

Opening the Doors: Return-to-Workplace Considerations During COVID-19

Part Ten: Preparing for President Biden's Employer Vaccine Mandate

September 23, 2021

Employment

Whether a company is an essential business that has operated throughout the pandemic or is expecting to reopen in the coming weeks or months, a number of challenges must be addressed in order to provide a safe environment in which employees can work, while at the same time mitigating risk and restoring operations.

This 10-part series examines the most challenging issues faced by employers that are planning to reopen or continue productive operations:

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President Biden's COVID-19 Action Plan



On September 9, 2021 the White House announced a [Path out of the Pandemic: President Biden's COVID-19 Action Plan](#), a six-prong plan to combat COVID-19 (the "Action Plan"). As part of the first prong, "Vaccinating the Unvaccinated", the President announced an intention to increase the number of vaccinated Americans through the use of regulatory powers to obligate private employers to require that their employees be vaccinated.

The Action Plan includes several initiatives designed to vaccinate the unvaccinated, including two that affect certain private employers:

1. Employers with 100 or more employees, including those in the private sector, must ensure that their workers are vaccinated or tested weekly; and
2. Employers with 100 or more employees must provide paid time off for the time it takes for workers to get vaccinated or to recover post-vaccination.

A third initiative, impacting federal government contractors, is addressed [here](#).

With respect to the initiatives aimed at employers with 100 or more employees, President Biden explained that he has requested that the Occupational Safety and Health Administration (“OSHA”) issue an emergency temporary standard to implement the vaccine mandates for private employers, and that the development of the regulations regarding the vaccine mandate and paid leave requirements is already in progress.

What is an OSHA emergency temporary standard and when will it be issued?

OSHA has authority under the Occupational Safety and Health Act of 1970 (“OSH Act”) to issue emergency rules that are “necessary” to address a “grave danger” to workplace health and safety, without going through the usual notice-and-comment process for issuing workplace safety rules. This type of rule is known as an “emergency temporary standard,” or “ETS”. An ETS remains in effect for six months and becomes the proposed safety standard subject to notice and comment.

OSHA has authority to directly regulate private-sector employers in 28 states, and the ETS will apply directly to those employers. The remaining 22 states have what are known as “state plans,” under which the states (rather than OSHA) have primary responsibility for enforcing occupational safety requirements. States with their own plans may adopt an ETS that is more stringent than the OSHA ETS, but not less.



Press reports have indicated the ETS will be released within a matter of “weeks” from the September 9 announcement. Historically, the fastest timeline between OSHA receiving an ETS request and then publishing an ETS was a little under three weeks. Pursuant to this timeline, the ETS could be issued as early as late September or early October—but it could take longer. States with their own state plans will have 15 days to inform OSHA about what steps they will take to implement their own ETS consistent with the federal ETS, and another 15 days to finalize its implementation.

When will the ETS requirements become effective?

As of September 22, 2021, OSHA has provided little information regarding the content of this potential ETS and has not stated when the requirements will become effective. However, in June 2021 OSHA issued an ETS relating to [COVID-19 in the healthcare sector](#). Many requirements in that ETS took effect 15 days after the ETS was published in the Federal Register, and the remaining requirements became effective 30 days after the publication. It is difficult to predict whether this short timeline will apply to the new ETS which, unlike the healthcare sector ETS, may require more time for employers to prepare and for employees to receive the vaccine.

Are President Biden’s COVID-19 Action Plan and the ETS legal?

Legal challenges to at least some components of the vaccination mandates are likely. But, many legal commentators posit that the mandates are constitutional based on the Supreme Court decision in *Jacobson vs. Massachusetts*, upholding a fine imposed by the city of Cambridge, Massachusetts on a

resident who refused to get inoculated against smallpox. Courts have also upheld vaccination requirements as a condition of employment, both before and during the coronavirus outbreak.

Previous ETSs have been challenged on the basis that the ETS is not “necessary” to mitigate a “grave danger” to the workplace, and several of those challenges have been successful. This ETS will likely be challenged on the same grounds.

How will the 100-employee threshold be calculated, and which employees will be required to comply?

OSHA has not formally published answers to either of these questions. However, early reports indicate that the 100-employee threshold will be counted on a company-wide basis and not based on how many employees work at a particular worksite. The mandate is unlikely to apply to fully remote workers who do not enter the workplace.

Will the ETS include exemptions for religious or medical reasons?

The White House has [indicated](#) that there will be “limited exceptions” in the ETS for legally recognized reasons such as disability or religious objections to the vaccine. However, regardless of whether the ETS itself provides medical or religious exemptions, accommodation standards under the Americans with Disabilities Act (“ADA”) and Title VII will likely apply to an employer’s vaccine and/or testing policies. Employers will thus need to accommodate employees who, because of a disability or a sincerely held religious belief, practice, or observance, do not get vaccinated for COVID-19 or refuse to participate in COVID-19 testing, unless providing an accommodation would pose an undue hardship on the operation of the employer’s business. We explain how employers should address vaccine policy accommodation requests in our [previous alert addressing vaccine considerations](#).



Will employers be able to impose a strict vaccination mandate, without a testing option?

Employers can generally implement workplace safety standards that are stricter than OSHA requirements, and therefore will likely be able to implement employee vaccination mandates that do not include a testing option. Testing, however, may be a reasonable accommodation to a strict employee vaccination mandate for employees eligible for a medical or religious exemption to the vaccination.

Will individuals who have natural COVID-19 immunity be exempt from vaccination or testing requirements?

Neither OSHA nor the White House have addressed whether natural COVID-19 immunity (that is, immunity developed because an individual previously contracted COVID-19) will be an acceptable alternative to receiving the vaccine or undergoing testing. Because many experts in the health care field opine that receiving the COVID-19 vaccine is beneficial even for individuals who recently recovered from COVID-19 and the Action Plan mandate involves vaccinating the unvaccinated, it is unlikely that the ETS will include an exemption for individuals with natural COVID-19 immunity.

How will employers be required to verify vaccination status and maintain vaccination documentation?

OSHA has not yet explained how employers will be required to verify an employee's vaccination status. Although the ETS will presumably require employees to present proof of vaccination such as a vaccination card or verification by a medical provider, the actual requirements are unknown.

With regard to maintaining vaccination information, [guidance](#) issued in May 2021 by the Equal Employment Opportunity Commission ("EEOC") states that vaccine records, such as vaccine cards and vaccine attestations, are considered medical records under the ADA. Therefore, employers must treat vaccine records as confidential by keeping them separate from employees' personnel files and limiting access to those who have a business need for the information.



Further, documentation of an employee's vaccination status may be considered a medical record under the OSH Act, in which case the employer would need to retain such records for the duration of the employee's employment plus 30 years. OSHA has not issued guidance confirming whether COVID-19 vaccine documents are in fact medical records, and it is unclear whether OSHA will narrow this significant retention requirement to reduce burdens on employers related to collecting vaccine information.

Will employers need to compensate employees for time to be vaccinated/tested under the ETS, or pay for COVID-19 tests?

The Action Plan states that the ETS will require employers with 100 or more employees to provide paid time off for the time it takes for workers to get vaccinated or to recover from the effects of vaccination. It is unclear whether the ETS will permit employers to require employees to use accrued sick leave, if available, for this purpose. The healthcare ETS issued in June permitted employers to require employees to use accrued sick time to recover from the effects of vaccination, but required employers to otherwise provide paid administrative time off.

The Action Plan does not indicate that employers will be required to provide paid leave to employees for the time it takes to be tested for COVID-19. As we explained in a [previous alert](#), however, the Fair Labor Standards Act or state wage and hour laws may require employers to compensate non-exempt employees for the time it takes to receive a COVID-19 test and related travel time.

It is also unclear whether the ETS will require employers to pay the cost of COVID-19 tests. Apart from any ETS requirements, employers may be obligated to pay for required testing under state or local law. Employers should be aware that employer-arranged testing or vaccination programs may be considered group health plans that are subject to ERISA and other legal requirements.

What is the interplay between the new federal mandate and state vaccine rules?



Montana is currently the only state with a law that contradicts the new federal vaccine mandate. Montana passed a law earlier this year making it unlawful for private employers to require vaccination as a condition for employment. The OSHA ETS likely would preempt state laws such as Montana's, where the ETS and state law directly conflict. However, employers will need to wait to see the substance of the ETS before determining what state laws may be preempted by the ETS. In any event, states can still impose law or orders that contain requirements stricter than the federal Action Plan, so it will continue to be important for employers to regularly monitor state law.

Final Considerations

Although there are many unanswered questions regarding the Action Plan and new vaccination mandates, employers should begin preparing now to ensure compliance. Employers that do not already have a vaccine mandate in place should draft a policy that requires vaccination or also includes a choice of testing. The type of policy an employer adopts may involve considerations such as the impact of a strict vaccination requirement on employee morale and retention and the potential costs of regular testing. Employers should also begin considering how they will document vaccination status and testing results, including whether they will use an app or whether an internal team will collect the information. Finally, employers should ensure they have a process in place for receiving, assessing, and responding to employee requests for medical and religious exemptions, including what accommodations will be offered. Other considerations associated with adopting vaccination policies and returning to the workplace are addressed in previous installments of our Return to Workplace series.

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