meal period, exceptions include:
 - Employees working less than five (5) hours
 - Employees working six (6) hours or less and have opted to waive their meal period
- **“Rounding” time:** California Supreme Court ruled that rounding time is not permitted for meal periods (*Donohue v. AMN Services, LLC*); employers may still round at the beginning and end of an employee’s workday



17

17

Other California New and Existing Laws - Changes or Updates

- **Minimum Wage Increase:** The minimum wage increased to \$15.50 per hour effective January 1, 2023
 - Many cities have implemented a higher minimum wage requirement than the state requirement
 - Minimum Annual Salary is 2 times the state minimum wage, or \$64,480
 - Minimum Annual Salary for computer professionals is \$112,065.20
- **Action Item:** Verify the minimum wage for your area, review your employees’ current pay rates, and adjust hourly and salary pay rates for employees where needed to meet the new minimum wage.



18

18

Other California New and Existing Laws - Changes or Updates

- **Los Angeles Fair Work Week Ordinance:** Would impose significant requirements on retail employers in the City of Los Angeles with respect to both scheduling and hiring
- Passed unanimously by the Los Angeles City Council
- If the mayor signs, it will go into effect in April 2023
- Some of the provisions include:
 - Employers must provide a “good faith” estimate of work hours upon hire
 - Work schedules must be stated 14 days in advance of the work period
 - Current employees have right of first refusal for additional work before employers can bring on more staff (except where staff is not qualified, or employee would incur overtime hours)
 - Employers must have employee’s written consent to schedule the worker for a shift less than 10 hours from the end of the employee’s last shift and pay the employee a premium pay rate at time and a half the employee’s regular rate of pay



19

19

Quick Reminders

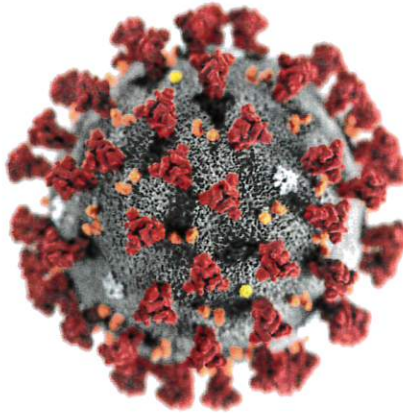
- **HR Audit:** Conduct and complete your annual HR audit, and update your employee handbook policies to include the new laws for 2023
- **Anti-Harassment Training Mandate:** Employers with five (5) employees or more must provide anti-harassment training for *all* employees. Management must receive two hours of training every 2 years; employees (non-supervisory) must receive one hour of training every two years
- **Reimbursement for Employee Use of Personal Cell Phone:** California Labor Code Section 2802 requires employers to reimburse employees for all work-related expenses, including the employee’s use of their personal cell phone
- **Final Pay:** Employers are required to have all final pay ready and available for the employee at the time of separation, except when the employee fails to give sufficient notice.



20

20

COVID-19: Where Are We Now?



21

21

Supplemental Paid Sick Leave



- **A.B. 152:** Extended **Supplemental Paid Sick Leave** through **December 31, 2022** (unless on leave on 12/31—finish leave to which you are entitled).
- **Local Ordinances:** Some local ordinances will remain in effect in 2023 – check your local city and/or county ordinance for special rules
 - The City of Los Angeles has announced the city's supplemental paid sick leave will expire on February 15, 2023. No other cities have indicated sunset dates
- **California Paid Sick Leave:** California's Healthy Families Healthy Workplace require of three (3) days or 24 hours of paid sick leave remains intact



22

22

CAL-OSHA

- **Cal/OSHA Standards Board** approved the new (“ETS”) will be replaced by the new COVID-19 Prevention Non-Emergency Regulations (“Non-emergency Standard”) on December 15, 2022
 - The Permanent Standard will remain in effect through 2024
 - Non-emergency standards will be incorporated into the workplace Injury and Illness Prevention Program (IIPP)
- **Model Injury and Illness Prevention Program:** Cal/OSHA has provided model IIPP to assist employers with developing and/or updating the IIPP (<https://www.dir.ca.gov/dosh/puborder.asp#IIPP>)



23

23

Additional New California Laws on COVID . . .

- **A.B. 2693 (Ch. 799) – COVID Notices:** Extends COVID notice requirements relating to COVID exposure for 1 year (until **January 1, 2024**); changes some of the rules surrounding posting (can place the notice on employee portals rather than providing written notice to employees)
- **A.B. 1751 (Ch. 758) – Workers’ Compensation: COVID:** Extends the rebuttable presumption that, in certain circumstances, COVID-19 is an occupational injury for workers’ compensation purposes to **January 1, 2024**
- **A.B. 2068 (Ch. 485)- Cal/OSHA Notices:** Effective January 1, 2023, Cal/OSHA citations, special orders, or actions must post the Cal/OSHA English version of the notice, along with multiple language versions of the notification that Cal/OSHA
- **Cal/OSHA COVID-19 Emergency Temporary Standard (ETS):** On December 15, 2022, the agency’s Standards Board will be voting on a “permanent” ETS that will replace the existing ETS and be in effect for two years



24

24

COVID-19 Emergency Declarations: Still in Effect



- **Department of Health and Human Services (HHS) Public Health Emergency (PHE):** The Secretary of HHS originally declared a Public Health Emergency (PHE) due to COVID-19. The PHE was most recently extended on October 13, 2022, for another 90 days, and therefore will run until **April 11, 2023** (at which time it may be extended again—we will be given 60 days notice if HHS does not intend to renew)
 - The PHE applies to the obligation of plans to cover **testing** for COVID-19 without cost-sharing, including over-the-counter tests
- **The President's National Emergency (National Emergency):** President Trump declared a National Emergency concerning the Novel Coronavirus Disease (COVID-19) Outbreak (National Emergency), effective March 1, 2020. National Emergency has been extended twice—for one-year increments—it will now expire on **February 28, 2023**, unless ended earlier or extended
 - The **timeframe extensions** are tied to this National Emergency declaration
- **California:** State of Emergency will end **February 28, 2023**



25

25

More Changes

- **Over-the-Counter—Permanent:** The CARES Act provides that over-the-counter drugs and medicines, as well as menstrual products, used for medical care may be reimbursed by an HSA, health FSA, HRA, or Archer MSA; applies to expenses incurred and amounts paid as of January 1, 2020
 - **Action Items:** Optional; amend plan terms and distribute notice of amendment, as necessary; coordinate with TPA
- **Personal Protective Equipment (PPE)—Still in Effect:** PPE—such as masks, hand sanitizer, and sanitizing wipes—for the primary purpose of preventing the spread of COVID-19 may be reimbursed through a health FSA, HSA, HRA, or Archer MSA, if the plan permits it. Applies to PPE costs incurred beginning on or after **January 1, 2020** (IRS Announcement 2021-7)
 - **Action Items:** Amend plan document by **December 31, 2022**



26

26

More Changes . . . Telehealth & Educational Assistance Programs

- **Telemedicine and HSA Eligibility—Expiring:** The CARES Act expanded telehealth services by permitting those enrolled in a HDHP to receive reimbursements for their telemedicine services below the HSA deductible limit without loss of HSA eligibility—expansion only applies to plan years beginning on/before **December 31, 2021—but then was expanded by the Consolidated Appropriations Act, 2022 for “months beginning after March 31, 2022, and before January 1, 2023”**
 - **New! Consolidated Appropriations Act, 2023:** Telehealth and remote care services will be disregarded—and will not cause a loss of HSA eligibility—during plan years beginning after December 31, 2022, and before January 1, 2025 (mind the gap)
- **Student Loans—Still in Effect but Has an Expiration Date:** The CAA modifies the law on educational assistance programs to allow employers to pay (to an employee or lender, including principal or interest) up to \$5,250 toward an employee’s qualified education loan; not taxable income to employees; payments must be made before **January 1, 2026** (26 U.S.C. § 127)
 - **Note:** CA law has not been amended accordingly
 - **Action Items:** Optional; create plan or amend existing plan terms



27

27

COVID-19 Vaccines, Testing, and Treatment: Where Are We?

- **Testing:** During the HHS PHE, plans (individual and group, fully insured and self-funded, GR and non-GR) must cover testing for the detection or diagnosis of COVID-19 and related items and services without cost-sharing, prior authorization, or other medical management requirements
 - **FAQs Part 51 (1/10/22) and FAQs Part 52 (2/4/22):** Plans must pay for at-home tests, even if not ordered by a provider; 8 per month; tests may also be reimbursed through health FSA or HSA
- **Treatment:** This same rule does not apply to treatment—so cost-sharing may apply
- **Vaccinations:** Non-GR health plans must cover the cost of the COVID-19 vaccine as a preventive service without cost-sharing



28

28

California: Mandated Benefits



- **S.B. 510 - Health Care Coverage: COVID-19 Cost Sharing:** (a) Insurers/HMOs must cover the cost of COVID-19 diagnostic and screening tests and health care services related to the testing; (b) must also cover the cost of COVID-19 immunization
 - Coverage is without cost-sharing or prior authorization
 - Limits on cost-sharing for out-of-network providers tied to federal public health emergency
 - “Diagnostic” and “screening” have broad definitions—including screening “workers in a workplace setting,” “before or after travel,” students/faculty, and at-home tests
 - Also applies to future diseases when declared a public health emergency by the governor
 - Provisions effective **January 1, 2022**, and retroactive to **March 4, 2020**

- **S.B. 1473 (Ch. 545) – Health Care Coverage: COVID-19 Cost Sharing:** When the federal PHE ends, plans no longer have to cover COVID testing and vaccines from an out-of-network provider without cost sharing; effective **September 25, 2022**



New Federal Laws



Consolidated Appropriations Act, 2023 (H.R. 2617)



- **Secure 2.0 Act of 2022:** Retirement plan changes—not summarized here
 - **Long-Term Care:** May use retirement accounts to pay long-term care premiums
 - **Student Loan Debt:** Starting in 2024, employers may match student loan payments with contributions to a qualified plan
- **Telehealth:** Telehealth and remote care services will be disregarded—and will not cause a loss of HSA eligibility—during plan years beginning after December 31, 2022, and before January 1, 2025 (mind the gap)
- **Mental Health Parity:** Increased funding for Mental Health Parity enforcement; no more opt outs for self-insured non-federal governmental plans
- **Pump for Nursing Mothers Act:** Must provide accommodations in the workplace for expressing milk
- **Pregnant Workers Fairness Act:** Must make reasonable accommodations in the workplace in relation to known limitations related to pregnancy, childbirth, and related medical conditions



31

31

The Speak Out Act (S. 4524)

- With respect to a sexual assault dispute or sexual harassment dispute, no nondisclosure clause or nondisparagement clause agreed to before the dispute arises shall be judicially enforceable in instances in which conduct is alleged to have violated Federal, Tribal, or State law.
- Nothing in this Act shall prohibit a State or locality from enforcing a provision of State law governing nondisclosure or nondisparagement clauses that is at least as protective of the right of an individual to speak freely, as provided by this Act.
- This Act shall not be construed to supersede a provision of Federal, State, or Tribal Law that governs the use of pseudonyms in the filing of claims involving sexual assault or sexual harassment disputes.
- Nothing in this Act shall prohibit an employer and an employee from protecting trade secrets or proprietary information.
- This Act shall apply with respect to a claim that is filed under Federal, State, or Tribal law on or after the date of enactment of this Act.



32

32

Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 (H.R. 4445)

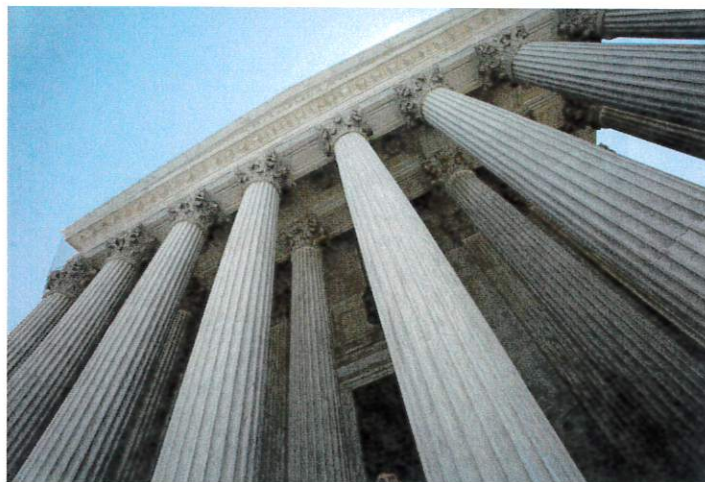
- Bill Summary: The bill invalidates arbitration agreements that preclude a party from filing a lawsuit in court involving sexual assault or sexual harassment, at the election of the party alleging such conduct
- The court—and not the arbitrator—will decide if the Act applies, even if the arbitration clause confers that responsibility on the arbitrator
- The term “sexual assault dispute” means a dispute involving a nonconsensual sexual act or sexual contact, as such terms are defined in section 2246 of title 28 or similar applicable Tribal or State law, including when the victim lacks capacity to consent
- The term “sexual harassment dispute” means a dispute relating to conduct that is alleged to constitute sexual harassment under applicable Federal, Tribal, or State law
- Applies with respect to any dispute or claim that arises or accrues on or after March 3, 2022
- Signed by President Biden on March 3, 2022



33

33

The Supreme Court



34

34



Dobbs v. Jackson Women’s Health Organization



- **Dobbs v. Jackson Women’s Health Organization (2022):** The Constitution does not confer a right to the authority to regulate abortion belongs to state representatives. By overturning *Roe v. Wade*, the shifted the abortion issue to the states. (Resource: www.kff.org)
- **Health Coverage:** What impact does *Dobbs* have on group health plan coverage?
 - If fully insured, will depend on state law and terms of policy—does the state mandate or permit carriers to offer coverage, and does the state limit or prohibit abortion
 - If self-funded, coverage will be determined based on terms of plan, but coverage may be impacted by applicable state law if it limits or prohibits abortion
- **CDI:** “California law is clear that abortion care is basic health care and covered by most insurance.”
 - FAQs: <https://www.insurance.ca.gov/01-consumers/110-health/30-have/Coverage-for-Abortion.cfm>
 - Bulletin 2022-7 (July 21, 2022)
- **DMHC:** “In California, both private health insurance plans regulated by the Department of Managed Health Care and Medi-Cal health plans under contract by the Department of Health Care Services must continue to cover reproductive health services, including abortions.”
 - August 22, 2014, letter to HMOs



Plan Design Options



- Scope of coverage (elective or therapeutic), and how will that be defined
 - Employer reimbursement of “medical care” (as defined by 26 U.S.C. § 213(d)) is not taxable income to the employee (26 U.S.C. § 105)
 - Abortion “not illegal under state law” is considered “medical care” under § 213(d) (IRS Rev. Ruling 73-201 & 73-603)
- Offer coverage inside or outside the group health plan (through an HRA)
 - Include as part of ERISA plan, where applicable
 - For HRAs, to address ACA issues, integrate with major medical plan
 - Expenses paid below deductible may impact HSA eligibility if covered by a HDHP
 - Other benefit laws will apply—COBRA, HIPAA, etc.
- Offer travel benefits as part of plan (apply limitations in 26 U.S.C. § 213(d)) (more over)
- We do not yet know applicability of ERISA preemption on potential civil or criminal liability (aiding and abetting)
- **Action Items:** Amend plan, communicate change, and coordinate with TPA (update contract as needed)



Internal Revenue Code and Travel Benefits

- Under section 213(a) & (d)(1) of the IRC, plans may reimburse “**medical care**”
 - Does not include “amounts expended for illegal operations or treatments” (26 C.F.R. § 1.213-1(e)(1)(ii))
- Under section 213(d)(1)(B) of the IRC, **transportation** primarily for and essential to medical care may be reimbursed (may use standard mileage rate—effective 7/1/22, increased to **22 cents**); includes bus, taxi, train, or plane fares or ambulance service (**Resource:** IRS Publication 502)
- Under section 213(d)(2) of the IRC, certain **lodging** away from home may be treated and paid as medical care up to **\$50** per night; must satisfy these requirements:
 - It is primarily for and essential to medical care
 - The medical care is provided by a doctor or in a licensed hospital or a medical care facility related to, or the equivalent of, a licensed hospital
 - The lodging isn’t lavish or extravagant under the circumstances
 - There is no significant element of personal pleasure, recreation, or vacation in the travel away from home
- **Meals** generally cannot be reimbursed
- **Note:** Expenses must be substantiated; reimbursements above limits are taxable income



37

37

Marietta Memorial Hospital Employee Health Benefit Plan v. DaVita, Inc.

- **Suit:** DaVita challenged the “relatively limited” reimbursement rate paid by Marietta’s self-funded plan for outpatient dialysis services provided out-of-network. DaVita argued that the reimbursement arrangement violated the **Medicare Secondary Payer (MSP)** statute. The Court disagreed (7-2)
- **Background:** Medicare provides coverage for individuals with end-stage renal disease (ESRD), regardless of age or disability. For the first 30 months after an individual is diagnosed with ESRD, Medicare is the secondary payer when the individual is also covered by an employer-sponsored group health plan, and the employer’s plan pays first. To discourage shifting of costs from employer-sponsored coverage to Medicare, the MSP rules impose certain limitations on group health plans. Under these MSP limitations, (a) plans cannot differentiate in the benefits they provide to individuals with ESRD and those without ESRD, and (b) plans cannot “take into account” that an individual is entitled to or eligible for Medicare due to ESRD.
- **Decision:** In upholding the plan’s reimbursement arrangement, the Court explained that the plan treats all participants receiving dialysis the same—regardless of whether they have ESRD or are eligible for Medicare—even though most people receiving dialysis have ESRD
- **End Result:** Plans have more flexibility in setting reimbursement rates for outpatient dialysis



38

38

Questions & Answers from Attendees/Students



39

39

CE Credit Reminders

- Don't forget to sign out on the CE forms for HRCI credit.
- Certificates of Completion will be handed out at the end of the program.
- Zoom participants will receive a notice of HRCI program ID numbers after ABC has reviewed your attendance.
 - You will receive a certificate by email for each course completed for HRCI credit.

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40

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Questions?



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