



## Rewards Policy Insider 2023-08



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## IRS Announces Annual Penalty Increase for Noncompliance with the Affordable Care Act's Employer Mandate

The Internal Revenue Service (“IRS”) recently announced the inflation-adjusted ACA Employer Shared Responsibility penalties for 2024. The higher penalties, combined with the IRS’s continued focus on enforcement, are good reminders of the importance of ensuring consistency with the Employer Shared Responsibility rules.

### Background and Updated Penalty Amounts

The ACA imposes Employer Shared Responsibility Payments – also referred to as the “Employer Mandate” – on Applicable Large Employers (“ALEs”), i.e., generally those with at least 50 full-time employees. Under the Employer Mandate, ALEs may be subject to Employer Shared Responsibility penalties if they fail to offer Minimum Essential Coverage (basically comprehensive group health coverage) to at least 95% of their full-time employees and their dependents. The penalty for failing to satisfy this requirement, which is imposed by Code Section 4980H(a), will be \$2,970 per full-time employee in 2024, up from \$2,880 in 2023.

Even ALEs that offer Minimum Essential Coverage to 95% of their full-time employees might have to pay a penalty, pursuant to Code Section 4980H(b), if the coverage they offer to certain full-time employees does not meet minimum thresholds relating to affordability and value. In 2024, that penalty will be \$4,460 for each full-time employee who opts-out and instead qualifies for subsidized coverage on an ACA exchange. In 2023, this penalty is set at \$4,320.

The IRS announced the updated penalty amounts in [Revenue Procedure 2023-17](#).

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## Agencies Issue Guidance on End of COVID-19 Emergencies

The Departments of Labor, Health and Human Services, and Treasury (“Agencies”) recently issued a set of Frequently Asked Questions (“FAQs”) relating to the end of the COVID-19 National Emergency and Public Health Emergency (“PHE”). The FAQs address issues relating to the group health plan coverage mandates that are tied to the PHE, as well as the Outbreak Period Relief that is tied to the National Emergency.

As noted in the FAQs, the PHE is expected to end on May 11, 2023. The FAQs also assume the National Emergency will end on the same date. However, President Biden signed a bill on April 10 to immediately terminate the National Emergency. Since previous guidance has indicated that the Outbreak Period will end 60 days after the National Emergency, questions have arisen about whether the Outbreak Period will end on June 9, 2023 (i.e., 60 days after April 10) or July 10, 2023 – which is the date referenced in the FAQs based on the assumption the National Emergency was going to end on May 11. DOL has

informally indicated that it still believes July 10 is the appropriate date for the Outbreak Period to end, and that is the assumption we will use throughout this article.

## How Will the End of the PHE Affect Group Health Plans?

The Families First Coronavirus Response Act ("FFCRA") and the Coronavirus Aid, Relief, and Economic Security ("CARES") Act established certain mandates for group health plans regarding coverage of COVID-19 testing and vaccinations that will remain in effect until the COVID-19 PHE ends.

In general, plans must cover COVID-19 tests and testing-related services without any cost-sharing, prior authorization, or other medical management requirements. This requirement was later extended to over-the-counter, at-home tests.

Additionally, plans must cover COVID-19 vaccines provided by out-of-network providers without cost-sharing. In general, plans must use the Medicare reimbursement rate for purposes of reimbursing out-of-network providers for the cost of administering the vaccine.

The FAQs confirm that these mandates will end when the PHE ends on May 11, 2023. But they also encourage plans to continue providing these coverages under the same terms and conditions, if possible.

If plans are going to end the mandated coverages on May 11, 2023 (or some other specific future date), the FAQs provide some helpful guidance regarding disclosure.

Specifically, the FAQs provide that plans do not necessarily have to provide any notice to participants that these coverages will be ending unless the changes result in a material modification to information provided in the plan's current Summary of Benefits and Coverage ("SBC"). In that case, 60-day advance notice of the change(s) will be required.

However, the FAQs also provide a safe harbor for situations where the plan increased benefits to comply with the mandates, and previously communicated that the benefits would remain in effect only during the PHE or otherwise stated they were for a limited duration.

Additionally, the FAQs note that the mandates will continue to apply to COVID tests furnished on or before May 11, 2023. The test is furnished on the day it is administered to the participant, regardless of when the claim is actually filed. Also, if the participant gives the sample on one day and the lab results come back a few days later, the date the sample is given is the date the COVID test is furnished.

## How Will the End of the National Emergency Affect Group Health Plans?

The Outbreak Period relief, which has been in effect since March 2020, gives ERISA plan participants additional time to exercise certain plan-related rights like appealing adverse claims determinations, electing COBRA, paying COBRA premiums, or exercising HIPAA special enrollment rights. The Outbreak Period is defined as ending on the earlier of (a) one year from the date an individual is first eligible for relief from certain ERISA deadlines, or (b) 60 days after the announced end of the COVID-19 National Emergency.

As noted earlier, even though the National Emergency ended on April 10, 2023, the DOL's information position continues to be that the Outbreak Period will end on July 10, 2023.

The FAQs provide some helpful examples of how the end of the Outbreak Period will affect participants. Specifically with regard to COBRA elections, the FAQs highlight three different situations where individuals have experienced COBRA Qualifying Events and received COBRA election notices on 3 different dates: (1) May 1, 2023, (2) May 15, 2023, and (3) July 15, 2023.

Assuming the Outbreak Period ends on July 10, 2023, the first and second person will have until 60 days after July 10, 2023 to make their COBRA election. Note that even though the second person's COBRA election notice was delivered after the National Emergency ended, the Outbreak Period was still applicable.

By comparison, the third individual received their COBRA election notice on July 15, 2023 – after the Outbreak Period has ended. In that case, they have the standard 60 days after receiving their COBRA election notices to make their COBRA elections.

Other examples illustrate how the end of the Outbreak Period will affect deadlines for paying COBRA premiums and exercising HIPAA special enrollment rights.

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## **IRS Releases Guidance on Treatment of Nonfungible Tokens as Collectibles**

In the wake of the recent increased popularity – and increased scrutiny – of nonfungible tokens (“NFTs”), the Internal Revenue Service (“IRS”) issued guidance describing the approach it intends to take to treat certain NFTs as collectibles under the Internal Revenue Code (“Code”). Tax-qualified defined contribution retirement plans generally may not invest in collectibles.

### **Background**

Under Code section 408(m), tax-qualified defined contribution plans are prohibited from investing in so-called “collectibles,” meaning a work of art, rug, antique, metal, gem, stamp, coin, alcoholic beverage, or other tangible personal property specified by the IRS. There is an exception for certain coins and bullion. The IRS has also stated in guidance that HSAs may not invest in collectibles (see [Notice 2004-50](#)). If a tax-qualified plan invests in a collectible, the investment is treated as a distribution from the account in an amount equal to the cost of the collectible. (Note that these rules also apply to IRAs.)

As defined in the IRS's new guidance described below, an NFT generally means a unique digital identifier that is recorded using distributed ledger technology and may be used to certify authenticity and ownership of an associated right or asset. As NFTs – particularly those in the form of digital artwork – have grown

in popularity, the question of whether an NFT counts as a “collectible” has been raised.

## IRS Guidance on NFTs

On March 21, 2023, the IRS released [Notice 2023-27](#), in which it announced that it intends to issue guidance regarding the treatment of certain NFTs as collectibles under Code section 408(m). Pending the actual issuance of that future guidance, the IRS explains that it intends to use a test called the “look-through analysis” to determine whether an NFT is a collectible. Under the test, an NFT is a collectible if the associated right or asset is a collectible. As an example, the IRS says that an NFT that certifies ownership of a gem – which is a collectible – is itself a collectible. However, a right to use or develop a “plot of land” in a virtual environment is not a collectible, and therefore, an NFT that provides such a right is not a collectible. Regarding whether an NFT would be a collectible if its associated right is a digital file – which is the case for many popular artwork-based NFTs – the IRS notes that this raises the question of whether a digital file is a “work of art” under Code section 408(m), and it is currently considering this issue.

The Notice also contains several questions that the IRS requests comments on, such as whether there are any concerns with respect to the look-through analysis, and whether there are other factors to consider when determining whether an NFT is a collectible. So, while this Notice provides some preliminary guidance on NFTs, it appears to be only a first step in addressing NFTs.

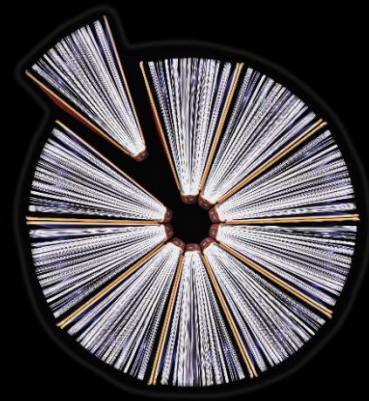
Importantly, while the Notice is mostly a request for comments and does not describe a particular effective date, the Notice does state that it describes how the IRS intends to determine whether an NFT is a collectible, pending the issuance of further guidance. This suggests that this guidance is effective immediately, and that any NFTs held in a tax-qualified defined contribution plan or HSA *could* be immediately treated as a taxable distribution.

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