<u>BACKGROUNDER – ERA Policy Group</u>
June 3, 2021

Please note: all ERA Policy Group meetings are video conferences via RingCentral.* ***Click here to log-on.*

1. **Welcome** ***(3 minutes: 11:00 a.m. – 11:03 a.m.)***

2. **Discussion: Update: Centers for Disease Control and Prevention (CDC) Updated Mask Guidance and Mandatory Covid-19 Workplace Safety Rules** ***(15 minutes: 11:03 a.m. – 11:18 a.m.)***
The decision by the U.S. Centers for Disease Control and Prevention to relax masking and social-distancing guidelines for vaccinated Americans has compelled employers to quickly determine how it should apply in their workplaces. The lack of a centralized database of vaccinated Americans or a system employers can use to verify vaccinations — and the legal and privacy ramifications of tracking them — means that calling back workers is shaping up to be just as complicated as it was to send them home. The burden is shifting to employers to figure it out, and this Policy Group will want to discuss the issues surrounding it.

The U.S. Centers for Disease Control and Prevention (CDC) recently relaxed many of its COVID-19 safety recommendations for people who are fully vaccinated—which raises complicated questions for employers about whether to revise their mask requirements and social-distancing policies.

According to the CDC, fully vaccinated employees can safely work indoors in many situations without wearing masks, social distancing or undergoing COVID-19 screening procedures. However, CDC guidance is not legally binding and only tells employers what behavior CDC thinks is safe based on [the agency's] expertise with contagious infections and diseases.

Employers that are located in a state or municipality that continues to mandate masks and social distancing must follow those orders. Employers that aren't subject to more-stringent local laws will have to choose whether to drop mandates or keep stricter rules in place.

Employers also should note that Occupational Safety and Health Administration (OSHA) rules require workplaces to be free from known hazards. OSHA recently said it is reviewing the CDC's guidance and will update its materials accordingly. "Until those updates are complete, please refer to the CDC guidance for information on measures appropriate to protect fully vaccinated workers," OSHA said on its website.

Reviewing the Rules

The CDC has said fully vaccinated people "can resume activities without wearing a mask or staying 6 feet apart, except where required by federal, state, local, tribal or territorial laws, rules and regulations, including local business and workplace guidance."

Notably, the guidance does not apply in every industry. People must cover their faces and practice physical distancing when they go to a doctor, hospital or long-term-care facility; when they travel by bus, plane, train or another mode of public transportation; while they are in transportation hubs, such as airports and bus stations; and when they are at a prison, jail or homeless shelter.

Additionally, employers still need to follow state and local mandates. The CDC's guidance is in fact just that—it's guidance. Employers need to be careful about making swift changes until they verify state and local requirements.

Maryland and Virginia lifted their mask mandates for fully vaccinated people following the CDC's announcement, while other states, such as California, have not lifted such mandates. Additionally, some large retailers announced that they will be lifting mask requirements for fully vaccinated workers and customers in locations without mandates, and other big businesses said they are still reviewing their policies.

Some have said the safest approach for an employer—particularly a business operating in multiple jurisdictions—is to apply the most restrictive and protective guidelines across the board. Whereas, others, including the Retail Industry Leaders Association called for further guidance, saying the policy "creates ambiguity for retailers because it fails to fully align with state and local orders" and puts "retailers and their employees in incredibly difficult situations."

Determining Vaccination Status

Employers also need to grapple with asking employees if they've been vaccinated. The CDC's relaxed requirements, as well as many updated state rules, apply only to people who have been "fully vaccinated," which means two weeks have passed since they received a single-shot vaccine or the second dose of a two-shot vaccine authorized by the U.S. Food and Drug Administration.

Questions to consider: can employers that want to loosen their mask mandates have different rules for vaccinated and non-vaccinated employees? Should they be tracking vaccination status or requiring proof?

It seems, each workplace will be a little different depending on the employer's given workforce. In general, if an employer permits vaccinated employees to work without masks, some suggest the employer should trust but verify. By that, they mean the employer will likely need to either see proof of the employee's vaccinations or have employees attest to their vaccination status. Employers likely can use vaccination status to guide policies on employee access to buildings, workspaces and events. However, employers will also need to keep vaccination information confidential and ensure compliance with any privacy requirements imposed by state and local laws.

Employers will also need to consider accommodation requests from employees who are unable to receive a vaccine due to a medical condition or sincerely held religious belief. Employees may be protected by the Americans with Disabilities Act and Title VII of the Civil Rights Act of 1964.

Although employers can have different safety standards and protocols for vaccinated and unvaccinated employees, it is also important to ensure that vaccination status isn't used as an excuse to discriminate against workers based on a legally protected characteristic, such as age, disability status, race, religion or sex.

More Guidance Forthcoming

Employers should look for updates from OSHA and the U.S. Equal Employment Opportunity Commission (EEOC) on evolving workplace guidelines related to COVID-19 safety and best practices.

The EEOC said it is currently reviewing the CDC's new guidelines to "considering any impact" on its COVID-19 technical assistance.

3. **Legislative Discussion: Clean Energy for America Act (CEAA) & Growing Renewable Energy and Efficiency Now Act (GREEN Act)** ***(10 minutes: 11:18 a.m. – 11:28 a.m.)***

Senate Finance Committee Chairman Ron Wyden (D-Ore.), announced that he plans to place the Clean Energy for America Act (CEAA) directly onto the Senate calendar without further committee hearings after a vote on the amended bill ended in a tie split along party lines. With the likelihood of this measure reaching the Senate floor, the Policy Group will want to discuss what action, if any, NSBA should take to weigh-in on the bill.

Despite starting with bipartisan support for reforming the convoluted U.S. system of energy tax credits, a May 26 meeting of the Senate Finance Committee ended with a sharply partisan divide over how best to accomplish that goal.

"This is an important time, and we're going to put America in the driver's seat of our new clean energy future," Sen. Debbie Stabenow (D-Mich.), said in her opening remarks to the committee. She related that Henry Ford originally wanted to develop battery-powered vehicles, but couldn't achieve the necessary range before Congress approved incentives for oil and gas production. "We picked a winner and they won, a hundred years ago. Now we're trying to level the playing field."

But exactly what it means to level the playing field between renewable energy and fossil fuels quickly became a matter of debate, with Sen. Steve Daines (R-Mont.), complaining that the committee's Democratic members had "plodded forward" with a bill that purported to create a resource-agnostic tax policy, while eliminating tax credits for fossil fuel production and extending credits for renewable resources.

The Clean Energy for America Act (CEAA) replaces several clean energy tax credits with a broader production tax credit worth 2.5 cents per kWh electricity produced. Any generation facility is theoretically eligible as long as it meets certain emissions reduction and labor requirements. The bill would extend existing clean energy production tax credits through the end of 2022, replacing those tax credits in 2023. It also creates a 30 percent investment tax credit for grid improvements and for businesses and homeowners who make energy efficiency upgrades, and tax credits worth up to $12,500 for clean fuels and electric vehicles.

However, Sen. Chuck Grassley (R-Iowa), noted that amendments made prior to Wednesday's meeting had already added three resource-specific tax credits into the bill. "We started with a single neutral clean fuels credit," he said. "I now count three credits. At this rate, we will be back to 40 separate credits."

The committee proceeded to vote down nearly a dozen amendments, including proposals to maintain tax credits on oil, gas and critical minerals production, to maintain caps on EV tax credits and implement taxes on EV charging stations, and to delay the implementation of the bill until the average permitting time for new clean energy projects falls below three years. Two amendments — one which excludes EVs made in China from qualifying for EV tax credits, and another that enables joint rulemaking between the IRS and other federal agencies to determine eligibility requirements for the tax credits — were added to the bill with unanimous approval. The committee also discussed, but did not vote on, adding specific tax credits to support the operation of existing nuclear and hydroelectric facilities.

The vote on final approval for the bill was split, 14-14, along party lines, but Sen. Wyden indicated he planned to place the bill directly on the Senate calendar without additional committee review, drawing criticism from Sen. John Cornyn (R-Texas). Democratic members of the committee generally supported the bill, arguing that it would allow renewable energy and fossil fuels to compete in a free-market system, and would reduce carbon emissions. Republicans rejected the final version, saying what started as an effort to level the playing field between energy resources ultimately ended up as a bill that would promote renewable energy at the expense of fossil fuels.

Clean Energy for America Act (CEAA)

In introducing the legislation – dubbed the Clean Energy for America Act – Wyden expressed his hope that the proposals could be incorporated into the jobs-and-infrastructure package recently unveiled by the Biden administration.

“The Clean Energy for America Act tosses those 40 temporary credits aside, replacing them with emissions-based, technology-neutral credits to turbocharge investment in clean electricity, clean transportation, and energy conservation,” Wyden said in a statement. “It would both put us on the path to achieving our emissions reductions goals and create good-paying jobs, and should be the linchpin of our clean energy efforts as we consider President Biden's jobs package."

Wyden's proposal – along with the Growing Renewable Energy and Efficiency Now (GREEN) Act introduced earlier this year by House Ways and Means Select Revenue Measures Subcommittee Chairman Mike Thompson (D-Calif.), and supported by all Democrats on the panel – will be key proposals to watch as the jobs and infrastructure debate unfolds this year.

Clean electricity

According to a section-by-section summary of Wyden's proposal, the bill would establish "an emissions-based incentive that would be neutral and flexible between clean electricity technologies," with taxpayers able to choose either:

- A production tax credit (PTC) equal to 2.5 cents per kilowatt hour of electricity produced and sold in the 10-year period after a qualifying facility is placed in service or
- An investment tax credit (ITC) equal to 30 percent of the investment in the year the facility is placed in service.

The new credits would phase out over five years once emissions targets are achieved. They generally would apply to qualifying facilities placed in service after December 31, 2022. In a change from previous versions of Wyden's energy tax legislation, other conditions would apply for a taxpayer to claim the credits, such as a requirement to pay wages of at least the local prevailing rates and to utilize registered apprenticeship programs (so-called "Davis-Bacon Act" requirements).

Additionally, taxpayers could elect to receive the tax credits as direct refunds – but to do so, they must inform the Treasury Department prior to the date on which the facility begins construction.

In order to transition to the new system, a slate of current temporary clean energy tax incentives would be extended until December 31, 2022, with special rules for the section 45Q credit.

Clean transportation

With respect to transportation-related tax incentives, Wyden's proposal would create a technology-neutral "clean fuel production credit" – applicable to qualifying fuel produced after December 31, 2022 – that is designed to incentivize the production of transportation-grade fuels that are at least 25 percent cleaner in terms of their lifecycle emissions (that is, from production through use in a vehicle) than the current U.S. nationwide average. Qualifying fuels would have to become increasingly cleaner between now and 2030 in order to be eligible for the credit, which would begin to phase out when certain emissions targets – as certified by the Environmental Protection Agency and the Department of Energy – are achieved. Taxpayers wishing to receive credits must pay wages at not less than local prevailing rates and utilize registered apprenticeship programs.

Additionally, Wyden's proposal would remove the per-manufacturer cap on the plug-in electric vehicle (EV) tax credit, make the credit refundable for individuals, and create a 30 percent nonrefundable credit for commercial operators purchasing EVs.

Energy efficiency and conservation

According to the summary, the plan would reform the current tax incentive under section 45L for energy-efficient new homes – setting the credit's value at either $2,500 for homes meeting the latest requirements of the Energy Star program, or $5,000 for homes meeting the Department of Energy's Zero Energy Ready program. As with the clean electricity and clean transportation incentives discussed above, contractors would have to comply with prevailing wage requirements and utilize registered apprenticeship programs.

Additionally, the proposal would reform the section 25C credit for nonbusiness energy property, replacing it with an "energy-efficient home improvement credit" of up to $500 per improvement, subject to an annual cap of $1,500 for all improvements. For commercial buildings, Wyden's plan would expand the deduction under section 179D as well as increase the credit for geothermal heat pump systems to 30 percent and make it permanent.

Clean energy bonds

Wyden's proposal would create a tax credit bond, or so-called "clean energy bond" – available to state, local, and tribal governments, along with public power providers and electric cooperatives – designed to incentivize the production of clean electricity and clean fuel. The maximum credit would equal 70 percent of the bond's interest (for zero-emission electricity or fuel). Entities would have the option of offering the bond as a tax credit bond, or of electing a direct pay bond, where the Treasury Department reimburses the bond issuer at a rate of up to 70 percent of the interest cost.

Fossil fuel provisions repealed

According to the summary, the plan would repeal a number of current-law tax incentives Wyden claims benefit fossil fuel producers, including expensing of intangible drilling costs, rules allowing for so-called "percentage depletion," the deduction for tertiary injectants, and credits for marginal oil wells and advanced coal projects, among others.

It also would repeal the publicly traded partnership rules for fossil fuels, reinstate "the current taxation of multinational oil companies' non-extraction income," and ensure "that multinational oil companies are not specially exempted from the 2017 tax law's global minimum tax."

Growing Renewable Energy and Efficiency Now Act (GREEN Act)

In February 2021, Rep. Mike Thompson (D-Calif.), a member of the House Committee on Ways and Means, reintroduced the Growing Renewable Energy and Efficiency Now Act (GREEN Act).

The GREEN Act would further extend and enhance the current incentives for wind and solar and other technologies under the existing tax framework and would introduce certain new provisions aimed at supporting the development of clean energy.

While it remains to be seen which of these competing visions will eventually be adopted as the legislative vehicle for Biden's infrastructure proposal, or whether Biden's proposal blends certain aspects of each approach.

The GREEN Act proposal includes, but is not limited to:

- Extension of the Section 45 production tax credit for facilities for which construction begins by the end of 2026.
- Extension and modification of the Section 48 investment tax credit at a 30 percent rate for projects that commence construction by the end of 2025 before beginning a new phase out period.
- Extension of the Section 45Q tax credit for carbon oxide sequestration. The provision would extend the Section 45Q tax credit for carbon oxide sequestration facilities that begin construction before the end of 2026.
- Elective direct payment, allowing taxpayers to elect to be treated as having made a payment of tax equal to 85 percent of the value of the credit they would have otherwise been eligible (under the ITC, PTC or the Section 45Q credit).
- Labor standards for certain energy jobs. The provision creates a certification by the Secretary of Labor for certain labor requirements for green energy and energy-related construction projects.

While the two approaches differ, the CEAA and the GREEN Act also adopt some similar concepts. For example, although both proposals include direct payment options, the CEAA benefits are more generous. It would not require a haircut to claim direct payment, while the GREEN Act would only allow direct payment at 85 percent of the full value. Both proposals also adopt labor standards for certain energy projects. Because of strong Democratic support, it seems likely that some type of labor requirement will be included in any final infrastructure proposal.

Ultimately, the proposals included in the GREEN Act and the CEAA advance many of the same goals. The overarching differences between the two proposals are that the CEAA provides a bolder expansion and reimagination of tax incentives that potentially better align to the required results. The technology-neutral approach provides for broader qualification among energy assets and greater flexibility for emerging technologies to potentially take advantage of the existing tax credit framework without future congressional action. Additionally, the ability to toggle between an ITC and PTC could provide flexibility to developers as different technologies advance, and cost are reduced, without the further legislative changes or extensions. The CEAA, however, is likely to create a more complex transition period, which will likely require further government guidance and potential clarifications of new rules and regulations as issues arise. These issues can have the effect of slowing down financing transaction during an interim period until issues are clarified. These sort of financing snags occurred initially with the 1603 Grant Program, the beginning of construction rules, and the Section 45Q credit expansion, but the potential for mischief is far greater because the changes proposed by the CEAA are far more significant is scope and scale. The GREEN Act by comparison provides a less ambitious and less disruptive approach of primarily extending and enhancing the current incentives under the existing tax framework.

4. **Comment Period: SBA Proposes Small Business Size Standard Revisions in Two Industrial Sectors to Increase Eligibility for Its Loan Programs *(10 minutes: 11:28 a.m. – 11:38 a.m.)***

This Policy Group will want to discuss the proposed rule and determine what action, if any, NSBA should take regarding the size standard revisions. Comments can be submitted on this proposed rule on or before July 26, 2021, at www.regulations.gov, using: RIN 3245-AH10. You may also send comments by mail to Khem R. Sharma, Chief, Size Standards Division, 409 3rd Street SW, Mail Code 6530, Washington, D.C., 20416.

The Small Business Administration is seeking public comments on a proposed rule that would revise the small business size standards for businesses in two North American Industrial Classification System (NAICS) sectors to increase small business eligibility for SBA's loan programs.

The NAICS sectors reviewed in the proposed rule are Wholesale Trade (Sector 42) and Retail Trade (Sector 44-45). SBA proposes to increase size standards for 49 industries in those sectors.

The following table includes the number of industries reviewed and the number of industries with proposed increases in size standards by the NAICS sector.

NAICS Sector	Sector Name	No. of Industries	
		Reviewed	**with Proposed Increases in Size Standards**
42	Wholesale Trade	71	14
44-45	Retail Trade	66	35

Total		**137**	**49**

SBA estimates that about 1,800 additional firms in these two sectors would become eligible for SBA's loan and other federal non-procurement programs under the proposed size standards, if adopted. NAICS codes under Sectors 42 and 44-45 do not apply to federal procurement and hence size standard revisions in this proposed rule will have no impact on contracting. Wholesalers and retailers can qualify for contracting as small businesses under the 500-employee nonmanufacturer size standard, which is not revised in this proposed rule.

The proposed rule is part of the second five-year comprehensive review of small business size standards, as required under the Small Business Jobs Act of 2010. The proposed revisions reflect changes in industry conditions and SBA's policy position under the current economic situation due to the COVID-19 pandemic. In response to the pandemic, SBA is retaining current size standards where data suggests that size standards should be lowered.

As part of the ongoing review of all size standards, the SBA generally considers the structural characteristics of individual industries, including average firm size, the degree of competition, and federal government contracting trends. This ensures that small business size standards reflect current economic conditions in those industries. The proposed increases to the size standards in those two sectors will enable some mid-sized businesses to regain their small business status and current small businesses to retain their small business status for a longer period, thereby allowing them to benefit from SBA's loan and other non-procurement programs.

Comments can be submitted on this proposed rule on or before July 26, 2021, at www.regulations.gov, using: RIN 3245-AH10. You may also send comments by mail to Khem R. Sharma, Chief, Size Standards Division, 409 3rd Street SW, Mail Code 6530, Washington, D.C., 20416.

An SBA-issued White Paper entitled, "SBA's Size Standards Methodology," which explains how SBA establishes, reviews, and modifies its receipts-based and employee-based small business size standards, can be viewed at http://www.sba.gov/size.

For more information about SBA's revisions to its small business size standards, visit "announcements about updating size standards" at http://www.sba.gov/size.

5. **Informational/ ICYMI: NSBA Beneficial Ownership Comments** ***(5 minutes: 11:38 a.m. – 11:43 a.m.)***

The federal government is moving to implement the so-called "Beneficial Ownership" mandate before the end of the year. NSBA is working to influence the implementation process to lessen the harm to small business and recently submitted a letter of concern during the comment period.

The mandate passed as part of the National Defense Authorization Act (NDAA) shortly before the end of 2020. Under the final legislation, corporations and limited liability companies with 20 or fewer full-time employees will be required to file new reports with the Treasury Department's Financial Crimes Enforcement Network (FinCEN) containing the personally identifiable information of small business owners and update that information periodically. The legislation creates a first-of-its-kind federal registry of small business owners, raising serious privacy concerns for owners.

While the mandate passed at the end of 2020, the Treasury Department has until the end of 2021 to fully implement it. The law says that regulations must "be promulgated not later than 1 year after the date of enactment." The department is drafting regulations to create a process for small businesses. The final regulations could be released at any point before the end of the year.

Once final rules are published, existing companies will have up to 2 years to comply and submit the relevant personal information to FinCEN, though that timeline could be shorter. The law says that existing companies must file reports, "in a timely manner, and not later than 2 years after the effective date of the regulations." New companies will receive no grace period: They will have to file with FinCEN immediately after regulations are finalized.

As Treasury begins drafting final regulations, NSBA will remain highly engaged and will continue holding regulators accountable.