

Federal: Use of Online Tracking Technologies by HIPAA-Covered Entities and Business Associates

On December 1, 2022, the Office for Civil Rights (OCR) released a [bulletin](#) about the use of online tracking technologies for entities and business associates (regulated entities) covered by the Privacy, Security, and Breach Notification Rules of the Health Insurance Portability and Accountability Act of 1996 (HIPAA). The bulletin defines tracking technology and how the HIPAA Rules apply:

- On user-authenticated webpages;
- On unauthenticated webpages;
- Within mobile apps; and
- To HIPAA compliance obligations for regulated entities when using tracking technologies.

Tracking technologies collect and analyze information about user interaction with websites or mobile apps. For example, a regulated entity hires a technology vendor to analyze user interaction with its website or app as part of its health care operations. The HIPAA Rules apply when information collected by that regulated entity—through the tracking technology or information disclosed to tracking technology vendors—includes protected health information (PHI).

Federal: President Biden Signs the Speak Out Act

Effective December 7, 2022, and for claims filed on or after that date, the federal Speak Out Act prohibits judicial enforcement of a nondisclosure clause or nondisparagement clause agreed to before a dispute arises involving sexual assault or sexual harassment. The act doesn't prohibit employers and employees from protecting trade secrets or proprietary information.

([US SB 4524](#) was signed by [the President](#) on December 7, 2022)

Federal: Informational Copies of 2022 Form 5500 Series Annual Return/Report Release

Pension and welfare benefit plans required to file an annual return/report regarding their financial condition, investments, and operations generally file the necessary Form 5500 series return/report along with required schedules and attachments. Concerning these returns/reports, the Employee Benefits Security Administration (EBSA) announced:

- The December release of [informational copies of the 2022 Form 5500, Form 5500-SF, and their related instructions](#); and
- That the informational copies of the IRS 2022 Form 5500-EZ and its instructions will be separately released after January 1, 2023, on the IRS website.

Important modifications to the forms, schedules, and instructions can be found in the Changes to Note section of the 2022 instructions for each. For Forms 5500 and 5500-SF, the Changes to Note information concerns:

- Multiple-employer plans.
- Administrative penalties.
- Schedule MB for multi-employer defined benefit plan information and certain money purchase plan actuarial information.
- Schedule R for retirement plan information.
- Schedule SB for single employer defined benefit plan actuarial information.

Informational copies cannot be used to file a 2022 Form 5500 Series Annual Return/Report. Filers should monitor efast.dol.gov for information on when the official electronic versions are available and can be filed using software from EFAST2-approved vendors or directly through the EFAST2 website.

Note: Beginning January 1, 2023, all new EFAST2 website accounts will be created using the Login.gov process. Existing filers may use their EFAST2-issued user ID and password to log in to the EFAST2 website until September 1, 2023. This eight-month grace period provides a gradual transition for filers. However, existing filers may change to a Login.gov account as early as January 1, 2023.

([Newsroom release](#) from the EBSA on December 8, 2022)

Federal: Respect for Marriage Act Safeguards Employee Benefits

On December 13, 2022, President Biden signed the Respect for Marriage Act, which provides statutory authority for same-sex and interracial marriages. The federal law repeals the Defense of Marriage Act that defined **marriage between** as between a man and a woman and **spouse** as a person of the opposite sex. These new provisions, for the purposes of federal law, recognize any marriage between two individuals that is valid under state law. States that previously were not required to recognize same-sex marriages from other states are now prohibited from denying any right or claim related to such marriages based on sex, race, ethnicity, or national origin.

Violation of the law will allow the Department of Justice to pursue civil action.

The Respect for Marriage Act does not affect religious liberties available under the Constitution or other federal laws. It does not require religious organizations to provide services to recognize a marriage and does not affect any benefits or rights that do not arise from a marriage. The act does not legalize same-sex marriage in all 50 states.

The passage of this act allows same-sex couples to have the same federal rights and protections as opposite-sex couples, including employee benefits.

Read the [Respect for Marriage Act](#)

Federal: Minimal Essential Coverage Reporting Regulations Finalized

Effective December 15, 2022, the IRS's regulations were finalized and published in the Federal Register. They provide an automatic extension of time for minimum essential coverage providers (including health insurance issuers and self-insured employers) to furnish individual statements about coverage, along with an alternative furnishing method, when the individual shared responsibility payment is zero. They also clarify that minimum essential coverage, as used in health insurance-related tax laws, doesn't include Medicaid coverage limited to COVID-19 testing and diagnostic services provided under the Families First Coronavirus Response Act.

The final regulations also:

- Provide an automatic time extension for applicable large employers (ALEs) with 50 or more full-time employees, including full-time equivalent employees, to furnish statements about health insurance that the ALE offers to their full-time employees; and
- Apply as follows (effective on December 15, 2022):
 - The regulations under [§ 1.5000A-2](#) (minimum essential coverage) apply for months beginning after September 28, 2020.
 - The regulations under [§§ 1.6055-1](#) and [301.6056-1](#) apply for calendar years beginning after December 31, 2021.

[\(87 FR 76569\)](#)

Federal Pregnancy and Lactation Accommodations Expanded

While federal employment law changes are generally few and far between, the budget bill that was just passed by Congress and signed by the President includes *two* sections that provide new protections for pregnant and lactating employees and applicants. We'll provide a deeper analysis, if needed, once we've had time to carefully review the final version of the law, but in the meantime, here are the highlights based on the publicly available bills.

Pregnant Workers Fairness Act

Employers with 15 or more employees must now accommodate employees' and applicants' known limitations related to pregnancy, childbirth, or related medical conditions unless it would create an undue hardship. Employers also cannot take any adverse action against an employee or applicant for requesting or using an accommodation.

Previously under federal law, employers generally only had to provide reasonable accommodations for pregnant employees and applicants if they also provided accommodations to other employees who were similar in their ability or inability to work because of a medical condition or injury. Note that many state laws already went above and beyond federal law in requiring accommodations for pregnant employees.

This appears to take effect immediately, but aligns with best practices, so hopefully will not require a significant change in approach for most employers.

Lactation Accommodations

The "Providing Urgent Maternal Protections for Nursing Mothers Act," or PUMP Act, expands the current federal requirements for providing employees with time and space to breastfeed or pump at work. Specifically:

- Exempt employees are now covered by the law (previously only nonexempt employees were covered).
- Employees must be allowed break time to express milk for up to two years (previously capped at one year) following a broader range of circumstances than just the birth of their own, live child.
- Employees who work *while* expressing breast milk must be paid for that time and have it count toward their total hours worked (arguably this was already true, but now it's crystal clear).

This law applies to employers of all sizes but (still) has an exception for employers with fewer than 50 employees if they can show that providing accommodations would cause an undue hardship.

These new requirements will take effect in approximately 120 days.