Biden Administration Announces Broad Employer-Based Vaccination Requirements

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On September 9, 2021, the Biden Administration announced its new COVID-19 Action Plan (the "Action Plan"), which outlines a six-pronged approach to combat the pandemic. The wide-ranging Action Plan lays out plans to vaccinate the unvaccinated, further protect the vaccinated, keep schools safely open, increase testing and masking, protect the economic recovery, and improve care for those with COVID-19. Three components of the Action Plan's "vaccinate the unvaccinated" prong impose new requirements for employers. Those components are:

- Require all employers with 100 or more employees to ensure their workers are vaccinated or tested weekly and to provide paid time off for employees to get vaccinated;
- Require COVID-19 vaccination for all federal workers and all employees of federal contractors and subcontractors; and
- Require COVID-19 vaccination for health care workers at Medicare and Medicaid participating hospitals and other health care settings.

On the same day he issued the Action Plan, President Biden issued two executive orders requiring vaccination for all federal employees and directing the Safer Federal Workforce Task Force to issue COVID-19 safety-related guidance. President Biden also instructed the Occupational Safety and Health Administration ("OSHA") to issue an Emergency Temporary Standard ("ETS") to implement the Action Plan's employer obligations.

A BRIEF HISTORY OF GOVERNMENT VACCINATION MANDATES, OSHA ETS AUTHORITY, AND EXISTING OSHA COVID-19 RULES

In 1905, the United States Supreme Court upheld Massachusetts's compulsory small pox vaccination law in a case challenging the constitutionality of the state's vaccination

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mandate. The decision did not address the constitutionality of a federal vaccination mandate or, if permissible, whether such a mandate may be issued by President without legislative action. The decision did, however, provide analysis of the government's ability to enact laws intending to protect the health and welfare of citizens during an outbreak or pandemic that will likely be relied on in any upcoming challenges to the Action Plan. In response to claims that notions of liberty preclude government vaccine mandates, the Court stated:

The liberty secured by the Constitution of the United States does not import an absolute right in each person to be at all times, and in all circumstances, wholly freed from restraint, nor is it an element in such liberty that one person, or a minority of persons residing in any community and enjoying the benefits of its local government, should have power to dominate the majority when supported in their action by the authority of the State.

OSHA has authority to issue an ETS when "employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards" and when such emergency standard is "necessary to protect employees from such danger." OSHA's ETS authority allows it to forego its normal what rulemaking process. An ETS can remain in place for up to six months, at which time OSHA must replace it with a permanent standard adopted through the normal rule making process. The last ETS OSHA issued before its June 2021 ETS for the prevention of COVID-19 in healthcare employment was a 1983 rule addressing workplace asbestos exposure that the Fifth Circuit Court of Appeals (covering Louisiana, Mississippi, and Texas) struck down months later in part on the grounds that OSHA did not provide sufficient support for its claim that 80 workers would die from asbestos exposure in the 6 months the ETS would cover.

On June 10, 2021, OSHA issued the first nationwide workplace-safety rule in an ETS for health care employers in response to the COVID-19 pandemic, and it was codified in the Federal Register on June 21, 2021. The motivation behind OSHA's June 2021 ETS addressing COVID-19 protections for health care workers was OSHA's determination that a "grave danger" to employee health existed related to the virus. OSHA's August update states "OSHA has determined that CDC's guidance on health care settings has not changed and that the requirements of the health care ETS released on June 10, 2021, remain necessary to address the grave danger of COVID-19 in health care." OHSA indicates it will monitor and assess monthly the need for any updates or changes to the health care ETS.

The Biden Action Plan in many ways follows OSHA's August 13, 2021 advisory guidance aimed at mitigating and preventing the spread of COVID-19 in the workplace, but also imposes new legal obligations regarding COVID safety in the workplace.

WHAT DOES THE BIDEN ACTION PLAN REQUIRE?

A. Employers with 100+ Employees.

1.
    a. Vaccination or Weekly Testing Requirement

OSHA is developing a rule that will require all employers with 100 or more employees to ensure their workforce is fully vaccinated or require any workers who remain unvaccinated to produce a negative test result on at least a weekly basis before coming to work. OSHA will issue an ETS to implement the requirement. This requirement is expected to affect over 80 million workers in private sector businesses with 100 or more employees.

Several questions remain regarding exactly how OSHA will implement the COVID-19 Action Plan for private employers, including how OSHA will determine whether an employer has more 100 or more employees for purposes of the ETS, who will pay for the weekly testing, the deadline for meeting the ETS standards, and how OSHA will apply penalties for non-compliance. While there is little doubt that the ETS will contain exceptions for employees who are unable to be vaccinated due to a disability or sincerely held religious belief, as is protected under federal and state laws, it will remain to be seen whether states which have enacted laws prohibiting employers from mandating vaccinations for employees will bring legal challenges to the ETS and the Action Plan more broadly. It is widely anticipated they will.

1.
    b. Paid Leave for Vaccination.

OSHA's ETS will also require employers with more than 100 employees to provide paid time off for vaccination and, if needed, post-vaccination recovery.[1]

B. The Federal Government, Federal Contractors, and Federal Subcontractors.

President Biden issued an Executive Order requiring all federal agencies to require COVID-19 vaccination for all of their employees, with exceptions only as required by law (e.g. religious and medical reasons). The Order directs The Safer Federal Workforce Task Force to issue compliance guidance by September 16, 2021.

The President signed a second Executive Order that applies to organizations that contract with the federal government and subcontractors to those contracts. While the Executive Order itself does not contain a vaccine mandate, President Biden's Plan indicates that the requirement that all federal employees receive the COVID-19 vaccine will "be extended to employees of contractors that do business with the federal government."

As to the contracts themselves, the Executive Order applies to any: (1) new contract, (2) new contract-like instrument, (3) new solicitation for a contract or contract-like instrument, (4) extension or renewal of an existing contract or contract-like instrument, or (5) exercise of an option on an existing contract or contract-like instrument. The Executive Order covers these contracts or contract-like instruments that are for services, construction, or a leasehold interest in real property; for services covered by the Service Contract Act; for concessions; or in connection with federal property or lands and related to offering services for Federal employees, their dependents, or the general public. The Executive Order requires agencies to take steps to include by October 8, 2021 required language for all contracts and contract-like instruments entered into or otherwise meeting the criteria above on or after October 15, 2021.

Extensions and options are used by the federal government pursuant to the Federal Acquisition Regulation, which permits solicitations and contracts to include an option clause that allows the government "to require continued performance of any services within the limits and at the rates specified in the contract." An option provision can be exercised more than once, but the total time of extension cannot exceed six months.

The Executive Order governing federal contractors and subcontractors does not apply to: (1) grants, (2) contracts, contract-like instruments, or agreements with Indian Tribes under Public Law 96-638, (3) contract or contract-like instruments with value equal to or less than the simplified acquisition threshold as defined by the Federal Acquisition Regulation, (4) employees who perform work outside of the United States, or (5) subcontracts solely for the provision of products.

In defining "contract-like instruments," the Executive Order refers to the Department of Labor's proposed rule, "Increasing the Minimum Wage for Federal Contractors," 86 Fed. Reg. 38816, 38887 (July 22, 2021).

The Executive Order requires executive departments and agencies to ensure that contracts and contract-like instruments include a clause that contractors and subcontractors must incorporate into lower-tier subcontracts. The clause will mandate compliance with "all guidance for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force" and will apply to any locations in which an individual works in connection with a federal contract or contract-like instrument. The Task Force is to issue such guidance no later than September 24, 2021. Thus, the Executive Order does not require contractors and subcontractors to create vaccination mandate language. Rather, their responsibility will be to include required language in contracts and develop workplace plans that ensure compliance it.

For contracts not covered by the Executive Order, the President has "strongly encouraged" contractors and subcontractors to follow any safety protocols developed by the Safer Federal Workforce Task Force.

C. Medicare and Medicaid Participating Hospitals and Other Health Care Settings.

Prior to the Action Plan's launch, organizations that advocate for long-term-care facilities urged the Administration to mandate the COVID-19 vaccine throughout the health care industry, citing concerns over existing staffing shortages that facilities feared would worsen if long-term-care workers who wished to decline the vaccine had the option to work in other health care facilities. In response, on August 18, 2021, President Biden announced plans to require long-term-care facilities to have "fully vaccinated" workforces as a condition of receiving Medicare or Medicaid funding. Details of those requirements are yet to be released, but in the Action Plan, he expanded that mandate to all healthcare workers at Medicare and Medicaid-participating healthcare organizations, including, but not limited to, hospitals, dialysis facilities, ambulatory surgical settings, and home-health agencies.

While OSHA's June 2021 ETS was broadly aimed at protecting health care workers amid the COVID-19 pandemic, it stopped short of requiring vaccines. President Biden's COVID-19 Action Plan goes further by requiring vaccinations for many employees in the healthcare industry.

D. All Employers

For months, the Equal Employment Opportunity Commission ("EEOC") has opined that all employers under its jurisdiction may elect to mandate COVID-19 vaccination for their employees. As we have previously discussed, employers that mandate the vaccine must make exceptions for medical and religious reasons or risk violating state and federal anti-discrimination laws.

Small employers who hope to avoid vaccine mandates may also incentivize employee vaccination. The EEOC's guidance explains that employers that administer vaccines may incentivize vaccination, as long as the incentives are non-coercive.

PRACTICAL STEPS FOR EMPLOYERS

1. Employers with 100 or more employees should begin considering and developing a vaccination policy that will comply with the Action Plan.
2. All employers mandating vaccines should consider the potential for exemptions for reasonable accommodations for religious belief and disabilities, pursuant to Title VII of the Civil Rights Act of 1964 ("Title VII") and the Americans with Disabilities Act ("ADA"), as well as applicable state law.

3. Employers should confirm whether they are a federal contractor or subcontractor. Federal contractor status is present if an organization has a contract with the federal government. Federal subcontractor status can be determined through a letter from a government contractor stating your organization is a subcontractor necessary for the performance of a government contract or undertaking a federal contractor's obligation under its contract.

Other ways to assess federal-contractor/subcontractor status include a search on the Federal Procurement Data System or USA spending either by searching for the organization name or Dun & Bradstreet number.

4. Employers with under 100 employees, and those without existing federal contracts not subject to the Executive Order, should consider whether to adopt vaccine mandates or incentives as outlined by the EEOC.
5. Employers should anticipate changes to new requirements due to COVID-19 itself (Delta, Mu, and other variants) and how to respond to such changes.

[1] *President Biden's COVID-19 Action Plan states that private employers with "100 or more" employees must require vaccination, but that private employers with "more than 100" employees must provide paid vaccination leave. While this may be an unintentional typo, we recommend employers presume that if they are required to mandate the vaccine, they are also required to provide paid vaccination leave.*