

# Insider

## OSHA issues COVID-19 vaccine mandate guidance

By Rich Gisonny, Ben Lupin and Kathleen Rosenow

The Department of Labor's Occupational Safety and Health Administration (OSHA) has issued the COVID-19 Vaccination and Testing Emergency Temporary Standard (ETS) in response to President Biden's September **Path Out of the Pandemic** COVID-19 action plan calling for, among other things, a vaccine mandate for private employers. The ETS mandates COVID-19 vaccinations or at least weekly testing for workers at companies in the United States with 100 or more employees by *January 4, 2022*. (Editor's note: For an update on the legal challenges to the ETS vaccine mandate, see page 7.)

OSHA has also established a **webpage** for these rules that includes various fact sheets, summaries and **FAQs**. A high-level checklist is included on page 3 to assist employers in developing a plan to comply with the ETS.

OSHA anticipates that the ETS will be in effect for at least six months, although it will continue to monitor trends in COVID-19 infections and deaths to help determine when the ETS can be terminated.

### COVID-19 Vaccination and Testing ETS

The ETS covers the specific topics outlined below.

#### **Employers covered by the ETS**

The ETS generally applies to employers in all workplaces that are under OSHA's authority and jurisdiction. Within these workplaces, all employers that have a total of at least 100 employees on a firm- or corporate-wide basis, at any time the ETS is in effect, are covered. In other words, once an employer reaches the 100-employee threshold, it becomes subject to the ETS and remains so even if its total employee count subsequently drops below 100.

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#### **Workplaces not covered by the ETS**

The ETS does not apply (1) to workplaces covered under the Safer Federal Workforce Task Force COVID-19 Workplace Safety: Guidance for Federal Contractors and Subcontractors, or (2) in settings where employees provide healthcare services or healthcare support services when subject to the requirements of the **healthcare ETS** or the new Centers for Medicare & Medicaid Services (CMS) rules (discussed further below).

#### **COVID-19 vaccination**

- **General requirements/deadlines.** Covered employers must develop, implement and enforce a mandatory COVID-19 vaccination policy, *except* employers that instead adopt a policy requiring employees to elect either to get fully vaccinated or to undergo regular COVID-19 testing and wear a face covering at the workplace. Employees of covered employers must be fully vaccinated by January 4, 2022. All unvaccinated workers must begin wearing masks by *December 5, 2021*, and provide a negative COVID-19 test on a weekly basis beginning *January 4, 2022*.
- **Mandatory vaccination versus regular testing policies.** Employers subject to the ETS that do not want to offer

employees a testing option are required to establish a “mandatory vaccination policy.” A mandatory vaccination policy is a written employer policy requiring each employee to be *fully vaccinated*. Such a policy must require vaccination of all employees, other than those employees who fall into one of three categories:

1. Those for whom a vaccine is medically contraindicated
2. Those for whom medical necessity requires a delay in vaccination
3. Those legally entitled to a reasonable accommodation under federal civil rights laws because they have a disability or sincerely held religious beliefs, practices or observances that conflict with the vaccination requirement

Regardless of which compliance option is chosen by the employer, the written policy should be made readily accessible to all employees through the employer’s normal methods of distributing information to employees. Employers are not required to submit their written policy to OSHA unless requested. Template policies that employers may use and customize can be found on OSHA’s ETS webpage.

### COVID-19 testing frequency/cost

If an employer has unvaccinated workers in the workplace, those employees must have weekly tests (at least every seven days) until they are fully vaccinated or the ETS is no longer in effect. The ETS *does not require* employers to pay for any costs associated with testing; however, employer payment for testing may be required by other laws, regulations, or collective bargaining agreements or other collectively negotiated agreements. Otherwise, the agency leaves the decision regarding who pays for the testing to the employer.

**Insider is a monthly newsletter developed and produced by Willis Towers Watson Research and Innovation Center.**

#### Insider authors

Ann Marie Breheny	Rich Gisonny	Steve Nyce
Michele Brennan	Anu Gogna	Jonathan Pliner
Cindy Brockhausen	Russ Hall	Kathleen Rosenow
Gary Chase	William Kalten	Maria Sarli
Stephen Douglas	Benjamin Lupin	Steven Seelig
Maureen Gammon	Brendan McFarland	

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For permissions and reprint information, please email Joseph Cannizzo at [joseph.cannizzo@willistowerswatson.com](mailto:joseph.cannizzo@willistowerswatson.com).

More information can be found on the website: [www.willistowerswatson.com](http://www.willistowerswatson.com).

**Publication company**  
Willis Towers Watson  
Research and Innovation Center  
800 N. Glebe Road  
Arlington, VA 22203  
T +1 703 258 7635

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## The Emergency Temporary Standard does not require employers to pay for any costs associated with testing.

### Paid leave

The ETS requires employers to support COVID-19 vaccination by providing each employee with (1) reasonable time to receive each primary vaccination dose<sup>1</sup> during work hours, and (2) reasonable time and paid sick leave to recover from vaccine side effects.

#### ■ Leave policies for employees to receive vaccination.

Employers are required to provide reasonable time to each employee during work hours to receive each of their primary vaccination dose(s), including up to four hours of paid time off, at the employee’s regular rate of pay. The maximum of four hours of paid time off that employers must provide for the administration of each primary vaccination dose *cannot be offset by any other leave that the employee has accrued, such as sick leave or vacation leave.*

#### ■ Leave policies for employees to recover from vaccine side effects.

An employer may require an employee to use accrued paid sick leave when recovering from side effects experienced following a primary vaccination dose. Additionally, if an employer does not specify between different types of leave (e.g., paid time off), then the employer may require employees to use that leave when recovering from primary vaccination dose side effects. If an employer provides employees with multiple types of leave, such as sick leave and vacation leave, the employer can only require employees to use the sick leave when recovering. The employer cannot require an employee to go into a negative balance for paid sick leave if the employee does not have accrued paid sick leave.

### Additional requirements

The ETS also requires employers to do the following:

- Determine the vaccination status of each employee, obtain acceptable proof of vaccination status from vaccinated employees, and maintain records and a roster of each employee’s vaccination status.
- Require employees to provide prompt notice when they test positive for COVID-19 or receive a COVID-19 diagnosis. Employers must then remove those employees from the workplace, regardless of vaccination status, and must not allow them to return to work until they meet certain criteria;

<sup>1</sup> “Primary vaccination dose” means receiving the vaccines currently authorized by the Food and Drug Administration: Johnson & Johnson (a single-dose primary vaccination), and Pfizer-BioNTech and Moderna (a two-dose primary vaccination series). This also includes the mixing of one Pfizer-BioNTech dose and one Moderna dose.

however, the removal of an unvaccinated employee if he or she has been exposed to a COVID-19 positive person is not required.

- Ensure that, in most circumstances, each employee who has not been fully vaccinated wears a face covering when indoors or when occupying a vehicle with another person for work purposes. The masking requirement applies to unvaccinated employees even though the employee is subject to weekly testing.

### Employees working remotely

The requirements of the ETS *do not* apply (1) to employees who do not report to a workplace where other individuals, such as coworkers or customers, are present; (2) to employees while they are working from home; or (3) to employees who work exclusively outdoors.

### State OSHA plans

The **22 states** with their own state OSHA plans covering private-sector employees will have 30 days to adopt OSHA's ETS or align with their own similar standards. When federal OSHA issues an ETS, state OSHA plans must either amend their standards to be identical or "at least as effective as" the new ETS or show that their existing state standards are "at least as effective" as the new federal standard.

### State laws prohibiting vaccine mandates

The ETS states that it *preempts* states (and political subdivisions of states) from adopting and enforcing workplace requirements relating to the occupational safety and health issues of vaccination, wearing face coverings and testing for COVID-19, except under the authority of a federally approved state OSHA plan.

### Other issues to consider

- **Enforcement.** According to OSHA's **2021 Annual Adjustments to Civil Penalties memorandum**, fines for violating the ETS could start at \$13,653 per violation and go as high as \$136,532 per violation (if employers are found to be willfully noncompliant or repeat offenders).
- **Legal challenges.** Legal challenges to the ETS vaccine mandate are expected shortly, particularly from attorneys general in states that oppose vaccination requirements.
- **Interaction with other existing federal vaccine mandates.** OSHA's ETS *will not* be applied to workplaces covered by the federal contractor vaccine requirement or the vaccination mandate from CMS for healthcare workers at facilities that participate in Medicare and Medicaid programs or employers subject to OSHA's healthcare ETS; however, it is important to note that the deadline



## Legal challenges to the ETS vaccine mandate are expected...particularly from attorneys general in states that oppose vaccination requirements.

for the vaccine mandate for federal contractors (and subcontractors) has been pushed back to *January 4, 2022* (to align with the OSHA ETS compliance deadline). The deadline for employees of federal contractors to complete their vaccination or claim an exemption was initially December 8, 2021.<sup>2</sup> Note that healthcare systems and facilities subject to the CMS **vaccine mandate rules** will *not* have a testing option as an alternative to a vaccine but, like other businesses, will have to review medical and religious exemption requests. These rules also require employees to be fully vaccinated by *January 4, 2022*.

### OSHA COVID-19 Vaccine ETS: Employer checklist

- ☐ Develop, implement and enforce an employer policy on COVID-19 vaccination (templates are available on the OSHA website).
- ☐ Determine employees' COVID-19 vaccination status and maintain records.
- ☐ Provide paid leave for COVID-19 vaccination and recovery.
- ☐ Disclose required information to employees (including how to notify the employer of a positive COVID-19 case).
- ☐ Require face coverings for unvaccinated employees in the workplace.
- ☐ Set up COVID-19 testing for unvaccinated employees (and determine who will pay).
- ☐ Make COVID-19 vaccine and testing records available to employees and their authorized representatives (including the aggregate number of vaccinated and unvaccinated employees).
- ☐ Report COVID-19 fatalities and hospitalizations, if any, to OSHA.

For comments or questions, contact  
Rich Gisonny at +1 203 351 5122,  
[rich.gisonny@willistowerswatson.com](mailto:rich.gisonny@willistowerswatson.com);  
Ben Lupin at +1 215 316 8311,  
[benjamin.lupin@willistowerswatson.com](mailto:benjamin.lupin@willistowerswatson.com); or  
Kathleen Rosenow at +1 507 358 0688,  
[kathleen.rosenow@willistowerswatson.com](mailto:kathleen.rosenow@willistowerswatson.com).

<sup>2</sup> See "COVID-19 vaccine guidance issued for federal contractors, subcontractors," *Insider*, October 2021.

# 2022 inflation-adjusted limits affect range of employee benefit plans

By Cindy Brockhausen, Stephen Douglas and Kathleen Rosenow

On November 10, the IRS released **Revenue Procedure 2021-45**, which contains the 2022 tax year inflation adjustments for a number of income tax provisions, including health flexible spending arrangements, qualified transportation fringe benefits, qualified adoption assistance programs and eligible long-term care premiums. Revenue Procedure 2021-45 also includes the indexed dollar amounts for the federal income tax-related standard deduction.

On November 4, the IRS released **Notice 2021-61**, which includes the qualified retirement plan limits for 2022. These limits restrict the contributions that can be made to, and benefits that can be paid from, qualified retirement plans as well as the compensation that can be used when determining benefits.

The table below includes these limits, along with the **Social Security maximum taxable wage base** that was announced on October 13, and the limits relevant to health savings accounts and excepted-benefit health reimbursement arrangements that were released earlier this year in **Revenue Procedure 2021-25**.

(Note that Revenue Procedure 2021-45 also includes the federal income tax rate tables for 2022.)

The 2022 tax-related limits potentially affect the design, administration, communication and tax reporting for retirement and benefit-related plans.

<b>Health flexible spending arrangements (health FSAs) (general and limited purpose)</b>	<b>2021</b>	<b>2022</b>
Maximum annual health FSA salary reduction contribution	\$2,750	<b>\$2,850</b>
Maximum annual health FSA carryover of unused amounts from the prior plan year for plans that permit carryover	\$550 <sup>1</sup>	<b>\$570</b>
<b>Qualified transportation fringe benefits</b>	<b>2021</b>	<b>2022</b>
Monthly limitation amounts		
– Transit pass and commuter highway vehicle (combined)	\$270	<b>\$280</b>
– Qualified parking	\$270	<b>\$280</b>
<b>Qualified adoption assistance</b>	<b>2021</b>	<b>2022</b>
Maximum per adoption income tax exclusion		
– Child with special needs (regardless of actual expenses)	\$14,440	<b>\$14,890</b>
– Other adoptions	\$14,440	<b>\$14,890</b>
Adjusted gross income (AGI) tax exclusion phaseout		
– Phaseout begins	\$216,660	<b>\$223,410</b>
– Phaseout complete	\$256,660	<b>\$263,410</b>
<b>Dependent care assistance (including FSAs)<sup>2</sup></b>	<b>2021</b>	<b>2022</b>
Maximum annual dependent care assistance benefit		
– Individual or a married couple filing jointly	\$10,500	<b>\$5,000</b>
– Married individual filing separately	\$5,250	<b>\$2,500</b>

<sup>1</sup> For plan years ending in 2020 and 2021, the Consolidated Appropriations Act, 2021 provided employers the option to allow full carryover of employees' healthcare FSA remaining balances to the next plan year.

<sup>2</sup> For the 2021 tax year, the American Rescue Plan Act increased the dependent care assistance limits under Internal Revenue Code (IRC) section 129 from \$5,000 to \$10,500 for an individual or a married couple filing jointly, and from \$2,500 to \$5,250 for married filing single. In 2022, these limits revert to \$5,000 for an individual or married couple filing jointly and \$2,500 for married filing single. These limits are not adjusted for inflation; they can only be adjusted by a legislative amendment to IRC section 129.

<b>Qualified retirement plan limits</b>	<b>2021</b>	<b>2022</b>
Maximum recognizable compensation	\$290,000	<b>\$305,000</b>
Highly compensated employee (HCE)	\$130,000	<b>\$135,000</b>
<b>Section 415 benefit limits</b>		
– Defined benefit plans	\$230,000	<b>\$245,000</b>
– Defined contribution plans	\$58,000	<b>\$61,000</b>
<b>Limit on pre-tax elective deferrals</b>		
– Under age 50	\$19,500	<b>\$20,500</b>
– Age 50 and over	\$26,000	<b>\$27,000</b>
<b>Qualifying longevity annuity contract (QLAC)</b>	<b>2021</b>	<b>2022</b>
Investment limit	\$135,000	<b>\$145,000</b>
<b>Social Security taxable wage base</b>	<b>2021</b>	<b>2022</b>
Taxable wage base	\$142,800	<b>\$147,000</b>
<b>Eligible long-term care (LTC) premiums</b>	<b>2021</b>	<b>2022</b>
<b>Annual limitation on LTC premiums includible as medical care</b>		
<b>Age before close of tax year</b>		
– Up to 40	\$450	<b>\$450</b>
– 41 to 50	\$850	<b>\$850</b>
– 51 to 60	\$1,690	<b>\$1,690</b>
– 61 to 70	\$4,520	<b>\$4,510</b>
– Over 70	\$5,640	<b>\$5,640</b>
<b>Standard deduction</b>	<b>2021</b>	<b>2022</b>
<b>Filing status</b>		
– Married individuals filing jointly	\$25,100	<b>\$25,900</b>
– Heads of households	\$18,800	<b>\$19,400</b>
– Unmarried individuals	\$12,550	<b>\$12,950</b>
– Married individuals filing separately	\$12,550	<b>\$12,950</b>
<b>Health savings accounts (HSAs)</b>	<b>2021</b>	<b>2022</b>
<b>Individual coverage</b>		
– Maximum annual HSA contribution	\$3,600	<b>\$3,650</b>
– Minimum annual deductible for high-deductible health plan (HDHP)	\$1,400	<b>\$1,400</b>
– Maximum annual out-of-pocket expenses for HDHP	\$7,000	<b>\$7,050</b>
<b>Family coverage</b>		
– Maximum annual HSA contribution	\$7,200	<b>\$7,300</b>
– Minimum annual deductible for HDHP	\$2,800	<b>\$2,800</b>
– Maximum annual out-of-pocket expenses for HDHP	\$14,000	<b>\$14,100</b>
Catch-up contributions <sup>3</sup> (for individuals attaining age 55 by December 31 until enrolled in Medicare)	\$1,000	<b>\$1,000</b>
<b>Excepted-benefit HRAs (EB-HRAs)</b>	<b>2021</b>	<b>2022</b>
Maximum amount employers can contribute	\$1,800	<b>\$1,800</b>

<sup>3</sup> The HSA catch-up contribution amount for participants attaining age 55 by December 31 of the tax year is not adjusted for inflation; any change would require statutory amendment.

For comments or questions, contact  
 Cindy Brockhausen at +1 203 326 5468,  
[cindy.brockhausen@willistowerswatson.com](mailto:cindy.brockhausen@willistowerswatson.com);  
 Stephen Douglas at +1 203 326 6315,  
[stephen.douglas@willistowerswatson.com](mailto:stephen.douglas@willistowerswatson.com); or  
 Kathleen Rosenow at +1 507 358 0688,  
[kathleen.rosenow@willistowerswatson.com](mailto:kathleen.rosenow@willistowerswatson.com).



# Proposed updates to rules on ESG factors and voting proxies

By Michele Brennan, Gary Chase, Stephen Douglas, Bill Kalten and Jonathan Pliner

On October 14, 2021, the Department of Labor (DOL) issued a **proposed rule** clarifying that fiduciaries of defined benefit (DB) and defined contribution (DC) plans subject to ERISA may take into account environmental, social and governance (ESG) factors when selecting investments or deciding on an investment course of action – and in some cases may be required to do so. The proposed rule, Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, modifies two Trump-era rules – **Financial Factors in Selecting Plan Investments**<sup>1</sup> and **Fiduciary Duties Regarding Proxy Voting and Shareholder Rights** – affecting how and when fiduciaries could consider ESG factors when selecting investments and voting proxies.

The regulations will take effect 60 days after the final rule is published. Comments on the proposed rule are due by December 13, 2021.

## Changes to the investment selection rule

The proposed rule provides that in order to evaluate an investment's risks and returns, a fiduciary may often be required to evaluate the economic effects of climate change and other ESG factors. Examples include risks from extreme weather as well as imminent or proposed regulations on emissions on the power sector.

The proposed rule also clarifies that a fiduciary may consider any material factor when performing a risk-return analysis, including ESG factors, and includes specific examples of material factors related to climate change, governance and workforce practices.

In addition, the proposed rule modifies a “tie-breaker” standard that would apply when a fiduciary is deciding between similar investments by replacing a requirement to document how the tie-breaker decision was made with a requirement to disclose to participants that collateral benefits were considered when selecting the investment.

Finally, the proposed rule eliminated a special restriction that prohibited the selection of a qualified default investment alternative (QDIA) that considered any non-material factors, so QDIAs would be treated just like any other investment option.



**The proposed rule...modifies two Trump-era rules...affecting how and when fiduciaries could consider ESG factors when selecting investments and voting proxies.**

## Changes to the proxy rule

The proposed rule includes four main changes to the proxy rule:

1. Eliminates a statement that fiduciaries are not required to vote all proxies
2. Imposes a duty to select and monitor delegations related to voting proxies that more clearly aligns with existing fiduciary requirements
3. Eliminates specific safe harbors for proxy voting policies
4. Eliminates a requirement for fiduciaries to document all proxy votes

## Going forward

Fiduciaries of both DC and DB plans should consult with their investment advisors and ERISA counsel to determine whether existing policies and practices should be updated to reflect the proposed rule (particularly if they have already begun implementing the prior final rules).

Plan fiduciaries should also consider reviewing whether any investments have been selected based on a tie-breaker rule, and if so whether the collateral benefit that was considered will need to be disclosed to participants and beneficiaries.

*For comments or questions, contact Michele Brennan at +1 312 219 1397, [michele.brennan@willistowerswatson.com](mailto:michele.brennan@willistowerswatson.com); Gary Chase at +1 212 309 3802, [gary.chase@willistowerswatson.com](mailto:gary.chase@willistowerswatson.com); Stephen Douglas at +1 203 326 6315, [stephen.douglas@willistowerswatson.com](mailto:stephen.douglas@willistowerswatson.com); Bill Kalten at +1 203 326 4625, [william.kalten@willistowerswatson.com](mailto:william.kalten@willistowerswatson.com); or Jonathan Pliner at +1 212 309 3811, [jonathan.pliner@willistowerswatson.com](mailto:jonathan.pliner@willistowerswatson.com).*

<sup>1</sup> See “DOL proposes rule on ESG factors in selecting retirement plan investments,” *Insider*, August 2020.

## News in Brief

# Sixth Circuit to hear challenges to OSHA COVID-19 vaccine mandate

By Anu Gogna and Ben Lupin

On November 12, 2021, the U.S. Court of Appeals for the Fifth Circuit issued a **permanent nationwide injunction** on the Department of Labor's Occupational Safety and Health Administration's (OSHA's) COVID-19 Vaccination and Testing Emergency Temporary Standard (ETS). The ETS mandates COVID-19 vaccinations or at least weekly testing for workers at U.S. companies with 100 or more employees by January 4, 2022.<sup>1</sup>

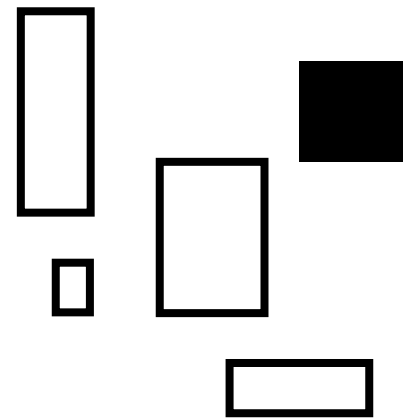
As background, on November 5, a day after the OSHA ETS was issued, a three-judge panel of the U.S. Court of Appeals for the Fifth Circuit granted a temporary injunction of the OSHA ETS. The Department of Justice appealed the decision, arguing that the OSHA ETS was necessary to protect workers from the COVID-19 pandemic and was well grounded in law.

Additional lawsuits challenging the OSHA ETS were filed in multiple circuit courts of appeal, and on November 16, the Sixth Circuit was selected via lottery to hear the case. Until the Sixth Circuit rules on the issue, the permanent injunction will remain in place. Regardless of the outcome of that ruling, it appears this issue will be appealed to the U.S. Supreme Court for a final ruling.

Pending further developments in the litigation, OSHA has suspended enforcement of the ETS. Employers should consult with legal counsel on whether to move forward in taking steps to comply with the ETS.

Note that an employer may impose a COVID-19 vaccination mandate on its own, subject to any applicable state laws, regardless of the eventual results of the OSHA ETS litigation.

<sup>1</sup> See "**OSHA issues COVID-19 vaccine mandate guidance**," *Insider*, November 2021.



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