

September 10, 2021

PRESIDENT BIDEN ANNOUNCES COVID-19 VACCINE MANDATES, WITH LEGAL CHALLENGES LIKELY TO FOLLOW

To Our Clients and Friends:

Yesterday, September 9, President Biden announced several initiatives regarding COVID-19 vaccine requirements for U.S. employers. This alert provides a brief overview of the content and timing of the principal initiatives, and previews certain objections likely to be raised in legal challenges that some governors and others have said they will file.

1. OSHA rule requiring all employers with 100+ employees to ensure their workers are vaccinated or tested weekly, and to pay for vaccination time.

The President announced that the Department of Labor's Occupational Safety and Health Administration (OSHA) is developing an Emergency Temporary Standard (ETS) that will require all employers with 100 or more employees to ensure that their workforce is fully vaccinated or to require any workers who remain unvaccinated to produce a negative test result at least weekly before coming to work. The rule—which is expected to issue within weeks—will require employers with more than 100 employees to provide paid time off for the time it takes for workers to get vaccinated and to recuperate if they experience serious side effects from the vaccination.

OSHA ETS's are authorized by statute, which permits the Secretary of Labor to promulgate an ETS when he determines (1) "that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards," and (2) "that such emergency standard is necessary to protect employees from such danger."^[1] An ETS may be in place for up to six months, at which point OSHA must issue a permanent standard that has been adopted through ordinary rulemaking processes.^[2] This would be OSHA's second COVID ETS, following an ETS adopted in June that was limited to the health care sector.^[3]

OSHA likely does not plan a notice-and-comment process for the forthcoming rule, which is not required for an ETS. As a consequence, the standard's specific requirements likely will become known the day of publication, with an effective date shortly thereafter. Uncertainties that issuance of the rule should resolve include how it would apply to employees working at home, or to workers at remote locations without contact with other employees.

The decision to adopt the rule as an "emergency" and "temporary" standard, without notice and comment, could be one focus of a legal challenge. A challenge may also target the rule's wage-payment requirement; wages are not a subject that OSHA ordinarily regulates, and the requirement arguably contrasts with Congress's decision to let the COVID-related paid leave programs established by the Families First Coronavirus Response Act expire after December 31, 2020. If the ETS requires vaccination for workers who recently had and recovered from COVID-19, that could be targeted also.

2. Executive Orders requiring vaccinations for employees of federal contractors, and for all federal workers.

In announcing the OSHA ETS, the President also issued separate Executive Orders regarding vaccination of employees of federal contractors, and regarding vaccination of federal workers.

The federal contractor Order imposes no immediate workplace requirements. Rather, the requirements—which the White House has said will include a vaccine mandate—are to be delineated by September 24 by the White House’s “Safer Federal Workforce Task Force” (Task Force), established by the President in January. Under the Order, by September 24, the Task Force is to provide “definitions of relevant terms for contractors and subcontractors, explanations of protocols required of contractors and subcontractors to comply with workplace safety guidance, and any exceptions to Task Force Guidance that apply to contractor and subcontractor workplace locations and individuals in those locations working on or in connection with a Federal Government contract.”^[4] The Task Force Guidance is to be accompanied by a determination, issued by the Director of the Office of Management and Budget (OMB), that the Guidance “will promote economy and efficiency in Federal contracting, if adhered to by Government contractors and subcontractors.”^[5] The Order cites the Federal Property and Administrative Services Act (the Procurement Act), as authority for the new federal contractor mandate.^[6]

The Order is effectuated by requiring federal agencies to include a clause in contracts requiring “the contractor and any subcontractors (at any tier)” to “comply with all guidance for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force,” “for the duration of the contract.”^[7] This clause is to be included in new contracts and extensions and renewals of existing contracts, and “shall apply to any workplace locations . . . in which an individual is working on or in connection with a Federal Government contract.”^[8]

A legal challenge to the Order is likely to focus on the President’s authority under the Procurement Act to use a White House Task Force to develop workplace safety rules for federal contractors. As discussed in a prior alert, presidents of both parties increasingly use the Procurement Act to regulate terms and conditions of employment at federal contractors, including most recently a \$15 minimum wage requirement.^[9] A challenge to this COVID Executive Order could produce an important legal precedent on presidential authority in this area.

Separate from the Order regarding contractors, President Biden also signed an Executive Order requiring that all federal executive branch workers be vaccinated, with minimal exceptions.^[10] The Order requires federal agencies to “implement, to the extent consistent with applicable law, a program to require COVID-19 vaccination for all of [their] Federal employees.”^[11] The Order does not allow employees to avoid vaccination through frequent testing. Instead, “only” those “exceptions . . . required by law” will be permitted.^[12] Those exceptions are likely to concern disabilities and religious objections.^[13] The President directed the Task Force to “issue guidance within 7 days . . . on agency implementation of” the Order’s requirements for federal employees.^[14]

3. COVID-19 vaccinations for health care workers at Medicare and Medicaid participating hospitals, and at other health care settings.

The President announced that the Centers for Medicare & Medicaid Services (CMS) will require COVID-19 vaccinations for workers in most health care settings that receive Medicare or Medicaid reimbursement, including but not limited to hospitals, dialysis facilities, ambulatory surgical settings, and home health agencies. This action is an extension of a vaccination requirement for nursing facilities recently announced by CMS, 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.[15]

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We anticipate providing further updates later this month, as actions on the President's directives proceed.

[1] 29 U.S.C. § 655(c)(1).

[2] *Id.* § 655(c)(3).

[3] See OSHA National News Release, *US Department of Labor's OSHA issues emergency temporary standard to protect health care workers from the coronavirus* (June 10, 2021), <https://www.osha.gov/news/newsreleases/national/06102021>.

[4] Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors (Sept. 9, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/09/09/executive-order-on-ensuring-adequate-covid-safety-protocols-for-federal-contractors/>.

[5] *Id.* § 2.

[6] *Id.* (citing 40 U.S.C. 101 *et seq.*).

[7] *Id.*

[8] *Id.*

[9] Gibson Dunn, *Department of Labor Initiates Rulemaking to Raise the Minimum Wage to \$15 Per Hour For Federal Contractors* (July 29, 2021), <https://www.gibsondunn.com/wp-content/uploads/2021/07/department-of-labor-initiates-rulemaking-to-raise-the-minimum-wage-to-15-dollars-per-hour-for-federal-contractors.pdf>.

[10] Executive Order on Requiring Coronavirus Disease 2019 Vaccination for Federal Employees (Sept. 9, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/09/09/executive-order-on-requiring-coronavirus-disease-2019-vaccination-for-federal-employees/>.

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[11] *Id.* § 2.

[12] *Id.*

[13] *Press Briefing by Press Secretary Jen Psaki* (September 9, 2021), <https://www.whitehouse.gov/briefing-room/press-briefings/2021/09/09/press-briefing-by-press-secretary-jen-psaki-september-9-2021/> (stating that there would be exceptions for “legally recognized reasons, such as disability or religious objections”).

[14] Executive Order on Requiring Coronavirus Disease 2019 Vaccination for Federal Employees (Sept. 9, 2021) at § 2; *see also* Safer Federal Workforce, <https://www.saferfederalworkforce.gov/>.

[15] *See also* CMS, Press Release, *Biden-Harris Administration Takes Additional Action to Protect America’s Nursing Home Residents From COVID-19* (Aug. 18, 2021), <https://www.cms.gov/newsroom/press-releases/biden-harris-administration-takes-additional-action-protect-americas-nursing-home-residents-covid-19>.



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