



## A quarterly newsletter about benefits and employment trends



Fall 2021

### IRS Releases Final Forms for Next Round of ACA Reporting

The Internal Revenue Service (IRS) recently released final 2021 Forms 1095-B and 1095-C for Affordable Care Act (ACA) reporting under Internal Revenue Code (Code) Sections 6055 and 6056. Applicable large employers (ALEs) and self-funded plan sponsors should review the new versions to get a jump on understanding what will be different for 2021 ACA reporting and how the differences could affect them.

[Continued on page 2](#)

### IRS Provides Guidance Regarding Extended COBRA Deadlines

The IRS recently released Notice 2021-58 (Notice) to help group health plan sponsors as they wrestle with COBRA administration in the wake of guidance that delayed COBRA election and premium payment deadlines during the COVID-19 pandemic. The Notice specifically clarifies when COBRA premium payments are due depending on when a qualified beneficiary elects COBRA continuation coverage.

[Continued on page 4](#)

### IRS Updates 2022 Affordability Safe Harbor

The Affordable Care Act (ACA) requires applicable large employers (ALEs) to make an offer of group health coverage to at least 95% of its full-time (i.e., regularly working at least 30 hours per week) employees or pay a shared responsibility penalty assessed by the IRS if at least one employee gets a premium tax credit (PTC) for Marketplace coverage.

[Continued on page 2](#)

### HHS Increases Fines for Certain HIPAA, ACA and Medicare Violations

On November 15, 2021, the U.S. Department of Health & Human Services (HHS) released its annual notice regarding penalties for violating the privacy, security and breach notification rules under the Health Insurance Portability and Accountability Act of 1996 (HIPAA), the Summary of Benefits and Coverage (SBC) rules under the Affordable Care Act (ACA), and the Medicare secondary payer (MSP) rules that forbid employers from giving individuals an incentive to drop employer group health coverage in favor of Medicare. HHS will begin applying the higher penalty levels for assessments issued after November 15, 2021, for any relevant violation that occurs after November 2, 2015.

[Continued on page 5](#)

### ERISA Considerations for Employer Vaccine Programs

COVID-19 vaccine mandates and the resulting fallout have dominated recent headlines. Employers face numerous challenges in implementing an effective and compliant vaccination program, ranging from employee relations concerns to potential discrimination complaints.

[Continued on page 2](#)



## IRS Releases Final Forms for Next Round of ACA Reporting

### 2021 Changes

First, the [draft instructions](#) for Forms [1095-B](#) and [1095-C](#) conspicuously omit references to the automatic individual statement filing deadline extension as well as the good faith compliance standard relief for filing errors. This underscores the likelihood that the IRS will be less lenient in reducing or waiving ACA filing penalties and means reporting entities should be well-versed in the changes to the 2021 forms and instructions. The draft instructions also note that the maximum penalty for failure to file a correct information return has increased to \$3,426,000, as has the maximum penalty for failure to provide a correct individual statement.

Form 1095-C contains two new codes for reporting entities to report on individual coverage health reimbursement arrangements (ICHRA). Employers who have adopted an ICHRA should understand when they should use new codes 1T and 1U to denote such coverage. Code 1T designates that the employer offered an individual coverage HRA to employee and spouse (no dependents) with affordability determined using the employee's primary residence ZIP code. Code 1U designates that the employer offered an individual coverage HRA to employee and spouse (no dependents) using the employee's primary employment site ZIP code affordability safe harbor.

### Conclusion

Though not much is changing in the technical information required on 2021 ACA reports and individual statements, what is changing is the stance of the IRS when it comes to reporting enforcement. That means there is a significantly greater risk of facing larger penalties that will be harder to refute or avoid in future years. If there ever were a time to be more diligent and more aware of ACA filing obligations, now is that time.

[Back to top](#)

## IRS Updates 2022 Affordability Safe Harbor

The ACA also mandates that ALEs who do offer group health coverage must make sure that the coverage offered is affordable and provides minimum value or pay a separate shared responsibility penalty for any individual who receives a PTC for Marketplace coverage.

The ACA provides that if the lowest-cost single only coverage offered to an employee does not exceed a threshold percentage of his or her household income, the IRS will deem the coverage affordable. The ACA originally set the affordability percentage at 9.5%, but the IRS adjusts the amount based on medical inflation annually. The IRS recently announced that the 2022 ACA affordability threshold will decrease to 9.61%.

Historically, the affordability threshold has risen more often than it has fallen. The drop in the threshold for 2022 means employers must be more careful to set the cost for coverage at a low enough level to avoid more employees triggering a potential shared responsibility penalty. Employers who use the Federal Poverty Line (FPL) safe harbor should be sure to limit an employee's share for the lowest-level self-only coverage to no greater than \$103.14. The new threshold applies for plan years (including non-calendar year plans) that start on or after January 1, 2022.

[Back to top](#)

## ERISA Considerations for Employer Vaccine Programs

One less obvious consideration for employers is whether launching a vaccine program could unwittingly create an ERISA group health plan and require an employer to comply with all of ERISA's rules. Employers mulling whether to start a vaccine program should consider its design carefully to be sure they do not create greater responsibilities and potential liabilities.

### EAPs and Onsite Clinics

Several sweeping laws have been implemented to respond to the COVID-19 crisis. Among other



requirements, these laws dictate that health plans and insurance carriers must cover certain COVID-19 testing and vaccination at no cost. The IRS, U.S. Department of Labor (DOL), and Department of Health and Human Services (HHS) (together, the Departments) have issued multiple rounds of FAQ guidance to address many aspects of COVID-19 relief including whether employers can cover these benefits under an EAP or onsite clinic and thus avoid important coverage mandates.

The FAQ guidance to date provides that employers may offer benefits for COVID-19 vaccines and their administration under an employee assistance program (EAP) and still be considered excepted benefits. The guidance relies on the Departments' longstanding view that an EAP provides excepted benefits if:

- The EAP does not provide significant benefits in the nature of medical care. For this purpose, the amount, scope, and duration of covered services are taken into account.
- The EAP is not coordinated with benefits under another group health plan, meaning that:
  - Participants in the other group health plan must not be required to use and exhaust benefits under the EAP before an individual is eligible for benefits under the other group health plan, and
  - Participant eligibility for benefits under the EAP must not be dependent on participation in another group health plan.
- No employee premiums or contributions are required as a condition of participation in the EAP.
- There is no cost sharing under the EAP.

The FAQ guidance states that solely because an EAP offers benefits for COVID-19 vaccines and their administration (including when offered in combination with benefits for diagnosis and testing for COVID-19), they will not provide significant benefits in the nature of medical care if the benefit meets the other noted requirements. Thus, employers with a qualifying EAP could incorporate

COVID-19 vaccines into that program and not run afoul of certain coverage mandates.

Similarly, the FAQ guidance states that an employer may offer benefits for COVID-19 vaccines (and their administration) at an onsite medical clinic and be considered excepted benefits free from many of ERISA requirements based on a general exception that applies to onsite clinics. Thus, employers who have already established an onsite medical clinic could offer COVID-19 vaccines at the clinic without implicating burdensome coverage mandates.

### **Standalone Program**

Some employers might be contemplating starting a COVID-19 vaccine program but have not established an EAP or on-site clinic. These employers might wish to hold a COVID-19 vaccination clinic that would operate as would a flu shot clinic – a practice that has traditionally been viewed as not creating a group health plan because it does not create a need for any ongoing administration. On its face, there are similarities between flu shots and COVID-19 vaccines, but the differences bear some careful attention.

Flu shots are simple to administer and essentially require nothing more than showing up, rolling up a sleeve and getting a shot. There's no maintenance or monitoring after receiving a shot, and there's no additional dosage.

Conversely, COVID-19 vaccines (and potentially booster shots) often will create a need for ongoing administration to account for receiving multiple doses, documenting vaccinated status and shifting governmental guidance and safety protocols. These factors could create a plan or program and, since a vaccine is medical in nature, a ERISA-governed group health plan.

There has been no guidance to date on this issue. One could argue, however, that the overall tenor of the government's response to the pandemic creates a compelling public policy argument that mitigates in favor of not finding a COVID-19 vaccine program to create an ERISA plan. It is hard to conceive that the same Departments that have made multiple sweeping exceptions to existing laws and regulations to combat the pandemic would act to create additional hurdles



for employers to comply with targeted mandates addressing an immediate response to a critical situation. It follows that one would not expect the DOL to impose on a COVID-19 vaccine program all the trappings of ERISA which might deter employers from making it easier and quicker for their employees to access vaccines.

Moreover, at least one court has held that no ERISA plan existed in the context of a plan where the court held there was no ongoing scheme even though a one-time benefit calculation resulted in multiple set future payments. In that vein, offering COVID-19 vaccines could be viewed as a one-time benefit that simply results in multiple set future encounters.

### **Conclusion**

Many employers are dealing with COVID-19 vaccine mandates and balancing workforce safety concerns with possible compliance pitfalls. Employers thinking about implementing a standalone vaccination program should carefully consider whether the ongoing involvement will create an ERISA plan. While it seems somewhat unlikely that such a program would rise to the level of an ERISA program, we certainly would welcome further guidance. We will watch developments as they unfold and provide actionable updates as needed.

[Back to top](#)

## **IRS Provides Guidance Regarding Extended COBRA Deadlines**

### **Background**

The Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) permits certain qualified beneficiaries to elect to continue employer-sponsored group health coverage following certain qualifying events like a termination of employment. COBRA mandates that a qualified beneficiary generally has 60 days following a COBRA qualifying event notice to elect continuation coverage, and an additional 45 days to make the first required premium payment for such coverage.

In 2020, the IRS and the U.S. Department of Labor (DOL) (collectively, the Agencies) issued Joint Notification of Extensions of Certain Timeframes for

Employee Benefit Plans, Participants, and Beneficiaries Affected by the COVID-19 Outbreak (Joint Notice), and the DOL also issued Disaster Relief Notice 2021-01 (Disaster Relief Notice) (collectively, Emergency Relief Notices). The Joint Notice provided, among other relief, that COBRA election and premium payment timeframes would not run from a period that began March 1, 2020, and would continue through 60 days after the Department of Health and Human Services (HHS) declared an end to the national emergency due to COVID-19 (Outbreak Period). The Disaster Relief Notice clarified that the maximum period during which these timeframes would not run would be the lesser of one year from the date the disaster relief applied to an individual or the end of the Outbreak Period.

### **Premium Due Dates Clarified**

The Emergency Relief Notices clearly require an affected individual to make an initial COBRA election by the earlier of one year and 60 days after the individual's receipt of the COBRA election notice or the end of the Outbreak Period. The Notice clarifies that the disregarded period for an individual to elect COBRA continuation coverage and the disregarded period for the individual to make initial and subsequent COBRA premium payments generally run at the same time.

Thus, if an individual elected COBRA continuation coverage outside of the standard initial 60-day COBRA election period, that individual generally will have one year and 105 days after the date the COBRA notice was provided to make the initial COBRA premium payment. However, if an individual elected COBRA continuation coverage within the standard initial 60-day COBRA election period, that individual will have one year and 45 days after the date of the COBRA election to make the initial COBRA premium payment.

Applying the disregarded periods in this way means that individuals who delay electing COBRA may not have more than one year of total disregarded time for the COBRA election and initial COBRA payment. However, the Notice also provides that in no event will an initial COBRA premium payment be due before November 1, 2021, if the individual makes the initial COBRA premium payment within one year and 45 days after the election date.



For each subsequent COBRA premium payment, the maximum time during which an individual has to make a payment while the Outbreak Period continues is one year from the date the payment originally would have been due in the absence of the Emergency Relief Notices, including the mandatory 30-day grace period, but subject to the transition relief that does not require any premium payment prior to November 1, 2021.

The Notice provides the following instructive examples:

**Example 1.** *COBRA election made more than 60 days after receipt of COBRA election notice under the Emergency Relief Notices.*

*Facts.* Alex participates in ABC Company's group health plan. On August 1, 2020, Alex has a qualifying event and receives a COBRA election notice. Alex elects COBRA continuation coverage on February 1, 2021, retroactive to August 1, 2020. When must Alex make the initial COBRA premium payment and subsequent monthly COBRA premium payments?

*Conclusion.* Alex has until November 14, 2021, to make the initial COBRA premium payment (one year and 105 days after August 1, 2020), because Alex did not elect COBRA continuation coverage under the Emergency Relief Notices within 60 days after receipt of the election notice. The initial COBRA premium payment would include monthly premium payments for August 2020 through October 2020. The November 2020 monthly COBRA premium payment would be due by December 1, 2021 (one year and 30 days after November 1, 2020), with premium payments due every month after that for the months that Alex is eligible for COBRA continuation coverage.

**Example 2.** *COBRA election made within 60 days of the receipt of COBRA election notice under the Emergency Relief Notices.*

*Facts.* Beth participates in XYZ Company's group health plan. Beth has a qualifying event and receives a COBRA election notice on October 1, 2020. Beth elects COBRA continuation coverage on October 15, 2020, retroactive to October 1, 2020. When must Beth make the initial COBRA

premium payment and subsequent monthly COBRA premium payments?

*Conclusion.* Beth has until November 29, 2021, to make the initial COBRA premium payment (one year and 45 days after October 15, 2020) because Beth elected COBRA within 60 days of receiving the election notice. The initial COBRA premium payment would include only the monthly premium payment for October 2020. The November 2020 monthly COBRA premium payment would be due by December 1, 2021 (one year and 30 days after November 1, 2020), with premium payments due every month after that for the months Beth is eligible for COBRA continuation coverage.

### Conclusion

Employers and COBRA administrators will need to adhere to the Notice as they process ongoing COBRA elections and premium payments. The guidance will be helpful, but employers will need to be careful because every situation will be different. Paying close attention to the details in each case will help an employer avoid making mistakes that can lead to costly COBRA violations.

[Back to top](#)

## HHS Increases Fines for Certain HIPAA, ACA and Medicare Violations

### HIPAA

The most significant increases relate to HIPAA violations. Covered entities like group health plans (as well as business associates) can face large fines for violating rules that require them to safeguard individuals' protected health information. The Office for Civil Rights applies penalties according to four tiers that depend on how egregious a violation is. The new amounts are shown in the table on the following page.

Employers should know that HHS has been exercising its discretion to impose much lower annual maximums for violations in Tiers 1 through 3. Thus, the exposure an employer faces for certain HIPAA violations could be capped at between \$25,000 and \$250,000, if such discretion continues. However, the per occurrence amounts continue to



Type of Violation	Minimum*	Maximum*	Calendar Year Maximum
Tier 1 – Lack of Knowledge	\$120	\$60,226	\$1,806,75
Tier 2 – Reasonable Cause and Not Willful Neglect	\$1,205	\$60,226	\$1,806,757
Tier 3 – Willful Neglect (corrected within 30 days)	\$12,045	\$60,226	\$1,806,757
Tier 4 – Willful Neglect (uncorrected within 30 days)	\$60,226	\$1,806,757	\$1,806,757

\* per occurrence

rise each year. So, employers should diligently meet their HIPAA obligations to avoid the escalating costs of HIPAA compliance mistakes.

### SBC

The ACA requires group health plan sponsors and carriers to produce and distribute SBCs to better inform individuals of their coverage options as they decide what group health plan option best suits their needs. The ACA requires SBCs to be distributed at certain intervals including when a plan sponsor distributes enrollment or re-enrollment information. The ACA dictates the form and content of SBCs as well. Entities that violate any of the applicable SBC rules now face penalties of \$1,190 per occurrence – up \$24 from last year.

### Medicare

Medicare prohibits employers who sponsor group health coverage under which Medicare-eligible individuals may participate from offering them any impermissible incentive – monetary or otherwise –

to elect Medicare over the employer’s group health plan. Medicare developed the rules to ensure that it remains secondary to other employer-sponsored coverage when that coverage should pay primary benefits. Employers that provide an impermissible incentive now face a penalty of up to \$9,753 per violation.

### Conclusion

The Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 requires HHS (and other federal agencies) to annually assess and increase penalties under the laws they enforce. Thus, these increases are not unusual; however, the latest HHS increase comes later in the year than typical, and it is likely it will increase penalties again in the first quarter of 2022. In the meantime, employer plan sponsors should consider reviewing their benefit programs and practices to close any gaps that could lead to costly fines and penalties.

[Back to top](#)

*IRS Circular 230 Disclosure: We inform you that any U.S. federal tax advice contained in this communication (including any attachment) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing, or recommending to another party any transaction or matter addressed therein. (The foregoing disclaimer has been affixed pursuant to U.S. Treasury regulations governing tax practitioners.)*



This newsletter is brought to you by your Partner Firm of United Benefit Advisors – the nation’s leading independent employee benefits advisory organization with more than 200 Partner offices in the U.S., Canada, England, and Ireland – and Fisher Phillips, representing employers in labor and employment matters with 32 offices and more than 350 attorneys. This newsletter is provided for informational purposes only. It is not intended as

legal advice, nor does it create an attorney/client relationship between Fisher Phillips LLP. and any readers or recipients. Readers should consult counsel of their own choosing to discuss how these matters relate to their individual circumstances. Reproduction in whole or in part is prohibited without the express written consent of Fisher Phillips. This newsletter may be considered attorney advertising in some states. Furthermore, prior results do not guarantee a similar outcome.



**ON THE FRONT LINES  
OF WORKPLACE LAW<sup>SM</sup>**