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## FEW Washington Legislative Update October 16-31, 2023

### In Congress:

The [Senate](#) is scheduled to be in session for [five weeks](#). Following Leader remarks, the Senate will proceed to Executive Session for the consideration of the [nomination](#) of Jennifer L. Hall to be United States District Judge for the District of Delaware. At 5:30 P.M, on October 17, 2023, the Senate will vote on the motion to invoke cloture on the Hall nomination. Ms. Hall was confirmed by the Senate by a Yea-Nay Vote, 67 - 29.

On Wednesday, October 18, 2023, Senators Brian Schatz (D-Hawaii) and Todd Young (R-Ind.) introduced new legislation to help stop illegal child labor. [The bipartisan Stop Child Labor Act](#) would increase maximum fines for violations, establish new criminal penalties, allow victims harmed by violations to file private lawsuits, and encourage collaboration between employers and government to stop child labor violations before they occur. This effort comes amid a 69 percent increase in child labor violations, according to figures from the Labor Department.

On Wednesday, October 25, 2023, the House [elected Mike Johnson](#), R-La., as the new Speaker of the House. Johnson's speakership comes as the federal government inched across the halfway mark of the 45-day continuing resolution Congress passed Sept. 30 that keeps the government funded through Nov. 17.

On a special note, on Friday, October 27, 2023, a majority of senators voted to end shutdowns forever, but the bill failed to gain the requisite support and the chamber has moved on toward passing its bipartisan annual funding bills. [The Prevent Government Shutdowns Act \(S. 135\)](#) was proposed as an amendment to a package of three fiscal

2024 spending measures but was rejected in a 56-42 vote that required 60 votes for approval.

### **Diversity, Equity, and Inclusion:**

#### **Legacy Programs Stymie Biden's Efforts to Boost Equity in Infrastructure Spending**

A new report finds that federal agencies have heeded one of President Joe Biden's top promises for infrastructure spending: that it be directed to help communities of color.

But that success has largely been limited to the few areas where federal agencies get to choose projects, not to the vast majority of infrastructure spending that Congress allocates with decades-old formulas that automatically give states and localities a predetermined share, according to the Urban Institute.

The report is one of the most extensive looks yet at how well federal agencies are living up to the promises of bringing infrastructure improvements where they are needed most. Urban Institute researchers examined federal infrastructure spending through dozens of programs during 2022, the first full year Biden's infrastructure law was in place. They tracked where the money was spent, down to the neighborhood level. And they analyzed how well that corresponded to the infrastructure needs, income levels and demographics of those areas.

The team also found:

- Counties that have relatively few employees won fewer competitive federal grants than counties with more bureaucratic capacity. Doubling the number of local transportation staff increased a county's chances of winning one type of major federal grant by 31 percent. "There seems to be a very clear relationship between capacity and winning a grant, no matter what the program, no matter the location of that county or state," said Tomi Rajniger, one of the report's authors.
- Federal competitive grants disproportionately went to higher income counties, which could be a sign that the process of applying for federal infrastructure grants is too cumbersome for lower income jurisdictions. Researchers found, though, that the more affluent counties that won those federal grants tended to use them to improve lower income communities within their boundaries.

- Programs designed to improve broadband service and transit do appear to be targeting places that show a significant need for those upgrades. But housing programs “have a less clear relationship” with needs by local residents.

The report, though, highlights some of the difficulties facing the Biden administration as it tries to help communities of color or low-income neighborhoods. The president promised to direct 40 percent of benefits from federal infrastructure and clean-energy programs to areas that are “marginalized, underserved and overburdened by pollution.” But federal agencies have struggled to agree on how to measure the benefits delivered under the so-called Justice40 initiative, making it difficult to determine whether they are actually living up to that promise.

Yonah Freemark, one of the authors of the Urban Institute study, said the researchers wanted to use other ways to measure equity, because the administration’s definition was “nebulous.” Instead, they looked at whether places with the highest levels of specific needs received funding to address those needs.

One of the Biden administration’s most promising ways for addressing inequities, they found, was through competitive transportation grants. That includes programs like the popular Raise Grants that help states and localities build multimodal projects that have a major local or regional impact.

“Many of the competitive transportation dollars are genuinely focused in communities of color, likely following agency equity plans they have developed over the past few years,” the researchers wrote. “But there is little evidence that the federal government provides progressively more funding to communities with the largest share of people of color or low-income populations, compared to the rest of the country. The federal government could further target grantmaking for these areas.”

Sourced From: [\(Government Executive\)](#)

## **FEW Washington Legislative Update – October 16-31, 2023**

### **Tier I**

### **FEHB: Here’s What’s New for Open Season 2024**

Before Open Season begins on Nov. 13, it's important to review what's new in the Federal Employees Health Benefit Program. As in previous years, there are significant premium, benefit, and plan availability changes that will affect both active and retired federal employees. We'll walk you through important updates impacting your budget and plan choice in 2024.

### **The Plans:**

With Humana exiting the FEHB market, there are far fewer plans available in 2024 than 2023—only 156 compared to 271. Besides Humana, additional HMO plans are no longer participating next year, including UnitedHealthcare Choice Plus Advanced in Florida and Georgia, United HDHP in Iowa and Kentucky, Indiana University Health Plan, AultCare in Ohio, and Aetna Open Access in Kansas and Missouri. Remember: If your plan is no longer available next year, you must choose a new one or you will be auto enrolled in the least expensive national PPO plan, GEHA Elevate.

Besides plans leaving, service area changes could impact your choice of available plans. Kaiser Permanente in Colorado is both adding and removing counties for High, Standard, and Prosper plans; Blue Shield of California High Open Access is dropping counties; and Capital Health Plan in Florida, Health Alliance in Michigan, and HealthPartners in South Dakota are all adding counties.

There aren't many new plan options for 2024. Compass Rose has changed their offerings with both a high and standard option. They have also expanded their enrollment criteria by granting Veterans Affairs Department employees and retirees with eligibility. Sentara High has a new plan available in Northern Virginia.

### **The Benefits:**

Every federal employee and annuitant should check Section 2, "What's New for 2024," of their current plan's official FEHB brochure, plus any other plan they're considering. This is where the plan will inform you of important benefit changes. While some plans will have very few and may only mention premium, other plans may have very different benefits in 2024 that could affect your decision.

For example, United Choice Plus Advanced is increasing the catastrophic out-of-pocket maximum from \$3,000 to \$6,000 for self-only enrollees and from \$6,000 to \$12,000 for self-plus-one and self-&-family enrollees.

Plans are offering some new benefits next year. MHBP plans have enhanced maternity programs as a wellness benefit, SAMBA plans are offering doula coverage, BCBS plans have both marital and family counseling and medically necessary genetic testing.

### **Improved Fertility Coverage:**

This is by far the biggest FEHB benefit change. OPM mandated that all FEHB plans in 2024 must provide coverage of artificial insemination procedures and IVF-related fertility drugs. Families that need these services will still face high out-of-pocket costs, however, as the cost share is sometimes as much as a 50% coinsurance. Also, some plans, like Aetna Advantage, don't count out-of-pocket costs for fertility services toward the out-of-pocket maximum.

The fertility coverage available to you is somewhat determined by where you live. FEHB plans based in Hawaii, HMSA & Kaiser, have covered IVF for many years because of laws passed in that state. And, historically, IVF coverage has been more widely available in HMO plans.

Next year you can find IVF coverage in the following HMO plans:

- Presbyterian High, Standard, and Wellness in NM
- UPMC HDHP and Standard in PA
- Calvo's Selectcare in Guam
- Triple S Salud in Puerto Rico
- SelectHealth HDHP and High in UT
- Baylor Scott & White Basic and Standard in TX
- Health Alliance HMO in IA/IN/IL
- Priority Health High, Standard, and Value in MI
- Two restricted enrollment PPO plans offer improved IVF coverage in 2024: Rural Carrier and Foreign Service.

And, importantly, one national PPO plan with open enrollment has gone above and beyond the OPM mandate. BCBS Standard now has a \$25,000 annual maximum for assisted reproductive technologies. Artificial insemination procedures and fertility drugs do not count toward the \$25,000 annual maximum. Do keep in mind though that BCBS Standard has the highest premium of any national PPO plan.

### **Higher Premiums:**

Overall, the average enrollee share of premium is rising 7.7% in 2024. This is slightly below last year, which was an 8.7% increase. When combined, however, this two-year span is one of the highest periods of increased premiums FEHB enrollees have faced in recent history.

Federal annuitants enrolled in Medicare Part B and paying the standard premium will see those premiums rise from \$164.90/month to \$174.70/month, a 5.9% increase.

### **Higher Contribution Limits for Tax Preferred Savings Accounts:**

With higher premiums and the potential for higher out-of-pocket healthcare costs in 2024, it's essential that active federal employees maximize the opportunity to save by using tax-preferred savings accounts.

Health Savings Accounts are available from High-Deductible Health Plans. HDHPs contribute a portion of the premium into the HSA as a monthly premium pass through. The total amount contributed to the HSA varies by plan, but ranges from \$900 to \$1,200 for self-only enrollees and \$1,800 to \$2,400 for self-plus-one and self-&-family enrollees. In 2024, the HSA contribution limit from the FEHB plan and employee is increasing to \$4,150 for self-only enrollees and \$8,300 for self-plus-one and self-&-family enrollees.

Only about 20% of all federal employees use a Flexible Spending Accounts (FSA), which is a great way to save about a third of the cost on a qualified healthcare expense. FSA contribution limits for 2024 have not been released by the IRS, but the limit is expected to rise to \$3,200.

### **Improved Prescription Drug Coverage for Annuitants:**

There are 17 FEHB plans that will offer a new Part D prescription drug plan in 2024. Plan members that have Medicare Part A or Medicare Parts A & B will be auto-enrolled in the Part D plan, except for BCBS plans which will only auto-enroll members that have both A & B.

- BCBS Basic, Standard, FEP Blue Focus
- NALC High
- MHBP Standard, Value, Consumer Option
- APWU High
- Rural Carrier High
- Foreign Service High

- SAMBA Standard, High
- HealthPartners Standard, High
- Aetna Direct Consumer Option
- Aetna Open Access Basic High – DC, MD, VA

Impacted members will receive communication of the new Part D coverage from their insurance plan and will have the opportunity to opt-out if they wish. However, almost everyone should keep the new Part D coverage. Why? Because the Part D prescription drug coverage is as good or better than what's available in the FEHB plan, at no extra premium. Additionally, BCBS Standard, Rural Carrier High, Foreign Service, and the MHBP and Aetna plans have all added a \$2,000 prescription drug out-of-pocket max, which could have a major impact on annuitants that face moderate to high prescription drug expenses.

High income annuitants will be subject to an Income Related Monthly Adjustment Amount (IRMAA) for Part D coverage. However, the Part D IRMAA is much lower than for Part B. For the first tier of IRMAA, individuals with yearly income above \$103,000 but less than \$129,000 and couples with income above \$206,000 and below \$258,000, you'll pay an extra \$12.90/month for Part D compared to an extra \$69.90/month for Part B. The enhanced Part D benefits will outweigh Part D IRMAA for most.

### **The Final Word:**

Your FEHB plan will change for 2024. Most will see increased premiums next year, and some 2023 FEHB plans won't be available in the new year. There could be an important benefit that you use that has a new pre-authorization requirement, or there could be a newly available benefit next year. Make sure you review Section 2 of the official plan brochure to see how your plan is changing.

Federal employees and annuitants will both face higher healthcare costs in 2024. Active employees have access to tax-preferred savings accounts while working, but many don't take advantage of this easy way to save on qualified healthcare expenses.

Annuityants will face both higher FEHB plan premiums and a higher Medicare Part B premium. However, new Part D prescription drug coverage available from certain FEHB plans will be an important way for annuitants that face moderate to high prescription drug costs to save money.

Sourced From: [\(Government Executive\)](#)

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**Tier II**

**‘There’s no fat left to trim’: Federal Labor Relations Authority Chairwoman Warns of Possible Furloughs in 2024**

Officials at the federal agency responsible for governing labor-management relations in the federal government warn that unless a decades-long trend of underfunding is reversed, the Federal Labor Relations Authority (FLRA) will need to resort to furloughs to keep the lights on next year.

The FLRA is best known for being the three-member board atop the agency that deals out decisions resolving disputes between federal agencies and the unions that represent their employees. But that function is buttressed by a corps of attorneys and investigators investigating complaints and grievances, mediators encouraging settling disagreements throughout the process. And the agency provides training to managers and union representatives alike about the rules of collective bargaining and how to cultivate collaborative relationships.

But the agency’s budget as assigned by Congress has not kept pace with rising workloads, let alone inflation. In fiscal 2023, the FLRA’s appropriations were set at \$29.4 million, a 1 percent decrease from its fiscal 2004 budget of \$29.6 million. Conversely, appropriations for the National Labor Relations Board, which serves a similar function albeit for the private sector, have grown 23 percent over the same time period, while the Merit Systems Protection Board’s budget has grown 51 percent, and the Equal Employment Opportunity Commission’s has increased 39 percent.

In the intervening years, the agency’s workforce has fallen from 213 full time equivalent positions in fiscal 2004 to 112 in fiscal 2023. And that’s in the face of surge of recent unionization drives in recent years, as well as a 60 percent increase in the number of unfair labor practice complaints filed with the agency.

The Biden administration’s fiscal 2024 budget proposal would provide a 14 percent increase over current funding levels, or a total of \$33.7 million. But the Senate’s latest version of appropriations legislation would keep funding flat at \$29.4 million, while a House draft bill would cut it further to \$28 million.



FLRA Chairwoman Susan Tsui Grundmann told Government Executive Wednesday that even if funding remains steady in the \$29 million range in fiscal 2024, that means the agency likely will have to undergo furloughs of anywhere between “a few days” and “20 to 30 days” to balance its books. Those furloughs could create a ripple effect, harming labor-management relations throughout the federal government, she said.

“There’s no fat left to trim . . . Our work is just not going to be completed, it’s going to be delayed,” she said. “That, in essence, will impede work on disputes and how they’re resolved—it’s all kind of related. What we’ve seen before is one dispute going unresolved leads to more disputes and leads to litigation. And if it’s prolonged litigation and disputes, that’s going to decrease employee morale, which is at the heart and core of any function or performance of an agency.”

If the FLRA cannot move expeditiously to resolve disputes or issue decisions, Grundmann said it eventually will serve to undermine the relationships between agency management and union representatives that undergird federal sector collective bargaining.

“If you don’t resolve a conflict, it becomes a dispute, and if a dispute is ongoing for any extended period of time, it may result in litigation,” she said. “If that’s not resolved in a timely fashion, you’ll get more disputes. People will start distrusting each other on both sides, and then eventually get to the point where there’s bitterness. And all of that attention in litigation itself—the resources, the time and the energy—gets diverted from the agency’s performance of a mission. We’ve seen it over and over again.”

Grundmann touted the success of the recently revived Collaboration and Alternative Dispute Resolution Office as a crucial way to try to avert that outcome. Despite consisting of only two attorneys, the office’s success rate in resolving or settling disputes is nearly 100 percent. However, if funding for the agency remains flat, the office’s impact will ebb.

“CADRO travels [to meet with parties to a dispute], and they can’t do that now,” Grundmann said. “And this travel is to places like Montana and South Dakota—we’re not going to Vegas.”

Sourced From: [\(Government Executive\)](#)

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**Tier III**

**EEOC Issues Robust Proposed Enforcement Guidance on Harassment in the Workplace After Stalled Attempt Under Trump Administration**

After a 3-2 vote along political party lines, the Equal Employment Opportunity Commission (EEOC) recently voted to publish its Proposed Enforcement Guidance on Harassment in the Workplace, which remains open to public comment until November 1, 2023. When the current version is finalized, it will be the first update on harassment issued by the EEOC in almost 25 years and will consolidate, supersede and update five dated EEOC guidance documents on the topic: Compliance Manual Section 615: Harassment (1987); Policy Guidance on Current Issues of Sexual Harassment (1990); Policy Guidance on Employer Liability under Title VII for Sexual Favoritism (1990); Enforcement Guidance on *Harris v. Forklift Sys., Inc.* (1994); and Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors (1999). The EEOC's last proposed guidance on harassment was issued in 2017 but was never finalized under the Trump administration. The proposed guidance follows the EEOC's 2024-2028 enforcement priorities, which include preventing and remedying systemic harassment.

In addition to reiterating the EEOC's position on what constitutes unlawful harassment (including causation and liability standards) and providing well-worn examples of workplace harassment, the EEOC's newest proposed guidance also "reflects notable changes in law, including the Supreme Court's decision in *Bostock v. Clayton County*, the "MeToo" movement, and emerging issues such as virtual or online harassment." The following are notable topics addressed in the draft enforcement guidance:

**Sexual Orientation and Gender Identity:**

Referencing the *Bostock* decision, 140 S. Ct. 1731 (2020), the proposed guidance explains that the decision itself "concerned allegations of discriminatory discharge, but the Supreme Court's reasoning in the decision logically extends to claims of harassment. Indeed, courts have readily found post-*Bostock* that claims of harassment based on one's sexual orientation or gender identity are cognizable under Title VII." As a result, the EEOC specifically identifies: 1) intentional and repeated use of a name or pronoun inconsistent with an individual's gender identity (i.e., misgendering); and 2) the denial of access to sex-segregated facilities like bathrooms and locker rooms that are consistent with an individual's gender identity as examples of sex-based harassment.

**Abortion:**

Consistent with the EEOC's proposed regulations to implement the Pregnant Workers Fairness Act, which contemplates reasonable accommodation in the form of leave for abortion-related care, the EEOC's proposed guidance states that sex-based harassment also includes harassment based on "pregnancy, childbirth, or related medical conditions," which can include "harassment based on a woman's reproductive decisions, such as decisions about contraception or abortion."

### **Religious Expression:**

With respect to religious expression, the EEOC's stated position on when such expression rises to the level of harassment is as follows: "If a religious employee attempts to persuade another employee of the correctness of his beliefs, the conduct is not necessarily objectively hostile. If, however, the employee objects to the discussion but the other employee nonetheless continues, a reasonable person in the complainant's position may find it to be hostile." Acknowledging the need for "special consideration when balancing anti-harassment and accommodation obligations with respect to religious expression," the EEOC states that "employers are not required to accommodate religious expression that creates, or reasonably threatens to create, a hostile work environment" and that employers "should take corrective action before the conduct becomes sufficiently severe or pervasive..."

### **Social Media:**

The EEOC also specifically addresses an employers' obligation to address private social media activity if such conduct begins to seep into and affect the workplace: "Conduct that can affect the terms and conditions of employment, even though it does not occur in a work-related context, includes electronic communications using private phones, computers, or social media accounts, if it impacts the workplace." The EEOC specifically notes that social media posts on personal social media pages can contribute to a hostile work environment if "an employee learns about the post directly or other coworkers see the comment and discuss it at work." The EEOC also addresses revenge porn: "Given the proliferation of digital technology, it is increasingly likely that the non-consensual distribution of real or computer-generated intimate images using social media can contribute to a hostile work environment, if it impacts the workplace."

While it is clear from this proposed guidance that employee comments on social media regarding, abortion, marriage, gender identity or sexual orientation may "impact the workplace," the EEOC is silent as to how an employer should reconcile its obligation to address potential sexual harassment with the First Amendment ministerial exemption, Title VII's religious organization exemption, or free speech protections. See e.g., *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021) (allowing challenge by a devout

Christian professor at Shawnee State University to discipline awarded to him by the University for refusing to use a student's preferred pronoun based on free-speech and free-exercise grounds). Employers should also exercise caution when addressing out-of-work conduct in light of the August 2023 National Labor Relations Board's Stericycle decision, which promises heightened scrutiny of workplace policies that impose restrictions on employee speech, including private social media speech. *Stericycle, Inc. v. Teamsters Local 628*, 372 NLRB No. 113 (2023).

While the proposed guidance does not "have the force and effect of law" and is "not meant to bind the public in any way," it is clear that the current proposed guidance is another step in the EEOC's coordinated effort to expand growth and enforcement under the Biden administration. Employers should consult experienced labor and employment counsel regarding training and to ensure policies and procedures are updated before this guidance is finalized.

Sourced From: [JDSupra](#)

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