

Benefits Report May 2026

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Proposed Rule Will Allow Employers to Establish Stand-Alone Fertility Benefits



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On May 13, 2026, the Internal Revenue Service, Department of Labor, and Department of Health and Human Services (collectively, the “Departments”) published a Proposed Rule (<https://www.federalregister.gov/documents/2026/05/13/2026-09479/excepted-fertility-benefits>) (the “Proposed Rule”) that will, if adopted, allow employers to offer fertility coverage as a “limited excepted benefit.” An employer would be allowed to offer fertility coverage on a standalone basis, exempt from certain compliance requirements under such federal laws as the Portability rules under the Health Insurance Portability and Accountability Act (“HIPAA”), the Affordable Care Act (“ACA”), and the No Surprises Act.

Expanding Fertility Benefits Part of President’s Agenda

The Department of Labor (“DOL”) news release accompanying the Proposed Rule called it “a central component” of the Trump Administration’s policy to expand access to fertility benefits by ensuring reliable and affordable access to in vitro fertilization (“IVF”). Over the past year, the Trump Administration has taken several actions to push its fertility benefits agenda.

On February 18, 2025, President Trump issued Executive Order 14216, “Expanding Access to In Vitro Fertilization,” directing the Assistant to the President for Domestic Policy to provide policy recommendations for lowering costs and reducing barriers to IVF. Then, on October 15, 2025, the Trump Administration announced a two-part IVF initiative. First, the administration announced agreements with EMD Serono, a drug manufacturer, to offer certain fertility medications at discounted prices when sold to patients directly and on TrumpRx.gov. Second, the Departments issued FAQs declaring their commitment to exploring options for reducing IVF costs and encouraging the adoption of extensive fertility benefits. These FAQs clarified the existing categories of excepted benefits that employers can use to offer fertility benefits (e.g., independent, non-coordinated excepted benefits and limited excepted benefits).

Employer Coverage of Fertility Benefits

Although employer and employee interest in fertility benefits has grown over the past decade, many employer-sponsored group health plans do not cover fertility benefits. For the employers that do offer fertility benefits, the benefits are often carved out from major medical coverage and administered by specialty vendors (e.g., separate provider networks, separate deductibles and out-of-pocket limits) or offered as a health reimbursement arrangement (“HRA”) that is integrated with major medical coverage (either the employer’s own group health plan or other employer-sponsored coverage, such as the spouse’s employer’s group health plan coverage).

There are also gaps in mandated fertility benefits, as only a handful of states require health insurance coverage to include IVF benefits, and whether fertility benefits are required as an Essential Health Benefit (“EHB”) depends on the state and issuer. Further, employer-sponsored self-funded group health plans are not subject to these insurance mandates or EHB requirements.

It is important to note that the Proposed Rule is not a mandate for employers to offer fertility benefits. However, the Departments state that creating the ability for employers to offer separate excepted fertility benefits that are exempt from various ACA market requirements will overall expand access to fertility by reducing the regulatory burden that may have been a barrier to more employers offering fertility coverage.

Current Excepted Benefits Rules

Currently, stand-alone fertility benefits are subject to various legal compliance obligations that must be taken into account when an employer designs its fertility benefit. For example, a stand-alone fertility benefit must comply with laws such as Employee Retirement Income Security Act of 1974 (“ERISA”), HIPAA Portability, and the ACA market reforms. Often, stand-alone fertility benefits often are not designed to satisfy ACA market reform requirements, such as covering preventive care (e.g., mammograms, etc.) without cost-sharing, providing dependent child coverage until age 26, and restrictions on annual and lifetime benefit limits. As a result, employers currently comply with the ACA by integrating their fertility benefit with an employer-sponsored major medical plan (i.e., limiting enrollment in the fertility benefit to those who are also enrolled in the employer’s major medical plan).

In the preamble to the Proposed Rule, the Departments state that there may be scenarios where an employer wants to offer fertility benefits “without regard to whether their employees have other coverage at all, or without regard to whether their employees have coverage that is subject to and satisfies the market requirements”—and that this can be accomplished by categorizing certain fertility benefits as a “limited excepted benefit.” Group health plan benefits that are deemed “excepted benefits” are not subject to the ACA market reform requirements, HIPAA Portability, and the No Surprises Act. Currently, the four statutory categories of excepted benefits are:

1. Excepted in all circumstances (e.g., automobile insurance, workers’ compensation, AD&D);
2. Limited excepted benefits (e.g., limited scope dental or vision, long-term care) that are provided under a separate policy, or are not an integral part of the plan;
3. Independent, non-coordinated excepted benefits for specified disease/illness coverage or fixed indemnity insurance that meets certain conditions; and
4. Supplemental excepted benefits that are provided under a separate policy, certificate, or contract of insurance (e.g., Medigap).

The Proposed Rule would establish fertility benefits as a new type of limited excepted benefits (category 2 above) by amending the regulations regarding excepted benefits under ERISA, the Internal Revenue Code (“IRC”), and the Public Health Service Act.

What Benefits May Be Provided Through an Excepted Fertility Benefit?

The Proposed Rule states that coverage under an excepted fertility benefit is limited to benefits which are (i) for the diagnosis, mitigation, or treatment of infertility or infertility-related health conditions, and (ii) provided by licensed medical professionals. The Departments clarify in the preamble to the Proposed Rule that the definition of covered fertility benefits is intended to provide employers with flexibility to cover a “broad spectrum of treatments and interventions for infertility related and pre-conception care.”

Note: The Proposed Rule does not limit fertility coverage to items and/or services that are for IRC section 213(d) medical care. Accordingly, it appears that an employer could cover fertility items and/or services beyond IRC section 213(d) medical expenses. In other words, an employer’s limited excepted fertility benefit could potentially cover fertility services and/or items that are for IRC section 213(d) medical care, as well as taxable fertility benefits such as long-term egg preservation. More guidance on this issue from the Departments would be welcome.

Lifetime Dollar Limits

Under the Proposed Rule, the total lifetime benefit per participant is \$120,000. For plan years beginning after December 31, 2027 (i.e., January 1, 2028 for calendar year plan years)—this maximum lifetime limit would be indexed for medical inflation.

Note: It is not clear whether the \$120,000 lifetime limit applies on a plan-by-plan basis. For example, could an individual participate in different employer-sponsored excepted fertility benefits (e.g., a current employer and a former employer’s excepted fertility benefit plan) and incur up to \$120,000 under each plan? Further guidance on this issue would be welcome.

Not an Integral Part of the Plan

Under the Proposed Rule, the fertility benefit must: (1) be provided under a separate policy, certificate, or contract of insurance, or (2) otherwise not be an integral part of the plan. A fully-insured fertility policy would be able to satisfy the first test, but self-funded fertility coverage would need to satisfy the second test. To be considered “not an integral part of the plan,” the Proposed Rule requires the employer to offer a group health plan that is not limited to excepted benefits and that is not an HRA or other account-based group health plan to fertility plan participants. The Departments state that participants are not required to enroll in the other group health plan coverage—merely that the employer makes such other group health plan coverage available.

Note: We suspect that offering an individual coverage health reimbursement arrangement (“ICHRA”) would not satisfy the “not an integral part of the plan” requirement of the Proposed Rule. Further, the preamble to the Proposed Rule states several times that only individuals who are offered “the traditional group health plan” would be eligible for the excepted fertility benefit.

Notice Requirements

An employer that sponsors an excepted fertility benefit is required to provide “notice” of this benefit to participants and beneficiaries. The Proposed Rule’s notice requirement is meant to function as a “quick reference guide” for excepted fertility benefits.

- *Content.* The notice must be written to be understandable to the average plan participant and include: (i) a summary of benefits and a description of coverage limits (including the lifetime dollar amount limit established by the plan); (ii) information regarding network providers; and (iii) claims submission procedures.
- *Timing.* The plan sponsor must provide this notice no later than the first date on which the participant and/or beneficiary is eligible to enroll in plan coverage as well as annually thereafter (e.g., at open enrollment). Further, the notice must be provided upon request.
- *Distribution.* The plan sponsor can satisfy the notice distribution requirements by providing the notice to the participant and any beneficiaries at the participant’s last known address. However, if the beneficiary’s last known address is different from the participant’s last known address, then a separate notice must be provided to the beneficiary.
- *The notice may be provided with other ERISA-required materials.* For example, if multiple documents are provided as part of an open enrollment packet, the excepted fertility benefits notice may be included as part of that packet.

This new notice requirement is in addition to the plan sponsor’s normal ERISA obligation to provide plan participants with a copy of an ERISA summary plan description for the fertility benefit.

Health Savings Account Implications

Under the IRS rules governing Health Savings Account (“HSA”) eligibility, a participant cannot be covered under non-High Deductible Health Plan coverage prior to meeting their statutory deductible, with the exception of preventive care, permitted insurance, and permitted coverage which may be offered on a first dollar basis. Excepted fertility benefits do not fall under these exceptions, because these benefits do not qualify as preventive care, permitted insurance or permitted coverage). Accordingly, in order to avoid becoming HSA-ineligible, a participant must satisfy their statutory deductible before gaining access to the excepted fertility benefit.

Excepted Fertility Benefits Will Still Be Subject to Other Laws

Excepted benefits, including the new excepted fertility benefit, are still required to comply with other laws that apply to group health plans such as COBRA continuation coverage, HIPAA privacy and security, and other ERISA requirements (e.g., summary plan descriptions, claims and appeals procedures, etc.).

Conclusion

It remains to be seen whether the Proposed Rule, if adopted, will prompt employers to adopt or expand fertility benefits for employees. For employers that already provide fertility benefits through their major medical plans and/or through fertility HRAs, it is unclear whether an employer would terminate their existing fertility arrangement in favor of an excepted fertility benefit program that has set dollar limits, or adopt an excepted fertility benefit to supplement their existing fertility coverage. Further, the Proposed Rule indicates that employers would still need to offer participants a traditional group health plan; therefore, the new rule would not help small employers provide fertility benefits unless they already offer other health coverage.

Excepted benefit status may assist employers who sponsor a fertility HRA to avoid the ACA-HRA integration rules (i.e., the rules requiring the HRA to integrate with other major medical plan coverage). However, to date, this integration requirement has not been a significant hurdle since these rules allow integration with any employer-sponsored plan (including employees who waive the employer's major medical plan in favor of other employer-sponsored major medical plan coverage through a spouse, etc.). Lastly, aside from supposed cost-savings gained by avoiding regulatory compliance requirements, such as ACA market reforms, the new excepted fertility benefit does not address the cost of providing fertility benefits. Although the Proposed Rule would provide more flexibility to employers in offering fertility benefits, we will have to wait and see whether this new excepted benefit pathway is persuasive to employers that are on the fence about offering fertility benefits.

DOL Provides Interim Relief on SECURE 2.0 Paper Statement Rules While Final Regulations Remain Pending



Adrine A. Cargill

The recent Department of Labor (“DOL”) guidance on the SECURE 2.0 Act of 2022 (“SECURE 2.0”) paper statement requirement provides welcome short-term relief for retirement plan administrators. At the same time, it underscores that plan sponsors should begin evaluating their electronic disclosure practices now.

On May 12, 2026, the DOL issued Field Assistance Bulletin 2026-02 (“FAB 2026-02”), announcing a temporary nonenforcement policy for plans that comply in good faith with a reasonable interpretation of the DOL’s February 2026 proposed regulations titled *Requirement to Provide Paper Statements in Certain Cases—Amendments to Electronic Disclosure Safe Harbors* (<https://www.federalregister.gov/documents/2026/02/25/2026-03723/requirement-to-provide-paper-statements-in-certain-cases-amendments-to-electronic-disclosure-safe>) (the “Proposed Rule”). The FAB follows the DOL’s proposed amendments to its 2002 and 2020 electronic disclosure safe harbors, which were issued earlier this year to implement Section 338 of SECURE 2.0.

Background

ERISA Required Disclosures. Title I of the Employee Retirement Income Security Act of 1974 (“ERISA”) requires plan administrators to furnish numerous disclosures to participants and beneficiaries. Historically, these disclosures were delivered in person or by mail, consistent with ERISA’s general standard that disclosure methods must be “reasonably calculated to ensure actual receipt of the material.” Over time, however, electronic delivery has become increasingly common.

Among these required disclosures are periodic pension benefit statements under Section 105(a) of ERISA. The required delivery frequency of these statements depends on the type of retirement plan. Participant-directed defined contribution plans must furnish benefit statements quarterly, while non-participant-directed defined

contribution plans must furnish them at least once each year. Defined benefit plans generally must provide benefit statements at least once every three years to certain participants with vested accrued benefits. These statements must include, among other information, the participant's or beneficiary's accrued benefit.

The 2002 and 2020 Safe Harbors. To facilitate electronic disclosure, the DOL issued two electronic delivery safe harbor regulations: the 2002 Safe Harbor[1] and the 2020 Safe Harbor[2]. Both regulations describe circumstances under which electronic delivery will be deemed compliant with ERISA's actual receipt standard.

The 2002 Safe Harbor established safeguards for electronic disclosure for two categories of participants and beneficiaries. The first category covers "wired-at-work" individuals whose employment duties enable them to effectively access electronically furnished disclosures as an integral part of their jobs. The second category consists of individuals who affirmatively consent to electronic delivery and do not withdraw that consent. Individuals in the second category have the right to fully opt out of electronic delivery by withdrawing consent. Although wired-at-work individuals may request paper copies of disclosures, the 2002 Safe Harbor does not require that they be given the right to opt out of electronic delivery entirely.

As an alternative to the 2002 Safe Harbor, the DOL established the 2020 Safe Harbor. The 2020 Safe Harbor allows retirement plans to furnish covered disclosures electronically by default to individuals who provide a valid electronic address, such as an email address or smartphone number. For employees, an employer-assigned email address may satisfy this requirement. Unlike the 2002 Safe Harbor, eligibility under the 2020 Safe Harbor does not depend on whether an individual is wired-at-work or has affirmatively consented to electronic delivery.

The 2020 Safe Harbor permits two primary methods of electronic disclosure. First, plans may use a "notice-and-access" approach, under which participants receive an electronic notice informing them that a disclosure is available on a continuously accessible website, along with a hyperlink to the document. Second, plans may deliver disclosures directly by email, either in the body of the message or as an attachment. Before relying on either method, plan administrators must furnish an initial paper notice explaining that disclosures will be provided electronically going forward and informing participants of their right to opt out of electronic delivery free of charge.

SECURE 2.0's Paper Statement Requirement. Section 338 of SECURE 2.0 amended Section 105(a)(2) of ERISA by adding new Section 105(a)(2)(E) to require, with two exceptions, at least one paper benefit statement each calendar year for defined contribution plans and at least one paper benefit statement every three calendar years for defined benefit plans. These statements do not need to be furnished on paper if they are delivered electronically under the 2002 Safe Harbor or because the participant or beneficiary has requested electronic delivery. The statute also directed the DOL to update the 2002 Safe Harbor and the 2020 Safe Harbor to reflect these new paper delivery requirements.

Proposed Changes to the 2002 Safe Harbor. Under the Proposed Rule, retirement plans using the 2002 safe harbor to electronically furnish pension benefit statements that otherwise would be required to be provided on paper would need to provide a one-time initial paper notice to participants and beneficiaries who first become eligible on or after January 1, 2026. The notice would need to be furnished before any electronic delivery of a covered pension benefit statement and would need to inform recipients of their right to request that all ERISA Title I required disclosures be furnished in paper form.

Importantly, the proposed initial notice requirement and related opt-out right are narrow in scope. They would apply only to newly eligible participants and beneficiaries and only where the plan elects to furnish the otherwise paper-required pension benefit statement electronically under the 2002 Safe Harbor. Accordingly, if a plan furnishes the required pension benefit statement on paper, the proposal would not require the one-time initial notice, even if other ERISA disclosures continue to be provided electronically.

The Proposed Rule also coordinates the new initial paper notice requirement with the 2002 Safe Harbor's existing affirmative consent rules to avoid duplicative disclosures. Under the Proposed Rule, an existing advance consent statement provided to participants who affirmatively consent to electronic delivery could satisfy the new initial notice requirement, but only if the advance statement is furnished on paper. As a practical matter, the DOL noted that the new paper notice requirement would therefore primarily affect wired-at-work participants who receive electronic disclosures without affirmative consent.

The DOL requested comments on the scope of the proposed amendments, including the interaction between the new initial notice requirement and the existing safe harbor provisions.

Proposed Changes to the 2020 Safe Harbor

Section 338 of SECURE 2.0 contains five directives to the DOL to update its "applicable guidance governing electronic disclosure" other than the 2002 Safe Harbor, which the DOL has interpreted as referring to the 2020 Safe Harbor. These directives address, among other things, participants' ability to elect electronic delivery in lieu of required paper statements, required disclosures accompanying paper and electronic statements, prohibitions on fees for paper statements, and the permissibility of furnishing duplicate electronic copies of paper statements.

Under the Proposed Rule, retirement plans generally could no longer rely on the 2020 Safe Harbor to electronically furnish the annual paper pension benefit statements required under ERISA Section 105(a)(2)(E), unless a participant affirmatively elects electronic delivery. Other required benefit statements, such as the remaining quarterly statements for participant-directed defined contribution plans, could still be delivered electronically under the 2020 Safe Harbor.

The Proposed Rule would also require plans using the 2020 Safe Harbor to give participants and beneficiaries the opportunity to opt into electronic delivery of otherwise-required paper benefit statements. To facilitate that election, each required paper statement would need to include an explanation of how to request electronic delivery, along with contact information for the plan sponsor, plan administrator, or another designated plan representative, including a telephone number.

In addition, the Proposed Rule would prohibit plans from charging fees for paper pension benefit statements requested by participants or beneficiaries. The DOL explained that this change is intended to align the safe harbor with SECURE 2.0's prohibition on fees for paper statements.

Finally, the DOL declined to propose amendments implementing certain other SECURE 2.0 directives because, in its view, the current 2020 Safe Harbor already satisfies those requirements. Specifically, the DOL concluded that the existing 2020 Safe Harbor already adequately explains participants' rights to opt out of electronic delivery and receive paper copies, and permits plans to furnish duplicate electronic copies of paper statements.

DOL's Temporary Nonenforcement Relief

Although the Proposed Rule provides that the DOL will not take enforcement action against plan administrators that comply in good faith with a reasonable interpretation of its provisions, the DOL issued FAB 2026-02 in response to concerns from plan sponsors and service providers regarding compliance before final regulations are issued. Under FAB, the DOL states that it will not take enforcement action against plan administrators that comply in good faith with a reasonable interpretation of either the Proposed Rule or Section 105(a)(2)(E) of ERISA.

The timing of the FAB was particularly significant because many calendar-year defined contribution plans were preparing to distribute first-quarter 2026 benefit statements by mid-May.

Practical Considerations for Plan Sponsors

FAB 2026-02 provides helpful interim relief, but it does not eliminate the need for plan sponsors to prepare for eventual final regulations. Until the DOL finalizes the rules, retirement plan administrators should continue monitoring developments and ensure that their disclosure practices are supported by a reasonable, well-documented good-faith interpretation of SECURE 2.0 and the Proposed Rule.

Although the Proposed Rule is framed as a relatively narrow set of amendments implementing SECURE 2.0, it could require meaningful operational adjustments for plan sponsors and service providers, and plan sponsors may wish to:

- identify whether their disclosure procedures rely primarily on the 2002 Safe Harbor or 2020 Safe Harbor;
- determine whether recordkeepers can distinguish between newly eligible participants and existing participants;
- evaluate whether systems can track participant elections regarding paper versus electronic delivery;
- review vendor agreements addressing printing and mailing responsibilities; and
- document their interim compliance approach while final regulations remain pending.

The Proposed Rule also may create incentives for some employers to reconsider which safe harbor they use. In particular, the DOL requested comments on whether plans may shift from the 2020 notice-and-access framework back to the 2002 wired-at-work Safe Harbor for active employees in light of the new paper statement requirements.

We will continue to monitor the Proposed Rule and related DOL guidance rulemaking process, and keep you advised of any significant developments.

[1] 29 CFR 2520.104b-1(c).

[2] 29 CFR 2520.104b-31.

PUBLICATION INFO:

The Trucker Huss Benefits Report is published monthly to provide our clients and friends with information on recent legal developments and other current issues in employee benefits. Back issues of the Benefits Report are posted on the Trucker Huss website (www.truckerhuss.com (<https://www.truckerhuss.com>))

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