HR and Employee Benefits: Recent Developments and 2019 Trends

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Brought to you by Winston & Strawn's Employee Benefits and
Executive Compensation Practice & Labor & Employment Practice

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Developments in Health and Welfare

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Wellness Program Update

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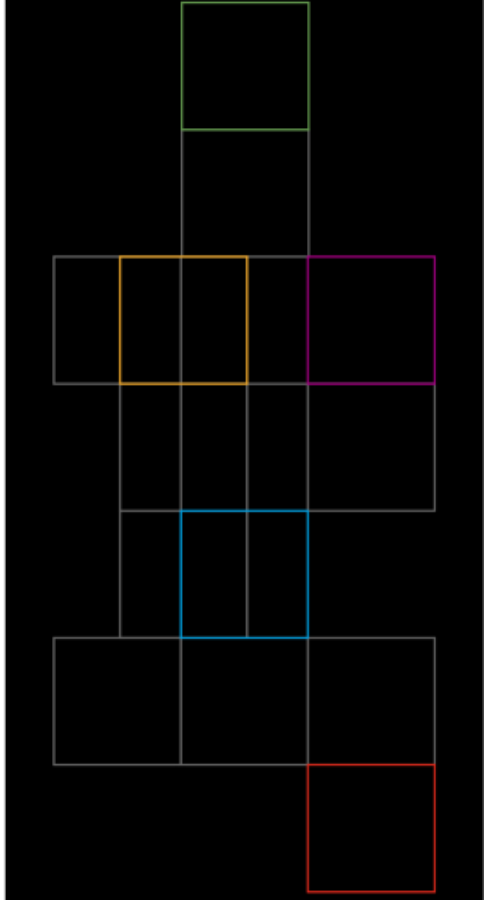
ADA Wellness Regulations

- Apply to all employee wellness programs that include **disability-related inquiries and/or medical examinations**
  - Regardless of whether wellness program is part of a group health plan or employee is enrolled in group health plan (HIPAA/ACA rules only apply to group health plans)
- Incentive limits apply to both participatory and health-contingent wellness programs (different from HIPAA/ACA rules)
- Incentive limits include both financial and in-kind incentives
  - No exclusion for de minimis value incentives
- Incentives may be in the form of either a reward or penalty
- Incentives are generally limited to 30% of benchmark – (lower than incentive cap under HIPAA/ACA rules)



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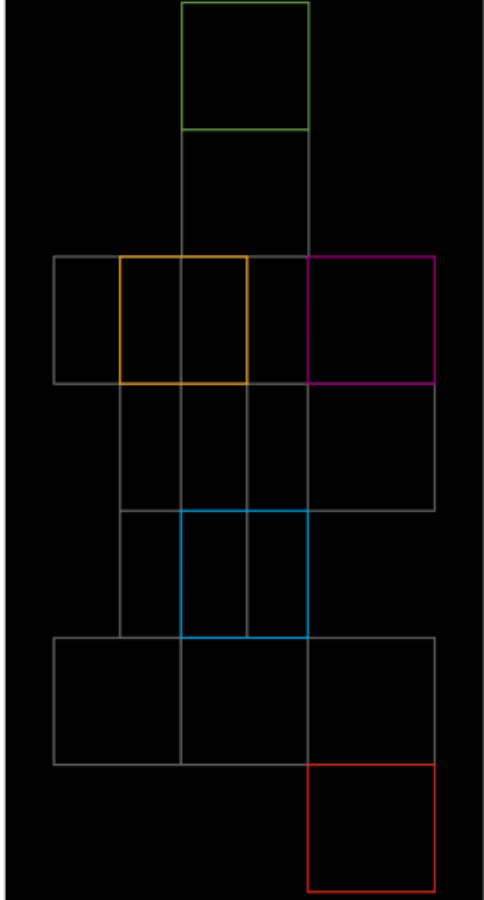
ADA Program Requirements

- Program must be voluntary: Employer cannot require participation or take action against employees who decline to participate; incentives are capped at 30% of benchmark
- Reasonable design: The program must be reasonably designed to promote health or prevent disease and the information collected must be used to design a program that actually addresses at least some of the wellness issues identified. Program also cannot be overly burdensome
- Confidentiality requirements: Requires a separate wellness program notice and restricts what data employers can receive



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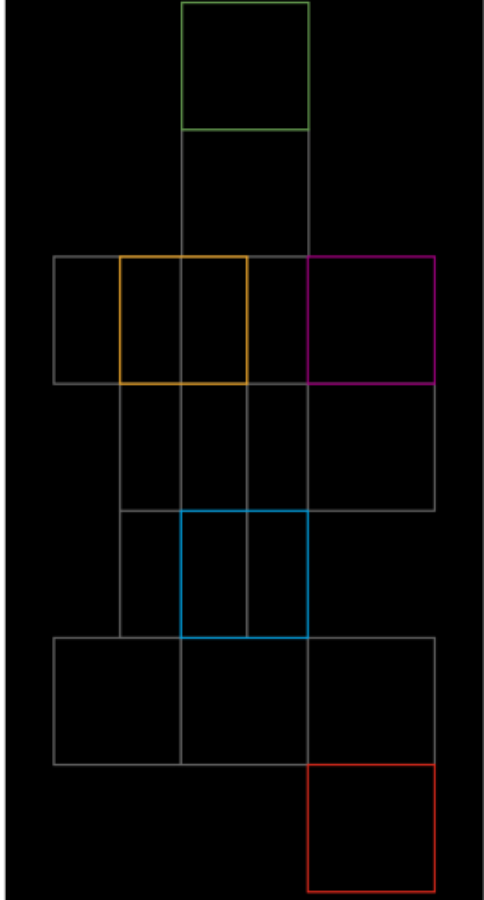
AARP Litigation

- Late last year, the AARP filed a lawsuit against the EEOC asking the court to stop the EEOC from enforcing the final wellness rules. AARP argued that the EEOC did not sufficiently justify how a wellness program with a 30 percent incentive could be viewed as voluntary
- In a ruling in late August, 2017, the court agreed with AARP that the EEOC needed to provide additional justification or rewrite its rules but they could continue to enforce the 30 percent incentive limit



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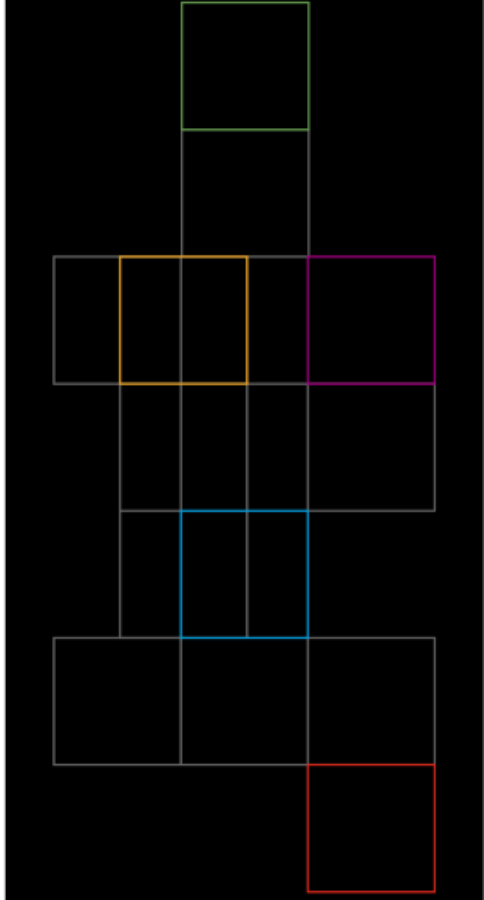
AARP Litigation

- EEOC indicated that new rules would not be issued until October 2019 with an effective date no earlier than 2021
- AARP (not happy with this time frame) asked the court to reconsider its earlier decision and either vacate the rules or prohibit enforcement beginning 1/1/2018 Court agreed to vacate the rules as of 1/1/2019
- In EEOC Status Report on March 30, 2018, EEOC informed the court they have no new rules for 2019 because they are awaiting Senate confirmation of three new commissioners
- Bottom-line – as of 1/1/19, barring intervention from EEOC and courts, incentive portion of EEOC ADA wellness program rules sunsets
- Provisions other than voluntary safe harbor remain in effect



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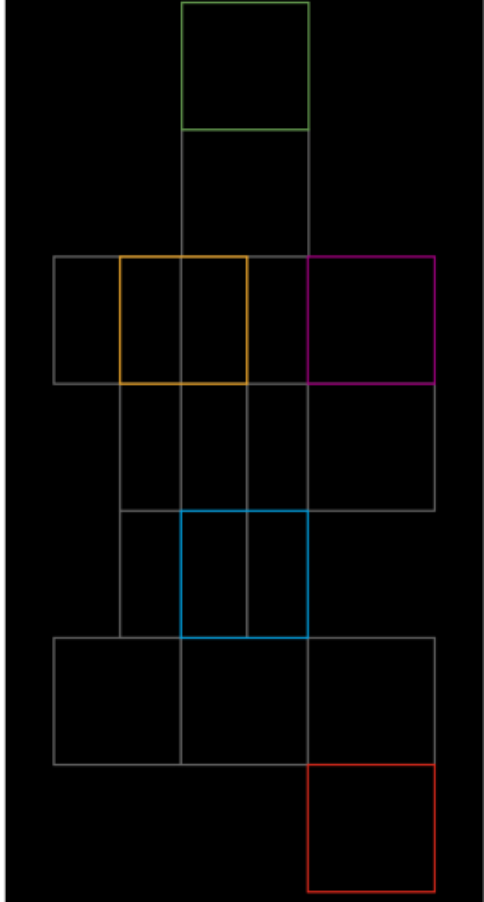
Wellness Programs: What Should Employers Do Now?

- Employers will not have final rules in time to design and implement 2019 programs
- Safe Option: End or modify wellness program designs that require participants to answer health related questions or undergo medical testing to receive an incentive (Highly disruptive)
- Middle Option: Continue following the EEOC's regs as written – EEOC enforcement unlikely; EEOC may still grant enforcement relief; participant challenge still possible
- Riskier Option: Ignore the EEOC voluntary regs entirely (since they end 1/1/2019) and follow less restrictive HIPAA / ACA regs (which permit higher incentives). Be prepared to defend program under bona fide underwriting exception
- Many companies with wellness programs are making minor adjustments, adding choice. If no current wellness program, employers may choose to delay adding a wellness program until 2020



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ACA Employer Shared Responsibility Update

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Overview of ACA Employer Shared Responsibility (ESR) Penalties and Enforcement

- Employer mandate = for all “full-time employees” (FTEs) and dependent children, must offer “affordable, minimum value” coverage or potentially pay penalty
- 4980H(a) penalty
  - “Minimum essential coverage” provided for less than 95% (70% in 2015) of FTEs
  - At least one FTE receives a premium tax subsidy on Marketplace Exchange
  - “A-Penalty” = 1/12 x (Total FTEs – 30) x $2,000 [$2,320 in 2018 adjusted for inflation]
- 4980H(b) penalty
  - “Minimum essential coverage” provided for at least 95% (70% in 2015) of FTEs
  - One or more FTEs not offered affordable, minimum value coverage receives a subsidy (“assessable FTEs”)
  - “B-Penalty” = 1/12 x assessable FTEs x $3,000 [$3,480 in 2018 adjusted for inflation]

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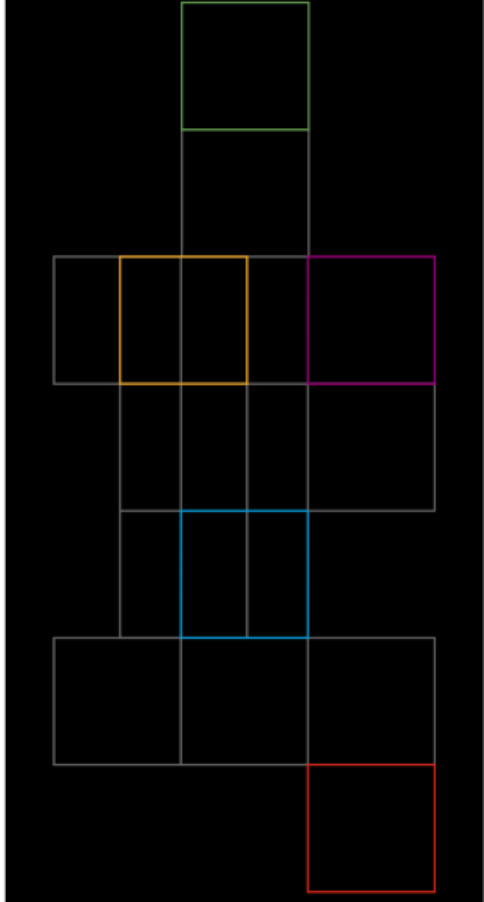
ESR Cycle

- **Prior to Open Enrollment:** Employer determines medical plan design, sets employee contribution affordability strategy for medical coverage, and identifies eligible full-time employees
- **Open Enrollment:** Eligible employees decide whether to enroll in employer coverage for the next plan year
- **Throughout the Plan Year:** Employer monitors new variable hour employees and offers coverage upon eligibility
- **First Quarter:** Employer reports full-time employees and employer medical plan coverage on Forms 1094-C and 1095-C
- Marketplace exchanges are supposed to notify employers when an employee has received a premium tax subsidy
- IRS compares Form 1095-Cs against list of individuals who purchased individual marketplace insurance coverage and who received a federal subsidy
- **IRS proposes and assesses ESR penalties**



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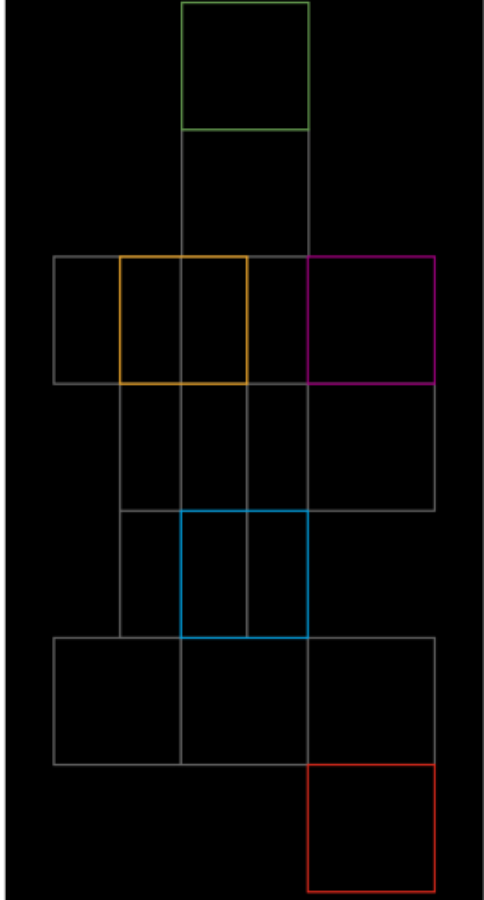
ESR Penalty Assessment

- IRS issues Letter 226J to large employers who may owe a penalty
  - ESR payment summary table shows the proposed penalty for each month
  - Form 14765, Employee Premium Tax Credit (PTC) List – shows individual assessable FTEs
  - Form 14762, ESRP Response
- Employer either objects or agrees to pay assessed penalty using Form 14762
- IRS responds using Letter 227, describing further actions the employer may need to take, showing revised ESR penalty or reduction to zero
- Employer may request a pre-assessment conference with IRS Office of Appeals
- IRS assesses ESR penalty and issues Notice and Demand for payment, Notice CP 220J



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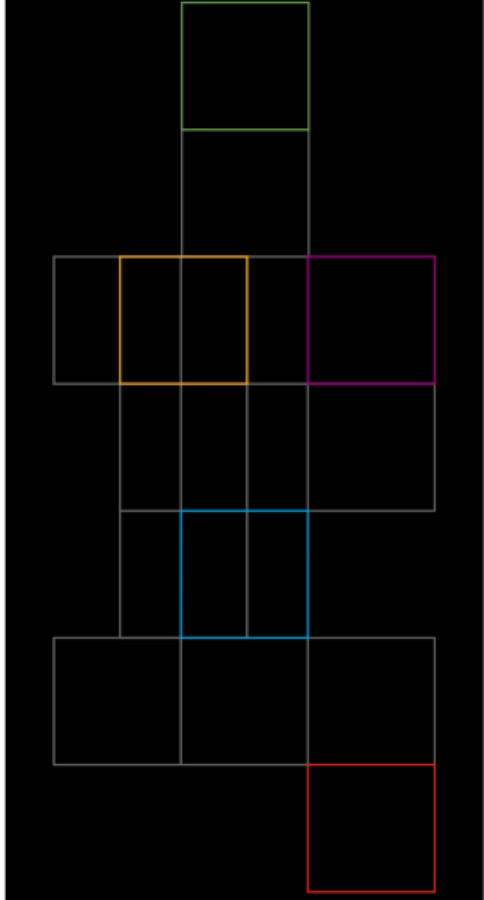
Received a Letter 226J? What To Do Next?

- Pay attention to the “Response date” listed on the first page of Letter 226J (https://www.irs.gov/pub/notices/ltr226j.pdf)
  - Important to send a response to the IRS by that deadline (30 days)
- Confirm IRS findings
  - Is the company a large employer subject to ESR mandate? Controlled group v. EIN issues
  - Does information on Form 14765 match Form 1095-C?
  - Were employees on Form 14765 properly reported to IRS?
  - Were any fields left blank on Forms 1094-C or 1095-C?
- Submit Form 14764
  - Pay proposed ESR penalty
  - Object to penalty, explain reason(s) for disagreement and note corrections to Form 14765



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Health Reimbursement Account Update

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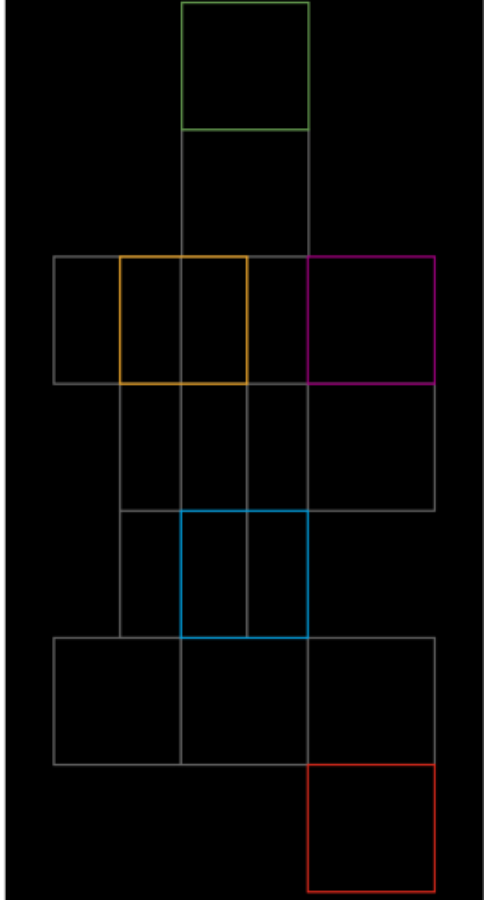
Health Reimbursement Accounts – Proposed Regulations

- Proposed Regulations were issued in response to Trump Executive Order
- Reverses Obama era guidance which prohibited integration of HRAs with individual insurance policies
- HRAs are group health plans that are subject to ACA requirements
  - No Annual or Lifetime Limits on EHBs
  - First Dollar Coverage of In-Network Preventive Care Benefits
- HRAs must be integrated with other ACA qualifying coverage or meet another exception
  - Obamacare: HRAs could only be integrated with group health plan coverage
  - Trumpcare: HRAs can be integrated with individual insurance coverage
- Proposed rules create two new types of HRAs
  - Individual Coverage HRA (ICHRA)
  - Excepted Benefit HRA (EBHRA)



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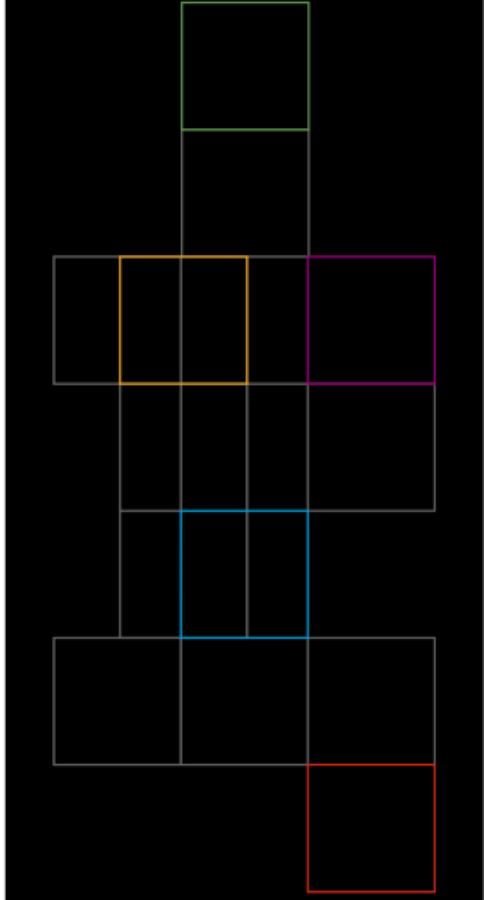
Individual Coverage HRA

ICHRA must meet 6 requirements:

- Enrollment – employee cannot be enrolled in ICHRA and traditional health insurance at the same time
- Employee Classification – can offer ICHRA to certain classes of employees and not others
- Same Terms – IHCRA must be offered on same terms and conditions to similarly situated employees
- Opt-Out – employees must be able to opt out at least annually to preserve PTC eligibility
- Substantiation – employees must substantiate individual insurance coverage
- Notice requirement



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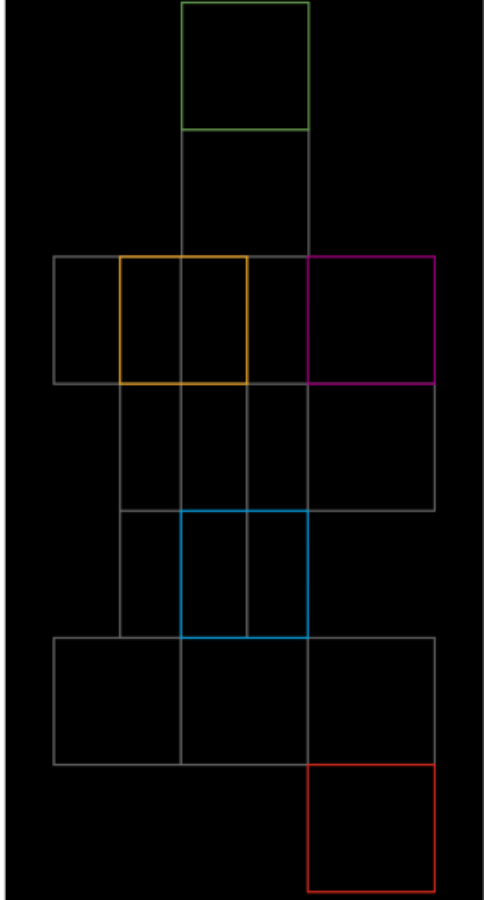
Excepted Benefit HRA

Excepted Benefit HRA must meet 5 requirements:

- Employee must be offered other major medical coverage
- $1,800 annual limit (subject to annual indexing)
- EBHRA can reimburse all medical expenses but not premiums (unless for COBRA, excepted benefit coverage or STLDI)
- Must be available to all similarly situated employees
- Employer cannot offer both an ICHRA and an EBHRA to the same employees



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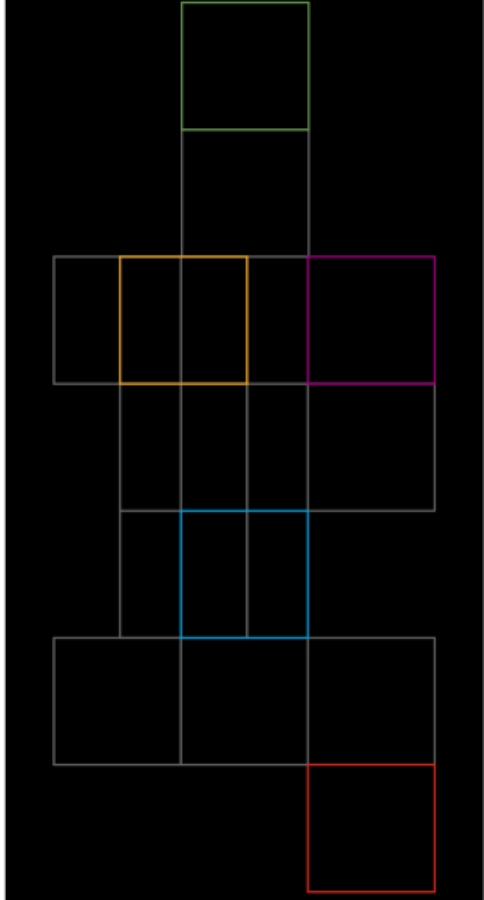
Application of ERISA

- HRAs (including ICHRAs and EBHRAs) are group health plans subject to ERISA
- However, individual insurance coverage integrated with HRA is not subject to ERISA if five requirements are met:
  - Voluntary participation
  - No employer (s)election or endorsement
  - Limits on types of reimbursement
  - No consideration received by employer
  - Annual notification
- Open Question:
  - How does private exchange impact employer selection or endorsement?
  - How to measure HRA affordability and minimum value? See IRS Notice 2018-88



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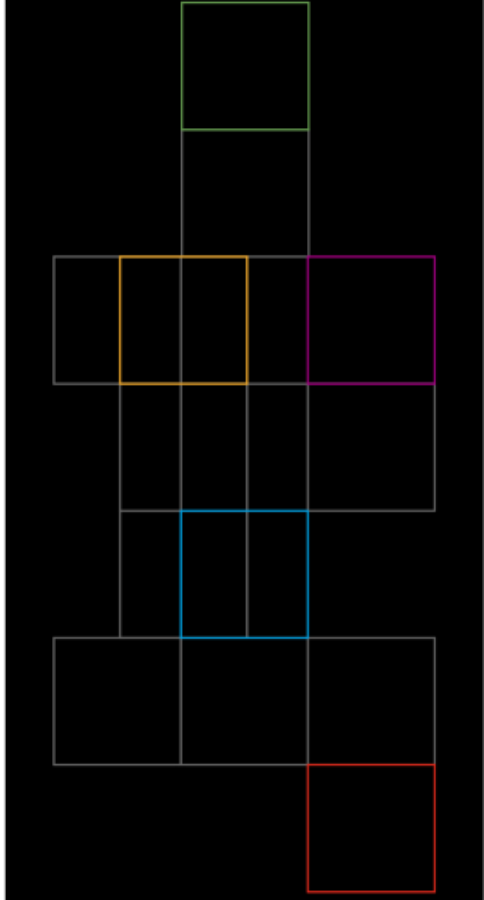
Developments in Privacy

Employee Privacy in 2018

- The Expansion of Privacy Regulation
  - The EU's General Data Protection Regulation (GDPR)
  - The California Consumer Privacy Act
- The Continued Flow of HIPAA Enforcement Cases
  - 11 enforcement cases in 2018 thus far, including the $16M Anthem settlement
- Enactment of Security Breach Notification Laws in all 50 States
  - Alabama and South Dakota joined other US states in March
  - Of note, Colorado revised its law (effective September 1, 2018) and introduced a 30-day breach notification requirement



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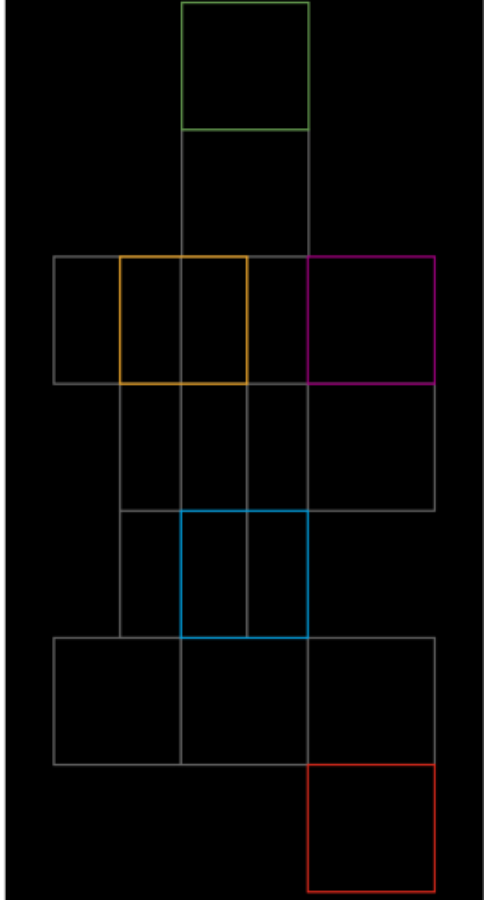
How GDPR May Affect US Employers

- GDPR went into effect on May 25, 2018, and regulates the processing (e.g., collecting, using, sharing, storing, etc.) of personal data of individuals who are located in the EU
- Many US companies are subject to GDPR in the employment context because they have “boots on the ground” in the EU or otherwise recruit from the EU
- While the potential enforcement fines are high (up to the greater of €20 million or four percent of the company’s worldwide turnover), EU regulators have emphasized that they will focus on corrective actions and compliance
- In order to comply with GDPR, employers may need to develop and implement substantial internal infrastructure



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High-Level GDPR Requirements

- **Organizational Requirements** (which may include appointing a Data Protection Officer and designating a lead supervisory Data Protection Authority ("DPA"))
- **Data Transfer Requirements** (which may include implementing cross-border transfer mechanisms (*e.g.*, model clauses, binding corporate rules, or Privacy Shield); registering with local DPAs, and entering into processing agreements)
- **Data Processing Requirements** (which may include ensuring processing of personal data is justified under GDPR); creating a record of processing; providing appropriate notice for processing; and maintaining/processing data only as necessary)
- **Individual Rights Requirements** (which may include creating mechanisms to respond to individuals' requests under GDPR, which provides individuals with the right to ask what personal data is processed; request that their personal data be corrected or, in some circumstances, deleted; revoke their consent; object to certain types of processing; and request a copy of their personal data)
- **Data Protection Requirements** (which may include confirming reasonable security safeguards are in place and notifying relevant DPAs within 72 hours of a breach)

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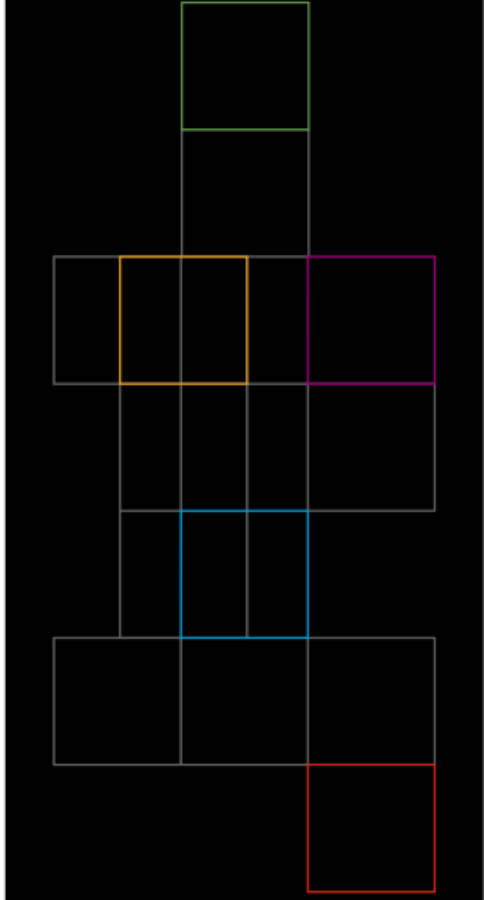
How CCPA May Affect US Employers

- Following in the steps of GDPR, the California Consumer Privacy Act (CCPA) establishes a new privacy framework for the collection, sale, and disclosure of the personal information of California residents
- The CCPA:
  - Broadly defines “personal information” or “PI” as information that “identifies, relates to, describes, is capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular consumer or household.”
  - Creates new data privacy rights for consumers including rights to know what PI exists, request that PI be deleted, and opt out of PI collection
  - Imposes a new and potentially severe statutory damages framework for violations of the CCPA, and for failures to implement reasonable security procedures and practices to prevent data breaches including:
  - Fines of up to $2500 for each individual record violation
  - If violations are intentional, fines of up to $7500 for each individual record violation



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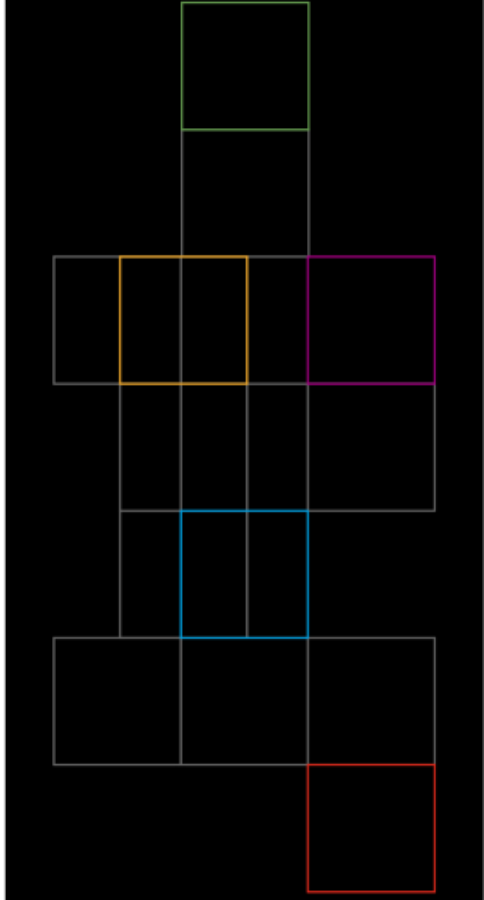
Who is Subject to the CCPA?

- The scope of the CCPA includes companies that conduct business in California; collect, or has collected on their behalf, the personal information of California residents; and satisfies at least one of the following:
  - Produce annual gross revenues in excess of $25,000,000.
  - Alone or in combination, annually buy, receive for their own commercial purposes, sell, or share for commercial purposes, the personal information of 50,000 or more consumers, households, or devices
  - Obtain 50 percent or more of their annual revenue from selling, releasing, renting, or otherwise making available consumer personal information to a third party for monetary or other valuable consideration
- Covered entities (e.g., self-insured health plans) and business associates under HIPAA are exempt with respect to PHI, but must meet the CCPA's requirements for other personal information under their purview



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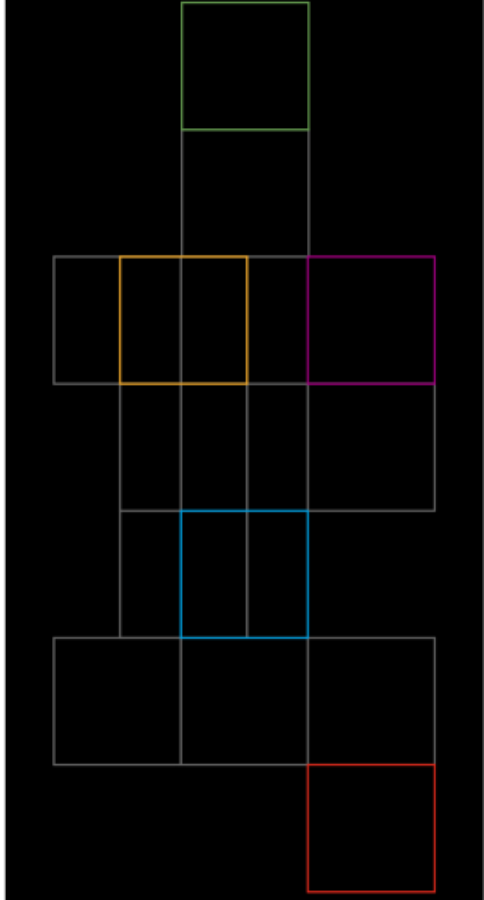
CCPA and Employee Information

- It is not clear whether CCPA applies to employee information.
- While the definition of “personal information” includes “professional or employment-related information,” CCPA seems to be geared toward consumers and the use of personal information for commercial purposes
- Some of the rights granted to consumers (including the right to delete information, which is not absolute) does not line up with the reasons for which employers collect personal information
- CCPA has already been amended once; it may be revised again before it goes into effect



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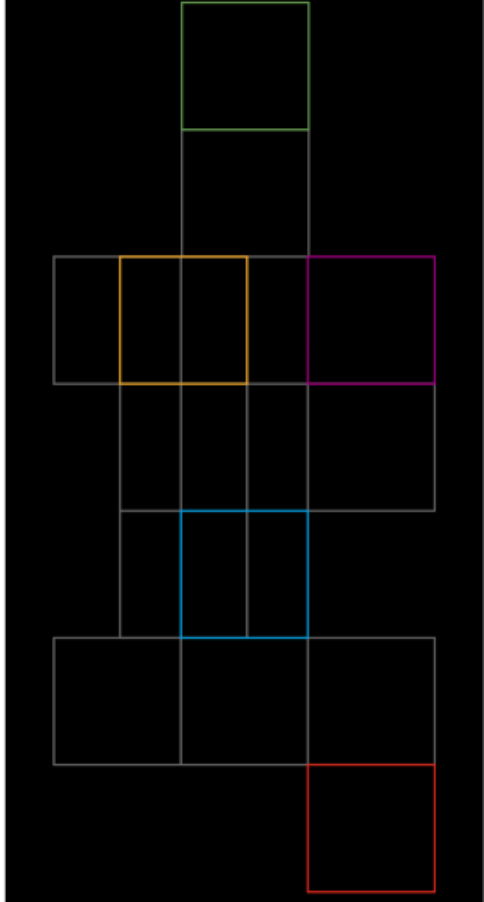
Key Takeaways – GDPR and CCPA

- With respect to GDPR, if no action has been taken yet, the first step is to determine whether the organization may have an obligation to comply
- With respect to CCPA, there is no clear indication of what specific requirements will be at this point, but it is possible that the law will remain as-is, and there will be an increased burden to disclose how employers collect, use and share employee information and to respond to individual rights requests
- For compliance with both laws, employers will need to look at where personal information “lives” within their organizations and how it is used and shared
- In addition, both laws emphasize security of personal information (and CCPA currently includes a private right of action on point), so employers may wish to review their information security practices



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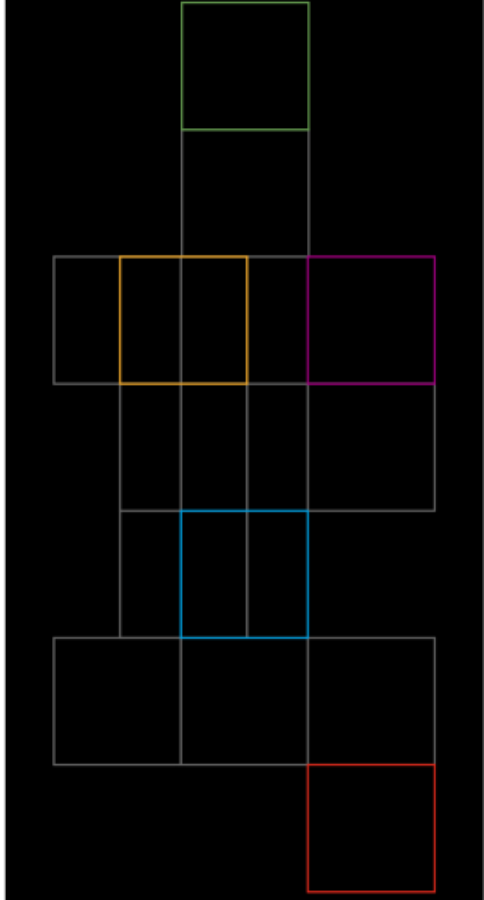
2018 HIPAA Enforcement Actions

- **Allergy Associates of Hartford** ($125K) *November 26, 2018*
- **Anthem** ($16M) *October 15, 2018*
- **Boston Medical Center, Brigham and Women's Hospital, and Massachusetts General Hospital** (MGH) ($999K) *September 20, 2018*
- **The University of Texas MD Anderson Cancer Center** ($4.3M) *June 18, 2018*
- **Filefax, Inc.** ($100K) *February 13, 2018*
- **Fresenius Medical Care North America** ($3.5M) *February 1, 2018*
- **21st Century Oncology, Inc.** ($2.3M) *December 28, 2017*
- **St. Luke's-Roosevelt Hospital Center Inc.** ($387K) *May 23, 2017*
- **Memorial Hermann Health System** ($2.4M) *May 10, 2017*
- **CardioNet** ($2.5M) *April 24, 2017*
- **The Center for Children's Digestive Health** ($31K) *April 20, 2017*



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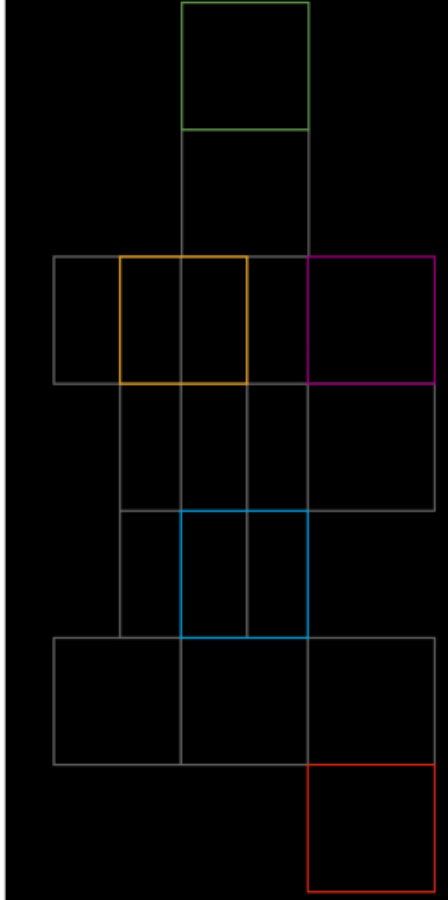
Anthem Settlement Agreement

- On October 15, 2018, OCR announced that it had entered into a settlement agreement with Anthem to address a 2014 breach that affected almost 79 million individuals
- OCR cited five potential HIPAA violations that triggered the resolution agreements:
  - Failure to conduct an enterprise-wide risk analysis
  - Failure to implement policies and procedures related to information system activity review
  - Failure to implement security incident response procedures and to actually respond to the incident at issue
  - Failure to implement information access management controls
  - Failure to prevent the impermissible disclosure of the PHI that occurred as a result of the breach



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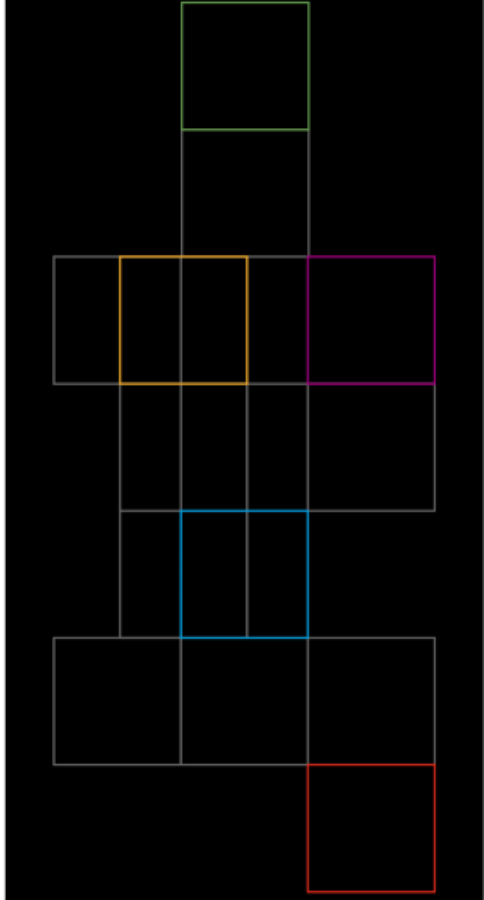
Key Takeaways

- Be prepared for a vendor breach
- Don’t overlook the basics (e.g., training staff on safeguards)
- A comprehensive, enterprise-wide risk analysis is the foundation of a Security Rule compliance program
- Follow-through on risk mitigation plans
- Implement effective encryption controls



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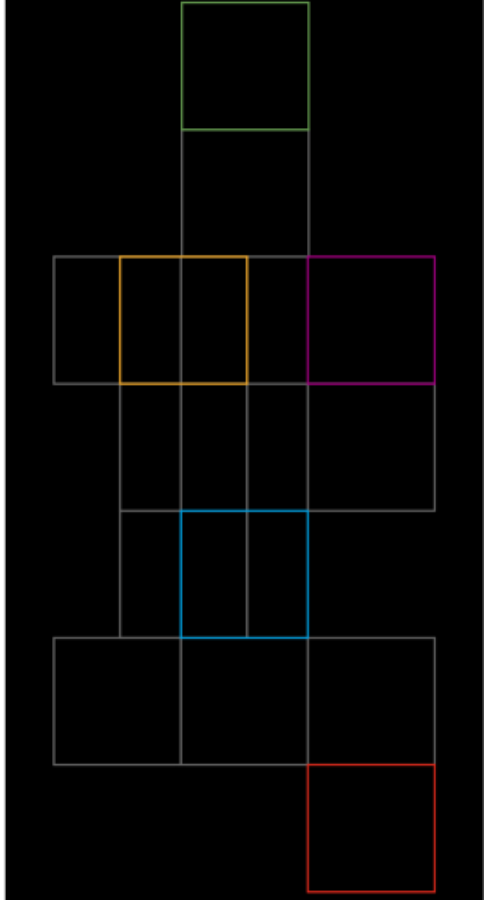
Proactively Preparing for Vendor Breaches

- Conduct business associate agreement audits and ensure that all such contracts are in place. If you discover gaps, take remediating actions (including conducting risk assessments)
- Ensure active agreements have been updated since 2013 and review provisions key to breach (e.g., who will provide notification, vendor indemnification obligations and any liability caps)
- Document all actions (if any) taken to measure the effectiveness of vendor security measures
- Take a realistic look at your vendors and determine what additional steps need to be taken to minimize risk to the organization (e.g., cyber insurance)



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Retirement Plan Developments

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Hardship Withdrawals

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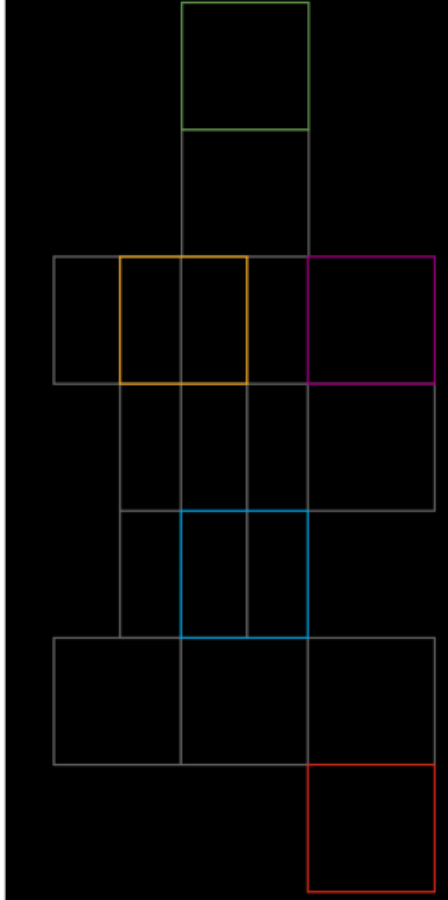
Overview of Hardship Withdrawal Changes

- Expanded safe harbor hardship reasons
- Changed rules for determining whether withdrawal is necessary to satisfy an immediate and heavy financial need
- Eliminated 6-month contribution suspension after withdrawal
- Eliminated “loan first, then hardship withdrawal” requirement
- Expanded sources of hardship withdrawals
  - Earnings on 401(k) contributions now allowed
  - QNECs and QMACs now allowed



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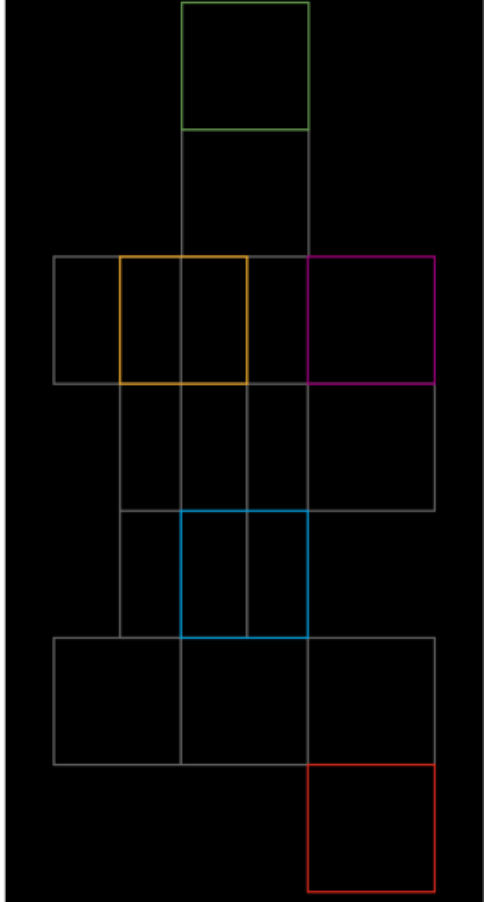
Hardship Withdrawals: New Safe Harbor Expenses

- **Current Rule:** Participant may take a hardship withdrawal only if the withdrawal is made on account of *an immediate and heavy financial need*
  - Current regulations provide a list of six categories of safe harbor expenses deemed to constitute an immediate and heavy financial need
- **New Rule:**
  - Adds new category of safe harbor expense for expenses incurred as a result of certain federally declared disasters (beginning with Hurricanes Florence and Michael)
  - Clarifies that safe harbor expense includes expenses incurred for damage to a principal residence that would qualify for a casualty deduction under Code Section 165 (glitch in Tax Cut and Jobs Act of 2017 would have limited casualty losses to only those incurred in FEMA disasters)
  - Incorporates PPA change to permit participant to incur qualifying medical, education and funeral expenses with respect to his or her primary beneficiary under plan
- **Effective Date:**
  - ***Optional*** for plan years beginning January 1, 2018 (PPA change optional after August 17, 2006)
  - ***Required*** under proposed regulations if/when finalized



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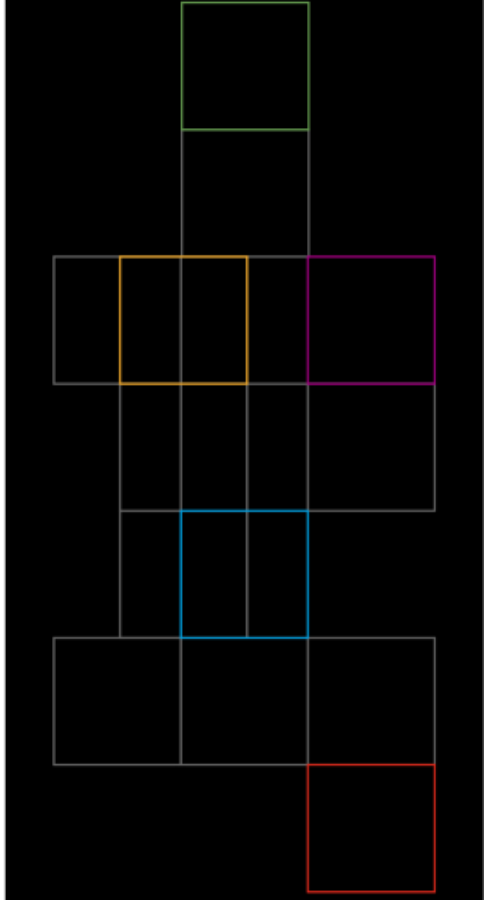
Hardship Withdrawals: Facts and Circumstances Test Eliminated

- **Current Rule:**
  - Immediate and heavy financial need determined based on all relevant facts and circumstances; safe harbor expenses are optional
  - Employee self-certification is optional and requires confirmation that broad range of resources not available (*i.e.,* commercially available loans)
- **New Rule:**
  - Eliminates “facts and circumstances” test
  - Requires employee to have obtained any other available distributions under all deferred compensation plans of the employer, whether qualified or non-qualified
  - Requires employee to represent in written or electronic form that he or she has insufficient cash or liquid assets to satisfy financial need; plan administrator may rely on representation unless it has actual knowledge to contrary
- **Effective Date:**
  - ***Required*** for distributions made on or after January 1, 2020, under proposed regulations if/when finalized



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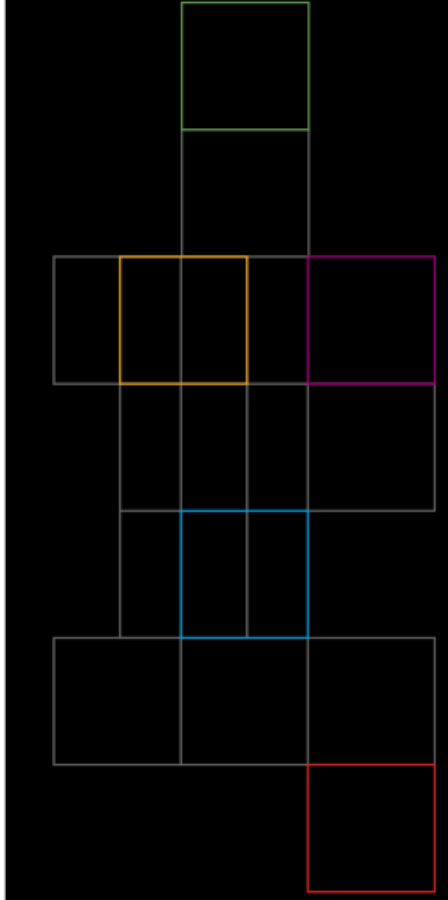
Hardship Withdrawals: 6-Month Suspension Eliminated

- **Current Rule:** After participant takes hardship withdrawal, he or she cannot make elective deferrals or after-tax contributions to any deferred compensation plan maintained by employer—qualified or non-qualified—for 6 months

- **New Rule:** 6-month suspension is eliminated

- **Effective Date:**
  - ***Optional*** for plan years beginning January 1, 2019
    - Under Bipartisan Budget Act of 2018, ***may be required for safe harbor plans***
  - ***Required*** for plan years beginning January 1, 2020 under proposed regulations (if/when finalized)



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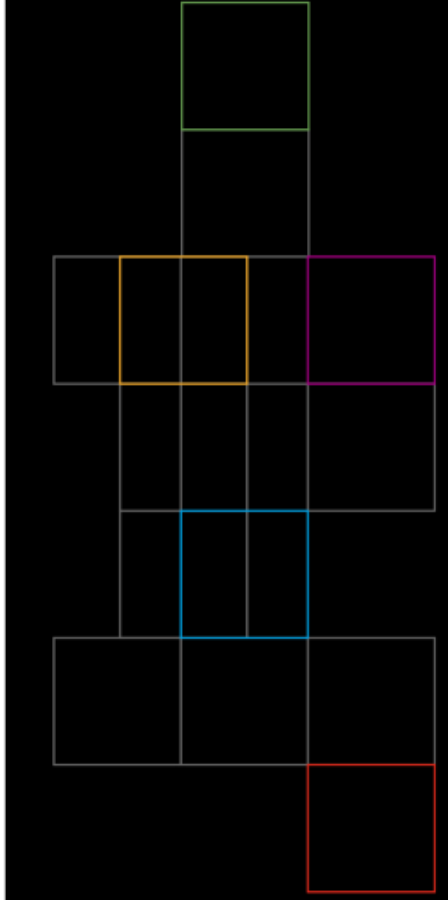
Hardship Withdrawals: “Loan First” Rule Eliminated

- **Current Rule:** Participant has to take all available plan loans before taking a hardship withdrawal

- **New Rule:** Requirement to exhaust all plan loans is eliminated

- **Effective Date:**
  - ***Optional:*** Plan years beginning January 1, 2019



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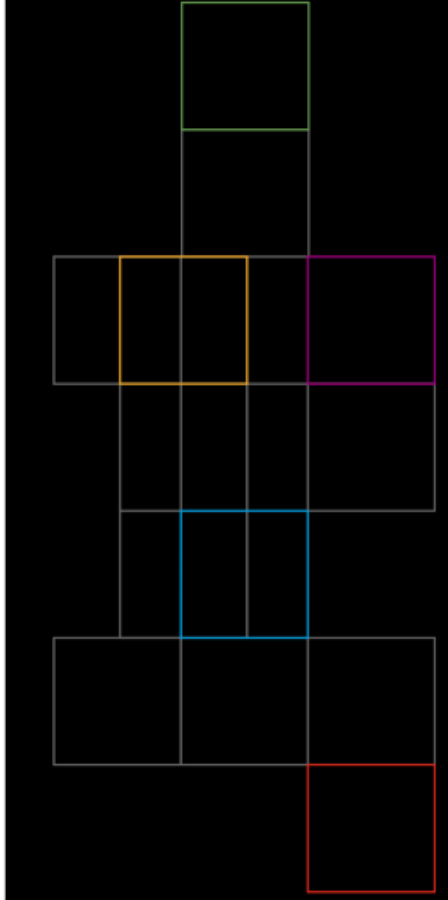
Hardship Withdrawals: Additional Sources (QNECs/QMACs and Post 86 Earnings)

- **Current Rule**: Participant cannot take hardship withdrawal from earnings on 401(k) contributions after 1986, nor from QNECs/QMACs or earnings

- **New Rule**: Hardship withdrawals permitted from all 401(k) earnings, QNECs/QMACs and earnings
  - QMACs may include certain safe harbor matching contributions that are "qualified matching contributions"
  - Special rules applicable to 403(b) plans

- **Effective Date:**
  - ***Optional:*** Plan years beginning January 1, 2019



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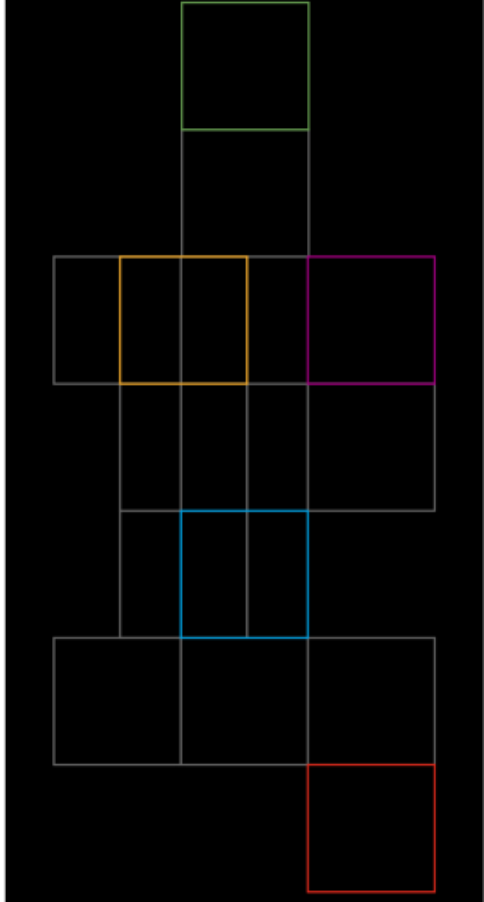
Implementation of Hardship Withdrawal Changes

- Implementation of any or all of the hardship withdrawal changes will require the following actions:
  - Update of plan procedures and record-keeper administrative systems
  - Review of participant communications
  - Plan amendments
- Plan administrator may also consider providing information reminding participants about the impact of taking a hardship withdrawal on retirement savings



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Disaster Relief

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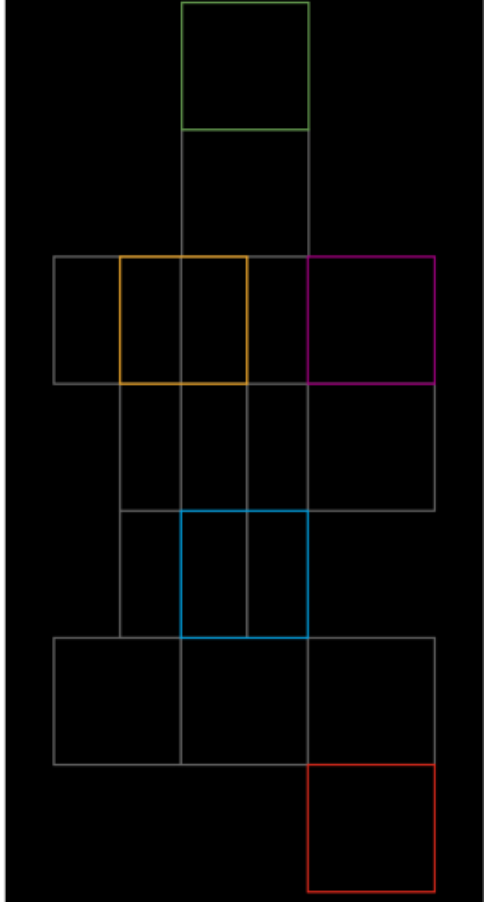
Overview of Available Disaster Relief

- IRS Relief:
  - IRS Announcement 2017-11 – Hurricane Harvey
  - IRS Announcement 2017-13 – Hurricane Irma
  - IRS Announcement 2017-15 – Hurricane Maria and California Wildfires
    - Proposed regulations would extend relief to victims of Hurricanes Florence and Michael
- U.S. Legislation
  - Disaster Tax Relief and Airport and Airway Extension Act – Hurricanes Harvey, Irma and Maria
  - Bipartisan Budget Act – California Wildfires
- Puerto Rico Treasury Administrative Determinations – Hurricane Maria



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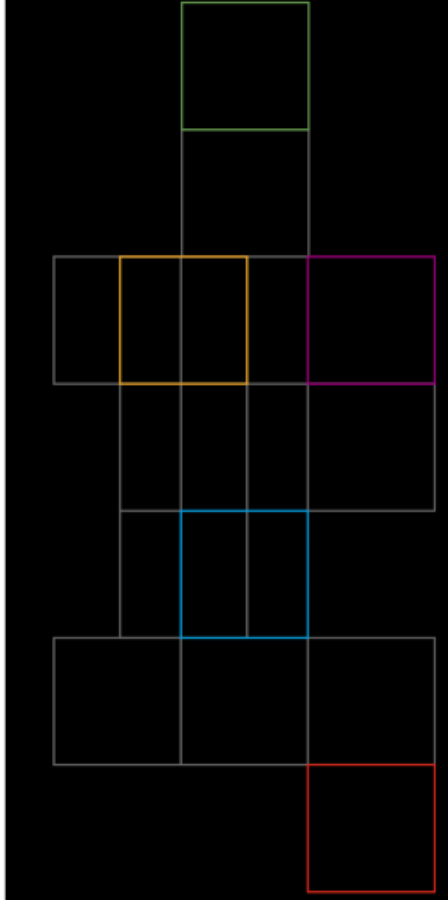
Varied Scope of Disaster Relief

- Disaster relief under current law is optional
- In general, disaster relief made it easier for impacted participants to receive in-service distributions and loans from their plans. In-service distributions include:
  - Modified hardship distributions under IRS relief
  - Qualified disaster distributions under U.S. legislative relief
  - Eligible distributions under Puerto Rico Treasury relief
- Relief specifics depended on plan design and whether plan sponsor availed itself of IRS relief, U.S. legislative relief and/or Puerto Rico Treasury relief



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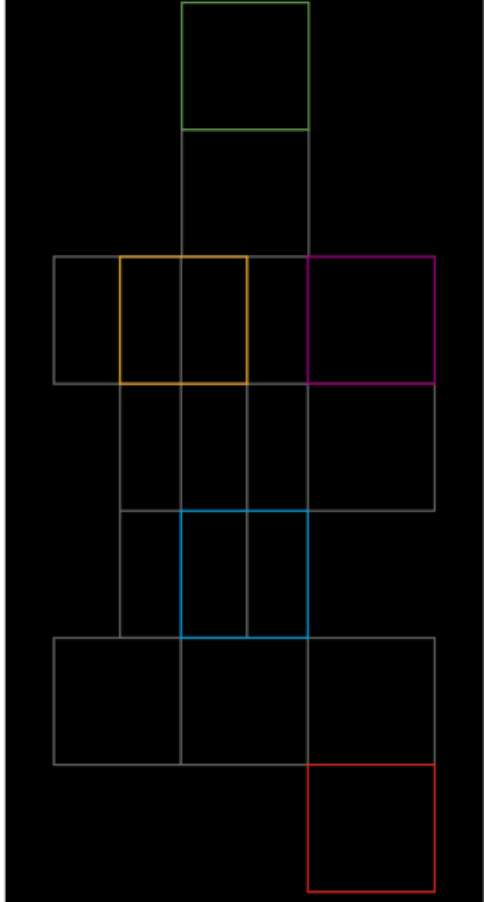
Disaster Relief – Upcoming Amendment Deadline

- Whether a plan amendment is required will depend on disaster relief adopted and current plan terms
  - If plan availed itself of IRS relief, amendment required by the last day of the first plan year beginning on or after January 1, 2018
  - If plan availed itself of Puerto Rico Treasury relief, amendment required no later than December 31, 2018
- If plan is dual-qualified in U.S. and Puerto Rico, as a practical matter, relief could require coordination of Puerto Rico Treasury relief with U.S. legislative relief.



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Developments in Sexual Harassment in the #MeToo Era

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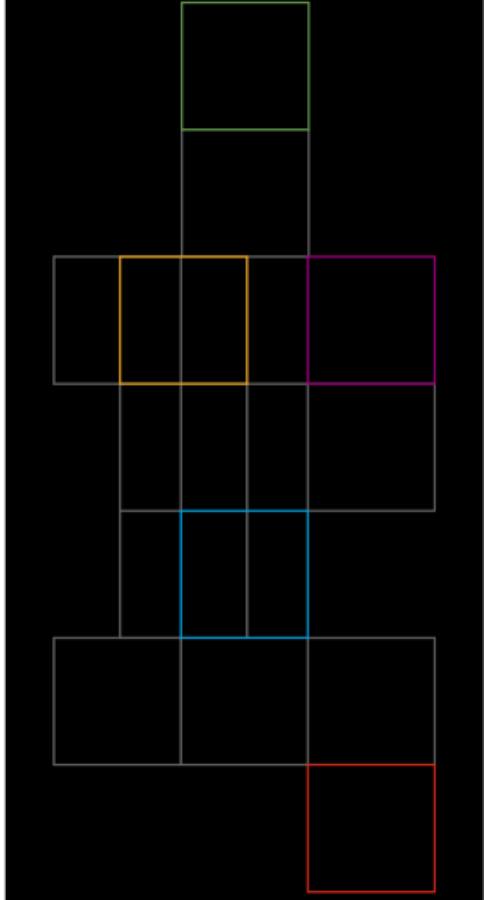
#MeToo Legislative Update

- **California**
  - Effective January 1, 2019 – settlement agreements cannot prevent disclosure of factual information related to a claim filed in a civil action or a complaint filed in an administrative action regarding sexual assault, sexual harassment, sex discrimination in the workplace, the failure to prevent an act of workplace harassment or discrimination based on sex or an act of retaliation against a person for reporting harassment or discrimination based on sex
  - More lenient standard for evaluating harassment claims under the state's Fair Employment and Housing Act ("FEHA") - plaintiffs need not prove that his or her tangible productivity has declined as a result of the harassment; single incident could create a triable issue of fact



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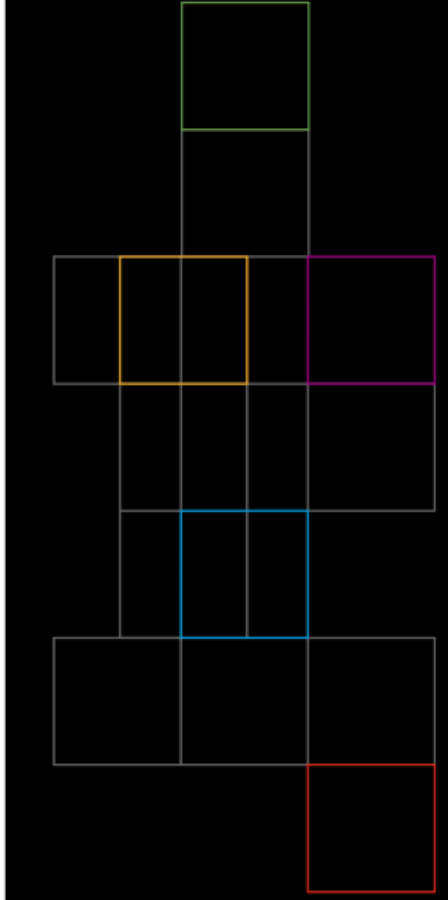
#MeToo Legislative Update cont.

- **California cont.**
  - By January 1, 2020 - employers with 5 or more employees must provide at least two hours of classroom or other effective interactive training and education regarding sexual harassment to all supervisory employees and at least one hour of classroom or other effective interactive training and education regarding sexual harassment to all nonsupervisory employees in California within six months of their assumption of a position
    - for seasonal and temporary staff, or any staff that is hired to work for less than six months, employers must provide training within 30 calendar days after the hire date or within 100 hours worked, whichever occurs first



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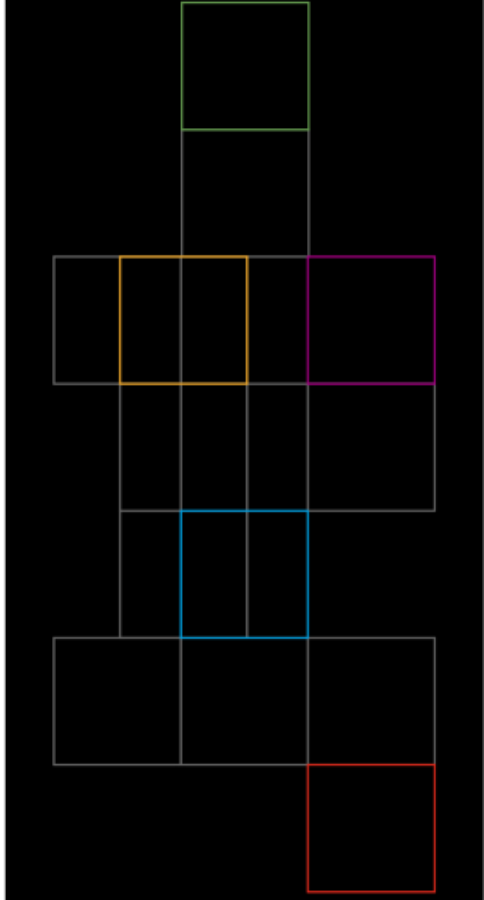
#MeToo Legislative Update cont.

- **Maryland**
  - Beginning October 1, 2018 - provisions in an employment contract, policy or agreement that waives a substantive or procedural right or remedy to a claim of sexual harassment or retaliation for reporting or asserting a right or remedy based on sexual harassment that accrues in the future is null and void
    - No adverse action may be taken against an employee who fails or refuses to enter into an agreement with such a void waiver



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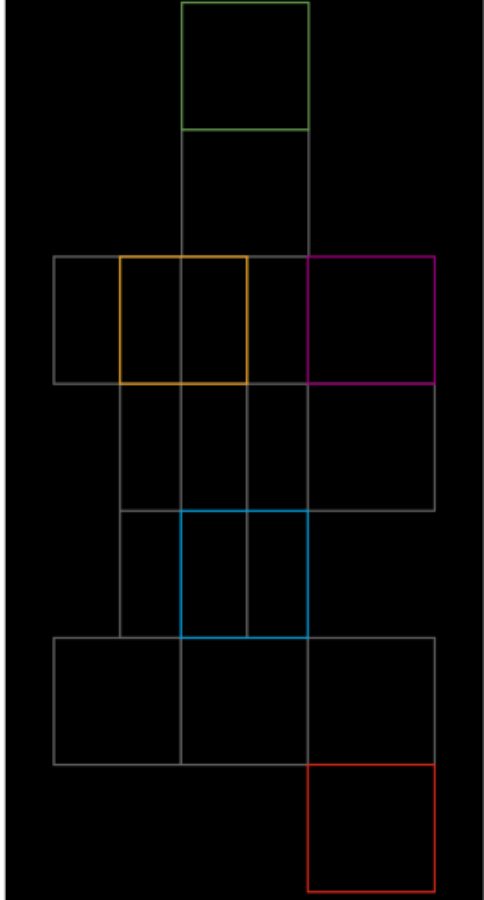
#MeToo Legislative Update cont.

- **Maryland cont.**
  - On or before July 1, 2020, and on or before July 1, 2022, employers must submit a short survey to the Maryland Commission on Human Right stating:
    - (i) the number of settlements made by or on behalf of the employer after an allegation of sexual harassment by an employee
    - (ii) the number of times the employer has paid a settlement to resolve a sexual harassment allegation against the same harasser over the past 10 years of employment
    - (iii) the number of settlements made after an allegation of sexual harassment that included a provision requiring both parties to keep the terms of the settlement confidential



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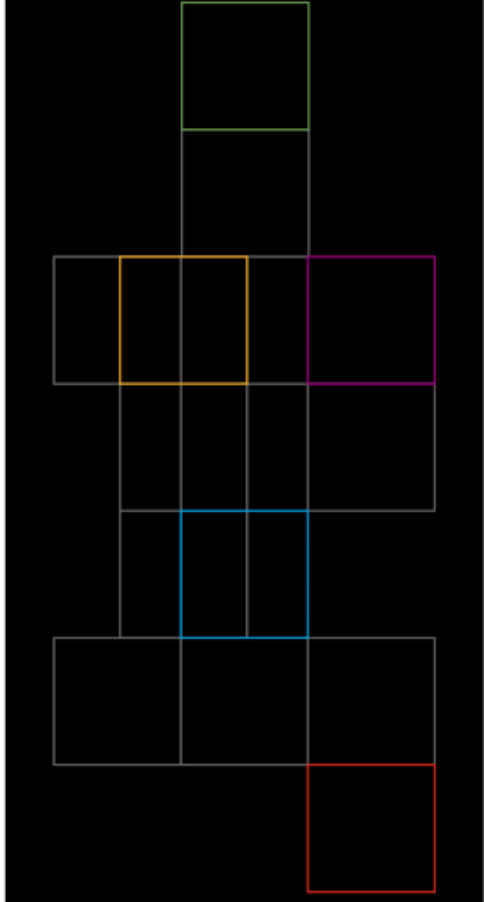
#MeToo Legislative Update cont.

- **New York State**
  - Effective July 11, 2018:
    - Mandatory arbitration clauses that require as a condition of the enforcement of the contract or obtaining remedies under the contract that the parties submit to arbitration any allegation or claim of sexual harassment are banned
    - Inclusion of a non-disclosure provision in any settlement, agreement, judgment, stipulation, decree, agreement to settle, assurance of discontinuance or other resolution of a claim, the factual foundation of which involved sexual harassment, unless it is the claimant's preference, is prohibited
      - ADEA-like 21 day consideration, 7 day revocation period
  - On or before October 9, 2018 - employers required to adopt a sexual harassment prevention policy that meets or exceeds the minimum standards published by the New York Department of Labor (the "Department"); provide a written copy of the policy to all employees; adopt annual sexual harassment prevention training consistent with the Department's model training program



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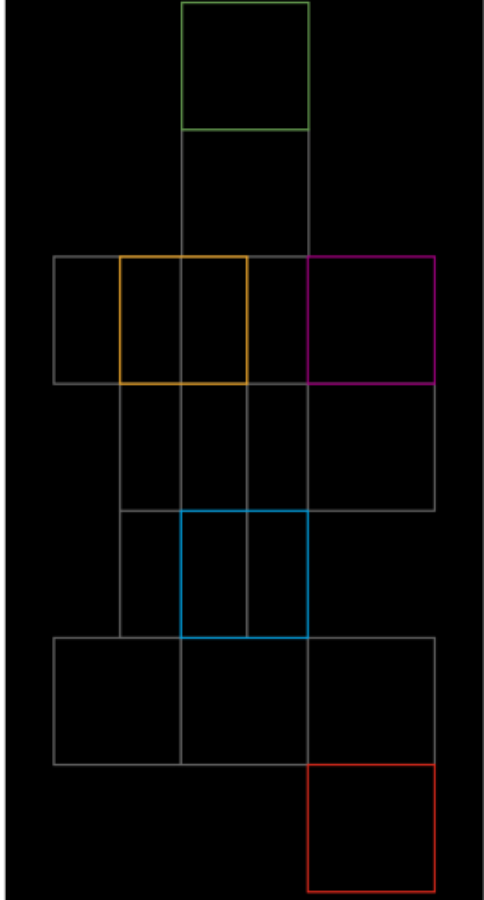
#MeToo Legislative Update cont.

- **New York City**
  - Stop Sexual Harassment Now Legislation:
    - Beginning April 1, 2019 – employers must conduct annual anti-sexual harassment training for all employees, including interns and supervisory and managerial employees
    - An employee who has received anti-sexual harassment training at a prior employer within the required training cycle is not be required to receive additional anti-sexual harassment training at the new employer until the next cycle
    - Employers must keep a record of all trainings, including a signed employee acknowledgement for a period of at least 3 years. The acknowledgement may be electronic
    - Effective September 6, 2018 - employers required to display an anti-sexual harassment rights and responsibilities poster designed by the City Commission; required to distribute an information sheet on sexual harassment to individual employees at the time of hire. The information sheet may be included in an employee handbook



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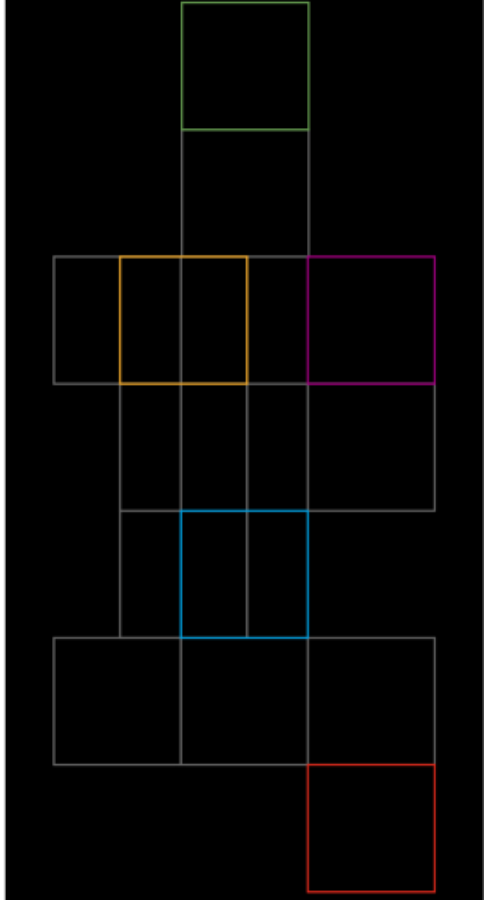
#MeToo Legislative Update cont.

- **Vermont**
  - Effective July 1, 2018 -- all persons engaged to perform work or services are protected against sexual harassment
  - Employers may not require employees or prospective employees to sign an agreement or waiver prohibiting or restricting the employee from opposing, disclosing, reporting, or participating in an investigation of sexual harassment or waiving a substantive or procedural right or remedy available in connection with a sexual harassment claim
  - In addition to providing individual copies of written sexual harassment policies to employees upon hire, employers must distribute updated copies of its sexual harassment policy if it is amended
  - An agreement to settle a claim of sexual harassment may not prohibit, prevent, or otherwise restrict an employee from working for the employer or any parent company, subsidiary, division, or affiliate of the employer



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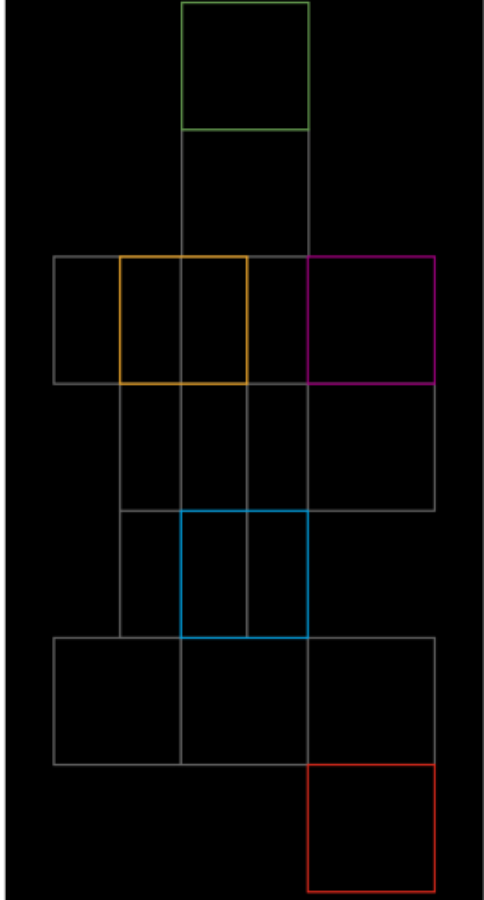
#MeToo Legislative Update cont.

- **Vermont cont.**
  - An agreement to settle a claim of sexual harassment must also expressly state that the agreement does not, among other things, prohibit, prevent, or otherwise restrict the individual who made a sexual harassment claim from filing complaints or participating or assisting in any investigation or proceeding with state or federal EEO agency
  - Attorney General or designee, authorized to enter and inspect any place of business or employment -- with 48 hours' notice, at reasonable times and without unduly disrupting business operations:
  - To question any person who is authorized to receive or investigate complaints of sexual harassment, and examine the records, policies, procedures, and training materials related to the prevention of sexual harassment



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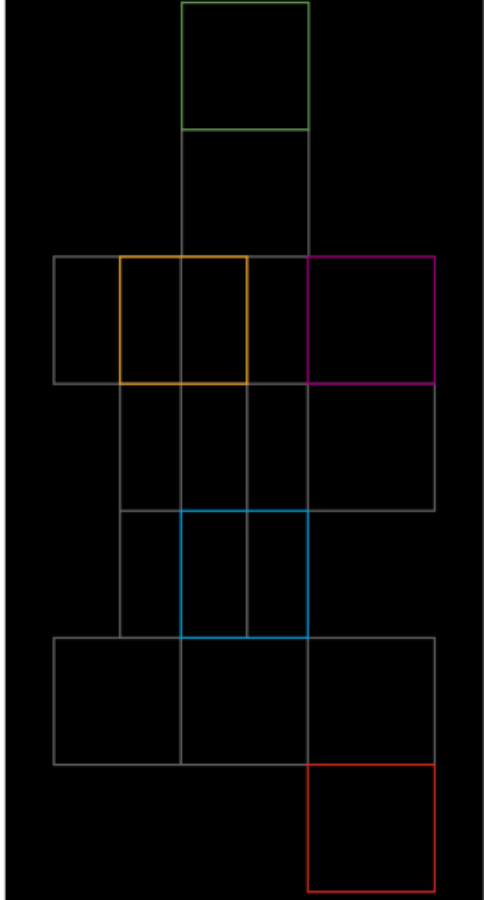
#MeToo Legislative Update cont.

- **Washington**
  - Effective June 7, 2018 –
    - Provisions of employment contracts or agreements that requires an employee to waive his/her right to publicly pursue a cause of action arising under state or federal non-discrimination laws, to publicly file a complaint with the appropriate state or federal agency or to resolve claims of discrimination in a dispute resolution process that is confidential are unenforceable
    - Except in settlements, employers may not require an employee, as a condition of employment, to sign a nondisclosure agreement, waiver, or other document that prevents the employee from disclosing sexual harassment or sexual assault occurring in the workplace or at work-related events and may not discharge or retaliate against an employee who makes such disclosures
    - Exception for HR staff, supervisors, or managers who are expected to maintain confidentiality as part of assigned job duties, and for participants in open investigation



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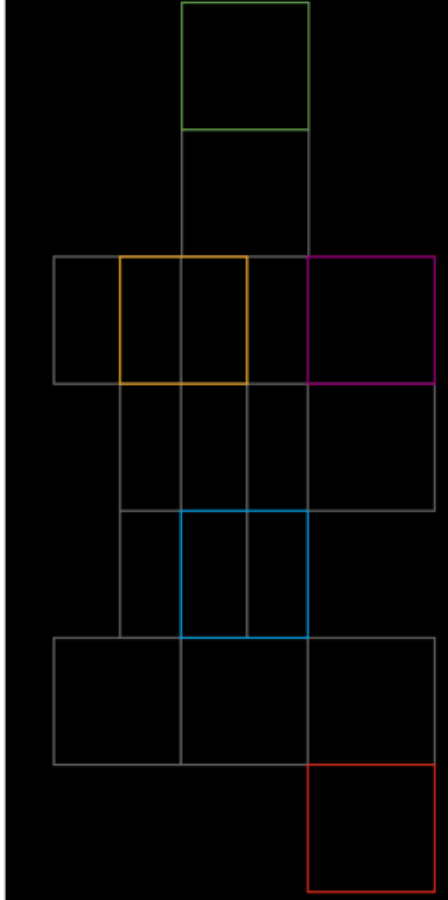
#MeToo Legislative Update cont.

- **Washington cont.**
  - Provisions of a non-disclosure policy or agreement, including an arbitration agreement, that would limit, prevent or punish the ability of a person to produce evidence regarding past instances of sexual harassment or sexual assault by a party to the civil action are unenforceable



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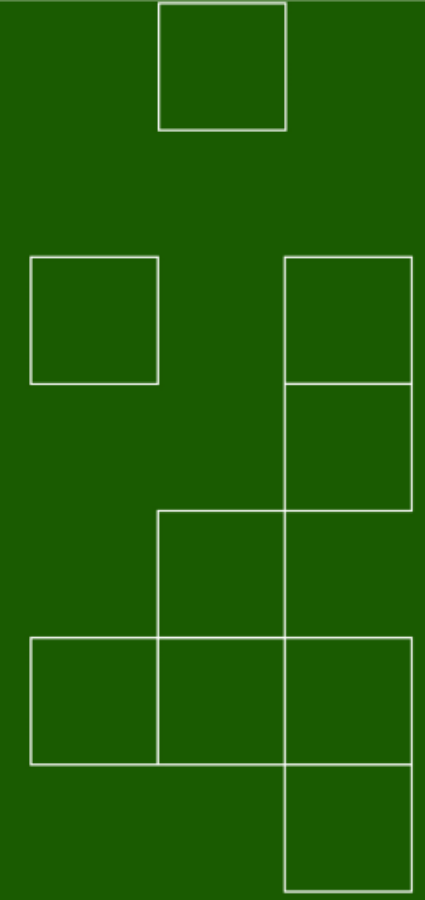
Questions?



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Thank You!

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