President Biden's Vaccine Mandate—What It Means for Employers

September 2021

On September 9, 2021, President Biden announced a series of actions designed to increase the number of Americans vaccinated against COVID-19.

Most importantly for employers, the President's COVID-19 Action Plan (entitled "Path Out of the Pandemic") includes a vaccination mandate for employers with 100 or more employees. Those employers will be required to implement a mandatory vaccination program for employees that requires employees either to be vaccinated against COVID-19 or, for those employees who decline to be vaccinated, to undergo weekly testing for COVID-19. Employers must provide paid time off for vaccinations and recovery from those vaccinations.

The President directed the Department of Labor's Occupational Safety and Health Administration (OSHA) to write emergency regulations implementing the President's actions. These regulations, known as an Emergency Temporary Standard (ETS), are expected within the coming weeks. In the meantime, employers should be prepared to address the implications of the ETS once it is released, including the following issues:

- Which employers will be subject to the vaccination program?
- What about employers not subject to OSHA's jurisdiction?
- What will be involved in vaccinating and testing employees?
- How will the vaccination mandate work at employers that have adopted health plan surcharges for unvaccinated employees?
- Will employers have to bargain with union employees over mandates?
- Is the mandate constitutional?
- What else should employers be thinking about?

Which employers will be subject to the vaccination program?

The ETS is expected to mandate that employers with 100 or more employees require employees to be vaccinated or tested frequently. However, it is not clear how employees will be counted in order to reach the 100-employee threshold. For example, will both full-time and part-time employees be included? By office or location? What about contractors? OSHA will need to provide detailed guidance on this point.

What about employers that are not subject to OSHA's jurisdiction?

Section 3(5) of the Occupational Safety and Health Act specifically excludes a state or any political subdivision of a state from the definition of an "employer." This means that OSHA regulations do not typically apply to state and local governmental employers. However, there are at least two dozen states with OSHA-approved workplace safety and health programs. Such state plans are monitored by OSHA and must be at least as effective as OSHA in protecting workers and in preventing work-related injuries, illnesses, and deaths. In a recent statement, Department of Labor Solicitor Seema Nanda indicated that states where OSHA monitors workplace safety plans would be subject to the OSHA ETS on vaccinations, either by adopting the federal requirement or developing their own requirement that is at least as effective as the federal requirement. Thus, the vaccination program could be extended to state and local governmental employees, including teachers, even if these states are not directly subject to federal OSHA. Guidance from OSHA will be needed on this point.

What will be involved in vaccinating and testing employees?

Applicable employers will be required to mandate their employees either be vaccinated against COVID-19 or be tested at least weekly for COVID-19. This raises many questions for employers, including:

- Who will pay for the testing? The employer, the employee, or the government?
- If the employer pays or reimburses for the testing, has the employer now set up a group health plan subject to laws such as ERISA and COBRA?
- How will the testing be conducted? Will it be done at the employer's place of business, off-site, or by the employee individually?
- Who on the employer's staff will be responsible for monitoring and collecting vaccination and testing information?
- What will happen to employees who refuse to be vaccinated or tested? What about employees who claim religious or medical exemptions? What about employees who work remotely?

The ETS and/or other guidance will need to address these issues.

How will the vaccination mandate work at employers that have adopted health plan surcharges for unvaccinated employees?

Either the ETS or other guidance will need to address how the vaccination mandate operates at employers that have adopted health plan vaccination surcharges for health plan participants. Under wellness program rules, employees must be given the option to decline the vaccination and pay the surcharge. Since vaccination will be mandatory, employers will need guidance on whether such surcharge programs remain practical or viable.

Will employers have to bargain with union employees over mandates?

It's not clear whether employers will have to negotiate with their unions over the mandates themselves or any disciplinary action that results from noncompliance. Presumably the ETS or other guidance will address this.

Is the mandate constitutional?

The answer to the constitutional question will depend on the terms of the ETS and will play out in real time, as various parties have already announced an intent to sue to stop enforcement of the ETS. The law on this issue is unclear. In 1905, the U.S. Supreme Court upheld a Massachusetts state law that required residents to be inoculated against smallpox or pay a fine. A federal appeals court cited this opinion as recently as August of this year in an opinion upholding Indiana University's vaccine mandate. However, those cases involved a mandate under state law and did not address a mandate established by the federal government or as part of a workplace safety law. Employers will need to consider whether and how to proceed if the mandate requirement is put on hold during any litigation.

What else should employers be thinking about?

Employers should consider:

- How they will communicate to employees about this requirement;
- How vaccination status will be tracked and monitored;
- The implications for staffing, such as the need for additional staff to help administer and enforce the ETS;
- Whether the paid time off requirements will result in a need for additional staff; and
- Whether the ETS will lead to employee recruiting and retention problems.

Resources

The White House “Path Out of the Pandemic” website is available here.

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