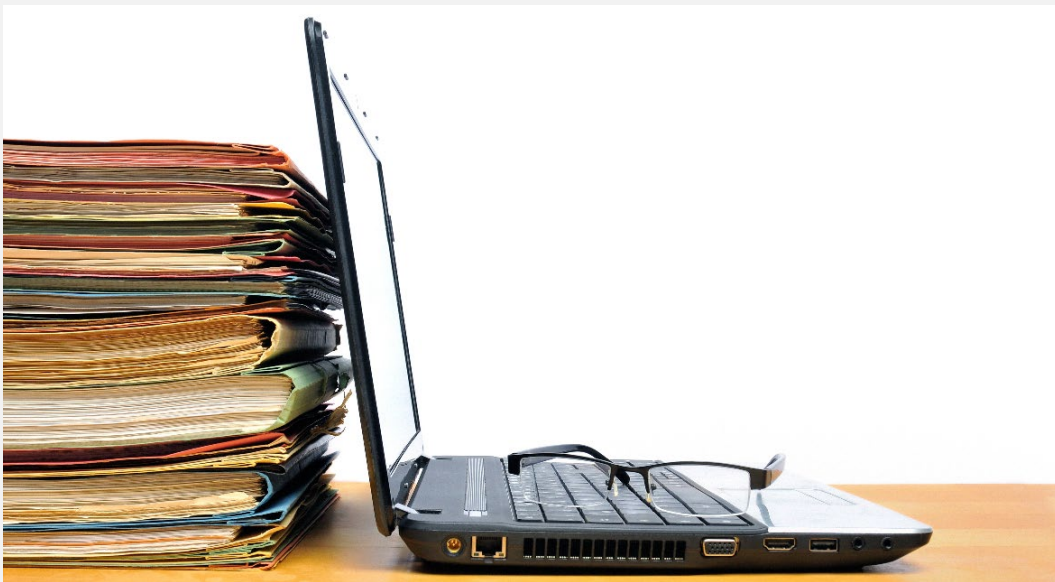




## Rewards Policy Insider 2021-21



### In this Issue:

1. [DOL Issues Proposed ESG Rules for ERISA Fiduciaries](#)
2. [OSHA Issues COVID-19 Vaccination and Testing Emergency Temporary Standard](#)
3. [PBGC Announces Premium Rates for 2022](#)

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## DOL Issues Proposed ESG Rules for ERISA Fiduciaries

The extent to which ERISA plan fiduciaries can consider climate change and other environmental, social, and

governance (ESG) factors when selecting investments and exercising shareholder rights has long been a controversial topic, with guidance shifting from one Administration to the next. On October 13, the Biden Administration weighed in by releasing proposed regulations to modify rules issued during the Trump Administration.

## Key Takeaways

As expected, the Biden Administration's proposed rule would swing the pendulum on the use of ESG factors considerably back from the direction the Trump Administration took with the ESG and proxy voting regulations. In fact, the DOL has proposed to specifically reference ESG factors in the regulation as examples of factors that may be material to a risk/return analysis.

Even so, the DOL's core views on a fiduciary's obligations have not changed. Specifically, a fiduciary may not subordinate the interests of the participants and beneficiaries in their retirement income or financial benefits under the plan to collateral objectives. As a result, much of the text of the current regulation, and the impact of the regulation, is not changed.

However, the proposal would eliminate use of the term "pecuniary" factors in the investment duties regulation, replacing it instead with a more general risk/return analysis concept and through references to "collateral" benefits.

Additionally, the proposal would eliminate the special documentation requirement from the current ESG Rule's tie-breaker test and the prohibition on the use of funds that take into account non-pecuniary factors from being qualified default investment alternatives (QDIAs). The DOL has also slightly rephrased how fiduciaries should think about the tie-breaker test, by framing it in terms of two investments that "equally serve the financial interests of the plan."

The proposal also would impose a new disclosure on 401(k) and other participant-directed plans in the case of a designated investment alternative that was selected for the plan menu or as a QDIA using collateral factors. The plan would need to prominently disclose the collateral-benefit characteristic of the investment.

Finally, the proposal would generally simplify the Proxy Voting Rule and eliminate a special recordkeeping requirement that applies in connection with exercising shareholder rights.

## Next Steps

Like all proposed regulations, this one is subject to a 60-day comment period. If history is a guide, the DOL will receive plenty of stakeholder feedback that it will need to consider before issuing a final rule. Of course, the final rule will almost certainly include some modifications based on that feedback.

The full text of the proposed regulations is available [here](#).

# OSHA Issues COVID-19 Vaccination and Testing Emergency Temporary Standard

The Occupational Safety and Health Administration (OSHA) on November 4 issued an Emergency Temporary Standard (ETS) that generally requires all employers with at least 100 employees to mandate that employees be vaccinated for COVID-19 or undergo weekly COVID-19 testing and wear a face covering at the workplace.

The ETS is effective immediately. Covered employers generally have 30 days to implement the required COVID-19 vaccination programs and must be ready to enforce the weekly testing requirement for unvaccinated employees by January 4, 2022.

## What employers are covered?

The ETS applies to employers that are under OSHA's authority and jurisdiction, which includes a wide range of industries such as retail, manufacturing, and others. However, only otherwise covered employers with at least 100 employees firm- or corporate-wide are required to comply at this time. Employers must count all employees, including part-time employees, regardless of where they work. Independent contractors are not included for this purpose. OSHA is seeking comments on whether a similar requirement should be imposed on smaller employers.

Employers that are subject to the vaccine mandate requirements for federal contractors and subcontractors, or OSHA's ETS for healthcare workers, are not subject to this ETS.

## What is required?

Covered employers must develop, implement, and enforce a mandatory COVID-19 vaccination policy that includes each of the following elements:

- **Proof of Vaccination** – employers must determine the vaccination status of employees, obtain proof of vaccination, maintain records of vaccination status, and maintain a roster of each employee's vaccination status. Employers must allow each employee (or anyone having the employee's authorized consent) to examine and copy their own COVID-19 vaccination documentation, as well as information about the aggregate number of fully vaccinated employees at the workplace and the total number of employees at the workplace.
- **Time Off** – Employers must provide employees reasonable time to receive each vaccine dose, and to recover from any resulting side effects. This requirement includes up to 4 hours of paid time to receive each dose and paid sick leave to recover from side effects.
- **Testing** – Employees who are not fully vaccinated and are in the workplace at least once a week must be tested for COVID-19 weekly. For unvaccinated employees who are away from the workplace for a week or longer, employers must require testing no more than 7 days before returning to work. The ETS does not require employers to pay for testing, although they may be

required to do so by other laws or collective bargaining agreements.

- **Handling a Positive COVID-19 Test** – Employers must require employees to promptly provide notice when they receive a positive COVID-19 test or are diagnosed with COVID-19, immediately remove such employee from the workplace, and keep them out of the workplace until they meet criteria for returning to work. These requirements apply regardless of whether the employee is vaccinated.
- **Face Coverings** – Employees who are not fully vaccinated must be required to wear a face covering when indoors or in a vehicle with another person for work purposes, subject to certain limited exceptions. Additionally, employers may not prevent any employee from voluntarily wearing a mask unless it creates a “serious workplace hazard.”
- **OSHA Reporting** – Employers must report work-related COVID-19 deaths to OSHA within 8 hours of learning about them. Work-related COVID-19 in-patient hospitalizations must be reported to OSHA within 24 hours of the employer learning about them.

The policy also must provide for employers to give certain information about the COVID-19 vaccination requirement to employees.

As an alternative to the mandatory vaccination policy, employers may adopt a policy that gives employees the option of being vaccinated or providing proof of weekly testing and wearing a face covering when indoors or in a vehicle with another person for work purposes.

Employers may adopt the mandatory vaccination policy for some segments of its workforce, and the optional vaccination/testing policy for other segments.

**Do these requirements apply with respect to employees who work from home?**

No. The ETS does not apply to employees who do not report to a workplace where coworkers or customers are present. As a result, it does not apply with respect to workers who are exclusively working from home.

**Do employers have to offer reasonable accommodations to individuals who cannot be vaccinated due to a disability, or will not be vaccinated due to a sincerely held religious belief?**

Yes. Any otherwise applicable federal law requirements – including the Americans with Disabilities Act and Title VII of the Civil Rights Act – continue to apply.

The full text of the ETS along with additional information is available on [OSHA's website](#).

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## **PBGC Announces Premium Rates for 2022**

The Pension Benefit Guaranty Corporation (PBGC) has announced inflation-adjusted single- and multiemployer

plan premium rates for 2022. For single-employer plans, the flat-rate premium will increase from \$86 to \$88 per participant, and the variable-rate premium will increase from \$46 to \$48 per \$1,000 of unfunded vested benefits.

The following table summarizes the updated and historical premium rates for the previous ten years.

Plan years beginning in ...	Single-Employer Plans			Multiemployer Plans
	Flat Rate Per Participant	Variable-Rate Premium		Flat-Rate Per Participant
		Rate per \$1,000 UVBs	Per Participant Cap	
2022	\$88	\$48	\$598	\$32
2021	\$86	\$46	\$582	\$31
2020	\$83	\$45	\$561	\$30
2019	\$80	\$43	\$541	\$29
2018	\$74	\$38	\$523	\$28
2017	\$69	\$34	\$517	\$28
2016	\$64	\$30	\$500	\$27
2015	\$57	\$24	\$418	\$26
2014	\$49	\$14	\$412	\$12
2013	\$42	\$9	\$400	\$12
2012	\$35	\$9	N/A	\$9

More historical data is available on [PBGC's website](#).

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