

Biden Administration to Review Rules for Employee Health and Retirement Plans

Numerous employee benefit regulations could be revisited

By Stephen Miller, CEBS

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On Inauguration Day, Jan. 20, the Biden-Harris transition team released a list of more than 100 federal agency regulations (<https://mailchi.mp/bidentransition/ascertainment-news-statement-3590426?e=53a3846dce>) approved under the Trump administration since 2017 that it intends to revisit. The Congressional Review Act (CRA) allows an incoming Congress to review federal agency final rules issued during the last 60 legislative-session days and to nullify such rules by a simple majority vote in both chambers. Older final regulations can be replaced by initiating new comment-and-notice rulemaking, and more are likely to come under scrutiny as new Cabinet secretaries take office.

The Biden administration also announced a freeze on all proposed regulations (<https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/regulatory-freeze-pending-review/>) that have not yet been finalized, pending their review.

SHRM Online has gathered the following articles regarding some of the regulations affecting employee benefits that the Biden administration is likely to review and, possibly, replace.

Final and Proposed Health Plan Rules

Under the CRA, Congress might review recently finalized Trump-era rules affecting health plan coverage. Targets could include, among others, a Department of Labor (DOL) and Health and Human Services (HHS) rule to allow grandfathered group plans to impose higher cost-sharing requirements (www.shrm.org/ResourcesAndTools/hr-topics/benefits/pages/final-rule-gives-boost-to-grandfathered-health-plans.aspx); a DOL, Treasury and HHS (tri-agency) rule requiring health insurers and self-insured plans to disclose price and cost-sharing information (www.shrm.org/ResourcesAndTools/hr-topics/benefits/pages/final-rule-requires-health-plans-to-disclose-prices-for-shoppable-care.aspx); and an HHS rule to pass along drug company rebates to patients (www.shrm.org/ResourcesAndTools/hr-topics/benefits/pages/hhs-issues-final-rule-on-drug-company-rebates-to-pbms.aspx) at the point of sale.

Among proposed health care regulations that the new administration could take a second look at, and possibly decide not to go forward with, is an IRS rule that would allow employers to reimburse employees for fees paid to direct primary care providers and to health care sharing ministries (www.shrm.org/ResourcesAndTools/hr-topics/benefits/pages/irs-proposes-letting-hras-pay-for-direct-primary-care-and-health-ministry-expenses.aspx). Critics charge that these options do not offer comprehensive coverage.

(Health Affairs Blog (<https://www.healthaffairs.org/do/10.1377/hblog20210107.817888/full/>))

Rules Opposed by HHS Secretary-Nominee Becerra

Biden has nominated California Attorney General Xavier Becerra to serve as his HHS Secretary. Becerra joined a coalition of 12 attorneys general who sued to block a 2018 DOL final rule that, if implemented, would allow small businesses to band together through association health plans (www.shrm.org/ResourcesAndTools/hr-topics/benefits/pages/judge-blocks-association-health-plan-rule.aspx) to provide large-group market health insurance to their employees, thereby avoiding some of the regulatory requirements that individual states and the Affordable Care Act (ACA) impose on small-group market plans. The rule is still being litigated.

Becerra also opposes a 2018 tri-agency rule allowing insurers to sell short-term, limited-duration health plans (www.shrm.org/ResourcesAndTools/hr-topics/benefits/pages/judge-dismisses-challenge-to-expanding-short-term-health-plans.aspx) that provide coverage for up to three years. These plans don't cover all services and treatments required by the ACA and cost less than ACA-compliant plans.

(Kaiser Health Foundation (<https://www.kff.org/report-section/potential-health-policy-administrative-actions-under-president-biden-issue-brief/>) and *SHRM Online* (www.shrm.org/ResourcesAndTools/hr-topics/benefits/Pages/biden-picks-xavier-becerra-to-head-hhs.aspx))

Final EEOC Rules on Wellness Incentives

The U.S. Equal Employment Opportunity Commission (EEOC) on Jan. 7 released proposed rules limiting the value of incentives employers may use to encourage employee participation in wellness programs that collect employees' health data. On Jan. 20, however, the Biden administration withdrew the proposed regulations from publication in the *Federal Register* until the president's newly appointed EEOC chair, Charlotte Burrows, reviews and approves the rule.

"Republican appointees currently hold a 3-2 edge at the EEOC until at least July 2022," noted Mathew Parker, a partner in the Columbus, Ohio, office of Fisher Phillips. "It would not be terribly surprising for the Biden administration to put these new rules on hold until they can be re-evaluated with a majority of Democrats making up the EEOC."

Ben Lupin, senior director in the health and benefits technical services unit at Willis Towers Watson, believes it is unlikely that the Biden administration would want to take things back to square one, "but the new administration may change certain aspects of the final rule when issued, depending on the comments the EEOC receives"—assuming that Burrows approves the proposal's publication in the *Federal Register*.

(*SHRM Online* (www.shrm.org/ResourcesAndTools/hr-topics/benefits/pages/eeoc-proposes-new-limits-on-wellness-program-incentives.aspx))

Final Rules on Picking Retirement Plan Investments and Limiting Fiduciaries' Corporate Proxy Votes

The Biden transition team's list of regulations to be reviewed includes a November 2020 DOL final rule requiring sponsors of retirement plans to evaluate investments based solely on financial risk and return factors (www.shrm.org/ResourcesAndTools/hr-topics/benefits/pages/final-rule-limits-401ks-from-picking-funds-based-on-nonfinancial-factors.aspx) except when nonfinancial factors are used as a "tie breaker" between funds with similar performance expectations. The rule was opposed by those who favor plan fiduciaries considering environmental, social and governance (ESG) criteria when selecting funds. Those criteria can exclude the stock of tobacco, fossil fuel, firearm and defense companies, for instance, or require funds to avoid investments in firms that are opposed to union organizing or that pay excessive executive compensation.

Under a related DOL rule finalized in December 2020, retirement plan fiduciaries are barred from casting corporate-shareholder proxy votes in favor of social or political positions (www.shrm.org/ResourcesAndTools/hr-topics/benefits/pages/dol-final-rule-limits-proxy-voting-by-retirement-plan-fiduciaries.aspx) that don't advance the financial interests of retirement plan participants. As Biden enters office, it is likely that there will be efforts to revisit the proxy voting rule as well.

Policy analysts anticipate that the next iteration of these policies, through the notice-and-comment rulemaking process, will provide stakeholders with a fresh opportunity to influence the policy debate.

(*The National Law Review* (<https://www.natlawreview.com/article/trump-era-dol-rules-will-they-remain-under-biden-administration>))

Final Rule on Offering Advice to Plan Participants

Another DOL final rule expected to be reviewed by the new administration addresses fiduciary requirements for professionals who recommend investments to 401(k) plan participants (www.shrm.org/ResourcesAndTools/hr-topics/benefits/pages/dol-finalizes-less-restrictive-fiduciary-standard-for-investment-advice.aspx), allowing advisors to receive compensation from mutual fund providers while holding them liable if they fail to act in the best interest of those they advise.

The Democratic Party platform said a Biden administration would "take immediate action to reverse the Trump administration's regulations allowing financial advisers to prioritize their self-interest over their clients' financial well-being." The Biden DOL could delay the Feb. 16 effective date of this regulation while it decides on its next steps.

The investment selection, proxy voting and fiduciary advice rules were finalized late enough in the Trump administration that they're vulnerable to being overturned by Congress through the CRA. But Democrats might not unleash the CRA if they want the Biden administration to do its own rulemaking in key areas like ESG and investment advice policy. After scuttling a regulation, the CRA does not allow an agency to promulgate a substantially similar regulation.

(ESG Clarity US (https://www.esgclarityus.com/biden-signals-administration-will-review-dol-esg-rule/?NLID=ESG-Clarity-Newsletter&NL_issueDate=20210120&utm_source=ESG-Clarity-Newsletter-20210120&utm_medium=email&utm_campaign=investmentnews&utm_visit=25645) and *SHRM Online* (www.shrm.org/ResourcesAndTools/hr-topics/benefits/pages/biden-proposals-could-alter-retirement-plan-landscape.aspx))

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