



## H&K Health Dose: January 10, 2023

A weekly dose of healthcare policy news

### LEGISLATIVE UPDATES

#### McCarthy Clinches the Speaker Gavel (*Finally*), and House Approves Updated Rules Package

After 15 rounds of voting, the U.S. House of Representatives elected Rep. Kevin McCarthy (R-Calif.) as House Speaker in the early hours of Jan. 7, 2023. The tally was 216-212, with Democrats remaining unified in support of Democratic leader Hakeem Jeffries (D-N.Y.) and six Republicans voting present. If the first week of the 118th Congress is any indication, Speaker McCarthy may have some tough times leading the House's new Republican majority.

On Jan. 9, 2023, House Republicans pushed through an overhaul of operating rules for the new Congress, overcoming some rank-and-file members' concerns about Speaker McCarthy's concessions. Some of these concessions are included in the revised rules package, such as reducing the number of members needed for a motion to vacate the chair to one. However, many concessions will not be formally voted on and may never be publicly disclosed. The full [text of the package](#) and a [section-by-section summary](#) have been released.

Also of note in the new Congress, Rep. Jason Smith (R-Mo.) won a three-way contest for the Ways and Means Committee gavel beating out Reps. Vern Buchanan (R-Fla.) and Adrian Smith (R-Neb.). The House Republican Steering Committee's recommendations for committee chairs for the 118th Congress was expected to be presented to the full House Republican Conference for ratification on Jan. 10. Rank-and-file members on both sides of the aisle will receive their committee assignments soon.

### REGULATORY UPDATES

#### OIG Releases Report on CMS Oversight of Average Sales Price Data

The U.S. Department of Health and Human Services (HHS) Office of Inspector General (OIG) on Jan. 3, 2023, [released a report regarding gaps](#) in the Centers for Medicare & Medicaid Services' (CMS) oversight of manufacturer-reported average sales price (ASP) data. The Consolidated Appropriations Act, 2021, directed OIG to review manufacturer-reported ASP data. To determine how CMS oversees the accuracy of manufacturer-submitted ASP data, the OIG 1) collected and reviewed CMS' standard operating procedures for oversight of ASP data; and 2) interviewed CMS staff regarding CMS' oversight processes and challenges to conducting effective oversight.

The report found that CMS' quality assurance procedures lack checks to ensure the accuracy of manual processes that it employs to analyze the data used to calculate Part B payment amounts. It also found that CMS does not leverage its ASP data collection system to produce analytical reports that would monitor ASP data quality and maximize CMS' oversight capabilities. The report found that 24 percent of drug codes were missing ASP data for one or more specific drugs within that code for at least one quarter between 2016 and 2020. The OIG recommended that CMS build a strategy to strengthen its internal controls for ensuring the accuracy of Part B drug payments and bolster its oversight of manufacturer-reported ASP data.



## FTC Proposes to Block Non-Compete Employment Clauses

The Federal Trade Commission (FTC) chair on Jan. 5, 2023, issued a proposed rule that would ban employers nationwide from both entering into new non-compete agreements with and enforcing existing non-compete agreements against their workers. The FTC also released the [proposed rule](#) and a [fact sheet](#). (See also Holland & Knight's previous alert, "[FTC Moves to Ban Non-Competes: What Employers Need to Know Now](#)," Jan. 6, 2023.)

This announcement comes on the heels of President Joe Biden's July 9, 2021, [Executive Order on Promoting Competition in the American Economy](#). In that Executive Order, President Biden directed the FTC to use its statutory rulemaking authority under the Federal Trade Commission Act "to curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility."

The FTC is seeking public comment on the proposed rule. Specifically, the FTC is seeking comment on whether senior executives should be exempted from the rule or if low- and high-wage workers should be treated differently under the rule. If adopted in its current form, the proposed rule would have the following impact on all employers regardless of size:

- The rule would ban employers from entering into new non-compete agreements with their workers, including independent contractors
- The rule would require employers to rescind existing non-compete clauses with workers, and actively inform their employees that the contracts are no longer in effect

### Quick Hits:

- The Centers for Medicare & Medicaid Services (CMS) [released](#) updated [guidance](#) to state Medicaid directors in which it outlined guidance to states about how they can utilize the in lieu of a service or setting (ILOS) option under Medicaid managed care to address health-related social needs.
- The Substance Abuse and Mental Health Services Administration (SAMHSA) [published](#) the results of the annual National Survey on Drug Use and Health (NSDUH) that contains information about how Americans report on their experience with mental health conditions, substance use and their pursuit of treatment.
- CMS recalculated the 2023 Medicare conversion factor due to the Consolidated Appropriations Act of 2023. The 2023 Medicare conversion factor is \$33.8872. The initial conversion factor represented a 4.47 percent cut from the Calendar Year (CY) 2022 conversion factor of \$34.6062, while the updated conversion factor represents a 2.08 percent cut. The revised relative value unit (RVU) file for CY 2023 is now available on the [CMS website](#).
- The Government Accountability Office (GAO) released a [request for nominations](#) for appointments to the Medicaid and CHIP Payment and Access Commission (MACPAC). Letters of nomination and resumes are due by Jan. 26, 2023.
- The Agency for Healthcare Research and Quality (AHRQ) issued a [solicitation for nominations](#) for members of the U.S. Preventive Services Task Force (USPSTF). It is anticipated that new members will be invited to serve on the USPSTF beginning in January 2024. Applications are due by March 15, 2023.
- The current COVID-19 public health emergency (PHE) declaration ends on Jan. 11, 2023. The declaration is expected to be renewed for another 90 days through April 11, 2023.
- The White House on Jan. 4, 2023, released its [2022 Unified Regulatory Agenda and Regulatory Plan](#). The unified agendas set nonbinding goals for regulatory actions, providing insight into the administration's priorities for the upcoming year.