

***BENEFITS INSIDER***

**Volume 324, July 3, 2023**

(covering news from June 15-30, 2023)

The ***Benefits Insider*** is a bimonthly member exclusive publication prepared for WEB members by the American Benefits Council (“the Council”), a premiere benefits advocacy organization based in Washington, DC. This newsletter provides the latest news and analysis on the most important benefits-related policy matters in Congress, executive branch agencies and the federal judiciary.

*Please note: any views or opinions expressed in these stories represent the advocacy positions of the American Benefits Council and its membership. They do not necessarily reflect the views of WEB or its membership. To inquire about membership with the American Benefits Council, contact Deanna Johnson at (202) 289-6700 or* *djohnson@abcstaff.org**.*

**TABLE OF CONTENTS:**

[RECENT LEGISLATIVE ACTIVITY 2](#_Toc139286466)

[Council Leads 225+ Organizations in Calling for Delay of Roth Catch-Up Provision 2](#_Toc139286467)

[RECENT REGULATORY ACTIVITY 3](#_Toc139286468)

[Council Continues Urging IRS to Support Repurposing of VEBA Assets 3](#_Toc139286469)

[IRS Clarifies Application of Certain COVID-19 Relief and Preventive Care for High-Deductible Health Plans 4](#_Toc139286470)

[RECENT JUDICIAL ACTIVITY 5](#_Toc139286471)

[Council Files Amicus Brief Supporting ERISA Preemption 5](#_Toc139286472)

[MISCELLANEOUS NEWS 6](#_Toc139286473)

[New American Benefits Podcast Episode: A Chat With Board Chair Fred Thiele 6](#_Toc139286474)

# RECENT LEGISLATIVE ACTIVITY

## Council Leads 225+ Organizations in Calling for Delay of Roth Catch-Up Provision

The American Benefits Council delivered [**a letter to Congress and the U.S. Treasury Department**](https://www.americanbenefitscouncil.org/pub/?id=14CDD986-FF5E-E1D4-F197-8E6122C0A4F2) on June 29 in which more than 225 organizations call for a two-year delay of a new requirement related to “catch-up” retirement contributions.

A catch-up contribution is an elective contribution made by a participant age 50 or older that exceeds a statutory limit, a plan-imposed limit, or the actual deferral percentage test limit for highly compensated employees. The Council has historically been supportive of catch-up contributions because they improve retirement security for older workers.

Under the SECURE 2.0 Act (enacted in late 2022 as part of the Consolidated Appropriations Act, 2023), employees age 50 and older who earned more than $145,000 in the preceding year from the current employer must make their catch-up contributions on a Roth (post-tax) basis by Jan.1, 2024.

The Council has been engaged with congressional and regulatory officials many times over the past few months [describing the issue](https://www.americanbenefitscouncil.org/pub/?id=E678E178-0668-FBB6-6993-323E2548A780) and explaining that, unless the SECURE 2.0 requirement is immediately delayed, many employers’ only means of compliance will be to eliminate all catch-up contributions for 2024. Specifically, the Council and its allies are requesting a two-year delay to give employers the necessary time to comply and provide Treasury time to provide essential guidance.

As the June 29 group letter states, “although some plans may be able to comply at great cost and burden, a vast number of plans and employers will not be able to comply with the new requirement … because systems do not exist – and certainly cannot be built in 2023 – to instantly coordinate payroll systems with plan recordkeeper systems that must ensure compliance with the new catch-up rule.”

Among the more than 225 signatories to the letter are companies of all sizes and from all industries, including numerous Fortune 500 firms and many public employers.

 “This overwhelming response from a diverse collection of employers underscores the seriousness of the problem and the need for speedy resolution,” Lynn Dudley, senior vice president, global retirement and compensation policy, said in a media statement. “While we firmly believe that [Treasury already has the authority to provide relief unilaterally](https://www.americanbenefitscouncil.org/pub/?id=55B2BEA1-F63B-59E5-F9AC-52C7A412A16D), the ideal solution would be for Congress to pass a two-year delay in the effective date of this provision.”

In addition to the two-year delay, the Council also asks for guidance on a number of issues and additional compliance time to give state and local governments the opportunity to consider and enact needed legislation and to avoid requiring changes during the term of a collective bargaining agreement or other applicable binding agreements.

“The $145,000 wage threshold that is integral to the mandatory Roth catch-up requirement necessitates coordination among employers, plan administrators, payroll providers, recordkeepers, and plan consultants. That work is underway, but indications are clear that, in many cases, full coordination is simply not possible by January 1, 2024.”

# RECENT REGULATORY ACTIVITY

## Council Continues Urging IRS to Support Repurposing of VEBA Assets

The American Benefits Council is once again requesting confirmation that companies may repurpose surplus assets from overfunded welfare benefit funds (such as voluntary employees’ beneficiary associations (VEBAs)) for other employees and other welfare benefits without being subject to a 100% excise tax.

The Council’s [**June 9 letter**](https://www.americanbenefitscouncil.org/pub/?id=DFC45C8B-CCEC-7EE2-95E2-9AF1CFD31FAB) was submitted in response to [Notice 2023-36](https://www.irs.gov/pub/?id=irs-drop/n-23-36.pdf), the U.S. Department of Treasury and Internal Revenue Service’s (IRS) annual request for recommendations for items to be included on the agency’s next Priority Guidance Plan. The Council has continued to advocate for clarifying guidance, formally and informally, including letters in [2020](https://www.americanbenefitscouncil.org/pub/?id=12D63F1A-1866-DAAC-99FB-87CD2F4CB298), [2021](https://www.americanbenefitscouncil.org/pub/?id=0B7428A4-1866-DAAC-99FB-CF8DF7480315) and [2022](https://www.americanbenefitscouncil.org/pub/?id=460EA34C-1866-DAAC-99FB-A9A327F80263).

Employers commonly set aside assets in welfare benefit funds to fund a reserve for employee benefits, such as post-retirement medical benefits. Many welfare benefit funds have accumulated significant surplus assets and some sponsoring employers would like to repurpose the assets to fund other welfare benefits, such as active medical benefits. However, there is a concern that, in some circumstances, the IRS could consider such repurposing an employer “reversion,” which would be subject to a 100% excise tax under the Internal Revenue Code.

Neither Treasury nor the IRS have published guidance of general applicability as to whether repurposing of welfare benefits to provide other welfare benefits would give rise to the excise tax. The Council’s letter argues that the excise tax should not apply, citing legislative history and prior IRS memoranda. As the letter states, we “strongly urge that Treasury and the IRS take action to provide employers with the certainty needed to enable them to use substantial welfare benefit fund assets … to provide benefits to employees and their beneficiaries.”

In the past, the IRS used to issue rulings for specific employers confirming that the excise tax does not apply, which were extremely helpful to plan sponsors and the individuals served by those employer-provided benefits. However, the IRS stopped issuing these rulings in 2019. The Council has asked the IRS to begin issuing these rulings again, at least in the absence of clarifying guidance.

As stated in the Council’s letter, “post-pandemic, many employers and employees continue to struggle financially and are exploring ways to use assets most efficiently while at the same time making every effort to continue providing existing health and welfare benefits. The continued lack of guidance (or, alternatively, issuance of PLRs) undercuts these critical efforts to the detriment of benefit plan participants and is inconsistent with sound public policy.”

## IRS Clarifies Application of Certain COVID-19 Relief and Preventive Care for High-Deductible Health Plans

The Internal Revenue Service (IRS) issued [Notice 2023-37](https://lnks.gd/l/eyJhbGciOiJIUzI1NiJ9.eyJidWxsZXRpbl9saW5rX2lkIjoxMTYsInVyaSI6ImJwMjpjbGljayIsInVybCI6Imh0dHBzOi8vd3d3Lmlycy5nb3YvcHViL2lycy1kcm9wL24tMjMtMzcucGRmIiwiYnVsbGV0aW5faWQiOiIyMDIzMDYyMy43ODY4MDg5MSJ9.vSSB1LH5-7kmaYHMULy87iGatvbQVgqOhgjlJov7y9c/s/1046672132/br/207298567268-l) on June 23 clarifying the following: (1) high-deductible health plans can cover COVID-19 testing and treatment before the deductible, only for plan years ending on or before December 31, 2024; (2) the preventive care safe harbor for high-deductible health plans does not include COVID-19 testing; and (3) Items and services recommended with an “A” or “B” rating by the USPSTF on or after March 23, 2010 are treated as preventive care for purposes of the preventive care safe harbor for high-deductible health plans, regardless of whether these items and services must be covered without cost-sharing under the Affordable Care Act (ACA).

Regarding COVID-19 testing and treatment, [previous IRS guidance (Notice 2020-15)](https://www.irs.gov/pub/?id=irs-drop/n-20-15.pdf) permitted a high-deductible health plan to cover COVID-19 testing and treatment before satisfying the minimum deductible. In March, the U.S. departments of Labor, Treasury and Health and Human Services (the “tri-agencies”) released a [frequently asked questions (FAQ) document](https://www.cms.gov/CCIIO/Resources/Fact-Sheets-and-FAQs/Downloads/FAQs-Part-58.pdf) stating (in relevant part) that the IRS is reviewing the appropriateness of continuing the relief, given the anticipated end of the COVID-19 public health emergency (PHE) and the related National Emergency (NE). The PHE ended on May 11 and the related National Emergency NE ended on April 10.

The IRS has determined that, with the end of the COVID-19 PHE and NE, the relief in Notice 2020-15 is no longer needed. Accordingly, Notice 2023-37 states:

* High-deductible health plans are permitted to cover COVID-19 testing and treatment before satisfying the minimum deductible, only for plan years ending on or before December 31, 2024.

Regarding preventive care, [previous IRS guidance (Notice 2004-23)](https://www.irs.gov/pub/?id=irs-drop/n-04-23.pdf) provides that preventive care for which high-deductible health plans are permitted to pay before the deductible includes screening services as specified in that notice, but does not generally include any service or benefit intended to treat an existing illness. The IRS has determined that COVID-19 differs from the types of infectious diseases included in the preventive care safe harbor. Accordingly, Notice 2023-37 states:

* The preventive care safe harbor for high-deductible health plans (as described in Notice 2004-23) does not include screening (i.e. testing) for COVID-19, effective as of the date of publication of this notice. (Note: This is only important after December 31, 2024, since it is permissible to cover COVID-19 testing pre-deductible under this guidance until after that date.)

In addition, on April 13, 2023, [the tri-agencies issued FAQs](https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/faqs/aca-part-59) that provide initial guidance on how the decision in Braidwood Management Inc. v. Becerra affects the requirement to cover preventive services without cost-sharing under the Affordable Care Act. The FAQs stated that, until further guidance is issued, items and services recommended with an “A” or “B” rating by the United States Preventive Services Task Force (USPSTF) on or after March 23, 2010, will be treated as preventive care for purposes of the preventive care safe harbor for high-deductible health plans. Notice 2023-37 states:

* Items and services recommended with an “A” or “B” rating by the USPSTF on or after March 23, 2010 are treated as preventive care for purposes of the preventive care safe harbor for high-deductible health plans, regardless of whether these items and services must be covered, without cost-sharing, under the ACA.
* If COVID-19 testing were to be recommended with an “A” or “B” rating by the USPSTF, then that testing would be treated as preventive care under the preventive care safe harbor, regardless of whether it must be covered, without cost sharing, under the ACA.

# RECENT JUDICIAL ACTIVITY

## Council Files Amicus Brief Supporting ERISA Preemption

On June 27, the American Benefits Council filed [**an amicus (or “friend of the court”) brief**](https://www.americanbenefitscouncil.org/pub/?id=82418898-FE2D-BBD8-7C6A-B59F827C4DD7) with the U.S. Court of Appeals for the 9th Circuit, in an attempt to dampen litigation by out-of-network providers bringing state law contract claims against employer plan sponsors.

In this case (Bristol SL Holdings, Inc. v. Cigna Health Life Ins. Co.), an out-of-network substance use disorder center sued the third-party administrator (TPA) to self-insured plans for its denial of benefits for several individuals, which the TPA had denied due to fraud by the out-of-network substance use disorder center, consistent with the terms of the plans. The substance use disorder center claimed benefits on behalf of plan participants under ERISA and alleged a contractual right to payment, under California law, based on conversations the TPA’s staff had with staff of the substance use disorder center in the process of verifying plan benefits.

The lower court ruled for the TPA—finding that its denial of benefits was not unreasonable, and that the substance use disorder center’s state law claims are preempted by ERISA. The substance use disorder center appealed.

The Council, along with several other groups, filed a brief in support of the TPA because the district court’s decision represents an important victory in a contested area of importance to plan sponsors and their TPAs. This is because many TPAs have been subjected to state law claims asserting that the TPA entered into oral contracts during “verification of benefits” calls to pay providers a certain rate for out-of-network benefits. While these allegations are generally not accurate, they can pose substantial problems in state courts that are often unfavorable to plans. Maintaining ERISA’s strong preemption principles is an important tool to defeat these claims.

The Council’s brief explained the real-world impacts of these lawsuits, including how important it is for plan sponsors to be able to make coverage decisions to disincentivize low-quality, low-value care, to ensure providers will be paid as set forth in the plan, to ensure economic viability of plans, and to continue to use pre-authorization to prevent unnecessary and excessive out-of-network expenditures. The brief also illustrates the connection of these points to the legal framework of ERISA preemption as a means to protect national uniformity on these central plan design decisions.

# MISCELLANEOUS NEWS

## New American Benefits Podcast Episode: A Chat With Board Chair Fred Thiele

In the [**latest episode**](https://americanbenefitspodcast.libsyn.com/windows-on-benefits-introducing-new-board-chair-fred-thiele-microsoft-corporation) of the [American Benefits Podcast](https://www.americanbenefitscouncil.org/publications-and-resources/podcast/), host Jason Hammersla speaks to Fred Thiele, vice president, global benefits and mobility at Microsoft and chair of the American Benefits Council’s Policy Board of Directors.

In addition to outlining his priorities as chair, Thiele describes his career journey, shares an inside look at his approach to innovation in the employee benefits space and goes deep on Microsoft’s benefits philosophy.

Like us? Rate us! Please leave a rating the next time you tune into [Apple Podcast](https://podcasts.apple.com/us/podcast/id1213050647) or [Stitcher Radio](https://www.stitcher.com/show/american-benefits-podcast). All episodes are available at <http://www.americanbenefitspodcast.com/>.