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Employee Benefits for Employers

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A Note from the Editor

After a long and heated campaign, there is a new President for the first time in eight years. Regardless of one's political sensibilities, it should be clear to any observer that the incoming administration's goals and priorities will differ dramatically from those of the outgoing administration. These changes will undoubtedly be felt in the employee benefits field as much as anywhere. In this special Inauguration Edition, several leading practitioners offer their insights on what we might expect from a Trump Administration. Monique Warren considers how President Trump's promise to repeal the Affordable Care Act — a centerpiece of the campaign — might affect employers. Keith Dropkin, Rob Perry, and Stephanie Zorn each review anticipated changes in the federal agencies that are principally responsible for administering employee benefits laws. On the litigation front, René Thorne looks at the ways President Trump's judicial appointees might affect major issues in benefits litigation. As always, we've noted other recent developments that we think employers should consider. Don't forget to read about our Featured Lawyer, Robert Wood. We hope you enjoy the new issue.

- Charles Seemann

HHS and ACA Enforcement under the Influence of a Trump Administration

By Monique Warren

For most employers, the Department of Health and Human Services (HHS) is relevant only because it enforces certain provisions of the Affordable Care Act in connection with employer-sponsored group health plans. HHS enforces the health care market reform provisions of the ACA. Many predictions have been made about what might happen to ACA now that Donald Trump has been inaugurated and the Republican-controlled Congress has gotten back to work. This is a summary of some of the essential facts about enforcement of the ACA by HHS.

Health Care Costs

National health care spending accounts for about 18% of the gross domestic product. If for no other reason than that, one must appreciate that there are a lot of stakeholders for whom the cost of health care is extremely important (in addition to patients, think of the hospitals and other providers, insurers, and government program employees). Report after report informs us that the majority of health care costs are attributable to about 5% of the population and the government funds most of that (*e.g.,* through Medicare and Medicaid programs) with taxpayer dollars. Given the large number of stakeholders and the diversity of stakeholders' priorities, there are many diverse (and conflicting) views about how health care costs are measured and addressed.

ACA Effects

Some 20 million previously uninsured people became covered under health insurance as a result of the ACA. About 85% of individuals with so-called Marketplace coverage (coverage bought on a government-run exchange) receive federal subsidies to purchase that coverage. HHS estimates the ACA has lowered the amount of uncompensated health care costs for hospitals and other providers by billions of dollars every year. The ACA also introduced about 18 new taxes intended to raise more than $800 billion in tax revenue over a 10-year period, mostly from business entities (and thus, influencing business planning). Every stakeholder probably can identify at least one positive effect the ACA has had and at least one negative effect the ACA has had — all from that stakeholder's point of view.

Campaign Promises

Notwithstanding certain tweets and sound bites, President Trump cannot repeal the ACA himself. However, as President, he could cause the government to withdraw its appeal in *House v. Burwell*, which would leave the U.S. District Court for the District of Columbia's decision invalidating funding for ACA exchange coverage cost-sharing reductions intact and significantly change the stakes for insurers and individuals participating in the insurance exchanges. Also, President Trump could direct HHS to withdraw regulations or withhold resources from HHS that are necessary for it to carry out its enforcement and other responsibilities under the ACA. Given that "repeal of the ACA" was a central tenet of his campaign platform, President Trump is expected to act quickly and significantly to unwind certain aspects of the ACA one way or another.

In fact, almost immediately following his inauguration, President Trump signed an Executive Order that is intended, among other things, "to minimize the unwarranted economic and regulatory burdens of the Act, and prepare to afford the States more flexibility and control to create a more free and open healthcare market." The Executive Order includes a directive to the Secretary of HHS and the heads of all other agencies of the Executive Branch to waive, defer, or delay the implementation of any new taxes on individuals, such as tax penalties an individual might face for not having health insurance, and to encourage the development of an interstate health insurance market.

Tom Price

President Trump's campaign health care policy advisors were adamantly anti-ACA. Tom Price, President Trump's pick for Secretary of Health and Human Services, was among those advisors and has proposed his own alternative to the ACA. Under the Price proposal, the ACA's exchange subsidies would be replaced with tax credits based on age so that older, tax-paying people receive more aid. Given Price's background (as a surgeon and a politician who has sponsored almost 40 bills related to health care issues) and the fact that he has had President Trump's ear for some time, HHS likely will follow a very different agenda.

Repeal and Replace

As has been widely discussed, it would take 60 Senate votes in favor to repeal the ACA and, since Republicans do not have 60 seats in the Senate, no one reasonably expects full repeal of the law. However, Republicans could repeal certain provisions of the ACA through the budget reconciliation process made semi-infamous in 2010, when those same provisions were introduced by way of that very budget reconciliation process. This could affect monetary flow provisions such as marketplace subsidies and individual and employer shared responsibility penalties. This process actually began when the Senate passed a budget resolution on January 12, 2017, which the House passed the next day. The resolution requires certain Congressional committees, including the Senate Committee on Health, Education, Labor, and Pensions, to submit deficit-reduction legislation to the Senate and House Budget Committees. This move is seen as the first step by the Republican-controlled Congress to pass legislation repealing major portions of the ACA in an expedited manner through a simple majority, without needing any votes from the Democrats.

Even if Republicans could get the 60 votes necessary to repeal the ACA entirely or if they use the budget reconciliation process to just repeal specific provisions, there is general agreement that an alternative plan needs to be in place before full or partial repeal of the ACA. As of this writing, no consensus has been reached on an alternative plan, but several of the various alternatives that have been put forward share some common features — including elimination of individual and employer mandates, an emphasis on more consumer choice for those who buy health insurance, and use of high-risk pools for those who cannot afford the coverage and care they need.

As the world witnessed with the presidential election last year, political predictions may be plentiful, but usually they fail to provide employers with meaningful information for business planning. Changes to the ACA are virtually certain to occur and likely will be shaped by free-market principles. For now, however, employers must comply with the law and regulations currently in effect and stay tuned.

Continued Struggles Expected for the Internal Revenue Service

By Keith Dropkin

Even though we seem to be a country divided, Americans of different political tribes still tend to unite over their dislike for the Internal Revenue Service (IRS). As politicians cater to these sentiments with talk of defunding, or even abolishing, the IRS, the Trump Administration is expected to continue the ongoing curtailment of the agency.

The IRS, among other things, is charged with enforcing the laws under the Internal Revenue Code relating to employee benefit plans. The Code encourages employers to provide retirement and health and welfare benefits to their employees through various tax incentives and penalties. In this respect, the IRS's duties include promulgating nondiscrimination rules to prevent plan sponsors from restricting the benefits to an employer's highly compensated or key employees, issuing determination letters on the tax-qualified status of retirement plans, providing a formalized correction program for retirement plans, and auditing employers on the administration of their benefit plans. While most of the ill will toward the IRS is related to its tax collecting duties, any decrease in funding or hiring could extend throughout the entire organization and affect all of its employee benefits activities.

Since 2010, the IRS has had its funding cut by about $900 million (7%). For the 2017 fiscal year, Congress has failed to pass a regular budget resolution and instead has used an emergency continuing budget resolution to temporarily fund the government through April 28, 2017, at the 2016 levels. For expediency, the IRS budget probably will remain the same for the remainder of the 2017 fiscal year ending on September 30, 2017. In 2018, however, the cuts may resume (the funding bill passed by the House of Representatives in the summer would have reduced the IRS's budget by $236 million if enacted). Furthermore, President Trump's 100-day action plan calls for a hiring freeze on most federal employees to reduce the federal workforce through attrition.

The reduced resources have affected the IRS's enforcement activities. In the area of employee benefits, this is most evident in the IRS's restriction of its determination letter program for qualified retirement plans to only new plans and terminating plans. The belt-tightening on retirement plan activities probably has been exacerbated, in part, by the attention the IRS has been required to give to the implementation of the Affordable Care Act. Even though the ACA may be repealed, at least in part, its unwinding and the implementation of whatever comes next would be a priority that could continue to divert IRS resources from its overview of retirement plans.

The IRS has issued its 2016-2017 regulatory agenda, which includes an assortment of employee benefits matters. Of particular note, employers with defined benefit retirement plans should budget for an increase in the

plan's minimum funding liabilities once the IRS finalizes its proposed update to the mortality tables used for pension funding purposes. However, the IRS regulatory agenda does not reflect President Trump's stated desire that for every new federal regulation enacted, two existing regulations must be eliminated.

President Trump has not proposed any specific changes to employee benefits policy (other than repealing and replacing the ACA). Nonetheless, President Trump's goal to reduce corporate and individual income tax rates on a revenue neutral basis may provoke tinkering to the tax breaks given to employee benefits.

With respect to IRS personnel, John Koskinen is the embattled IRS commissioner who has had impeachment proceedings lingering against him in Congress since 2015. While Koskinen's term is scheduled to end on November 12, 2017, President Trump is expected to request his resignation and Koskinen has stated publicly that he would comply with such a request. At the time of this writing, President Trump's transition team has not revealed the pick for commissioner.

The commissioner's position is the only political appointment at the IRS, thus there should be no other significant turnover in personnel beyond attrition. However, we intend to keep a close eye on how Congress applies the newly reinstated Holman Rule — an arcane appropriations procedure that empowers any member of Congress to propose an amendment to an appropriations bill to target the funding of a specific government program or even an individual government employee's salary. If used, the Holman Rule could affect the independence of IRS civil servants.

What to Expect of DOL under Labor Secretary Puzder

By Stephanie Zorn

The Department of Labor exists to foster, promote, and develop the welfare of wage earners and job seekers; to improve working conditions; and to assure work-related benefits and rights. How might the Trump Administration promote or change these values? The President's choice of fast-food tycoon Andrew F. Puzder to lead the DOL offers some insights.

Puzder is the CEO of CKE Restaurants, the parent company of Hardee's and Carl's Jr. President Trump described Puzder as a job-creator who has a long history of fighting for workers. If confirmed as Secretary of Labor, however, Puzder will almost certainly lead a more management-sympathetic DOL. Other than vocal criticism of the Affordable Care Act, Puzder has not commented publicly on specific employee benefits issues. How might Puzder's pro-business philosophy play out in the context of employee benefits generally?

Start with the obvious: the ACA. Puzder has opined that the ACA and other initiatives of the Obama Administration have forced the restaurant industry to find ways to reduce

costs — such as replacing live workers with automation — while trying to maintain expected levels of service and food quality. Although Puzder has described increased automation as a welcome innovation, he also has acknowledged that employees remain an important part of the fast-food customer experience. Since DOL has substantial responsibility for regulations issued under the ACA, employers can expect Puzder's enthusiastic cooperation with President Trump's stated goal of dismantling and replacing the ACA.

Puzder's anti-regulation, free-market views likely suggest strong opposition to the DOL's fiduciary rule. The fiduciary rule — scheduled for implementation on April 10 — significantly expands the definition of a fiduciary to include financial advisors and other professionals who provide investment advice concerning individual retirement accounts and employer-sponsored retirement plans. The new rule subjects financial advisors to ERISA's best interest standards and anti-conflict rules, subject to some exemptions. As Secretary of Labor, Puzder could delay enforcement of the new rule. The Puzder-led DOL also could decline to defend pending court challenges to the fiduciary rule or work with allies in Congress to overturn or delay implementation of the fiduciary rule. In anticipation of this posture, Senator Elizabeth Warren has reached out to Wall Street requesting information on how financial services firms have already taken significant steps to comply with the rule.

If his public comments concerning non-employee benefits workplace issues are any indication, Puzder can be expected to revisit DOL enforcement initiatives undertaken during the Obama Administration. Chief among these initiatives is an ongoing enforcement priority regarding employee misclassification — predicated on perceived abuse of the independent contractor classification, with resulting denial of workplace protections and employee benefits that would be afforded employees. This initiative likely will receive less emphasis under the new administration, and might well be abandoned by a Puzder DOL. Employers, however, should note that misclassification remains subject to challenge by state authorities and through private litigation.

As Secretary of Labor, Puzder also can be expected to use DOL's authority to promote market-based competition among employers to attract and retain employees. Additional appointments (most notably, the head of DOL's Employee Benefits Security Administration) will follow and may further illuminate the DOL's new direction.

Avoiding the Pitfalls of the Multiemployer Pension Plan Amendments Act

By Robert Perry

President Donald Trump has given little to no indication about the direction that the Pension Benefit Guaranty Corporation, or PBGC, will take under his administration. However,

since the issues faced by the PBGC directly affect blue-collar workers (key supporters of President Trump in the recent election), we can expect the PBGC will be front and center at some point in the Trump presidency.

PBGC is a federal agency tasked with insuring pension benefits earned by participants in single employer and multiemployer pension plans (collectively bargained plans to which many employers contribute). PBGC assumes responsibility for benefits earned in insolvent plans, albeit on a sharply reduced basis. Although both of the PBGC insurance programs are in trouble, the financial condition of the latter is particularly dire.

In its 2016 fiscal year annual report, PBGC announced that the multiemployer program deficit increased by $6.5 billion (an increase of more than 12%). The deficit now stands at a record-high, whopping $58.8 billion, and PBGC is projected to become insolvent by 2025. However, the insolvency of the mammoth 400,000-plus participant International Brotherhood of Teamsters Central States and Southwest Areas Pension Fund (projected to occur in 2026) would alone result in PBGC's insolvency.

Congress attempted to address this in 2014 by enacting the Multiemployer Pension Reform Act, or MPRA. Among other things, MPRA revised current law by allowing multiemployer plans to reduce benefits previously earned by participants upon approval of the Treasury Department. This attempt to address the PBGC funding crisis by permitting troubled plans to reduce accrued benefits and forestall or avoid the plans' insolvency and PBGC assistance has been viewed as failing miserably. The first four such applications (including one by the Central States Fund) were denied by the Treasury Department.

In late-December, however, a benefit reduction application (by an Ohio iron workers fund with a mere 2,000 participants) was approved. Other potential solutions, including the Miners Protection Act (that would improve the status of a large miners fund by using unspent amounts previously allocated to clean up abandoned mines) and the Keep Our Promises Act (which would provide federal funds for the PBGC) remain pending.

Surprisingly, the question of how to fix the broken multiemployer pension system and the PBGC has been largely ignored by President Trump since his election. President Trump secured the presidency in large part as the self-proclaimed champion of blue-collar workers, the very individuals who would suffer the most if the system were to collapse. We will find out soon whether the new administration plans to solve the multiemployer pension/PBGC crisis.

Trump Appointments Could Have Major Impact on ERISA Litigation

By René Thorne

President Donald Trump's first Supreme Court appointee likely will restore the conservative majority on the Court that was displaced by Justice Antonin Scalia's death.

If the new Justice is seated by June, the appointment could change the outcome in the "church plan cases" pending before the Court by tilting a 4-4 ideological balance in favor of plan sponsors. The ruling will affect pension plans for religiously affiliated hospitals and other religious organizations across the country. Briefing in those cases will be complete in mid-March, and oral argument is expected in April.

However, the new administration's influence will be readily felt as President Trump moves to fill 103 vacancies on the federal bench, compared to 54 that were open when President Barack Obama took office. Employers can expect President Trump to appoint business-oriented jurists, which should yield positive results for employers in several key ERISA litigation areas.

A good example is in the application of the Supreme Court's *CIGNA Corp. v. Amara*, 131 S. Ct. 1866 (2011), a decision that potentially expanded the equitable remedies available under ERISA. A more conservative bench may limit post-*Amara* recoveries, instead of embracing broad, "make whole" remedies endorsed by plaintiffs and the Department of Labor.

Employers also may see a rollback of the Court's *Tibble v. Edison International*, 135 S. Ct. 1823 (2015), after which ERISA plaintiffs and the DOL have attempted to gut ERISA's six-year statute of repose.

In cases arising from plan overpayments to participants, plan administrators also may find President Trump's appointees more receptive to claims seeking to recover those funds from participants. Over the last several years, some federal courts, including the Supreme Court, have opposed such claims, typically in plan-initiated litigation to recover payments to injured participants who successfully pursue personal-injury claims against third parties.

A more conservative federal bench also may expand defense-friendly precedents requiring plaintiffs to show concrete injury, instead of a "bare procedural violation." In the ERISA litigation context, this "concreteness" precedent will benefit ERISA defendants — for instance, by supporting lack-of-standing defenses to claims based on purely technical statutory violations.

Ultimately, the Trump Administration's greatest impact on ERISA litigation could turn on the probability that President Trump will ap-

point a Justice to replace one of the older liberal Justices now of the bench. Later this year, Justice Ginsburg turns 84, and Justice Breyer turns 79. If either of them retires during President Trump's tenure, the Court could have a 6-3 conservative majority for the first time in 80 years.

Recent Developments

Supreme Court Grants *Certiorari* in Three "Church Plan" Cases

In a move that will affect dozens of pending class action lawsuits, on December 2, the Supreme Court granted *certiorari* in three consolidated "church plan" cases: *Advocate Health Care Network v. Stapleton* (No. 16-74), *Saint Peter's Healthcare Sys. v. Kaplan* (No. 16-86), and *Dignity Health v. Rollins* (No. 16-258). The Court will interpret ERISA's "church plan" provisions, which exempt eligible plans from ERISA's fiduciary, funding, and other requirements. Recent decisions have been inconsistent on whether the exemption applies to plans sponsored by religiously affiliated organizations or is limited to plans established and maintained by a "church." The religious organizations seeking Court review appealed from rulings finding them ineligible for church-plan status, despite favorable determinations from the IRS and PBGC. A ruling is expected by June 30, 2017.

Form 1095-C Extension

As discussed in our recent blog post, The IRS has given employers and other coverage providers a welcome automatic 30-day extension for the furnishing of 2016 IRS Forms 1095-B and 1095-C to employees, with such forms now due on March 2, 2017 (although the IRS encourages furnishing the Forms as soon as possible). The due date to file 2016 Forms 1094-B, 1095-B, 1094-C, and 1095-C with the IRS has *not* been extended and remains February 28, 2017 (March 31, 2017, if filing electronically). The IRS also has indicated that the good faith reporting standards will continue to apply for 2016 reporting. We will continue to monitor these deadlines as the IRS may react to the President's Executive Order calling for agencies to use their discretion to delay provisions that impose fiscal and administrative burdens.

IRS Updates Mortality Tables

The IRS has proposed regulations that would update the mortality tables used (together with other actuarial assumptions) by most defined benefit pension plans to determine a plan's minimum funding requirements, as well as the minimum required amount of a lump-sum distribution from a plan, for plan years beginning in 2018. For later years, updated tables will be set forth in IRS guidance. The regulations also update the requirements a plan sponsor must meet to obtain IRS approval to use mortality tables specific to a plan for minimum funding purposes (rather than generally applicable mortality tables). These updates are expected to cause an increase in plan li-

abilities for many defined benefit plans, thereby causing a corresponding reduction in the funding level of those plans.

New Process for Disability Benefits Claims

In mid-December, the Department of Labor published final regulations governing the administrative-review process for disability benefits claims filed on or after January 1, 2018. Plan administrators should note the increased procedural and notice requirements, as well as additional protections for participants. These protections include a right to appeal rescission of coverage (except for non-payment of premiums) and a requirement that denial letters provide more detailed information on the grounds for the decision and the participant's right to access relevant files. For a closer look at these regulations, see our blog post.

New Guidance on Proxy Voting

The DOL has updated earlier guidance on proxy voting, expressing concerns that prior guidance discouraged plan fiduciaries from exercising shareholder rights on behalf of participants. The new interpretive bulletin clarifies that a trustee's typical role includes the voting of participants' proxies, except in limited circumstances, for example, when the trustee is a directed or non-discretionary trustee, or a cost-benefit analysis shows that extraordinary costs outweigh the benefit of exercising shareholder rights. The regulations also offer a detailed look at DOL's views on investment policies and shareholder engagement.

Featured Lawyer: Robert Wood

By William H. Payne

Robert Wood has been an ERISA litigator in the Greenville office for 17 years, but he still has an affinity for the simple life and regular folks. Mr. Wood lives in a rural area of South Carolina located in the shadow of the Blue Ridge Escarpment. The area is locally known as the "Dark Corner" from its days as a center of moonshine production, where government "revenuers" often disappeared without a trace.

Perhaps Mr. Wood's appreciation of indigenous South Carolina life stems from his origins as a prosecutor for state professional licensing boards, which put him in touch with hordes of irate customers of physicians, well-drillers, manufactured home dealers, and residential builders, among others. Perhaps he gained a deeper respect for his state during his term as a staff attorney for the Supreme Court of South Carolina. In any case, his laidback approach provides a needed contrast to the complex world of ERISA litigation that he inhabits.

Do you have anything else in your life as complex as ERISA litigation? No. It's a highly complex area of law. Outcomes are often dependent upon subtle nuances in the case law, with much depending upon the jurisdic-

tion. We've had ERISA for 40-odd years — it was supposed to make national employment benefits law more uniform, but it's done the opposite. So, this job takes up most of my life. Virtually all of my remaining free time is devoted to family activities. If I can't do an activity with my family, I usually don't do it.

What are some of the tools that ERISA litigators should have in their toolboxes? Patience. Litigating disability claims requires a patient analysis of reams of paper. In a 2,000-page administrative record, there could be a case changer on any one particular page. You also need a process, a method, for putting this pile of details into a manageable form. My method involves the use of a spreadsheet that serves as an index and a detailed chronology, and facilitates identification of inconsistencies that may be useful in winning the case. Professional intuition. This is a simple matter of experience. After several years, one develops a kind of a sixth sense of what to look for — the kinds of facts that tend to damage your defense or the plaintiff's claims. Finally, you have to enjoy writing. Most ERISA cases are resolved "on the papers." If one's goal is to be a trial lawyer, ERISA litigation is probably not for you. It is very rare that you get to argue in front of a judge, much less a jury.

Without asking for a partisan slant, if you could have any position in the new President's administration, what would it be? Department of the Interior. No. Wait. Secretary of State. I'm not saying I'd be good at it, but I'd just like to be in the middle of world events more than anything else. I've recently been reading a new biography of John Adams, and in his letters, he talks about being in Paris and suddenly becoming aware of where he was and the importance of what was happening around him. Of course, after my stint as Secretary of State, I'll clean up the Department of Labor for my clients.

In 25 words or less, give me the definition of equitable surcharge under ERISA. A travesty; a form of ancient, make whole relief that I believe will motivate employers to discontinue many types of benefit plans, a result contrary to the Congressional purpose of encouraging employers to create ERISA plans. That's more than 25 words; so sue me.

Media...

- **Joy Napier-Joyce** commented on President Trump signing the Affordable Care Act executive order and its impact on employers in "What Trump's ACA executive order means for employers," published by *Employee Benefit News*.
- **Joy Napier-Joyce** commented on President Trump's Affordable Care executive order and its effect on the employer mandate requiring organizations to meet ACA obligations in "How Trump's First Executive Order Could Affect Employer Health Plans," published by SHRM.
- **Joy Napier-Joyce** commented on implications of President Donald Trump signing an executive order against the Affordable Care Act in "Impact of Trump's executive action on Obamacare will depend on agency responses," published by *Wolters Kluwer Employment Law Daily*.

- **Eric Magnus** and **Patricia Anderson Pryor** discussed anticipated labor and employment law policy changes for 2017 in "Workplace Legal Trends for 2017," published by SHRM
- **Joseph Lazzarotti** commented on implications of the new 21st Century Cures Act law in "New Law Lets Small Employers Use Stand-Alone Health Reimbursement Arrangements," published in SHRM
- **Robert Perry**, **Paul Friedman**, and **Howard Bloom** authored "Be mindful of multiemployer benefit fund pitfalls," published in Employee Benefit News
- **Joshua Rafsky** discussed the U.S. Department of Health and Human Services nondiscrimination regulations taking effect January 1 in "2 health plan changes you may need to make before Jan. 1," published by HRBenefitsAlert.com

Staying current of changing laws, regulations, trends, and strategies is a challenged. Jackson Lewis can help. Subscribe to our blog, the *Benefits Law Advisor Workplace* (at benefitslawadvisor.com), and have updates written by experienced attorneys sent to your inbox, or follow us on Twitter (at twitter.com/jacksonlewispc).

Upcoming Seminars

FEBRUARY

- ***Wellness Programs: Navigating the New Web of Regulations,*** Randal Limbeck at the Lincoln Human Resource Management Association, Lincoln, NE
- ***Data Security Imperatives for Plan Sponsors, Record Keepers, Third Party Administrators, and other Service Providers,*** Joe Lazzarotti at the American Society of Pension Professionals & Actuaries, Northwest Regional Meeting, Seattle, WA and Portland, OR

APRIL

- ***Second Stage ESOP Transactions,*** Brian Goldstein at the National Center for Employee Ownership Annual Conference, Denver, CO

For more on what our attorneys are up to in the coming months, go to jacksonlewis.com/events

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