

***BENEFITS INSIDER***

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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**.*

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# RECENT LEGISLATIVE ACTIVITY

## House Committee Advances Health Care Price Transparency Bills Package

In a [July 12 mark-up session](https://edworkforce.house.gov/calendar/eventsingle.aspx?EventID=409371), the U.S. House of Representatives Committee on Education and the Workforce approved four bipartisan measures aimed at improving price transparency and competition in the healthcare system, strongly supported by the American Benefits Council.

The Council urged for the passage of this package in a [**July 11 letter**](https://www.americanbenefitscouncil.org/pub/?id=C8C21B99-EAA8-F5DA-7A3D-0EED1FBAE176) of support to the committee, applauding the bipartisan work to lower health costs through increased transparency and competition and urging the committee to advance all four measures.

Approved in the markup:

* The committee voted 39-0 to pass the [Transparency in Billing Act](https://www.congress.gov/118/bills/hr4509/BILLS-118hr4509ih.pdf) (H.R. 4509) that would require off-campus hospital outpatient departments to obtain a separate unique health identifier and include it on all claims for services billed to commercial group health plans or their enrollees.
* The [Transparency in Coverage Act](https://www.congress.gov/118/bills/hr4507/BILLS-118hr4507ih.pdf) (H.R. 4507), passed by a vote of 38-1, would codify and improve price transparency requirements for commercial group health plans and require pharmacy benefit managers to report to plan sponsors detailed prescription drug spending data, including rebates .
* The [Hidden Fee Disclosure Act](https://www.congress.gov/118/bills/hr4508/BILLS-118hr4508ih.pdf) (H.R. 4508), passed by a vote of 39-1, would require PBMs and third-party administrators to disclose certain compensation information, such as total spending on drugs and clawbacks from pharmacies.
* The final bill, [The Health DATA Act](https://edworkforce.house.gov/uploadedfiles/bills-118hr4527ih.pdf) (H.R. 4527), passed by a vote of 38-1, aims to strengthen the No Surprises Act’s gag clause prohibition and ensure employers are not contractually restricted from obtaining cost or quality of care information related to their own health care plans.

The Council has strongly advocated for increasing transparency and competition, as summarized in our [Health Policy Priorities for the 118th Congress](https://www.americanbenefitscouncil.org/pub/?id=C446B8D9-E6D0-5A1D-9D88-080F6A91787F) document shared with lawmakers earlier this year and in our April 26 [testimony before the House Energy and Committee Health Subcommittee](https://www.americanbenefitscouncil.org/pub/?id=694AC5B3-F77D-CCAA-3E93-2C9D814EEA18).

In a statement celebrating passage of the bill, Committee Chairwoman Virginia Foxx (R-NC) said “Today’s passage of our bipartisan health care package makes great strides toward … building a health care system that is more transparent, affordable and accessible.”

The House Energy and Commerce Committee earlier approved a bipartisan package of measures to increase health care transparency and competition. The House Ways and Means Committee has recently held hearings examining health care price transparency and consolidation. The timetable for consideration of these measures by the full House remains uncertain.

## Update: Council Leads Nearly 250 Organizations in Calling for Delay of Roth Catch-Up Provision

The American Benefits Council delivered [**an updated letter to Congress and the U.S. Treasury Department**](https://www.americanbenefitscouncil.org/pub/?id=14CDD986-FF5E-E1D4-F197-8E6122C0A4F2) on July 14 in which 248 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 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.”

For more information on the proposal or other retirement policy issues, contact Lynn Dudley, senior vice president, global retirement & compensation policy, or Diann Howland, vice president, legislative affairs.

# RECENT REGULATORY ACTIVITY

## Agencies Issue Guidance on Fixed Indemnity Insurance and Other Arrangements

On July 7, the U.S. departments of Treasury, Labor and Health and Human Services (the “tri-agencies”) issued [**proposed regulations**](https://www.federalregister.gov/documents/2023/07/12/2023-14238/short-term-limited-duration-insurance-independent-noncoordinated-excepted-benefits-coverage) addressing various types of insurance, including hospital indemnity or other fixed indemnity insurance (“fixed indemnity insurance”) and short-term, limited-duration insurance (STLDI). According to the tri-agencies, the rules are intended to “more clearly distinguish STLDI and fixed indemnity excepted benefits coverage from comprehensive coverage” and to protect consumers and the stability of the individual health insurance market.

The pieces of the proposed regulations most relevant to plan sponsors address fixed indemnity insurance, which is often offered by employers, in addition to major medical coverage.

Currently, to qualify as an excepted benefit, fixed indemnity insurance sold in the group market must pay a fixed dollar amount per day (or other period) of hospitalization or illness regardless of the amount of expenses incurred. The proposed regulations add to this definition that the fixed dollar amount must be paid regardless of the services or items received, severity of the illness or other characteristics of treatment, and not on a per-item or per-service basis. The regulations also add a consumer notice requirement, noting the coverage is not comprehensive coverage and is not subject to most federal consumer protections. (Less relevant to plan sponsors, the regulations also revise the individual market fixed indemnity excepted benefit rules.)

On this same topic and of note, in the proposed regulations, Treasury and the IRS address the taxation of payments made to individuals under fixed indemnity and other similar policies, stating that, if premiums for the coverage are paid on a pre-tax basis, amounts received under an excepted benefit fixed indemnity plan are to be included in an individual’s income (i.e., taxable). This is a noteworthy development as the Treasury/IRS view on this issue has not been clear and, as noted in the preamble, as a general matter, stakeholders have not been treating at least a portion of these payments as taxable. For employers that offer fixed indemnity excepted benefits (or fixed indemnity-type coverage that does not qualify as an excepted benefit), this is an issue that merits attention.

The proposed rules also address STLDI, which is a form of short-term insurance which can be sold to individuals and which is exempt from the requirements that apply to individual market insurance (e.g., the Affordable Care Act). In general, the proposed rules narrow the definition of STLDI so that its maximum length is less than three months, down from twelve months. This rule is not directly relevant to employers because, while there is an exemption for STLDI from the individual market rules, there is no similar exemption for group health plans or insurance sold in the group market.

In addition, the tri-agencies ask for comments on whether additional rules are needed related to specified disease or illness coverage, and the tri-agencies solicit comments on level-funded plan arrangements, which they describe as a type of self-funded arrangement offered by small employers in which the plan sponsor makes set monthly payments to a service provider to cover estimated claims costs, administrative costs, and premiums for stop-loss insurance, beyond which the plan sponsor is no longer responsible for paying claims.

Comments on the proposed regulations are due September 11, 2023.

## ERISA Advisory Council Releases Issue Statements on 2023 Topics; Council to Urge Study of Defined Benefit Plan De-Risking

The ERISA Advisory Council (EAC) has issued its initial reports on the topics it will be discussing in 2023 and on which it will provide input to the U.S. Department of Labor (DOL):

* [Long-Term Disability Benefits and Mental Health Disparity](https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/about-us/erisa-advisory-council/2023-advisory-council-issue-statement-long-term-disability-benefits-and-mental-health-disparity.pdf)
* [Recordkeeping in the Electronic Age](https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/about-us/erisa-advisory-council/2023-advisory-council-issue-statement-recordkeeping-in-the-electronic-age.pdf)

The EAC is a group of benefits experts established by Congress and appointed by the DOL to identify emerging benefits issues and advise the Secretary of Labor on health and retirement issues. The EAC holds hearings on the topics it selects and submits a report of findings and recommendations to the Secretary of Labor. The American Benefits Council is frequently requested to provide testimony for the panel.

Pension Plan De-Risking

Notably, the EAC elected not to study defined benefit pension plan de-risking during the 2023 term, despite a provision of the SECURE 2.0 Act (enacted in 2022) requiring DOL to provide a study of the topic in consultation of the EAC. In a meeting of the panel earlier this year, at least two officials with the DOL Employee Benefits Security Administration told the ERISA Advisory Council that its involvement in the study would be “redundant” and the EAC wouldn’t be able to conclude its work within the department’s one-year timeline for drafting a report to Congress.

On June 9, the Council sent [**a letter to the EAC**](https://www.americanbenefitscouncil.org/pub/?id=4F9EC07B-9C9C-D4FF-C527-073B84821191) urging the panel to study Interpretive Bulletin 95-1 (with which de-risking strategies must comply) as statutorily required and requesting the opportunity to testify at a public hearing. The letter also included a copy of a letter to DOL summarizing the issue and explaining that:

* Congress did not direct DOL to amend IB 95-1, and thus clearly wanted to see the report and review the issues legislatively before DOL considers modifying 95-1.
* The DOL process of preparing the report should be a transparent one, through a public request of information, with hearings and discussions that are open to the public and are made part of the public record.
* To be consistent with the statute, the EAC needs to study this issue so that they can fully consult with DOL. Congress clearly intended that the consultation with the ERISA Advisory Council should be meaningful, based on a full study by the EAC of IB 95-1.
* If DOL decides after issuing the report to issue new guidance on pension risk transfers, the new guidance should be subject to public notice and comment.
* The analysis under 95-1 should continue to be based on fiduciary principles, not a regulatory system for evaluating each investment of every insurer.

Representative Virginia Foxx (R-NC), chair of the U.S. House of Representatives Education and the Workforce Committee (which helped craft the statutory language), has weighed in on the issue, suggesting that the DOL is “trying to sidestep the ERISA Advisory Council, and, in doing so, are attempting to undermine congressional intent and interfere in the implementation of the law.”

In response to this criticism, the EAC has released [**a consultation paper on the topic**](https://www.americanbenefitscouncil.org/pub/?id=544AC806-F40B-81C4-BB56-5083D95D792C) and scheduled a series of public hearings, with the American Benefits Council [slated to speak on July 18](https://www.dol.gov/sites/dolgov/files/EBSA/temporary-postings/erisa-advisory-council-public-comment-schedule0782023.pdf).

It remains unclear whether the EAC will be able to add a new topic to its agenda for the 2023 term.

Recordkeeping in the Electronic Age

The EAC intends to investigate the transfer of records when plan-level transactions occur, such as recordkeeper transitions, spin-offs, plan terminations, orphaned plans and pension risk transfers. The EAC’s exploration of plan-level transactions will include the fiduciary responsibilities of named and other fiduciaries, as well as the duties of service providers (e.g., recordkeeping and payroll) during times of transition. In addition, it will look into whether the contracts and service level agreements in place between plan sponsors or plans and recordkeeping and payroll service providers adequately address the wide range of potential outcomes associated with plan-level transactions. Additionally, the EAC will consider the availability of historical plan records when plan sponsors or plan fiduciaries change service providers, and the length of time electronic records should remain accessible after a change in service provider.

The EAC intends to determine if guidance would be beneficial with respect to records retention, the authenticity and reliability of the electronic records, the data security of electronic records, or other issues that the EAC believes the DOL should consider.

Long-Term Disability Benefits

The EAC will study the scope and impact of employee benefit plans’ limitations on disability benefits for mental health and substance use disorder conditions. For example, it seems to be the case that many long-term disability (LTD) plans limit the duration of benefits for mental health disabilities, whereas benefits for many other disabilities are not limited in the same way. Over the next several months the EAC plans to study the prevalence, rationale and impact of these limitations on disability benefits.

The EAC has indicated it is aware that the Mental Health Parity and Addiction Equity Act does not apply to LTD plans, but the EAC plans to study state and international laws that impose mental health parity requirements on LTD plans. The EAC also hopes to learn about the employer rationale for those who voluntarily provide LTD benefits that apply equally to all disabilities.

The Council has been asked to provide input on this topic and welcomes input from members.

# MISCELLANEOUS

## Council Webinar Recording: Summer 2023 Legislative, Regulatory and Judicial Update

The American Benefits Council held a one-hour webinar on July 6 to provide an update on legislative, regulatory and judicial activity, including:

* Efforts to erode ERISA federal preemption
* Pharmacy benefit manager (PBM)-related reforms
* “Surprise” medical billing
* SECURE 2.0 Act implementation
* Environmental, social and governance investing
* Paid leave

Through a partnership with the Council, WEB Members have access to the recording of this webinar here:

[**https://abcevents.webex.com/abcevents/ldr.php?RCID=6f688c658040c11cdf48b956d93e3ae2**](https://abcevents.webex.com/abcevents/ldr.php?RCID=6f688c658040c11cdf48b956d93e3ae2)