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Biden Administration Announces COVID-19 Vaccination Mandate Rulemaking Underway

Mandates will Affect Roughly 100 Million U.S. Workers

On September 9, 2021, the Biden Administration announced rulemaking was underway for four separate COVID-19 vaccination mandates affecting U.S. workers:

1. A vaccination/testing mandate for employers with 100 or more employees;
2. A vaccination mandate for employees of health care entities participating in Medicare or Medicaid;
3. A vaccination mandate for federal contractors; and
4. A vaccination mandate for federal employees.

For now, the available information is largely limited to the Biden Administration's directives to certain federal groups to write the rules. It is easiest to describe the directives as "mission statements" containing very few details.

Brief Summary of the Mandates

Vaccination/Testing Mandate for employers with 100 or more Employees

As part of the Biden Administration's new [COVID-19 Action Plan](#), the Occupational Safety and Health Administration (OSHA) will write and implement a new Emergency Temporary Standard (ETS) that requires employers with 100 or more employees to:

- Take steps to ensure their employees are fully vaccinated; and
- Require any unvaccinated employee to test negative for COVID-19 at least once per week before reporting to work.

This is an interesting approach, and it means the White House intends to push vaccination as a workplace safety issue similar to employers having to protect employees from dangerous chemicals. OSHA believes it has the legal authority to do this, but we expect a quick challenge (see [Expected Legal Action](#)).

Covered Employers

The directive indicates the federal OSHA ETS is limited to private sector employers, which makes sense since there is a separate vaccination mandate for federal employees. OSHA-approved state plans must adopt the ETS once it is effective. There are [28 OSHA-approved state plans](#) (including U.S. territories) that cover state and local governmental employers. Adoption of the ETS should automatically extend to those employers unless the states will have the discretion to exclude them.

Required Paid Leave

The ETS will require covered employers to provide paid time off for the time employees need to vaccinate or recover from post-vaccination illness.

Timing

We expect it will take OSHA two to three weeks to write the ETS, meaning it should appear by the end of September. The ETS will address the effective date(s) for compliance. We assume an effective date beginning in October or November with compliance windows for employers to begin taking steps to ensure vaccination or require weekly testing.

Some Key Questions

1. How will employer size be determined? By total U.S. workforce? By location?

Based on the directive's estimate that the ETS will cover 80 million private sector employees, we assume an employer will count its total U.S. workforce and not apply the ETS by location size.

2. Who pays for the mandatory weekly testing for unvaccinated employers?

We do not know if the ETS (or related guidance) will indicate employers can require unvaccinated employees to pay for testing or if a reimbursement mechanism will exist if employers must pay for testing. It is also not clear how this might interact with state laws that may require employers to pay for mandatory testing.

3. How will the paid leave requirement work? Will reimbursement be available similar to COVID paid sick leave or emergency family medical leave?

The existing reimbursements available for providing the now optional COVID paid sick leave and emergency family medical leave already allow paid leave for testing and recovery. We suspect the IRS will extend the available credits for COVID paid sick leave and emergency family medical leave to address the duration of the ETS.

4. What are the penalties for non-compliance?

We have heard mention of a maximum \$14,000 penalty per violation, but we do not know how the penalties will be calculated. Will this be a daily penalty per person up to the cap? A per person penalty based on tiers (e.g. 1 – 30 days; 31 – 60 days; 90+)? The maximum penalty may also change before the ETS appears.

5. How long will the ETS be in effect?

We do not know, but we expect an official or unofficial link to the COVID-19 National Emergency. President Trump declared the emergency with an initial effective date of March 1, 2020, and [it continues under President Biden](#).

Vaccination Mandate for Certain Health Care Workers

The [COVID-19 Action Plan](#) also directs the Centers for Medicare & Medicaid Services (CMS) to draft rules requiring vaccination for employees of health care entities participating in Medicare or Medicaid. Affected health care entities include, but are not limited to, health care systems, hospitals, dialysis facilities, nursing homes, and home health agencies.

We know CMS intends to issue an interim rule in October, but we have no other information about this mandate.

Vaccination Mandate for Federal Contractors

This mandate is by [Executive Order](#), and it requires the Safer Federal Workforce Task Force¹ to write standard COVID safety protocols applicable to most federal contractors (including their subcontractors) by **September 24, 2021**.

The Executive Order does not specifically mention vaccination or testing, but the safety protocols will almost certainly include some sort of vaccination/testing standard. The order indicates these standards will go into effect in **October 2021**.

Vaccination Mandate for Federal Employees

This mandate is also by [Executive Order](#), and requires all federal employees to vaccinate unless they qualify for an exception under federal law.²

The Executive Order does not specify a due date, but it does require the Safer Federal Workforce Task Force to issue guidance by **September 16, 2021**. The deadline to vaccinate should appear in that guidance. We have heard federal employees will have 75 days to vaccinate from the effective date or face termination unless an employee qualifies for an exception.

Expected Legal Action

We expect swift legal action against the OSHA ETS. Potential plaintiffs must likely wait for the ETS to appear before challenging it, and we assume they will request an injunction while the legal action is underway.

We are aware of some discomfort by federal labor union employees and federal contractors with their mandates, but it is not clear what recourse may be available to them.

Keeping You Informed

We will provide additional information when guidance for these COVID-19 vaccination mandates becomes available. Please stay tuned and in contact with your client service team.

¹ This task force consists of [leaders from certain federal agencies and departments](#).

² The exceptions should generally be limited to disability and religious exceptions.

About the Author



Christopher Beinecke, J.D., LL.M. is the Employee Health & Benefits National Compliance Leader for Marsh McLennan Agency.

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