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FEW Washington Legislative Update
April 1-15, 2024

In Congress:

Congress returns to Capitol Hill this week following its two-week Easter recess and having wrapped up a turbulent fiscal 2024 appropriations process but still staring down a host of pressing priorities.

On Monday, April 1, a new bill was introduced which would remove the security access of any federal employee and candidate running for federal office if charged with certain crimes. The Guarding the United States Against Reckless Disclosures Act — sponsored by Rep. Mikie Sherrill, D-N.J., — would restrict classified access of an individual charged or convicted of obstructing an official proceeding, unlawful retention of national defense information, the unlawful disclosure or improper handling of classified information, acting as a foreign agent or compromising the national security of the United States.

Senate Majority Leader Chuck Schumer's (D-New York) bipartisan wish-list, which he laid out earlier in a Dear Colleague letter to Senate Democrats, is extensive and ambitious, with much of it carrying over from last year. Toping that list is rail safety legislation, a cannabis banking package and potential work on Big Tech, including a kids' safety bill and on the future of TikTok. Complicating completion of that work however is a series of must-pass items — including FISA renewal later this month and FAA reauthorization in May — and an expected supplemental package to deal with the collapse of the Francis Scott Key Bridge in Baltimore last month. While the federal government is expected to cover a large part of the recovery using existing emergency funds, Congress still needs to play a role in approving additional dollars for rebuilding the bridge and helping to cover the economic loss that the Port of Baltimore has experienced.

Most of the action this week will be working on a resolution to Ukraine funding.

On Wednesday, April 10, The House Oversight and Accountability Committee on advanced legislation aimed at preventing improper payments in the employer-sponsored health insurance program for federal workers. In 2022, the Government Accountability Office issued a report finding that the federal government needs to do more to ensure enrollees in the Federal Employees Health Benefits Program, which provides health insurance to roughly 8 million federal employees, retirees and their families, are eligible for the benefits.

On Friday, April 12, President Biden rescinded a trio of executive orders enacted during the height of the COVID-19 pandemic, shuttering temporary panels, and shuffling duties to a fledgling White House office devoted to pandemic response. The Executive Order on COVID-19 and Public Health Preparedness and Response, signed Friday, ends edicts aimed at preventing the hoarding of medical supplies, promoting pandemic-era travel safety policies and the order that required mask-wearing in federal facilities and creating the Safer Federal Workforce Task Force.

Diversity, Equity, and Inclusion:

The Supreme Court Just Complicated Employer DEI Programs

The U.S. Supreme Court's ruling that a St. Louis police sergeant can sue over a job transfer she claims was discriminatory was championed by human rights groups as "an enormous win for workers."

However, hours after the decision Wednesday, lawyers were warning that the outcome could have a chilling effect on employers' diversity initiatives because it adds to questions about what's legal.

Jatonya Clayborn Muldrow sued the City of St. Louis after she was reassigned from the department's intelligence division on public-corruption and human-trafficking cases to a job in the city's Fifth District. Though she was paid the same, she said she had to start working weekends, had less prestigious assignments and lost access to high-profile people. In short, she argued, the transfer was negative for her, and claims it was made on the basis of sex.

Workplace discrimination due to sex or other protected characteristics — like race, color, religion, or national origin — is illegal, but courts across the country have disagreed about how substantial the unequal treatment must be to merit a legal claim.

In this case, the city argued that Muldrow's lateral move at the same pay grade wasn't significantly harmful enough to meet the standard.

The Supreme Court disagreed, saying an employee just needed to show "some harm" under the terms of their employment, but it doesn't need to be "material," "substantial" or "serious." The decision makes it easier for workers to sue over discriminatory job transfers.

Some employment lawyers say the same reasoning could be carried over to workplace development programs or employee resource groups designed to benefit traditionally underrepresented cohorts: for example, a fellowship that only accepts Hispanic students or a leadership program only open to women.

"Could you say that exclusion from participation in a mentoring or leadership program materially disadvantages someone?" said Jonathan Segal, a partner specializing in employment and labor law at Duane Morris. Even before the opinion, Segal was advising companies to eschew development programs that only allow people of protected groups to participate, he said. Now, he says, "the risk is even higher."

The Supreme Court's decision to overturn affirmative action in college admissions last year prompted executives across the country to reexamine their diversity, equity and inclusion, or Diversity, Equity, and Inclusion (DEI) programs. At the same time, conservative legal groups refocused their attentions on corporations, arguing that some initiatives meant to benefit marginalized groups amount to reverse discrimination.

Though the racial justice group Legal Defense Fund praised the ruling, Senior Economic Justice Counsel Pilar Whitaker acknowledged opponents of DEI programs likely "will see this as an opening" to launch new attacks on diversity programs.

She's among lawyers who believe that anyone seeking to sue for being excluded from a program will face steep hurdles in proving that being left out hurts them.

"The Court reaffirmed that challengers must establish harm or injury in a term or condition of employment," said Lauren Hartz, co-chair of the DEI Protection Task force at law firm Jenner & Block. In her view, that won't be easy to prove, but will still open the door to more lawsuits. Her firm is advising companies to carefully document changes to employee schedules, perks, and assignments to ensure that they can later show the moves weren't discriminatory.

The ruling is a “double-edged sword,” says David Glasgow, executive director for the Meltzer Center, which studies DEI law at New York University. “It may become a bit easier to challenge DEI programs, but it will also be a bit easier to bring traditional discrimination claims,” such as the one Muldrow brought against St. Louis.

Sourced From: (Bloomberg Law)

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Tier I

The Federal Government Will Now Offer its Employees Generous Fertility Benefits

Companies have increasingly offered generous fertility benefits to attract and keep top-notch workers. Now, the federal government is getting in on the act. Starting this year, federal employees can choose plans that cover several fertility services, including up to $25,000 annually for In vitro fertilization (IVF) procedures and up to three artificial insemination cycles each year.

With about 2.1 million civilian employees, the federal government is the nation’s largest employer. Now, just as businesses of every stripe prioritize fertility benefits, In vitro fertilization — a procedure in use for more than 40 years — has become a tricky topic for some anti-abortion Republican members of Congress and even presidential candidates.

It was inevitable that disagreements over IVF among abortion opponents would eventually break into the open, said Mary Ziegler, a legal historian and expert on reproductive health.

“The anti-abortion movement from the 1960s onward has been a fetal personhood movement,” said Ziegler, a law professor at the University of California-Davis. Since the U.S. Supreme Court’s Dobbs decision eliminated the constitutional right to abortion, anti-abortion groups and the Republican Party are grappling with what “fetal personhood” means and how that fits into their position on IVF and other technologies that help people have babies.

The Alabama Supreme Court set the stage for the recent brouhaha with a ruling last month that frozen embryos created through IVF are children under state law. A pair of Democratic senators advanced legislation that would override state laws by establishing

a statutory right to access IVF and other such technologies. The bill was blocked on the Senate floor by a Republican opponent.

These events highlight the tough spot in which Republicans find themselves. Many support IVF, and they are keenly aware that it's extremely popular: 86 percent of adults in a recent CBS News-YouGov poll said IVF should be legal. The outcry over the Alabama ruling and Republicans' inability to coalesce around a federal response, however, has exposed fault lines in the party.

Some anti-abortion groups have strenuously objected to measures like that Senate bill, arguing that lawmakers must balance IVF with the responsibility to respect life.

Republicans "are trying to finesse it, which is very hard," Ziegler said.

About 10 percent of women and men face fertility problems, according to the National Institute of Child Health and Human Development. IVF, a process in which an egg is fertilized in a laboratory and later implanted in the uterus, is among the most expensive fertility treatments, costing about $20,000 for one round. Even with insurance coverage, the procedure is pricey, but for some people it's the only way to conceive.

In recent years, the number of companies offering fertility benefits to employees has grown steadily. In the early 2000s, fewer than a quarter of employers with at least 500 workers covered IVF, according to benefits consultant Mercer's annual employer survey. In 2023, that figure had roughly doubled, to 45 percent. Employers typically cap IVF benefits. In 2023, employers had a median lifetime maximum benefit of $20,000 for IVF, according to the Mercer survey.

The federal government's IVF benefit — paying up to $25,000 a year — is more generous than that of a typical employer. Coverage is available in the popular Blue Cross and Blue Shield Federal Employee Program, which covers more than 5 million federal employees, retirees, and family members worldwide. Altogether, two dozen 2024 health plans for federal workers offer enhanced IVF coverage, with varying benefits and cost sharing, according to the federal Office of Personnel Management (OPM), which manages the federal health plans.

"OPM's mission is to attract and retain the workforce of the future," said Viet Tran, OPM's press secretary, in written answers to questions. He noted that surveys have found that federal health benefits have influenced employees' decisions to stay with the federal government.

Starting this year, plans offered to federal employees are required to offer fertility benefits, according to OPM.

But it’s unclear how the emerging political debate surrounding IVF and other reproductive health issues could affect national benefit and coverage trends.

Last month, after the Alabama Supreme Court ruled that frozen embryos left over following IVF procedures are considered children under state law, the state legislature quickly passed and Republican Gov. Kay Ivey signed a bill that grants immunity to patients and providers who participate in IVF services. During the ensuing dust-up, a coalition of more than a dozen anti-abortion groups signed a letter drawing a clear line in the sand. “Both science and logic have made it clear that embryos must be accorded the same human rights” as other human beings, it read. The Alabama law didn’t address the underlying issue of the “personhood” of the embryos, leaving open the door for further litigation and potential restrictions on IVF in Alabama and other states, some legal analysts say.

More than a third of states have laws on books that classify fetuses as people at some stage of pregnancy, according to an analysis by Politico.

It's unclear whether the turmoil surrounding the Alabama case will have long-term repercussions for employee benefits there or in other states.

“If this were something that were to happen in multiple states, employers would have to figure out how to navigate around that,” said Jim Winkler, chief strategy officer of the Business Group on Health, a nonprofit that represents the interests of large employers. At this point, employers will want to keep a watchful eye on the issue but probably not plan any changes, Winkler said.

A Mercer blog post advised businesses with Alabama employees to review health plan policies related to medical travel and leave benefits. Further, “employers should monitor other states that broadly define fetal personhood and restrict reproductive healthcare,” the blog post advised.

The situation is reminiscent of what happened with abortion coverage following the Supreme Court’s Dobbs v. Jackson Women's Health Organization decision in 2022. As states-imposed restrictions on access to abortions, many companies began providing travel expenses for their workers to seek them.

But what happened with abortion may not be a good predictor of what will happen with IVF, said Dorianne Mason, director of health equity at the National Women’s Law Center.

Following the Alabama judge’s ruling, “the legislature in Alabama moved so quickly to respond to the outcry,” Mason said. “When we look at the legislative response to IVF,

it's moving in a markedly different direction on access to care" than has occurred with other types of reproductive care.

Sourced From: **(Government Executive)**

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Tier II

OPM Issues its Final Rule for Schedule F Protections

The Office of Personnel Management issued the final version of its regulation meant to safeguard the civil service from the return of a Trump-era policy that sought to convert most federal employees to at-will workers.

The new regulation — which will be published in the Federal Register for public inspection on Thursday — seeks to provide 2.2 million federal employees with defined protections that would make it difficult for a future administration to re-apply the Trump policy, known as Schedule F.

"We are confident that our final rule is the best reading of civil service statutes and is grounded in the civil service in the statutory language, congressional intent, legislative history and decades of applicable case law and practice," said OPM Deputy Director Rob Shriver on a press call. "The rule is strong; it will help to ensure the rights employees earned as envisioned by Congress when it enacted the Civil Service Reform Act in 1978 and expanded and strengthened those protections through subsequent enactments."

The regulation has its roots in an October 2020 executive order from the Trump administration that created a new job category for federal employees in policy-related positions, dubbed Schedule F, that would exempt them from civil service protections and make them easier to remove.

President Joe Biden rescinded the executive order in January 2021 before it could be fully implemented, but nine days before Biden took office, the Office of Management and Budget received OPM approval to move 68 percent of its workforce into Schedule F.

OPM officials began working on new regulations to make it difficult to reintroduce Schedule F policies in September 2023, receiving more than 4,000 public comments.

"Today, my administration is announcing protections for 2.2 million career civil servants from political interference, to guarantee that they can carry out their responsibilities in the best interest of the American people," said Biden, in a statement. Day in and day out, career civil servants provide the expertise and continuity necessary for our democracy to function. They provide Americans with life-saving and life-changing services and put opportunity within reach for millions. That's why since taking office, I have worked to strengthen, empower, and rebuild our career workforce. This rule is a step toward combating corruption and partisan interference to ensure civil servants are able to focus on the most important task at hand: delivering for the American people."

The final rule states that an employee's civil service protections cannot be taken away by an involuntary move from the competitive service to the excepted service; clarifies that the "employees in confidential, policy-determining, policy-making or policy-advocating positions" terminology used to define Schedule F employees means noncareer, political appointments and won't be applied to career civil servants; and sets up an appeals process with the Merit Systems Protection Board for any employees involuntarily transferred from the competitive service to the excepted service and within the excepted service.

The move comes in an election year where Trump is seeking a return to the White House, and GOP allies, and rivals, have sought to revive the policy if elected.

"If another administration were to disagree with the policies that are reflected in this regulation, first, they would have to follow that full rulemaking process themselves," said a senior administration official when asked about potential attempts to revive Schedule F. "They would have to justify how a different rule would ensure that decisions to hire and fire were based on how well federal employees served the American people, as is required by the merit system principles that are enshrined in the law, rather than on their political allegiance."

Biden administration officials said that the regulation is the strongest protection the White House can provide to safeguard against Schedule F, though there have been similar GOP efforts on Capitol Hill last year to codify elements of the policy.

A senior administration official said the White House would welcome legislation to further strengthen civil service protections, but that the new regulation was "firmly in line" with existing policies in the current law.

The final rule was largely well-received among stakeholders and groups advocating for good governance.

“Today’s final rule is a necessary step to prevent partisan abuse of the civil service rules and a return to the failures and corruption of the spoils system of the 1800s,” said Max Stier, president, and CEO of The Partnership for Public Service, in a statement. "Those rules do, however, need to be updated. Agencies and the administration should continue to explore ways to make our federal government more responsive, transparent, and accountable to the American people.”

“Streamlining processes for hiring, performance management and accountability, and preparing managers to support the workforce through the talent lifecycle are just some of the ways the federal government can better serve while adhering to merit principles," he added. "The Partnership stands ready to work with Congress, agencies, administrations of both parties and anyone interested in taking on these important tasks.”

House Committee on Oversight and Accountability Ranking Member Jamie Raskin, D-Md., and House Subcommittee on Government Operations and the Federal Workforce Ranking Member Kweisi Mfume, D-Md., both applauded the rule in a statement.

"The president’s job under the Constitution is to take care that all the laws of the people are ‘faithfully executed,’ not demolished at the whim of a despot,” Raskin said. "A nonpartisan civil service is essential to governmental effectiveness and fairness because who you vote for should never affect your rightful access to government benefits and services. This regulation will work to protect a civil service that implements the laws of the people and protects the rights and benefits of the people against partisan manipulation."

Mfume said he was pleased the final regulation was adopted, "Civil servants are the nucleus of our federal workforce and provide the continuity needed to keep our government operating efficiently," he said. "I applaud the Office of Personnel Management for working with my congressional colleagues and me on this rule, because hardworking public servants deserve to be protected from the volatility of electoral politics."

The regulation is expected to go into effect on May 9.

Sourced From: **(NextGov)**

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Tier III

EEOC Issues Final Regulation on Pregnant Workers Fairness Act

The U.S. Equal Employment Opportunity Commission (EEOC) issued a final rule to implement the Pregnant Workers Fairness Act (PWFA), providing important clarity that will allow pregnant workers the ability to work and maintain a healthy pregnancy and help employers understand their duties under the law. The PWFA requires most employers with 15 or more employees to provide "reasonable accommodations," or changes at work, for a worker's known limitations related to pregnancy, childbirth, or related medical conditions, unless the accommodation will cause the employer an undue hardship.

The PWFA builds upon existing protections against pregnancy discrimination under Title VII of the Civil Rights Act of 1964 and access to reasonable accommodations under the Americans with Disabilities Act. The EEOC began accepting charges of discrimination on June 27, 2023, the day on which the PWFA became effective.

The final rule will be published in the Federal Register on April 19. The final rule was approved by majority vote of the Commission on April 3, 2024, and becomes effective 60 days after publication in the Federal Register.

The final rule and its accompanying interpretative guidance reflect the EEOC's deliberation and response to the approximately 100,000 public comments received on the Notice of Proposed Rulemaking. It provides clarity to employers and workers about who is covered, the types of limitations and medical conditions covered, how individuals can request reasonable accommodations, and numerous concrete examples.

"The Pregnant Workers Fairness Act is a win for workers, families, and our economy. It gives pregnant workers clear access to reasonable accommodations that will allow them to keep doing their jobs safely and effectively, free from discrimination and retaliation," said EEOC Chair Charlotte A. Burrows. "At the EEOC, we have assisted women who have experienced serious health risks and unimaginable loss simply because they could not access a reasonable accommodation on the job. This final rule provides important information and guidance to help employers meet their responsibilities, and to jobseekers and employees about their rights. It encourages employers and employees to communicate early and often, allowing them to identify and resolve issues in a timely manner."

Highlights from the final regulation include:

- Numerous examples of reasonable accommodations such as additional breaks to drink water, eat, or use the restroom; a stool to sit on while working; time off for

health care appointments; temporary reassignment; temporary suspension of certain job duties; telework; or time off to recover from childbirth or a miscarriage, among others.

- Guidance regarding limitations and medical conditions for which employees or applicants may seek reasonable accommodation, including miscarriage or still birth; migraines; lactation; and pregnancy-related conditions that are episodic, such as morning sickness. This guidance is based on Congress's PWFA statutory language, the EEOC's longstanding definition of "pregnancy, childbirth, and related medical conditions" from Title VII of the Civil Rights Act of 1964, and court decisions interpreting the term "pregnancy, childbirth, or related medical conditions from Title VII.

- Guidance encouraging early and frequent communication between employers and workers to raise and resolve requests for reasonable accommodation in a timely manner.

- Clarification that an employer is not required to seek supporting documentation when an employee asks for a reasonable accommodation and should only do so when it is reasonable under the circumstances.

- Explanation of when an accommodation would impose an undue hardship on an employer and its business.

- Information on how employers may assert defenses or exemptions, including those based on religion, as early as possible in charge processing.

More information about the PWFA and the EEOC's final rule, including resources for employers and workers, is available on the EEOC's "What You Should Know about the Pregnant Workers Fairness Act" webpage.

For more information on pregnancy discrimination, please visit https://www.eeoc.gov/pregnancy-discrimination.

Sourced From: (U.S. Equal Employment Opportunity Commission)