



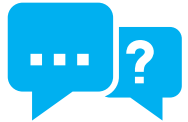
EMPLOYEE BENEFITS AND THE BIDEN ADMINISTRATION

Thursday, February 4, 2021
12:00 - 1:00 PM

Webinar Procedures



All lines will be muted



Please submit all questions using the “Q&A” dialog box



Email Diane Engel at dengel@nebgh.org with any issues during this webinar



The recording and a PDF of the slides will be shared



Q&A

You have no question.

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Speakers



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Northeast Business Group on Health

Employee Benefits and the Biden Administration

February 4, 2021

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Agenda

1. Workplace COVID-19 Vaccine Incentive Programs
2. Consolidated Appropriations Act, 2021
 - i. Extension of FFRCA/Paid Leave Laws Update
 - ii. Select Health and Welfare Plan & Fringe Provisions
 - a. Permitted Changes to Health FSAs and Dependent Care FSAs
 - b. Student Loan Repayment Exclusion
 - c. Mental Health Parity and Addiction Equity Act Compliance
 - d. Surprise Billing Regulations & Other Immediate HHS Regulatory To-Do List
 - iii. Retirement Plan Provisions
 - a. Qualified Disaster-Related Relief Provisions
 - b. New COVID-19 Pandemic Related Relief Provisions
3. Policy Roll Back
4. Overview of Biden Administration Healthcare Proposals
5. Overview of Biden Administration Retirement Proposals
6. Appendices



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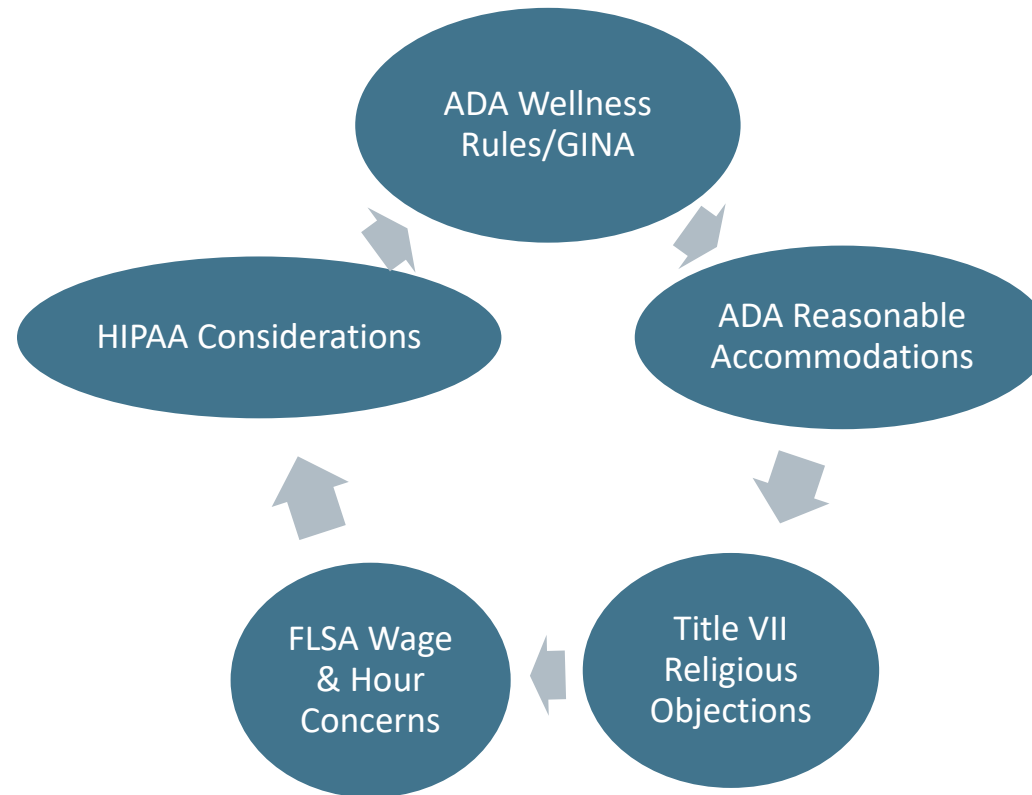


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Workplace COVID-19 Vaccine Incentive Programs

Workplace COVID-19 Vaccine Incentive Programs

- Prior to implementing a vaccine incentive program, employers need to consider applicable federal laws as well as related state and local laws, and depending on nature of incentive, tax considerations, too



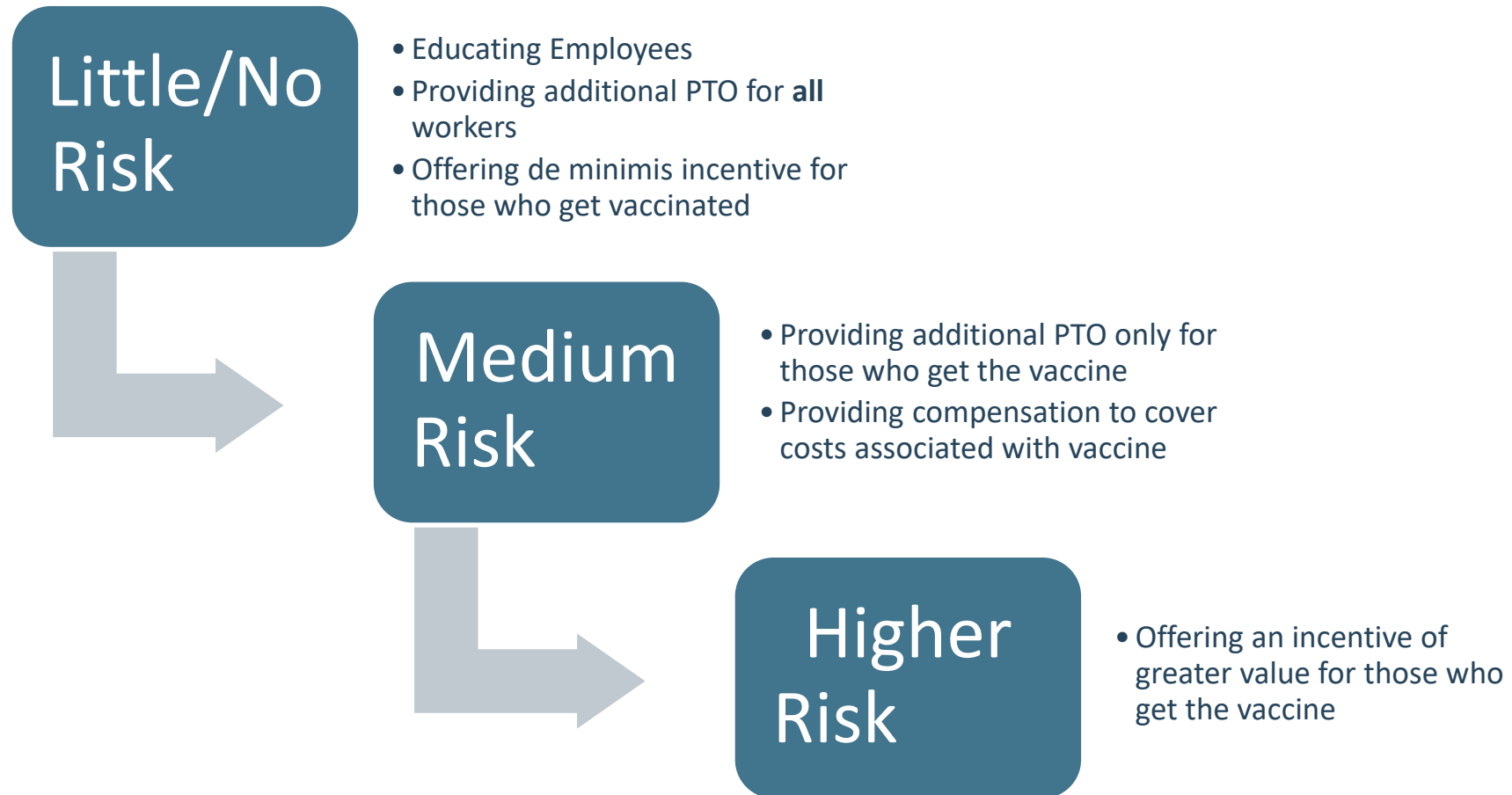
Workplace COVID-19 Vaccine Incentive Programs (cont'd)



- Employers can avoid implicating ADA wellness rules if
 - Any pre-exam screening questions come from a third party that is not contracted with the employer to conduct testing (e.g., neighborhood pharmacy or clinic); or
 - Employee's participation and responses to the disability-related inquiries are entirely voluntary
- Legal issues arise if employee cannot take the vaccine because of medical reasons and, therefore, doesn't qualify for the incentive
 - If employee asks for an accommodation or alternative to earn the incentive, ADA requirements implicated
- If program is not "voluntary" because incentive is "too high," wellness program rules may be violated; EEOC's view is that employees could feel coerced to participate
 - Recent EEOC proposed rule permits only *de minimis* incentives for **participatory wellness programs**
 - Examples: water bottles or items of equivalent value or gift card of modest value
 - Examples of items that are **not** de minimis: \$50 monthly premium payment, paying for gym membership, providing airline tickets
 - **Proposed rule withdrawn by Biden administration under a regulatory freeze and is pending review**

Workplace COVID-19 Vaccine Incentive Programs (cont'd)

Possible Types of Incentives



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Consolidated Appropriations Act, 2021: FFRCA/Paid Leave Laws Update

Federal – FFCRA Expired; What Next?

- The Families First Coronavirus Response Act required certain employers to provide their employees with paid sick leave or expanded family and medical leave for specified reasons related to COVID-19
- FFCRA expired on December 31, 2020
 - Paid leave mandates NOT extended
 - Employers' choice to continue providing FFCRA leave to employees
 - Continuing tax credits through March 31, 2021
- President Biden's "**American Rescue Plan**"
 - Extends or expands FFCRA's paid leave mandates for COVID-19 related reasons



Comparison: Original FFCRA vs. American Rescue Plan

Original FFCRA

Covered Employers

- Employers with under 500 employees
- Exception for employers with under 50 employees

Tax Credits

- Reimbursement available for covered employers

Amount & Reasons for Leave

- Up to 12 weeks for eligible employees

ARP Proposals

Covered Employers

- Employers with fewer than 500 employees
- Employers with 500 or more employees
- No more exceptions for employers with under 50 employees

Tax Credits

- Reimbursement available for employers with fewer than 500 employees
- No reimbursement for employees with 500 or more employees

Amount & Reasons for Leave

- “Over 14 weeks of paid sick and family and medical leave”
- Additional reason: COVID-19 vaccination

Comparison: Original FFCRA vs. American Rescue Plan (cont'd)

Original FFCRA

Paid Benefit Changes

- \$1,000/week cap (\$200/day) to take care of children or family members
- \$2,555/week cap (\$511/day) for employees taking sick leave for themselves

Eligible Employees

- Health care workers and first responders may be excluded from FFCRA paid leave requirements
- Federal employees entitled to paid sick leave, but not paid FMLA leave

ARP Proposals

Increased Paid Benefit

- Maximum paid leave benefit of \$1,400 per week
- Some areas of uncertainty

Eligible Employees

- Health care workers and first responders entitled to leave
- Federal employees entitled to paid FMLA leave

Emergency paid leave measures through September 30, 2021

Federal - Comprehensive Paid Leave for Federal Employees Act

- On January 28, Congresswoman Carolyn Maloney (D-NY) introduced legislation which provides all federal employees up to 12 weeks of paid leave relating to personal illness, illness of a family member, or personal military deployment or deployment of a spouse, parent, or child
- Employees would not have to exhaust annual leave to request paid family leave under this legislation



State Paid Leave Laws – New York

New York COVID-19 Sick Leave Law

Amount of leave depends on the size of business

- Small (10 or fewer employees): job protection for duration of pandemic
- Medium (11-99 employees)/Small (net income >\$1 mil): job protection + 5 days paid leave
- Large (100 + employees): job protection + 14 days of paid leave
- Public employers (regardless of size): job protection + 14 days of paid leave

June 25, 2020 – NY DOH and NY DOL guidance clarifies that health care employees may qualify for paid leave for up to 3 orders of mandatory quarantine or isolation

January 20, 2021 Guidance from the New York Department of Labor

- Employees may qualify for sick leave for up to three QOs
- An employer must pay employees who are required to remain out of work because they been exposed or potentially exposed to COVID-19, even in the absence of a COVID-19 Order

State Paid Leave Laws – California



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Cal-OSHA Emergency Regulations

- If an employee is excluded from the workplace due to COVID-19 infection or exposure but is otherwise able and available to work, then earnings and benefits must be continued.
- If an employer demonstrates that the employee's COVID-19 exposure was not work-related, then the employer is not required to comply with the exclusion pay requirements.

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Other Paid Leave Programs

- COVID-19 Supplemental Paid Sick Leave expired on December 31, 2020. However, employees who already started receiving CSPSL before January 1, 2020 can continue to take the leave they were currently on even if that entitlement extended past December 31.
- Various Local Government Supplemental Paid Sick Leave in several localities including Los Angeles and San Francisco.

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Consolidated Appropriations Act, 2021: Select Health and Welfare Plan & Fringe Provisions

Consolidated Appropriations Act, 2021

Special Temporary Relief on FSAs

Expanded Carryovers

All unused HCFSAs **and** DCFSAs from 2020/2021 PY may be carried over to 2021/2022 PY

Temporarily removes \$550 (indexed) cap

Carryover amounts do **not** decrease maximum contribution participants may make to a HCFA (i.e., participants can still elect \$2,750 for 2021); should not count towards contribution limit for DCFSAs but statutory exclusion remains unchanged (need guidance)

Consider impact on employees' HSA eligibility and design alternatives (e.g., automatically converting to a limited purpose HCFA or allowing participants to irrevocably decline)

May limit carryover to individuals who have elected to participate in HCFA in the next PY

Consolidated Appropriations Act, 2021

Special Temporary Relief on FSAs

Extended Grace Period

- Grace Periods for 2020 and 2021 plan years may be extended (from 2 ½ months to up to 12 months)
- Cannot have both carryover and grace period
- Adoption will create HSA disruption issues; may automatically convert to a limited purpose FSA but must apply to **all** employees in HCFA (even those not enrolled in HDHP)

Consolidated Appropriations Act, 2021

Special Temporary Relief on FSAs (cont'd)

HCFA Spend Down

- For 2020 & 2021, health FSA may permit participants who cease participation mid-year to continue to incur claims for the remainder of the year (including any grace period)
- HSA disruption issues if adopted for general purpose FSA
- Questions remain about implementation – can employee decline? amount available? how will this work with COBRA?

Additional FSA Election Changes

- May amend plans to permit FSAs to allow participants to make mid-year changes for any reason in 2021
- Elections must be prospective
- Only applies to FSAs

Expanded Definition of Child for DCFSAs

- Employees who have unused funds for children who reached age 13 during the last DCFSA PY for which the open enrollment period ended on or before January 31, 2020 may continue to treat the child as eligible up to age 14 for the remainder of the PY
- If the DCFSA adopts the carryover feature, plan can reimburse dependent care expenses to such child in the following plan year until the child turns 14, but only with respect to unused amounts carried over from 2020 into 2021

Consolidated Appropriations Act, 2021

Special Temporary Relief on FSAs (cont'd)

- All of the temporary special rules are **optional**
- Employers will need to work with TPAs on administration and additional cost before communicating to employees
- If adopted, notification must be provided to eligible employees
- Employers have additional time to formally adopt plan amendments
 - Amendments must be adopted no later than last day of the first calendar year beginning after the end of the plan year in which the amendment is effective
 - Example: By December 31, 2021 for an amendment that provides for a carryover of 2020 amounts from a calendar year FSA

- We expect IRS guidance soon

(Posted on LinkedIn on 01.21.2021)



Stephen Tackney · 1st

Deputy Associate Chief Counsel (Employee Benefits) at IRS - Chief Counsel

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CCA legislative relief for dependent care assistance programs and health FSAs - we have gotten a lot of questions and are working on and anticipate issuing guidance (although we can never promise anything until it is issued). Sorry to get you excited this was going to be the guidance but did want everyone to know where we were and thank everyone who has sent us questions and input.

👍 20

1 comment



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Consolidated Appropriations Act, 2021

New Tax Exclusion for Student Loan Repayments

- CARES Act amended Section 127 of the Code to allow payment by an employer of principal or interest on certain “qualified education loans” up to \$5,250 through December 31, 2020
- CAA expands provision to ***through December 31, 2025***
- Payments must be for a qualified education loan incurred for the education of the employee (i.e., payments cannot be for the education of an employee’s spouse or children)
- The provisions for education-assistance programs under IRC Section 127 remain in full force
 - Employers must adopt and implement a written plan describing the tuition assistance benefit and must communicate the terms of the program to eligible employees
 - No more than 5% of the amounts paid can go to shareholders and owners who own more than 5% of the company’s stock or capital
- Statutory amount has not been changed; any tax-free loan repayments must be aggregated with other qualified educational payments



Consolidated Appropriations Act, 2021

Mental Health Parity and Addiction Equity Act (MHPAEA) Compliance

- On and after **February 10, 2021**, group health plans that impose nonquantitative treatment limitations on mental health/substance abuse disorder benefits will be required to perform and document a detailed comparative analysis and make it available to federal regulators upon request
 - May get triggered by participant complaints
- Law requires:
 - Federal regulators to review compliance analysis from at least 20 different group health plans every year
 - Institute a formal process if noncompliance is found, including a corrective action period
 - Agencies to issue an annual report to Congress detailed results
- Implementing guidance required to be issued within 18 months; **MHPAEA enforcement is expected to continue to be a priority under the Biden administration**
- Employers should evaluate their plans' compliance with the MHPAEA
 - View plan design and make any necessary changes
 - Ensure that the plan's vendor will provide the comparative analysis; may need additional contracting
 - Be prepared to respond to a request for documentation

Consolidated Appropriations Act, 2021

Surprise Billing Regulations & Other Immediate HHS Regulatory To-Do List

Surprise Billing Regulations – Implementing the “No Surprises Act”

Requires that for emergency services or non-emergency services received out-of-network providers at in-network facilities, health plans must hold enrollees harmless from any out-of-network cost-sharing charges higher than in-network cost-sharing levels

Plans must provide cost sharing comparison tools and Advanced EOBs for scheduled services

Base cost-sharing calculations on a “Recognized Amount”, informed by market-based median in-network rate

An independent dispute resolution (IDR) process will be established for contested payments between plans and emergency providers

Regulations must be developed within one year to codify standards and plan audit requirements, as well as to determine who may serve as an IDR arbitrator

COVID-19 Relief to Health Care Providers

- \$22 B for purchase of vaccines, therapeutics, diagnostics, and necessary medical supplies
- Approx. \$8 B vaccine distribution and related planning and tracking initiative
- \$22 B initiative to monitor and suppress COVID-19 through testing, contact tracing, surveillance, containment, and mitigation
- Additional funds for another \$30 B HHS Provider Relief Distribution in the first half of 2021 (approx. \$150 B distributed to providers to-date)

Medicare Reimbursement and Compliance

- Allow Medicare beneficiaries to receive mental health services via telehealth, including in the beneficiary’s home; Permit direct Medicare reimbursement to physician assistants beginning in 2022

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Consolidated Appropriations Act, 2021: Select Retirement Plan Provisions

Consolidated Appropriations Act, 2021

Retirement Provisions Relating to COVID-19 Pandemic



- Partial plan termination temporary relief
 - In the event of a partial plan termination (generally reduction in force of more than 20% of active participants during a plan year), the accounts of affected participants must be fully 100% vested
 - The CAA provides brief relief from the partial plan termination rules (and therefore, 100% vesting) during any plan year that includes the period beginning March 13, 2020 and ending March 31, 2021
 - This is helpful for employers who may have had layoffs and closings during the COVID-19 pandemic if the plan participation numbers rebound by March 31, 2021
 - To be eligible for this relief, the number of active participants covered under the retirement plan on March 31, 2021 must be at least 80% of the number of active participants covered under the retirement plan on March 13, 2020 (the participants need not be comprised of the same individuals)
- CARES Act COVID-19 in-service distribution provisions retroactively extended to money purchase plans
- In-service distributions for working retirement lowering age 59½ to 55 for certain workers in the building and construction industry participating in multiemployer pension plans
- One-time election to reverse Section 420 transfers from overfunded defined benefit plans to pay retiree medical and life insurance benefits (election must be made by December 31, 2021)

Consolidated Appropriations Act, 2021

Retirement Provisions Qualified Disaster Relief (other than COVID-19 pandemic)



- Qualified disaster distributions (QDD) (not related to COVID-19 pandemic)
 - Similar to the CARES Act provisions for COVID-19 withdrawals, a QDD permits qualified individual to take a withdrawal of up to \$100,000 or vested balance of the account on or before June 25, 2021, which may be taxed ratably over three years (and repayable for three years)
 - Applies to qualified disasters occurring between January 19, 2019 and December 27, 2020 that are declared disasters under the Stafford Act from January 1, 2020 through February 25, 2021
 - Qualified individual must reside in a qualified disaster area and suffer an economic loss (excluding areas declared disaster area solely due to the COVID-19 pandemic)
- Return of hardship withdrawals for home purchase and construction
 - If funds were not used for construction due to qualified disaster, may be recontributed to the plan
 - Hardship distribution must have been received 180 days before through 30 days after the qualified disaster
 - Repayment must be made no later than June 25, 2021

Consolidated Appropriations Act, 2021

Retirement Provisions Qualified Disaster Relief (other than COVID-19 pandemic) (cont'd)



- Qualified disaster related plan loans
 - Similar to the CARES Act provisions for COVID-19 loans, loan limits for qualified individuals may be increased up to \$100,000 or vested balance of the account
 - Loan repayments may be extended one year or, if longer, through June 25, 2021 if repayment normally during the period beginning on the qualified disaster and ending 180 days after the end of the qualified disaster
 - Interest continues to accrue
- Plan amendment deadline for qualified disaster relief provisions is the last day of the first plan year beginning on or after January 1, 2022 (i.e., December 31, 2022 for calendar year plans)

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Policy Roll Back

“Midnight” Regulations & Last Minute Rulemaking

BIDEN ADMINISTRATION RESPONSE TO LATE TRUMP RULEMAKING

Jan. 20, 2021 Memo of WH Chief of Staff to Agencies, “Regulatory Freeze Pending Review” – For final rules that are not yet effective, “consider postponing the rules’ effective dates for 60 days from the date of this memorandum, . . . for the purpose of reviewing any questions of fact, law, and policy the rules may raise. For rules postponed in this manner . . . consider opening a 30-day comment period.” Also withdraw unpublished rules.

Finalized and effective regulations require new notice and comment rule-making to alter, including simply deferring effective date

Late Trump Administration Rulemaking Potentially Subject to Additional Review

Regulation	Summary	Finalized	Effective	Biden Administration Action
PBM Rebates	Removes anti-kickback safe harbor for rebates from pharma manufacturers to Medicare plans and PBMs unless 100% of value is passed to consumer at point of sale. PCMA suit challenges as arbitrary and capricious	Nov. 30, 2020	Jan. 29, 2021	Effective date deferred to Mar. 22, 2021
ADA & GINA Wellness Rules	Proposed rules from EEOC to update regulations under the Americans with Disabilities Act and the Genetic Information Nondiscrimination Act in response to federal court ruling addressing incentives for participation in wellness programs	Jan. 7, 2021		Not yet published in the Federal Register
SUNSET Rule	All HHS regulations expire after 10 years unless reviewed to confirm ongoing need and appropriate impact	Jan. 8, 2021	Mar. 8, 2021	
Notice of Benefit and Payment Parameters (2022)	Allows states to drop reliance on healthcare.gov Exchanges and instead rely on direct enrollment entities like web-based brokers to extend coverage. Codifies guidance allowing states to use ACA subsidies for short-term limited-duration health plans and association health plans. Other provisions to be finalized in later rulemaking	Jan. 14, 2021	Jan. 1, 2022	
Wage Protections for Employment of Certain Aliens	Employment and Training Administration rule intended to strengthen wage protections for temporary and permanent employment of certain aliens in the US	Jan. 14, 2021	Mar. 15, 2021	Effective date deferred to May 14, 2021

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Overview of Biden Administration Healthcare Proposals

Executive Order on Strengthening Medicaid and the Affordable Care Act

SIGNED JAN. 28, 2021 AS A PART OF BIDEN'S "10 DAYS OF PRESIDENTIAL ACTIONS"

"Special Enrollment Period" (SEP)

- Directs the HHS Secretary to consider existing authorities to establish a SEP for uninsured and under-insured Americans to seek coverage through the Federally Facilitated Marketplace
- On Jan. 28, CMS announced a Feb. 15 - May 15 SEP for all eligible consumers (uninsured and currently-enrolled members)

"Immediate Review of Agency Action"

- Directs Agencies (HHS, DOL, IRS) to review all Trump-era Agency Actions to determine whether or not to suspend, revise, or rescind prior actions "inconsistent with the policy of protecting and strengthening Medicaid and the ACA", such as policies that may:
 - Undermine protections for people with pre-existing conditions; present barriers to enrollment; reduce affordability; or undermine the Health Insurance Marketplace or the individual, small group, or large group markets for health insurance
- Directs the Agencies to consider additional Agency Actions to more fully enforce the policy of protecting and strengthening the ACA. Possible actions include:
 - Limit future enrollment in short-term, limited duration plans. Require comprehensive benefits
 - Limit future use of individual contribution health reimbursement arrangements (ICHRA). Apply stricter safe harbor methods to assess affordability and minimum value requirements
 - Increase duration of, and marketing budget for, annual open enrollment periods

Compare to Biden Campaign Plan: "Public Option That Would Build Off of the ACA"

- Increase the value of ACA tax credits; Eliminate the 400% income cap for eligibility; Cap premiums in the individual marketplace at 8.5% of enrollee income
- Establish Public Option plan to negotiate lower prices from doctors and hospitals; coordinate care among all of an enrollee's providers
- Allow all states to move the Medicaid expansion population to the premium-free Public Option
- Lower Medicare age to 60

President Biden's "American Rescue" COVID-19 Relief Legislative Plan*

OVERVIEW AND HEALTHCARE PRIORITIES RELEASED JANUARY 14, 2021

Health Coverage Expansion

- Fully subsidize continuation of COBRA coverage through Sept. 2021
- "Expand and increase the value of the Premium Tax Credit"
- Ensure ACA Exchange enrollees pay no more than 8.5% of their income for coverage

Additional \$20B for National Vaccine Program

- Encourage access for more priority groups (65+, essential workers)
- Establish more vaccination sites through FEMA, Nat'l Guard, FQHCs, and pharmacies
- Increase vaccine supply using Defense Production Act
- Use PHS Commissioned Corps for vaccinations and hire a contact tracing workforce
- Public education campaign to encourage vaccination

Additional \$50B Testing Initiative

- Purchase rapid tests & Expand lab capacity
- Implement regular testing protocols for schools and local governments

Other Provisions

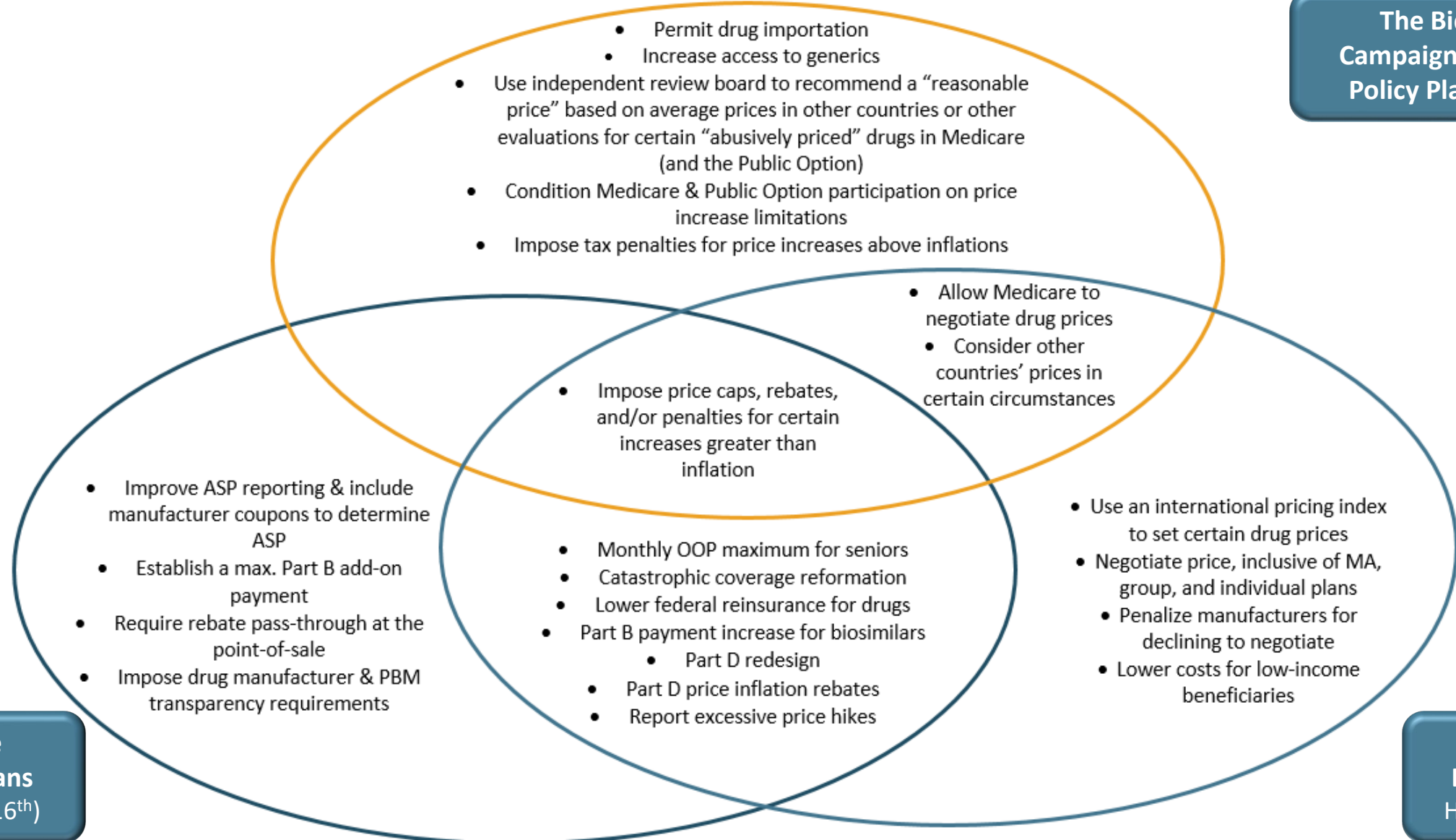
- \$1,400 per person stimulus checks (in addition to \$600 previously enacted)
- Extend unemployment comp to Sept. 2021
- \$15 minimum wage
- Increase funding for long term care residents and workers and in prison settings
- \$30B into the Disaster Relief Fund + \$10B investment into domestic manufacturing for pandemic supplies

*Dec. 2020 Consolidated Appropriations Act provided \$30B for vaccination program and \$20B for testing program

Drug Pricing Legislation

DRUG PRICING LEGISLATION & OVERLAPPING POLICY PRIORITIES

The Biden
Campaign's Drug
Policy Platform



Senate
Republicans
S. 2543 (116th)

House
Democrats
H.R. 3 (116th)

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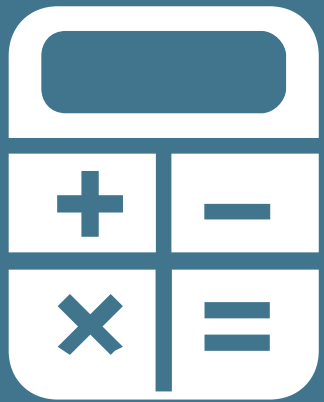


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Overview of Biden Administration Retirement Proposals

Biden Proposal – Equalizing 401(k) Tax Benefits


Ending pre-tax or tax-deductible contributions in exchange for flat-tax credits



- Biden supports ending upfront tax breaks for contributing to traditional 401(k) plans and replacing them with flat-tax credits
- Pre-tax contributions and tax-deductible contributions (which favor higher earners) would be replaced by flat-tax credits for each dollar saved, allowing lower income earners to receive a greater benefit
- The credit would be refundable, so employees earning too little for the credit to offset their income tax liability would still receive the full value
- The proposed tax credit amount has not been published
- Would this change behavior for lower-income workers?
 - Tax credit would only be seen at the end of the year
 - Higher earners would contribute through Roth contributions

Biden Proposal – Multiemployer Pension Plan Relief

Providing for federally backed loans to underfunded multiemployer defined benefit pension plans



Biden has indicated it will address "issues related to pensions, starting with passing the Butch Lewis Act," which would provide federally backed loans to underfunded multiemployer defined benefit pension plans

The Butch Lewis Act passed the House last year, but has not been brought up for vote in the Senate

Biden Proposal – Auto-Enrollment 401(k) Savings Accounts

For employers with no retirement plan, employees would auto-enroll into government or small employer 401(k) account plan



Biden has considered mandating that employers provide auto-enrollment plans through (1) subsidies for small businesses to set them up, or (2) a government-provided defined contribution plan option



This proposal is similar to many different state proposed retirement plans for small employers



Similar proposals have been around for years (i.e., Obama Administration's MyRA proposals)

Biden Proposal – Social Security Rate Increase

Increasing Social Security contributions on earnings over \$400,000



- 1 Biden has proposed requiring high-wage earners to pay Social Security taxes on a higher percentage of their income
- 2 Currently, employees and employers each pay 6.2 percent from wages to fund Social Security up to an income cap of \$142,800 for 2021 (Biden also proposes to increase the income cap)
- 3 While earnings immediately above the current tax cap would continue to be exempt from Social Security taxes, earnings above \$400,000 would be taxed at the 12.4 percent rate
- 4 The new taxes on earnings above \$400,000 would not trigger additional Social Security benefits

Biden Proposals: ERISA Fiduciary Rules

Stay of enforcement of Trump Administration rulemaking over fiduciary rules

The Biden Administration stated it would review the DOL final rule on “Financial Factors in Selecting Plan Investments”

- In October, 2020, the DOL released its final rule requiring fiduciaries to select investments for employer-sponsored plans based on pecuniary (risk/return) factors, rather than nonfinancial factors such as environmental, social and governance (ESG) criteria
- The proposed rule was subject to numerous comments and is effective January 12, 2021

In July, 2020, the DOL also proposed a fiduciary standard for advisors who recommend investments to retirement plan participants requiring advisors to act in participants' best interests and to avoid conflicts of interest when recommending specific investments – less restrictive than the Obama’s fiduciary rules for advisors

In September 2020, the DOL issued a proxy voting proposal that would require retirement plan fiduciaries to refrain from voting on shareholder matters that do not advance the financial interests of retirement plan participants

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Appendix

Parameters of Democratic Control of Senate

LEGISLATIVE OPPORTUNITIES AND RESTRAINTS IN 50-50 SENATE WITH VP BREAKING TIE VOTES

51 Votes for a Simple Majority

- Cabinet and judicial nominations may be easily confirmed
- Set agenda for Committees and Senate floor
- Pass low profile legislation
- Senate rules may be changed (eliminate filibuster; expedited impeachment for former POTUS)

60 Votes to Pass Cloture Motion

- Rules require supermajority of 60 votes to invoke “cloture” to end debate and move to final vote on passage of bill
- Failure to invoke cloture is considered a “filibuster”
- Effectively requires supermajority support to pass major legislation
- Use has more than doubled over 20 yrs

51 Votes for “Budget Reconciliation”

- Not subject to filibuster
- Legislation must be limited to changing either (1) taxes, (2) entitlement spending, or (3) debt limit
- Limited to only one bill addressing each topic per budget resolution
- Multi-stage process required: (1) include directives in budget resolution; (2) Committees draft corresponding changes to underlying law; (3) expedited final vote
- Used by Congress 25 times since 1980

Eliminating the Senate Filibuster? Considerations for Democrats . . .

- Leadership likely to maintain perpetual threat of eliminating filibuster in order to enforce party discipline on other votes

Factors In Favor of Eliminating Filibuster	Factors In Favor of Maintaining Filibuster
Democratic base is owed substantive legislative wins (add seats to Supreme Court; create new states; single-payer; Green New Deal)	Democratic majority status in Congress is razor-thin. Threat of losing majority in electoral backlash against overreach (i.e., 1994, 2010)
Pressure on Majority Leader Schumer (NY) and other Dem incumbents to avoid primary challenge from left; 13 Dem Senate seats up in 2022	Swing state Democrats may face tight reelection race in 2022: Raphael Warnock (GA); Mark Kelly (AZ)
Once in generation opportunity to pass long-standing, major reforms	Expanded legislative power would be used by Republicans against Democrats when they next gain back 1 Senate seat

Key Personnel

HEALTH LAW & REGULATIONS EMERGE FROM NEGOTIATION AMONG MULTIPLE STAKEHOLDERS

Dep't of Health & Human Servs. (Nominees & Appointments)

- **Secretary of HHS**
 - **Nominated** | Cal. AG Xavier Becerra
 - **Acting** | Norris Cochran (until Becerra confirmed)
- **Deputy Secretary** | Andrea Palm
- **CMS Administrator** | ? (Liz Richter acting)
- **FDA Commissioner** | ? (Janet Woodcock acting)
- **CDC Director** | Dr. Rochelle Walensky
- **COVID-19 Equity Task Force Chair** | Dr. Marcella Nunez-Smith
- **Surgeon General** | Dr. Vivek Murthy

The White House (Appointments)

Chief of Staff | Ron Klain
Director of OMB | Neera Tanden (Nominee)
Director of the National Economic Council | Brian Deese
Director of the Domestic Policy Council | Susan Rice
Chief Medical Adviser on COVID-19 to the President | Dr. Anthony Fauci

Congressional Leadership

U.S. Senate

- **Senate Majority Leader** | Sen. Chuck Schumer (D-NY)
- **Senate Minority Leader** | Sen. Mitch McConnell (R-KY)
- **Key Committee Leadership**
 - **Finance**: Sen. Ron Wyden (D-OR)
 - RM: Sen. Mike Crapo (R-ID) (presumed)
 - **HELP**: Sen. Patty Murray (D-WA)
 - RM: Sen. Richard Burr (R-NC) (presumed)

U.S. House of Representatives

- **Speaker of the House**: Speaker Nancy Pelosi (D-CA-12)
- **Key Committee Leadership**
 - **Energy & Commerce** | Rep. Frank Pallone (D-NJ-06)
 - RM: Rep. Cathy McMorris Rodgers (R-WA-05)
 - **Ways & Means** | Rep. Richard Neal (D-MA-01)
 - RM: Rep. Kevin Brady (R-TX-08)

The Biden Administration must fill nearly 4,000 political appointee positions, 1,200 of which require Senate confirmation. This usually takes more than 1 year.

ACA Marketplaces – Immediate Review of Trump-Era Agency Action

HHS CONSIDERING NEW ADMINISTRATIVE ACTIONS TO “PROTECT AND STRENGTHEN” THE ACA

Marketplace-Related Actions During the Trump Administration*	Potential Responses by the Biden Administration	Requires New Rulemaking?
Reduce funding to navigators. Require only 1 navigator program to operate in each federal Marketplace	Increase funding for marketing and promotion. Restore navigator grant levels. Restore minimum number of 2 navigator programs in federal Marketplaces and require maintenance of physical presence in the service area.	
Allow states to drop reliance on healthcare.gov Marketplaces and instead rely on direct enrollment entities like web-based brokers to extend coverage	Maintain requirement that enrollment is performed through healthcare.gov. Strengthen consumer protection standards for commercial we-broker sites	✓
Codify less restrictive standards for the review of state requests for “section 1332 waivers” from certain ACA requirements	Revise regulatory standards for waivers to limit exceptions to ACA requirements and to prevent reductions in access, affordability, or comprehensive benefits	✓
Reduction in user fees paid by Marketplace plans	Restore user fees to prior levels. Such fees finance marketplace operating expenses, including compliance oversight, navigator assistance, and marketing and outreach	✓
Permit enrollment in short-term, limited duration plans for 364 days, with an option to renew for 36 months	Limit future enrollment in such plans. Require more comprehensive benefits	✓
Classify some association health plans (AHPs) as single employer plans and therefore exempt from individual and small group coverage standards	Restore prior classifications and standards	✓
Shorten open enrollment periods for the federal Marketplace	Increase the enrollment period for the federal Marketplace	✓

***Note** - On Nov. 10, 2020, Supreme Court heard oral arguments in *California v. Texas*. As Congress eliminated the individual mandate tax penalty from the ACA in 2017, Texas argues that the individual mandate is now unconstitutional and that the entire ACA should be overturned due to “lack of severability” between the law’s provisions. An opinion is expected between Feb. – June 2021 addressing plaintiffs standing, the individual mandate, and its severability from the rest of the ACA.

COVID-19 Presidential Actions

EXECUTIVE ORDERS & ACTIONS ON JAN. 21, 2021 (DAY 2 OF BIDEN'S "10 DAYS OF PRESIDENTIAL ACTIONS")

	Executive Action <small>(with Links)</small>	Details
1	EO "Improving and Expanding Access to Care and Treatments for COVID-19"	<ul style="list-style-type: none"> • Directs the Defense, HHS, VA Secretaries to establish targets for the production, allocation, & distribution of COVID-19 treatments • Directs the HHS Secretary to evaluate and take any available steps to promote insurance coverage for safe and effective COVID-19 treatments and clinical care in Medicare, Medicaid, group health plans, and health insurance issuers • Directs the HHS Secretary with NIH to develop plans to support studies for promising COVID-19 treatments & future public health threats, to support research in rural locations & to study long-term impacts of COVID-19 on health • Directs relevant agency heads to provide targeted surge assistance to critical care and long-term care facilities • Directs the HHS Secretary to issue recommendations to states & healthcare providers to increase the capacity of their healthcare workforce capacity
2	EO Establishing the COVID-19 Pandemic Testing Board and Ensuring a Sustainable Public Health Workforce for COVID-19 and Other Biological Threats	<ul style="list-style-type: none"> • Establishes the "COVID-19 Pandemic Testing Board" comprised of representatives from dep'ts & agencies to coordinate efforts • Directs the Treasury, HHS & Labor Secretaries to facilitate provision of free COVID-19 testing for those that lack comprehensive coverage & clarify insurers' obligations to cover testing • Directs HHS, Ed. & Homeland Sec. Secretaries FEMA to support surveillance tests in certain settings & expand access to testing • Establishes a Public Health Workforce Program & requires planning for public health threats
3	EO Ensuring a Data-Driven Response to COVID-19 and Future High-Consequence Public Health Threats	<ul style="list-style-type: none"> • Directs various agency and executive leaders (including HHS, Labor Dep't, Ed. Dep't, OMB, OSTP) to designate a senior official to lead their agency's work on COVID-19 and pandemic-related data issues • Directs agencies to review current public health data systems to advance innovation in public health data & analytics
4	EO Sustainable Public Health Supply Chain	<ul style="list-style-type: none"> • Directs the State Dep't, Defense, HHS & Homeland Sec. Secretaries to evaluate inventory of emergency response supplies , including PPE and the resources to effectively produce & distribute tests & vaccines at scale & to use all available legal authorities, including the Defense Production Act, to fill shortfalls • Directs these Secretaries to identify & analyze each agency's needs & capacity to produce/provide/distribute supplies • Directs HHS, Defense, & Homeland Sec. Secretaries to recommend how to address the pricing of pandemic response supplies (including whether to use GSA schedules for State, local & tribal govt.)

Note: On Jan. 20, 2021, Pres. Biden [established](#) the position of the "Coordinator of the COVID-19 Response and Counselor to the President" (COVID-19 Response Coordinator) to assist the President and executive departments & agencies coordinate on the pandemic response

COVID-19 Presidential Actions

EXECUTIVE ORDERS & ACTIONS ON JAN. 21, 2021 (DAY 2 OF BIDEN'S "10 DAYS OF PRESIDENTIAL ACTIONS")

	Executive Action <small>(with Links)</small>	Details
5	EO Protecting Worker Health and Safety	<ul style="list-style-type: none">• Directs OSHA to issue revised science-based guidance on COVID-19 workplace safety within 2 weeks to reduce workers' exposure to COVID-19 and considering emergency temporary standards such as mask-wearing• Directs OSHA to launch a national program to focus OSHA enforcement efforts related to COVID-19 violations
6	EO Ensuring an Equitable Pandemic Response and Recovery	<ul style="list-style-type: none">• Establish COVID-19 Health Equity Task Force• Directs agency heads to work with the Task Force to strength equity in pandemic response
7	EO Supporting the Reopening and Continuing Operation of Schools and Early Childhood Education Providers	<ul style="list-style-type: none">• Directs the Ed. Secretary to develop evidence-based guidance for reopening and for remaining open for in-person learning
8	EO Promoting COVID-19 Safety in Domestic and International Travel	<ul style="list-style-type: none">• Requires travelers will have to wear masks in airports and in certain public transportation• Requires international travelers to show proof of a negative COVID-19 test & imposes self-isolation & quarantine guidelines
9	National Security Directive on U.S. Global Leadership to Strengthen the International COVID-19 Response and to Advance Global Health Security and Biological Preparedness	<ul style="list-style-type: none">• Focuses on increasing the United States' role in the global pandemic response• Follows the Jan. 20, 2021, reversal of the previous administration's decision to withdraw from the World Health Organization
10	Memorandum to Extend Federal Support to Governors' Use of the National Guard to Respond to COVID-19 and to Increase Reimbursement and Other Assistance Provided to States	<ul style="list-style-type: none">• Increases FEMA reimbursement to 100% of the costs states and tribal governments incur for deploying the National Guard or buying emergency supplies used to set up vaccination centers

Executive Orders | Exercising authority that Congress has given to the president alone or statements of administration policy that direct agencies to develop regulations or substantive law



Have a question? Use the Q&A box!

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Upcoming NEBGH virtual events:

- **Feb. 8:** NEBGH Medical Director's Weekly Monday COVID-19 Update
- **Feb. 11:** "Safe Space" Employer Roundtable: Racial Health Disparities
- **Feb. 22:** Weekly Monday COVID-19 Update w/ Dr. Lindsay Jubelt
- **Feb. 23:** Bicoastal Benefits Leaders' Coffee Talk featuring Marco Diaz