THE ERISA INDUSTRY COMMITTEE
Shaping benefit policies before they shape you.

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President and CEO

**Submitted Electronically**

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Internal Revenue Service
Attn: CC:PA:LPD:PR (Notice 2023-36) Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

**Re: Recommendations for Inclusion on 2024-2025 Priority Guidance Plan (Notice 2024-28)**

To Whom It May Concern:

On behalf of The ERISA Industry Committee (ERIC) and our large employer member companies, and pursuant to Notice 2024-28, thank you for the opportunity to provide suggestions and feedback on the 2024-2025 Priority Guidance Plan for the U.S. Department of the Treasury (Treasury) and the Internal Revenue Service (IRS).

By way of background, ERIC is a national advocacy organization exclusively representing the largest employers in the United States in their capacity as sponsors of employee benefit plans for their nationwide workforces. With member companies that are leaders in every economic sector, ERIC is the voice of large employer plan sponsors on federal, state, and local public policies impacting their ability to sponsor benefit plans. ERIC member companies offer benefits to tens of millions of employees and their families, located in every state, city, and Congressional district.

As such, ERIC is very interested in guidance that can help make plan administration less burdensome, more efficient, and better able to serve plan participants. ERIC commends the Treasury Department and the IRS for the ambitious guidance plans it has published in previous years. Still, plans and participants would benefit from even more clarity and guidance on a host of topics. Among the multitude of issues deserving of your time and attention, we particularly recommend addressing the following:

## Recommendations

### *Health Issues*

- **Proposed Mental Health and Substance Use Disorder Parity Regulations**

  The Mental Health Parity and Addiction Equity Act (MHPAEA) was intended to generate parity between the services provided to patients with medical and surgical treatment needs and those with mental health and substance use disorder treatment needs. Importantly, it does not require self-insured plans established under the Employee Retirement Income Security Act (ERISA) health benefit plans to cover mental health and substance use disorder treatment, but if plans do so, they are subject to the federal law. Employers choose to voluntarily offer health benefits to attract and retain talented workers and keep their employees healthy and productive.

  Last, year, the Departments of Health and Human Services (HHS), Labor (DOL), and the Treasury (the "Departments") published significant mental health and substance use disorder proposed rule changes that will significantly alter the ability of health plans, including ERISA health benefit plans, to ensure compliance with MHPAEA's parity requirements while fostering better access to providers and services, including tele-mental health services. The proposed rule changes are unworkable, overly burdensome, and will add to the already ever-increasing high cost associated with providing employer-sponsored health benefit coverage. The Departments should withdraw the proposed rule and reengage all stakeholders to inform practical policy and legal considerations.

- ***No Surprises Act* (NSA) Implementation**

  For many years, surprise medical billing resulted in high out-of-pocket cost exposure for American workers and their families due to unwarranted balance billing practices by providers. In the three years since enactment of the NSA, and the first two years of implementation, roughly 24 million surprise bills have been avoided. This is a good down-payment on the promise that an independent dispute resolution (IDR) process will lead to less surprise bills and more in-network provider contracting.

  However, the IDR process should be used as a limited last resort for disputes that cannot be negotiated, rather than an opportunity for inflating costs. ERIC commends the Departments for their effort to facilitate a federal IDR process. We strongly support a federal IDR process that restrains excessive health care spending, discourages unnecessary utilization of IDR, and encourages more health care providers to negotiate contracts with group health plans. We look forward to the proposed rule being finalized and building on the NSA's success.

- **Provider Nondiscrimination Requirements for Group Health Plans and Health Insurance Issuers in the Group and Individual Markets**

  ERIC member companies provide high quality, affordable health care coverage for employees and their families. They do so in part by managing their provider networks carefully to ensure robust access to high-quality care, while working to mitigate the rising cost of health care. The Provider Nondiscrimination Requirements for Group Health Plans and Health Insurance Issuers in the Group and Individual Markets remains listed in the NPRM stage on the unified agenda. ERIC along with several organizations have called upon the Departments to ensure as little disruption as possible, maintaining the flexibility of employers and carriers to choose who will be in-network. Given the potential impact on plan design, ERIC continues to urge the Departments to proceed with caution as these policies remain under consideration.

- **Electronic Delivery Rules and Other Guidance for Providing Applicable Notices and Making Participant Elections**

  ERIC was very supportive of the 2020 DOL regulation permitting plan sponsors to provide electronic delivery as the default option for sending ERISA retirement plan notices, provided certain conditions were met. In that regulation, DOL noted that the Treasury Department and the IRS had indicated an intent to issue additional guidance relating to the use of default electronic delivery for participant notices for ERISA health plans. ERIC encourages the Departments to promulgate a rule allowing for the use of default electronic delivery for ERISA health plan disclosures in addition to retirement plan disclosures.

- **Streamlining Employer Reporting Requirements under the Affordable Care Act**

  Congress is currently working to pass the *Commonsense Reporting Act* that would enable employers to report employer-sponsored health plan information to the IRS immediately before the annual *Affordable Care Act* open enrollment period, instead of 14 months later when the coverage year has ended. We encourage the IRS to issue best practices on how the agency can improve and simplify the current reporting process.

  Further, we urge the IRS to issue updated guidance and processes to reconcile employer-reported coverage information with individual's receipts of advanced premium tax credits (APTCs). No employer should receive a 226-J letter that is generated due to an individual inappropriately receiving a tax credit. The IRS has the ability to reconcile employer reporting, tax filings, and APCT receipts in order to eliminate the majority of these penalty letters.

- **High-Deductible Health Plans (HDHPs) and Health Savings Accounts (HSA) Modernization**

  Tens of millions of Americans are enrolled in HDHPs and HDHP/HSAs, including many who have no other affordable options. Modernizing HDHP and HDHP/HSA rules could vastly improve the coverage these individuals receive. In order to more fully maximize the ability of HDHPs and HDHP/HSAs to incentivize high-value health care and smart shopping, there are several actions the IRS should take to ensure the requisite regulatory flexibilities are in place. These could include:

  - Giving employers the flexibility to offer first-dollar coverage of high-value services, such as the use of onsite employee health centers and chronic care items and services;

  - Allowing the coordination of HDHP/HSAs with supplemental benefits like direct primary care, TRICARE benefits, Medicare (in the case of working seniors), and other appropriate benefits that do not constitute comprehensive health plans; and

  - Providing technical guidance to eliminate the Flexible Spending Account (FSA) spousal glitch for HSA account holders, broadening the definition of dependents to include adult children and domestic partners for the purposes of using HSA funds, and streamlining rollovers from FSAs and Medicare Medical Savings Accounts (MSAs) into HSAs.

***Retirement and Compensation Issues***

ERIC thanks the IRS, as well as the other ERISA agencies, for the guidance it has published implementing the SECURE 2.0 Act. This important piece of legislation contained dozens of updates and enhancements to our voluntary, private-sector retirement system. However, the implementation of its provisions – including the guidance issued by Treasury, IRS, the Department of Labor (DOL), and the Pension Benefit Guaranty Corporation (PBGC) – will be crucial to its success. Therefore, ERIC urges Treasury/IRS to include the following on its 2023-2024 priority guidance plan:

- **Matching Contributions for Student Loan Payments and Other Account Contributions**

  Section 110 of the *SECURE 2.0 Act* extended the ability of plan sponsors to establish programs to provide employer contributions that match qualifying employee student loan payments. Many companies are interested in establishing these benefits. In its implementing guidance, among other things, Treasury/IRS should provide additional clarity about the "reasonable procedures" plan sponsors may establish under the statute for employees to claim the match. Treasury/IRS should also address the certification of loan payments permitted or required and the implications of fraud.

**The IRS should issue this guidance as soon as practicable, so that plan sponsors can implement this feature.** Further, Treasury/IRS should explore whether there are circumstances in which contributions to certain other tax-preferred accounts, such as Section 529 plans or HSAs, should also be treated as salary reduction contributions.

- **Catch-up Contributions**

SECURE 2.0 required that, beginning after December 31, 2023, individuals with wages over $145,000 in the prior year may only make catch-up contributions on a Roth basis. ERIC is very appreciative of the two-year administrative transition period that the IRS provided to help plan sponsors and service providers navigate this new, complicated requirement. We provided detailed comments and questions in October 2023 in response to Notice 2023-62. In that letter, we provided ideas for additional guidance, including on the flexibility plan sponsors have surrounding catch-up contributions. A very basic question should also be answered: Are the SECURE 2.0 increases in the catch-up limits voluntary for plans? We believe they are, but confirmation would be appreciated. Other areas where guidance is needed include the application of the non-discrimination rules, the treatment of new hires, rehires, and transferred employees, and the mechanics of participant deferrals.

- **Clarify the Automatic Enrollment Mandate Exemption for Existing Plans**

SECURE 2.0 requires that, beginning in 2025, certain employer plans must include an automatic enrollment feature. However, plans established prior to the date of enactment ("grandfathered" plans) are exempt from this requirement. The IRS issued very helpful guidance in Notice 2024-2, clarifying that a plan is established on the date plan terms are adopted "initially." Additional clarification would be helpful; the IRS should clarify that this mandate is not triggered by plan amendments or other plan changes, including those expanding eligibility (not involving spinoffs or mergers, which would already be covered). Further, in the multiple-employer plan context, IRS should clarify that if a pre-enactment single employer plan is merged into a post-enactment plan maintained by more than one employer, the cash or deferred arrangement should be treated as pre-enactment with respect to that single employer for purposes of the mandate.

- **De Minimis Financial Incentives**

Under Section 113 of the *SECURE 2.0 Act*, an employee is permitted to receive a de minimis financial incentive to elect to participate in a defined contribution plan. The incentive is not permitted to be paid by plan assets. ERIC appreciated the guidance provided in section D of Notice 2024-2. However, further clarification would be helpful. For example, Q&A D-1 of the Notice defines "de minimis" as an incentive that "does not exceed $250 in value." Additional clarification would be helpful in the case of an incentive consisting of a chance at a contingent or speculative award, such as a raffle or other game of chance.

If the value of the contest prize exceeds $250, but the expected value of the contest entry is less than $250, is the incentive permissible? There is a strong case that it should be, as the economic value to the participant of something like a raffle ticket is less than $250, but further guidance would be helpful. Similarly, is an offer of vacation time or other non-monetary incentives permissible? What if the offer is universal but the value to some employees is higher than $250?

Finally, if an employer provides a gift card and wants to gross it up to account for the employee's taxes, would that additional amount count toward the $250 limit? In our view, the section should be construed broadly to permit these incentives.

It is also not clear that the statute's scope limits these incentives to participants making an election for the first time. In Q&A D-2, IRS forecloses this possibility of an incentive for participants for whom an election is already in effect but who may elect higher contributions if offered the incentive. The basis for this restriction is not evident in the legislative text. Similarly, there is nothing in the statute prohibiting a third-party from incentivizing the election pursuant to this section. We recommend IRS permit maximum flexibility in order to further encourage retirement savings.

- **Overpayments and Self-Correction**

  SECURE 2.0 includes a provision creating a safe harbor for employers to decide not to seek recoupment of inadvertent benefit overpayments under certain circumstances, and also sets forth limitations on plans that do decide to recoup. While many aspects of this provision are in the interpretive jurisdiction of the DOL, close coordination with Treasury/IRS will be needed. For example, guidance on the interaction between the decision to forego recoupment and the minimum funding rules would be helpful. The agencies should also interpret the SECURE 2.0 provisions expanding the Employee Plans Compliance Resolution System to provide the flexibility and certainty that plans need to efficiently make necessary corrections.

- **Optional Roth Match**

  SECURE 2.0 creates an option for employers to permit employees to request matching contributions to be made on a Roth basis. We appreciated the clarifications made in Notice 2024-2, especially the confirmation that a plan offering a Roth feature need not offer every possible type of designated Roth contribution.

  However, for plans that do offer designated Roth matching or nonelective contributions, IRS should clarify that a "partial Roth" election is possible. In other words, a participant should be allowed to elect some, but not all, of the matching or nonelective contribution to be made on a Roth basis.

Like designated Roth elective contributions, IRS should also clarify that plans can make Roth treatment the default for matching and nonelective contributions. The Notice does not appear to foreclose these options, but additional clarification would be helpful.

Additionally, IRS should not limit the opportunity to elect designated Roth matching and nonelective contributions to fully vested participants. Participants who are partially vested should be allowed to elect Roth treatment for the vested portion of any matching or nonelective contributions. The statute's requirement that designated Roth matching and nonelective contributions be nonforfeitable is consistent with such an approach, and nothing in the plain language of that provision suggests that Congress intended Roth treatment to be limited to fully vested participants.

- **Long-Term Part Time Eligibility**

  We appreciated the proposed regulations implementing the provisions in the *SECURE Act* and the *SECURE 2.0 Act* expanding retirement plan coverage for certain long-term, part time employees (LTPTEs). Specifically, under the *SECURE Act*, certain defined contribution plans must permit employees who perform work for at least 500 hours of service over three consecutive years to contribute. This was modified further by SECURE 2.0, which reduced the service period for LTPTEs to two consecutive years. The proposed regulations were largely straightforward, but did leave a few unanswered questions. For example, the treatment of full-time employees who were formerly LTPTEs is complicated, and they potentially will receive favorable vesting treatment relative to similarly situated full time employees who are not former LTPTEs. Further clarification may also be needed about the eligibility of LTPTEs who meet the general eligibility requirements during a plan year. Depending on plan design, it seems possible under the proposed regulations, an LTPTE that meets the general eligibility requirements may not enter the plan as a regular employee until the next plan year under some circumstances; the IRS should confirm that this is a potential outcome.

- **Notice and Disclosure**

  SECURE 2.0 included a number of provisions addressing notice and disclosure requirements under the ERISA and the Internal Revenue Code (Code), including a requirement that regulators make recommendations to Congress for legislative changes. In working with DOL and PBGC, we urge you recommend reducing unneeded notices, and simplifying current disclosures, while still providing important information regarding plan costs and financial literacy. Disclosures should be tailored to provide participants and beneficiaries with understandable, actionable information in an efficient manner. We welcome the opportunity to work with you as you develop these recommendations.

In addition to these and other SECURE 2.0-related issues, we hope you'll provide plan sponsors with needed guidance regarding the following:

- **Effect of Corporate AMT on Retiree Health Plans**

  The Corporate Alternative Minimum Provisions of the *Inflation Reduction Act* created a 15 percent tax on adjusted financial statement income. When the provision was being considered, employer groups, including ERIC, worked with Congress to ensure that defined benefit pension plans and other assets valued similarly for accounting purposes wouldn't be included in that income. In other words, if a retiree health trust has asset gains or losses, that isn't counted as corporate income. The IRS asked the public last fall for opinions on whether certain account-based health reimbursement arrangements for retirees would qualify for this treatment; we think so, and the IRS should confirm this in guidance.

- **In-service Distributions**

  Under Code Section 401(a)(36), as amended by the *Pension Protection Act of 2006* and the *Bipartisan Miners Act of 2019*, employers are permitted to offer an in-service distribution option. However, it is unclear how an early retirement subsidy should be considered for purposes of Code Section 411(d)(6), the anti-cutback rule. In Notice 2007-8, the IRS asked for stakeholder input on this question, but has not issued guidance. This issue should be addressed so employers considering offering this option have clarity.

- **Paid Leave**

  ERIC urges you to carry over from the 2022-2023 Priority Guidance Plan the entry on paid leave. More specifically, Treasury/IRS should provide guidance on the federal tax treatment of contributions to – and benefits from – paid family and medical leave programs. As evidence of ambiguity in this area, several relevant state laws, including Minnesota's and Maryland's, include provisions that refer to the possibility of IRS providing guidance. Workers and employers deserve clarity on this treatment, and so we urge you to provide interpretive guidance.

- **Missing Participants, Including Guidance on Uncashed Checks**

  ERIC's member companies are especially susceptible to difficulties when trying to locate missing participants because their plans tend to be larger and more complex, with more significant acquisition histories that span decades. SECURE 2.0 authorized a federal searchable "lost and found" to help participants locate their benefits, but the agencies need to do more. Revenue Ruling 2019-19 clarified that distributions from a 401(k) plan are taxable to the participant in the year made, not when the distribution check was cashed. However, the guidance did not address what happens if the check is not received in the first place. IRS should also coordinate with PBGC and DOL to harmonize guidance and provide flexibility for the reasonable steps employers should take to locate missing participants, depending on circumstances.

- **Remote Witnessing**

  During the COVID-19 pandemic, IRS extended relief from its requirement that permitted certain participant elections be witnessed in the physical presence of a notary public or plan representative. The IRS has subsequently proposed a regulation to extend this relief. ERIC supported the proposed regulation and urges IRS to finalize the regulation.

## Conclusion

In the case of each of these recommendations, and pursuant to Notice 2024-28, ERIC believes that the guidance requested above would resolve issues affecting broad classes of taxpayers, including employee benefit plans, plan sponsors, and plan participants. The recommended guidance would address several unanswered questions and also reduce burdens. The requested guidance would modernize and streamline current requirements, could be administered in a uniform manner, and would not require extraordinarily complicated regulatory drafting.

Thank you for the opportunity to provide these recommendations. If we can be of further assistance, please contact our policy leads, Melissa Bartlett, Senior Vice President for Health Policy, or Andy Banducci, Senior Vice President for Retirement and Compensation Policy.

Sincerely,

James P Gelfand

James P. Gelfand
President & CEO