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

Council Emphasizes Importance of ERISA Preemption with House Committee

You Need to Know:

- A key congressional committee is taking a closer look at ERISA as part of observing the law's 50th anniversary.

- Preservation of ERISA, specifically its federal preemption standard, is a core policy priority for the Council.

- The Council offered detailed input on a variety of other ERISA topics, including fiduciary status and reporting requirements.

Preserving and protecting ERISA as the cornerstone of the employer-sponsored benefits system is one of the American Benefits Council's core public policy priorities. In **a March 14 letter to the U.S. House of Representatives Education and the Workforce Committee**, the Council explained the vital importance of the landmark law, and specifically its federal preemption provision.

The letter was a response to the committee's formal request for information (RFI), soliciting feedback on "ways to build upon and strengthen ERISA, the foundation of employer-sponsored health care." The RFI also outlined several specific issues on which they sought targeted feedback.

The Council's letter focused on the first of these, ERISA preemption, which the Council affirmed is fundamental to the success of the employer-sponsored system.

"On its 50th anniversary, ERISA preemption is under assault on multiple fronts. Your request for information comes at a critical time to convey to the committee the seriousness of the threat to ERISA preemption and the imperative to protect it," the Council wrote. "ERISA's federal preemption of state laws [enables] multi-state employers to offer uniform benefits to their employees, irrespective of their or their employees' location and tailored to meet the needs of employees and their families." The Council also described how ERISA preemption promotes equitable coverage, simplicity and protections for participants, employee mobility and cost savings through economies of scale.

The Council's letter also covered several other matters on which the committee sought feedback, including:

- **ERISA fiduciary status:** The Council outlined the important conditions under which the committee should take into account when considering expanding the scope of ERISA's fiduciary definition with respect to group health plans.

- **Reporting requirements:** The Council expressed strong support for expanded use of electronic disclosure when beneficial to plan participants and where it can help reduce administrative burdens.

- **Prohibited transactions: T**he committee should add additional detail to ERISA's prohibited transaction rules as they pertain to health plans.

- **Data sharing:** The Council offered support for increased health care price and quality transparency, which help drive higher-value care.

- **Cybersecurity:** The Council cautioned against the imposition of additional or inconsistent requirements outside of existing HIPAA rules.

- **Direct and indirect compensation:** The Council reiterated its strong support for lowering health care costs through increased transparency.

- **ERISA Advisory Council:** The Council advised against proposals to expand the role of the ERISA Advisory Council to make recommendations to Congress on issues affecting employer-sponsored health benefits.

- **Specialty drug coverage:** The Council appreciates that the committee recognizes the challenges employers face in paying for high-cost specialty drugs and urged the committee to "facilitate, not hinder" employer efforts to advance innovative payment models.

While the RFI is focused on employer-sponsored health coverage, the Council also urged the committee to take into account any potential impact on retirement plans as well.

The Council will continue to be in close contact with policymakers to emphasize the importance of ERISA — and preemption, specifically — both as part of its priority advocacy agenda and in observance of the law's 50th anniversary.

Council Shares Pension Proposals with Senate HELP Committee in Conjunction with Hearing, Sanders Report

The American Benefits Council shared **a set of common-sense proposals to bolster the defined benefit pension system** ahead of the U.S. Senate Health, Education, Labor and Pensions (HELP) Committee February 28 hearing, Taking a Serious Look at the Retirement Crisis in America: What Can We Do to Expand Defined Benefit Pension Plans for Workers?

The Council's proposals describe the cause of the decline of the defined benefit plan system — including a discussion of the important role of Pension Benefit Guaranty Corporation (PBGC) premiums in causing that decline — and consists of eight specific recommendations.

At the start of the hearing, Committee Chair Bernie Sanders (I-VT) emphasized the importance of retirement savings, noting "traditional pension plans have become an endangered species on their way to extinction."

Closing his opening statement, Sanders suggested every U.S. business should be required to provide a retirement plan for their workers, and, if they choose not to provide a retirement plan, they must give workers the option of contributing to a federal pension plan similar to what members of Congress have.

Senator Bill Cassidy (R-LA), the committee's ranking Republican member, disagreed, noting since the passage of ERISA, the defined benefit plan has been largely replaced by the defined contribution system, which has "flourished."

"The advantage of the defined contribution system, and why many have flocked to it, is workers own their own retirement system," Cassidy said. "No matter what happens to the worker's current or previous employer, their retirement funds are secure."

Both Democratic and Republican senators discussed the positive impact of both the Setting Every Community Up for Retirement Enhancement (SECURE) Act of 2019 and the SECURE 2.0 Act of 2022, as well as additional legislative proposals that could build on the bipartisan advancements.

Witnesses also praised efforts by several lawmakers to improve the retirement system. For example, Cassidy and Sen. Tim Kaine (D-VA) would require ERISA plans let people into these plans earlier at 18 and not 21, under certain conditions which would help address companies with high turnover. Further, their Auto Re-enroll Act, would reinvigorate these auto enrollment provisions to encourage more participation. Both of these measures are supported by the Council.

Witnesses providing oral testimony to the committee included:

- Teresa Ghilarducci, a professor of economics and policy analysis at The New School for Social Research
- Sara Schambers, UAW member, Local 182, Ford Livonia Transmission
- Dan Doonan, executive director, National Institute on Retirement Security
- Rachel Greszler, senior research fellow, The Heritage Foundation
- Eric Stevenson, president, Nationwide Retirement Solutions, Nationwide Mutual Insurance Company

Coinciding with the hearing, Sanders released a report entitled "A Secure Retirement for All," which he released as a rationale for his retirement policy agenda, including the Social Security Expansion Act (S. 393).

The report details America's retirement crisis and criticizes the defined contribution system while highlighting Sanders' interest in bolstering the defined benefit system, echoing similar statements made by Sanders during the hearing.

While the Council supports the need to strengthen the defined benefit system, it is important to also continue strengthening the defined contribution system — which has been a success — as was done in the SECURE Act and SECURE 2.0.

RECENT REGULATORY ACTIVITY

Proposed White House Budget Includes Provisions Addressing Mental Health, Prescription Drugs, Retirement Savings, Many Other Issues

You Need to Know:

- The president's budget proposal is non-binding and most provisions will not be seriously considered by Congress, but it indicates the administration's priorities, which is particularly useful in an election year.

- The budget includes strong statements on numerous health, paid leave, and retirement benefit issues.

- The tax "expenditures" associated with employee benefit plan tax incentives could make for attractive targets in the next round of tax legislation.

The White House Office of Management and Budget (OMB) released President Biden's **fiscal year (FY) 2025 budget proposal** on March 11, with numerous proposals that would directly affect employee benefit plans.

Although the executive branch's annual budget proposal lacks binding authority and is unlikely to garner serious legislative consideration for most elements, it serves to describe the Biden administration's policy priorities. This proposal acts as the initial framework for negotiations with Congress. Included in the president's $7.3 trillion budget submission is the U.S. Treasury Department's annual Green Book, which outlines tax or revenue proposals to fund much of the administration's policy agenda.

Many of the proposals included in the president's $7.3 trillion budget represent expansion of certain policies included in the Inflation Reduction Act of 2022 (IRA) or a restoration of provisions that were dropped from the IRA prior to enactment.

In the foreground of this proposal is the White House's ongoing push to increase taxes and ask "the wealthy and large corporations to pay their fair share," with Republicans holding out for steeper cuts in federal spending. President Biden's tax proposals described below likely represent his current position on these negotiations.

Health Provisions

Mental Health

The 2025 budget continues the emphasis on mental health access, an issue seen in prior investment proposals, especially since the pandemic.

The proposed budget:

- Would require all health plans to cover mental health and substance use disorder benefits.
- Would ensure that plans have an adequate network of behavioral health providers.
- Would expand enforcement by the U.S. Department of Labor (DOL).

In addition, the budget includes $275 million over 10 years to increase DOL's capacity for mental health parity enforcement.

The budget does not include additional detail on these policies, which, depending on the details, could represent a significant change in the requirements for group health plan coverage of mental health benefits.

Prescription Drug Pricing

As President Biden previewed in his recent State of the Union address, the budget would expand on various aspects of the IRA. Most notably for employers, the budget would apply the inflation rebates and $2,000 out-of-pocket limit for prescription drugs added to Medicare by the IRA to the commercial market. (As a reminder, under the IRA, drug companies must pay a rebate to the government if they raise the prices they charge Medicare for certain drugs faster than the rate of inflation). Regarding the inflation rebate, the legislation as introduced included the commercial market in the rebate calculation. The Council expressed serious concerns when those provisions were removed prior to its enactment, explaining that the exclusion of the commercial market from the inflation rebate and negotiation provisions as modified would exacerbate cost-shifting to employer-provided health plans.

Additionally, the $35 cost-sharing cap on covered insulin products that apply to Medicare under the IRA would be extended to the commercial market.

Although the budget contains other expansions of the IRA as well, it does not include any proposals to extend the Medicare Part D program's ability to negotiate prescription drug prices beyond the Part D program.

ACA Non-compliant Excise Tax

The proposed budget would impose an excise tax for non-compliant group health plans (re a range of requirements, including the Affordable Care Act and the Mental Health Parity and Addiction Equity Act), on third-party administrators (TPAs), if the TPA causes the group health plan to be noncompliant with the applicable group health plan requirement(s). The current excise tax (which is $100 per affected participant per day) only applies to employers that sponsor group health plans, not to TPAs. As the reason for the change, the budget notes that employers rely on TPAs to administer the plans they sponsor and that widening the scope of application of the excise tax would increase compliance with the requirements that apply to group health plans.

Facility Fees

The budget would also provide support for the U.S. Department of Health and Human Services to ban facility fees for telehealth and certain outpatient services in commercial insurance.

As hospitals expand ownership of outpatient and physician office settings, consumers are seeing an uptick in fees for more than just the care provided to them. These "facility fees" are increasingly a driver of healthcare costs in America and are leading to consumers being charged as though they received treatment in a hospital even if they never entered one, according to HHS's budget proposal. (This is the basis for the Council's support of site-neutral payment reform, as included in the Lower Costs, More Transparency Act (H.R. 5378).)

This proposal would prohibit hospitals from billing unwarranted facility fees for telehealth services and for certain other outpatient services, resulting in almost $2.3 billion in savings over 10 years.

Paid Leave Provisions

The White House proposes establishing a national paid family and medical leave program, similar to previous proposals found in the Build Back Better Act (BBBA), which was never enacted. While the Council has consistently asserted its support for universal paid leave, we were vocal in expressing concerns with the proposal at the time.

In the proposed 2025 budget, employees would be guaranteed up to 12 weeks of paid leave to bond with a new child; care for a seriously ill loved one; heal from their own serious illness; or address circumstances arising from a loved one's military deployment; find safety from domestic violence, dating violence, sexual assault, or stalking (safe leave); or up to three days to grieve the death of a loved one. The proposal also would guarantee up to three days of paid bereavement leave.

The budget also includes investments in a DOL program to help states expand access to paid leave programs but lacks any mention of uniform standards for multi-state employers.

The proposal also calls on Congress to "require employers to provide seven job-protected paid sick days each year to all workers, and ensure that employers cannot penalize workers for taking time off to address their health needs, or the health needs of their families, or for safe leave."

Retirement Provisions

There were also a number of key retirement provisions for plan sponsors detailed in DOL's FY 2025 Budget in Brief.

PGBC Revenue

The Bipartisan Budget Act of 2015 included a budget provision to raise revenue (Section 502). That legislation accelerated PBGC premiums for the 2025 plan year so that they were due a month earlier, thus accelerating premiums for calendar year plans from outside the budget window to inside the budget window. The proposed budget undoes this by shifting the premiums back to their regular due date.

EBSA/SECURE 2.0 Funding

The FY 2025 Budget requests a $14.6 million increase in the DOL Employee Benefit Security Administration's (EBSA's) budget, including $4.7 million designated as necessary for SECURE 2.0 implementation.

Some SECURE 2.0 provisions have already gone into effect, while others will go into effect in 2024, 2025 and later. The reasoning for the budget request is that DOL is tasked with conducting studies, submitting reports to Congress, establishing a public-facing database, opening initiatives, issuing multiple regulations, providing other formal guidance, and consulting with other agencies on various regulatory and sub-regulatory projects.

Cap on Retirement Assets

The budget proposal includes a version of the $10 million cap on IRA and defined contribution plan accumulations that was originally included in the BBBA but never enacted. Various versions of this idea have been proposed in previous budget proposals but have never received serious consideration. The BBBA provision would have limited to $10 million an individual's total vested balances (as of the close of preceding calendar year) in IRAs and defined contribution plans, with no grandfathering of existing amounts.

The president's budget includes several other retirement policy proposals designed to raise revenue. Many of the following proposals were included in the original BBBA legislation but were not enacted as part of the IRA:

- Elimination of Roth conversions for high-income taxpayers
- Elimination of "backdoor" Roth contributions
- Treating IRA owners and beneficiaries (if the owner has died) as disqualified persons for purposes of prohibited transaction rules
- Prohibiting an IRA from holding an interest in a domestic international sales corporation or foreign sales corporation that receives a payment from an entity owned by the IRA owner
- Imposition of a six-year statute of limitations on "a substantial error relating to valuation of assets with respect to an IRA asset," as well as "the excise tax on prohibited transactions"

Employee Misclassification

As in many prior budgets under Democratic administrations, the 2025 budget specifically recommends addressing "the misclassification of workers as independent contractors" in the context of funding the U.S. Department of Labor.

Tax Policy

In an effort to offset the cost of the budget's spending provisions, the White House proposes measures in keeping with the mantra "that ensure corporations and the wealthiest Americans pay their fair share." This includes: (1) an increase of the corporate income tax rate from 21% to 28% and of the top individual income tax rate (for single filers making more than $400,000 a year and married couples making more than $450,000 per year) to 39.6%, (2) expansion of the “net investment income tax” on high earners (originally created as part of the ACA), and (3) establishment of a 25% minimum income tax on households worth more than $100 million.

Additionally, the annual **Analytical Perspectives document** issued along with the President’s budget proposal lists the ten-year cost of all federal tax expenditures – the revenue lost or forgone as a result of current tax policy. This includes the expenditures associated with tax incentives for employee benefit plans.

Notably, the report identifies the “exclusion of employer contributions for medical insurance premiums and medical care” as the largest income tax expenditure in the federal budget (approximately $3.4 trillion over ten years). While there is no active, serious proposal in Congress that would eliminate or curtail this tax exclusion, such measures have been floated as a potential, substantial source of federal revenue — or precursor to large-scale health reform — by lawmakers in both parties.

Likewise, if the tax deferrals for 401(k) plans and the tax exclusion for employer-provided pension contributions and earnings are combined, the total forgone tax (approximately $2.7 trillion over ten years), would be No. 2 on the list. (In discussions with policymakers and the media, the Council always emphasizes that the characterization of retirement plan tax incentives as a tax “expenditure” is misleading since these incentives involve a deferral of tax, rather than tax loss. Because traditional 401(k) and IRA retirement plan assets are taxed when the participant takes a distribution from the plan, the tax revenue is eventually collected. Furthermore, the tax collected from retirement plan distributions results in a revenue gain for the federal government since the amount taxed includes matching and/or non-elective contributions and the earnings on the savings over time, along with the original deferral.)

As with the health tax exclusion, there are no pending proposals to change the tax treatment of retirement plan contributions, but the significant revenue effects of these tax incentives for employer-sponsored benefits is a lucrative target for lawmakers seeking to pay for other policy priorities.

The Council will continue to review the president’s budget for additional provisions that could affect employer benefit plan sponsors.

Council Comments on Changes to Medicare Part D Program

As a part of ongoing efforts to help employers comply with federal health plan regulations, the American Benefits Council recently provided feedback to the U.S. Department of Health and Human Services (HHS) on guidance affecting the “actuarial value” of Medicare Part D benefits.

The Council submitted **written comments to HHS** on March 1 related to Medicare Part D that could affect certain employers with regard to the health coverage offered to Medicare-eligible employees and retirees. The comments respond to the draft calendar year2025 Part D Redesign Program Instructions, which HHS updated to reflect, and provide guidance on, changes made to Medicare Part D by the Inflation Reduction Act (IRA) for 2025.

In general, the IRA made substantial changes to benefits for Part D beneficiaries, including providing a cap on out-of-pocket spending beginning in 2025 (of $2,000). These improvements affect the richness or “actuarial value” of the Part D benefit. This is relevant to some employers for two reasons:

- Employers are required to notify Medicare-eligible plan participants as to whether their plan constitutes “creditable coverage”. A plan constitutes creditable coverage if it has an actuarial value that equals or exceeds standard Part D coverage. (If an individual has creditable coverage, they avoid the penalty for joining Part D late (*i.e.*, after they are first eligible)).

- Some employers offer retiree prescription drug coverage and can receive a related retiree drug subsidy (RDS) from the government, but to be eligible for the RDS, the employer-sponsored plan must have an actuarial value at least equivalent to that of Part D.

The new instructions provide that a method that was previously available to do a simplified calculation of actuarial value for employer-sponsored plans is no longer available, leaving plan sponsors to have to use a more complex and costly method. In our comments, the Council requests that HHS develop a new simplified creditable coverage determination methodology that is updated based on the IRA’s enrichment of the Part D benefit. We explain that all of the sound policy rationales that supported HHS’s development of a simplified methodology in the past persist today.

Additionally, a general concern has been raised that if the actuarial value of Part D has increased due to the benefit improvements of the IRA, some employer-sponsored plans for Medicare eligible employees and retirees (based on plan design) may no longer have an equivalent actuarial value and so may not qualify as creditable coverage. In the draft comment letter, we note this issue and ask that HHS consider a simplified creditable coverage determination methodology that will preserve access to these plans.