

President Biden Announces Plan Calling for Employee Vaccination Requirements

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On Sept. 9, 2021, President Biden issued a six-part plan to combat the ongoing COVID-19 pandemic “while also keeping schools open and safe, and protecting [the] economy from lockdowns and damage.”

The first part of the plan, titled “Vaccinating the Unvaccinated,” notes that there are “over 175 million fully vaccinated Americans,” but that “nearly 80 million Americans eligible to be vaccinated ... have not yet gotten their first shot.” The plan aims to reduce the number of unvaccinated Americans by requiring private employers with 100 or more employees, federal contractors, and many healthcare employers to impose vaccine mandates on employees. According to the White House, this part of the plan will work through the use of “regulatory powers and other actions to substantially increase the number of Americans covered by vaccination requirements.”

Employers With 100 Or More Employees

The President’s plan states that the Occupational Safety and Health Administration (OSHA) is actively developing an emergency temporary standard (ETS) “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.” (Emphasis added.)

While the precise language of the forthcoming ETS will dictate an employer’s specific obligations, the standard will likely require that covered employers provide employees paid time off to get vaccinated and to recover from any post-vaccination side effects. It is not yet known if part-time employees will count toward the 100-worker threshold. Nor is there clarity on whether employers will be required to pay for weekly testing (if the employer permits testing as an alternative to vaccination) or to provide paid time off for testing.

OSHA could issue the ETS by Sept. 30, 2021. Unless it is successfully challenged in court, the ETS may go into effect almost immediately in the

approximately 29 states in which OSHA has jurisdiction over private employers. The remaining states, including North and South Carolina, have OSHA-approved plans; in those states, the ETS, or a state plan's version of it, may or may not go into effect right away. The timing of the ETS and its precise scope and impact are still open questions that Nexsen Pruet is tracking.

Federal Contractors

Another key aspect of the first part of President Biden's plan covers employers that do business with the federal government. In connection with issuance of the plan, the President signed an executive order (EO) that provides for inclusion of a new clause in all federal contracts and subcontracts that will require the contracting business to comply with certain COVID-19 "safety protocols"—which the plan states will include employee COVID-19 vaccinations. Details on the wording of the new clause are to be issued by the Safer Federal Workforce Task Force on or before Sept. 24, 2021.

The required protocols will apply to any new contract or subcontract and may apply to existing contracts as well. There is no indication in the plan or EO that federal contractor employees will have a weekly testing option like the one contemplated for inclusion in the ETS. But disabled employees who cannot safely be vaccinated and those with sincerely held religious beliefs precluding vaccination will have to be accommodated.

Healthcare Employers

President Biden's plan states that "The Centers for Medicare & Medicaid Services (CMS) is taking action to require COVID-19 vaccinations for workers in most health care settings that receive Medicare or Medicaid reimbursement." This includes "hospitals, dialysis facilities, ambulatory surgical settings, and home health agencies." CMS's action will require that more healthcare employees become vaccinated as a condition of employment, as it adds to the agency's recently announced vaccine requirement for nursing facilities "and will apply to nursing home staff as well as staff in hospitals and other CMS-regulated settings, including clinical staff, individuals providing services under arrangements, volunteers, and staff who are not involved in direct patient, resident, or client care."

Following the announcement of the President's plan, CMS issued a press release encouraging covered healthcare employers to "make efforts now to get health care staff vaccinated." However, the agency noted that specific guidance would not be released until Oct. 2021.

What Comes Next for Employers?

As of now, there is no immediate action required under the President's plan, but employers that have not already developed a COVID-19 vaccination strategy will want to consider doing so. In the coming weeks, federal agencies responsible for implementing the vaccination requirements contemplated by the President's plan will issue more detailed information about employer obligations.

As those requirements become clearer, we expect they may be subject to legal challenges. In the past, courts have generally upheld flu and other vaccination requirements as a condition of employment for healthcare employees, and in June 2021 a federal court upheld a COVID-19 vaccine mandate for hospital employees. As far back as 1905, the U.S. Supreme Court upheld a state government-imposed smallpox vaccination requirement. However, one or more of the

mandates called for by President Biden could be subject to attack over the process that is followed to implement them.

Regardless of what requirements come down from the federal or state governments, private employers are currently within their rights to require that employees receive a COVID-19 vaccine and show proof of such vaccination in all states except Montana. But they must provide exemptions from the mandate for workers who have disability or medical reasons or sincerely held religious beliefs that prevent them from becoming vaccinated.

As we monitor how the President's plan develops and gain further clarity on employer requirements, it remains important for all employers to continue to regularly evaluate their safety and COVID-19 protocols to ensure they are providing a safe workplace for employees. The Nexsen Pruet Employment and Labor Law team has assisted many employers in developing policies and procedures related to COVID-19 and vaccinations. If you have questions about COVID-19 and workplace safety and health requirements and best practices, please contact us.

Additional resources on this topic:

[FDA Full Approval of Pfizer's COVID-19 Vaccine: To Mandate or Not to Mandate, That is the Question](#)

[Mask Up, Mask Down: In Reversal, Health Officials Recommend Masks for Fully-Vaccinated Individuals. What is the Potential Impact on Employer Immunity?](#)

[N.C. and S.C. OSHA Agencies Take Different Approaches to Emergency COVID-19 Standard](#)

[OSHA Issues Emergency Rule for Healthcare Employers and Updates Guidance for Other Employers](#)

[OSHA Updates COVID-19 Guidance](#)

[Paid Time Off For Vaccinations – A Reason for an Employer Tax Credit](#)

[Workplace Protests and Mandatory Vaccinations](#)