

Biden Announces Sweeping Vaccination Requirements With Wide-Ranging Implications For Employers

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On September 9, 2021, President Biden announced a sweeping plan to combat COVID-19 by mandating vaccinations for millions of American workers -- raising a number of questions for employers across a range of sectors, including private employers, healthcare entities, and organizations that contract with the federal government. Although answers to many questions won't be known for some time, this Client Alert provides an overview of the Biden plan and what it is likely to mean for employers in the weeks and months ahead.

Private Employers

The centerpiece of the Biden plan will be a rule that private entities with more than 100 employees must require all of their workers to be either fully vaccinated or submit to weekly COVID testing and produce a negative test to be onsite. This rule will be issued by the federal Occupational Safety and Health Administration (OSHA) under its Emergency Temporary Standard (ETS) authority, which empowers OSHA to implement immediate standards when it determines that workers are in imminent and grave danger. That temporary standard can then become permanent if it is adopted through the normal rulemaking procedure and survives any court challenges.

The White House has indicated that it expects the new vaccine ETS to apply to more than 80 million private sector workers. The White House has also indicated that the ETS will require private employers with more than 100 employees to provide paid time off for workers to get vaccinated or to recover from post-vaccination symptoms. A White House official told reporters that businesses that ignore the ETS could be penalized up to \$14,000 per violation, although that part of the plan has not yet been formally confirmed.

There are a number of questions that the White House has yet to answer regarding the proposed vaccination requirement, including: the expected rollout date of the ETS; how compliance will be monitored and enforced; how the number of employees of an entity will be counted; whether being "fully vaccinated" may require receiving a booster shot; and how much time private companies will be given to comply with the requirement. Also unclear at this time is how the ETS will affect remote workers, as the Biden plan indicates that the vaccination and testing requirements apply to employees before "coming to work." It is also not yet



clear whether employers will be expected to provide accommodations for workers who object to both the vaccine and the testing requirement on either religious or disability grounds. Guidance from the White House and federal agencies enforcing employment laws will hopefully address many of these questions.

Health Care Employees

Another key component of President Biden's plan is a requirement of vaccinations for workers in health care settings that receive Medicare or Medicaid reimbursement, such as hospitals, dialysis facilities, ambulatory surgical settings, and home health agencies. The White House anticipates that this requirement will apply to roughly 50,000 providers and will cover approximately 17 million health care workers across the country. The rule applying to workers in this sector will be issued by the U.S. Centers for Medicare & Medicaid Services and it is expected to be issued in October.

Federal Workers and Government Contractors

The final component of President Biden's plan involves vaccination mandates for all federal executive branch employees and employees of entities that are federal government contractors or subcontractors. Both of these requirements are based on executive orders signed by the President, and, unlike the OSHA ETS rule that will apply to certain private employers (discussed above), the executive orders aimed at the federal workforce and government contractors do not appear to allow employees to opt for routine COVID testing instead of receiving a vaccine. However, the order aimed at executive branch employees expressly states that the requirements is subject to exceptions as required by law, which likely indicates that religious and medical accommodations will be considered.

The executive order relating to federal contractors states that it shall apply to any new contract, new contract-like instrument, new solicitation for a contractor or contract-like instrument, extension or renewal of an existing contract or contract-like instrument, and an exercise of an option on an existing contract or contract-like instrument if certain parameters apply.

The White House has stated that executive branch workers will have 75 days to comply with the vaccine requirements. Employees who fail to comply by that time will be subject to the standard disciplinary process for federal workers. The order applying to federal government contractors will be followed by more detailed guidance issued by a taskforce that is expected by September 24. The White House announcement indicates, however, that the government contractor order is likely to apply to all workplace locations in which an individual is working on or in connection with a federal government contract or contract-like instrument.

For more information, please contact Dorraine Larison, Dion Farganis, or your regular Lathrop GPM employment law contact.