

# ALSTON & BIRD



## HEALTH & WELFARE PLAN LUNCH GROUP

**February 5, 2026**

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## **INDEX**

1. Health & Welfare Benefits Monthly Update Presentation

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# Health & Welfare Benefits

## MONTHLY UPDATE

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0

### Health & Welfare Benefits

MONTHLY UPDATE

**February 2026**  
**Health Benefits Update**

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1

## Health & Welfare Benefits

MONTHLY UPDATE



### February 2026 Agenda

- Federal Legislation and Regulations
- Administration Healthcare Proposal
- Deep Dive on Notice 2026-5
- Litigation Update
- Grab bag

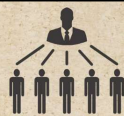
2

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2

## Health & Welfare Benefits

MONTHLY UPDATE



### Regs and Legs



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3

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MONTHLY UPDATE



### Published in the Federal Register

- [Improving Transparency Into Pharmacy Benefit Manager Fee Disclosure](#) (DOL-EBSA), Proposed Rule published on 1/30/2026
- [Update to the Women's Preventive Services Guidelines](#) (HHS-HRSA), Notice published on January 5, 2026
- [Delinquent Filer Voluntary Compliance Program](#) (DOL-EBSA), Notice published on 12/30/2025
- [Transparency in Coverage](#) (HHS-CMS, TREAS-IRS, DOL-EBSA), Proposed Rule published on 12/23/2025
- [Global Benchmark for Efficient Drug Pricing \(GLOBE\) Model](#) (HHS-CMS), Proposed Rule published on 12/23/2025
- [Guarding U.S. Medicare against Rising Drug Costs \(GUARD\) Model](#) (HHS-CMS), Proposed Rule published on 12/23/2025
- [Prohibition on Federal Medicaid and Children's Health Insurance Program Funding for Sex-Rejecting Procedures Furnished to Children](#) (HHS-CMS), Proposed Rule published on 12/19/2025
- [Hospital Condition of Participation: Prohibiting Sex Rejecting Procedures for Children](#) (HHS-CMS), Proposed Rule published on 12/19/2025
- [Nondiscrimination on the Basis of Disability in Programs or Activities Receiving Federal Financial Assistance](#) (NPRM: HHS-OCR), Notice of Proposed Rulemaking published on 12/19/2025
- [Contract Year 2027 Policy and Technical Changes to the Medicare Advantage Program, Medicare Prescription Drug Benefit Program, and Medicare Cost Plan Program](#) (HHS-CMS), Proposed Rule published on 11/28/2025

4

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4

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MONTHLY UPDATE



### At the Office of Management and Budget (OMB)

These proposed rules are under review at OMB and are not yet publicly available:

- Final Rule: **Independent Dispute Resolution Operations**, rec'd 1/29/2026 (HHS-CMS)
- Notice: **Comprehensive Regulations to Uncover Suspicious Healthcare (CRUSH)**, rec'd 1/16/2026 (HHS-CMS)
- Proposed Rule: **Fiduciary Duties in Selecting Designated Investment Alternatives**, rec'd 1/13/2026 (DOL-EBSA)
- Final Rule: **Administrative Simplification: Adoption of Standards for Health Care Attachment Transactions and Electronic Signatures (CMS-0053)**, rec'd 1/9/2026 (HHS-CMS)
- Proposed Rule: **HHS Notice of Benefit and Payment Parameters for 2027**, rec'd 11/14/2025 (HHS-CMS)
- Proposed Rule: **Requirement to Provide Paper Statements in Certain Cases-Amendments to Electronic Disclosure Safe Harbors**, rec'd 9/30/2025 (DOL-EBSA)

5

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5



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MONTHLY UPDATE



### Proposed Legislation

- [S.3549 \(H.R.6837\)](#) - **PBM Fiduciary Accountability, Integrity, and Reform (FAIR) Act**: To amend the Employee Retirement Income Security Act of 1974 to ensure that pharmacy benefit managers are considered fiduciaries, and for other purposes. Introduced 12/17/2025.
- **Appropriations Committee releases [Consolidated Appropriations Act, 2026](#)** : Increasing funding for mental health and substance use treatment and prevention. For a summary related to DOL, HHS, and related agencies appropriations, click [here](#).

6

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6

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### DOL-EBSA Enforcement Priorities

- On January 15, 2026, DOL released its [updated enforcement priorities](#).
- EBSA will focus its enforcement resources to:
  - increase broad-based employee benefit plan compliance,
  - address abusive practices and bad actors, and
  - deliver results that increase security for participants and beneficiaries.

7

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7

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MONTHLY UPDATE



### DOL-EBSA Enforcement Priorities (cont.)

- Under the updated enforcement projects, investigators will prioritize cases related to:
  - Cybersecurity
    - Will we see the HIPAA cybersecurity final rule this year?
  - Barriers to mental health and substance use disorder benefits
    - Funding has been increased. Will the 2024 MHPAEA final rule be amended?
  - Protecting benefit distributions
  - Retirement asset management
  - Surprise billing
    - Federal IDR Operations final rule is at OMB.
    - Will HHS/CMS step up enforcement of payment determinations?
  - Criminal abuse of contributory benefit plans

8

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8

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MONTHLY UPDATE



### DOL-EBSA Enforcement Priorities (cont.)

- Although not a national project, EBSA will continue its long-standing commitment to identifying abusive [Multiple Employer Welfare Arrangements](#) and preventing fraudulent MEWA operators from opening new arrangements in other states.
- EBSA removed Employee Stock Ownership Plans from the national enforcement project list and will reduce its focus on missing participants following the establishment of the [Retirement Savings Lost and Found Database](#).

9

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9

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MONTHLY UPDATE



# Administration Healthcare Proposal



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10

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# TrumpRx and Direct to Consumer Pricing

In a September 30, 2025 Executive Order President Trump announced “most favored nation” drug pricing. The official website ([TrumpRx](#)) notes it is “coming soon”. Several of the biggest drug manufacturers have agreed to participate. Also see PhRMA sponsored website (AmericasMedicines).

- Current direct to consumer options (and who uses them)?
  - Commercial offerings
  - Manufacturer discounts/rebates (issues for HSAs)
- Implications for employer plans
  - “Competing” offerings?
    - Sponsored by employer
    - Impact when not sponsored
  - Participant use when contracted prices are better
  - Consumer directed arrangements
    - FSA, HRA, HSA, EBHRA

11

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11



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MONTHLY UPDATE



# The Great Healthcare Plan

On January 15, President Trump released [The Great Healthcare Plan](#). As announced in the related [fact sheet](#), the Plan focuses on four areas:

- **Lower drug prices**
  - Codify “most-favored-nation” deals
  - Increase the number of verified safe drugs available for OTC purchase.
- **Lower insurance premiums**
  - Send money directly to people (e.g., into HSAs) rather than through ACA subsidies.
  - End PBM kickbacks
- **Increase accountability for health insurance companies**
  - Require health insurers to publish rate/coverage comparisons
  - Require health insurers to publish the percentage of revenues paid out in claims versus overhead costs and profits on their websites.
  - Require health insurers to publish claims denial rates and average wait times for routine care on their website.
- **Maximize price transparency**
  - Require any healthcare provider or insurer who accepts Medicare/Medicaid to publicly and prominently post their pricing and fees

12

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12

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# Notice 2026-5 Answers Many OBBB HSA Questions



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13

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### House Bill, Investing in the Health of American Families and Workers

- On May 22, 2025, the U.S. House of Representatives passed **H.R.1 — One Big Beautiful Bill Act**. Title XI, Part 3 of the bill, titled “Investing in the Health of American Families and Workers,”
  - Would codify the regulatory framework for Individual Coverage Health Reimbursement Arrangements (ICHRA), rebranded as CHOICE arrangements (Custom Health Option and Individual Care Expense), and
  - Proposed sweeping reforms to Health Savings Accounts (HSAs).
- The Senate approved a modified version of the House Bill, removing the CHOICE Act provisions and limiting the HSA improvements
- The Senate version became law on July 4th



14

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14

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### Comparison of Senate and House Versions

#### Senate version (**enacted into law**)

- Telehealth exception for HSAs made permanent (retro to 1/1/25). Section 71306 (Not in House Bill)
- Bronze and Catastrophic Exchange Plans Qualify as HDHP. Section 71307 (from House Bill)
- Certain Direct Primary Care (per month up to \$150 individual/\$300 plus one or more) compatible with HSAs. Section 71308 (from House Bill)
- Dependent Care Assistance (e.g., DCAP FSA) benefits increased to \$3750/\$7500 (up from \$2500/\$5000). Section 70404
- Permanent extension of CARES Act tax-free student loan repayment assistance (annual limits still \$5,250, but cost of living adjustment applies for taxable years after 2026). Section 70412 (from House Bill)
- Note: Bicycle (commuter) benefit is eliminated effective for tax years on/after 12/31/25. Section 70112



#### House version provisions left on cutting room floor (**NOT enacted**)

- CHOICE Act ICHRA codification
- HSA Improvements (more below)

15

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15

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MONTHLY UPDATE



### Provisions enacted into Law

- *Telehealth Exception for HSAs made permanent:* Telehealth (or other remote care) will not disqualify an individual from HSA eligibility. **Effective Date: Plan years beginning after December 31, 2024 (effectively bridges existing arrangements)**
  - Huge interest by employers with HDHPs
  - When is care telehealth or remote care ?? Is it applicable to DME or Rx?
- *Direct Primary Care (DPC):* Direct primary care arrangements (up to \$150 individual/\$300 for two or more per month) compatible with HSA eligibility and an HSA-eligible expense. **Effective Date: Months beginning after December 31, 2025**
  - DPC is defined to include care by a primary care provider or PA within a list of specified codes. But excludes general anesthesia-required procedures, prescription drugs other than vaccines, and lab services not typically administered in an ambulatory primary care setting.
  - Many questions: Can annual payment be prorated; can payments be made by employer or pre-tax by employee?
- *Bronze and Catastrophic Exchange Plans:* These plans are now treated as HSA compatible irrespective of deductible level. **Effective Date: Months beginning after December 31, 2025.**
  - Exchange plans cannot be pre-tax under a cafeteria plan
  - But could be HRA eligible

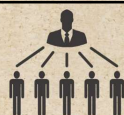
16

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16

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MONTHLY UPDATE



### Notice 2026-5 and Telehealth

- Q/A-1 – Relief extends retroactively to Dec 31, 2024 (bridging gaps)
- Q/A-2 – Look to Medicare for telehealth definition
- Q/A-3– In person care associated with telehealth not included (e.g. Rx or DME)

17

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17

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MONTHLY UPDATE



### Notice 2026-5 and Bronze/Catastrophic Plans (effective 1/1/26)

- Q/A 3 – Bronze/Catastrophic Exchange Plans qualify regardless of deductible or OOP
- Q/A 6,7 – Off exchange individual bronze and catastrophic plans may qualify
- Q/A 5 – ICHRA funding may be compatible with HSA
- Q/A 8 – SHOP plans will not qualify
- Q/A 10 – IHS Bronze/Catastrophic may be compatible with HSA

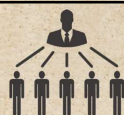
18

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18

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MONTHLY UPDATE



### Notice 2026-5 and Direct Primary Care Service Arrangements (DPCSA)

- Q/A 15 – DPCSA inclusion in HDHP offers benefits below deductible
- Q/A 16 – DPCSA membership fee cannot count toward deductible
- Q/A 11, 12 – No separate fees for DPCSA covered services (ala carte services outside DPCSA may be allowed)
- Q/A 15, 18 – DPCSA fees that are pre-tax funded cannot be reimbursed through an HSA; fees outside the HDHP can be employer funded
- Q/A 13, 19 DPCSA fees can be pro-rated (monthly limits apply \$150/\$300)
- Q/A 17 – No further elaboration on what are primary care services
- Q/A 14 – DPCSA inclusion of ineligible expense disqualifies individuals in DPCSA from HSA
- Q/A 20 – non-compatible DPCSA could be an eligible HSA expense (but individual no longer HSA eligible)

19

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19

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MONTHLY UPDATE



### House Bill Provisions (**NOT Enacted**)

- The following House Bill provisions for HSAs and ICHRAs/CHOICE arrangements were not enacted, but may make their way into future legislation
  - **ICHRA codification (CHOICE Arrangements) – Not enacted as part of OBBA**
  - HSA changes (not enacted as part of OBBA)
    - Medicare Part A eligibility
    - Onsite clinic compatibility
    - Fitness/Wellness expenses
    - Catchup contribution for spouse
    - FSA/HRA rollovers
    - Spousal FSA eligibility
    - Increased HSA contribution
    - Establishment Date Issue fix

20

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20

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MONTHLY UPDATE



### Preparing for 2026: Next Steps

#### Telehealth Extension for HSAs:

- **Optional—Plan sponsors do not have to adopt.**
- If removed in 2025, plan sponsors may add it back (using proper process/procedure).
- If never removed, the extension is retroactive.

#### Bronze and Catastrophic Exchange Plans qualify as HDHP.

- If pre-tax HSA contributions are permitted under the 125 are they permitted for participants who are not enrolled in employer's HDHP.
- Ensure that HSA eligibility language describing compatible HDHP coverage does not inadvertently exclude Bronze and Catastrophic Exchange Plans.
- [NOTE: Contributions for individual exchange policies cannot be made pretax under a cafeteria plan.]

#### Certain Direct Primary Care compatible with HSAs.

- **Required.** Review any definition of eligible medical expenses for HSAs and ensure it aligns with Code section 223(d).

#### Dependent Care Assistance (benefits increased to \$3750/\$7500 (up from \$2500/\$5000)).

- **Optional—Plan sponsors do not have to adopt the increase.** If adopting, consider nondiscrimination testing issues.
- Consider whether to exclude HCEs entirely.
- Use proper plan process/procedure for any amendments.
- Include changes in open enrollment materials.
- **Required:** If the DCAP SPD includes a discussion on the child and dependent care tax credit, review and update, if needed, to align with OBBA amendment.

#### Tax-free student loan repayment assistance extension.

- **Optional—Plan sponsors do not have to adopt.**

#### Bicycle (commuter) benefit is eliminated effective for tax years on/after 12/31/25.

- **Required:** Permanently remove bicycle commuter benefits from qualified Code Section 132 plans.

21

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21



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MONTHLY UPDATE



# Litigation Update



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22

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## Voluntary Benefit Cases

- A firm filed “excessive fee” litigation under ERISA in December
- Cases allege breach of fiduciary duty in selection and monitoring of certain voluntary benefits offered through ERISA plans
- Items to note
  - Evaluate offerings as ERISA often applies to “worksite” voluntary benefits
    - The ERISA voluntary plan safe harbor factors (2510.3-1(j)) are slippery
    - But . . . Are you really any worse off under ERISA?
  - If ERISA applies then . . .

23

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23

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MONTHLY UPDATE



## Litigation Update

- **ACA Excise tax:** *Faulk Company, Inc. v. Kennedy*
- **Appointments Clause Challenge:** [Order and Final Judgment](#), *Braidwood Mgmt., Inc. v. Kennedy*
- **No Surprises Act enforcement/cert denied:** *Guardian Flight, LLC v. Health Care Service Corporation*
- **GLP-1 Litigation:** Series of class action filed against insurers, including discrimination claims (obesity as a disability), prohibited transactions (higher rebates for one brand over another)

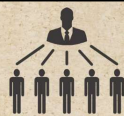
24

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24

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MONTHLY UPDATE



## Grab Bag



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25

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# HIPAA

- [January 2026 OCR Cybersecurity Newsletter](#)
  - Failure to patch systems, remove unnecessary software, manage default passwords, and configure security controls can support a finding of noncompliance with the HIPAA Security Rule.
- Notice of Privacy Practices
  - February 16, 2026: deadline to update NPP for HIPAA Part 2
    - In general, Part 2 protects Substance Use Disorder (SUD) information obtained by any federally assisted program.
  - What updates need to be made to the HIPAA NPP for HIPAA Part 2?
    - A statement that such records (or related testimony) **cannot be used in legal proceedings** against the patient without **written consent** or a **court order** with notice and opportunity to be heard.
    - If used for **fundraising**, individuals must be given a **clear opt-out option**.
  - HHS promised model language, which has not yet been issued.

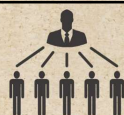
26

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26

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MONTHLY UPDATE



# Q1 Deadlines

- January 31:
  - Form W-2-Health Plan Coverage Reporting
  - 2025 Form MA 1099-HC (Massachusetts Creditable Coverage Requirement)
  - 2025 Form 1095-C-furnish to individuals residing in California that are covered under the major medical plan
- Privacy breaches affecting less than 500 must be reported w/in 60 days of the end of the calendar year in which the breach was discovered.
- Notice of creditable coverage to CMS due within 60 days after the beginning date of the plan year.
- HCSO Top-Off calculation and payment: March 2.
- 2025 Form 1095-C to individuals:
  - For automatic furnishing: Jan. 31, but regulations allow automatic 30-day extension (generally March 2). Applies to Federal, RI and NJ.
  - New Alternate furnishing manner (Federal only): The statement is timely furnished if provided to the individual no later than the later of January 31, 2026, or 30 days after the date of the request.

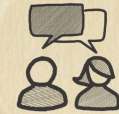
27

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27

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MONTHLY UPDATE



# Q1 Deadlines (continued)

### Alternate Manner for Furnishing Form 1095-C.

- To use the alternative manner of furnishing statements, the following conditions must be met:
- Provide clear and conspicuous notice, in a location on its website that is reasonably accessible to all responsible individuals, stating that individuals may receive a copy of their statement upon request.
- Use plain, non-technical terms and with letters of a font size large enough, including any visual clues or graphical figures, to call to a viewer's attention that the information pertains to tax statements reporting that individuals had health coverage.
- Notice must include an email address, a physical address to which a request for a statement may be sent, and a telephone number that individuals may use to contact the employer with any questions.
- Timely posted, which for tax year 2025 is by March 2, 2026, and retained until October 15 of the filing year.
- Furnished to the individual no later than the later of January 31, 2026, or 30 days after the date of the request.
- See [Instructions for Forms 1094-C and 1095-C \(2025\)](#) for more information.

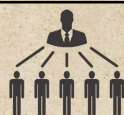
28

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28

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MONTHLY UPDATE



# HRSA Expands Women's Preventive Services

- Plans must cover these updates for plan years beginning on or after **12/29/2027**:
  - Primary High Risk HPV Testing Is Now the Preferred Method (Ages 30–65)
    - For average risk women ages 30–65, the guideline now expressly states:
      - Primary high risk HPV (hrHPV) testing every 5 years is preferred, or
      - Co testing (cytology + hrHPV) every 5 years, or
      - Cytology alone every 3 years if hrHPV testing is not available.
  - Patient Collected (Self Collected) hrHPV testing is explicitly authorized as an option for cervical cancer screening in women aged 30 to 65 years at average risk.
- Coverage Must Include Follow Up Testing Needed to Complete Screening
  - Additional testing required to complete the screening process must also be covered (regardless of whether the initial test was clinician collected or self collected), including:
    - Cytology
    - Biopsy
    - Colposcopy
    - Extended genotyping
    - Dual-stain testing
    - Pathologic evaluation (when clinically indicated)

29

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29

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MONTHLY UPDATE



# Proposed Changes for Part D Notices

- **Proposed Change:** Exclude account-based medical plans (such as Health Reimbursement Arrangements (HRAs), Individual Coverage HRAs (ICHRAs), Health FSAs, and HSAs) from the requirement to make creditable coverage disclosures to CMS and to Medicare-eligible individuals.
  - **Rationale:** These arrangements do not “offer prescription drug coverage” in the sense required by the statute; they are reimbursement vehicles, not insurance plans.
- **Proposed Updated Methodology:** Would codify recent changes to the simplified determination methodology for creditable coverage. For 2027, a non-retiree drug subsidy (non-RDS) group health plan is creditable if it is designed to pay at least **73% of participants’ prescription drug expenses** (up from 72% in 2026), provides reasonable coverage for brand/generic drugs and biologicals, and reasonable access to retail pharmacies.
- **Transition:** The old “60% rule” for simplified determination is sunset; plans must use the new, higher threshold.

30

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30

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# Signed, Sealed...and Delivered? New Rule Clarifies the Effect of a Postmark

- **Final Rule:** [Postmarks and Postal Possession](#), published in Fed. Reg. on 11/24/2025.
- Section 608.11.3 of the Final Rule states that “[t]he presence of a postmark confirms that the Postal Service accepted custody of a mailpiece, and that the mailpiece was in the possession of the Postal Service on the identified date. However [...] the postmark date does not necessarily indicate the first day that the Postal Service had possession of the mailpiece.” (Emphasis added.) Rather, the postmark date “shows the date of the first automated processing operation performed on a mailpiece or, alternately, the date when a mailpiece was accepted at a retail unit.”
- Current Statutory language under IRC Section 7502(a)(1): “[i]f any return, claim, statement, or other document required to be filed, or payment required to be made, [...] is delivered by the United States mail to the agency, officer or office [...] *the date of the United States postmark stamped on the cover [...] shall be deemed to be the date of delivery or date of payment.*”
- The Final Rule was not intended to “change any existing postal operations or postmarking practices, but [was] instead intended to improve public understanding of postmarks and their relationship to the date of mailing.”

31

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31



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MONTHLY UPDATE



# MEWA/M-1 Relief under DFVCP

- DOL Extends DFVCP to M-1 filings for MEWAs by MEWA administrators and Entities Claiming Exceptions (ECEs).
- The MEWA or ECE administrator must file a complete Form M-1 Return/ Report, for the most recent filing year. The requirement to file once for the most recent filing year applies to MEWAs and ECEs who either failed to file annually or who failed to file upon the occurrence of certain other events specified in 29 CFR 2520.101-2.
- This filing shall be submitted electronically in accordance with the EFAST electronic filing requirements.
- The MEWA or ECE administrator shall pay the \$750.00 penalty amount by submitting electronic payment in accordance with the gov.pay web payment link on the Department's website.
- The MEWA or ECE administrator is personally liable for the payment of civil penalties assessed under sections 502(c)(2) and 502(c)(5) of ERISA; therefore, civil penalties, including amounts paid under this DFVC Program, shall not be paid from the assets of an employee benefit plan

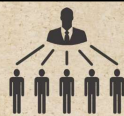
32

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32

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MONTHLY UPDATE



# Questions

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33