

PRESIDENT BIDEN MANDATES COVID VACCINATIONS FOR FEDERAL EMPLOYEES AND CONTRACTORS BY EXECUTIVE ORDERS, WITH OSHA MANDATE ON THE HORIZON FOR THE PRIVATE SECTOR

Hodgson Russ OSHA Alert
September 10, 2021

On Thursday, September 9, 2021, President Biden addressed the nation to discuss his Administration's new, six-part COVID-19 Action Plan ("Plan"), which is intended to increase vaccination rates among the American workforce and help curtail the spread of the virus and COVID-19 illnesses. With the Pfizer vaccine now having received full FDA approval for adults, and with the continued availability of the Moderna and Johnson & Johnson/Jenness vaccinations pursuant to Emergency Use Authorizations, the Biden Administration is pushing forward with mandatory employee vaccination requirements in both the public and private sectors. Part of the President's Plan for the public sector was the issuance of two new Executive Orders mandating vaccinations for all federal employees and requiring federal contractors to follow adequate COVID safety protocols. According to White House press secretary Jennifer Psaki, "The expectation is if you want to work in the federal government or want to be a contractor, you need to be vaccinated."

Federal Employees

With respect to federal employees, the message is clear. Federal employees who wish to retain their jobs must submit to vaccination. The only apparent exceptions are those otherwise required by law. President Biden's [Executive Order](#) directs federal agencies to implement programs requiring vaccination of all federal employees in accordance with guidance to be issued by the Safer Federal Workforce Task Force ("Task Force"). The Task Force was directed to issue that guidance within seven days of the Executive Order. Federal employees should be afforded a period of time for compliance with vaccination requirements, probably at least forty-five days based on President Biden's earlier comments in August.

Federal Contractors

Through a separate [Executive Order](#), federal agencies are being required to include clauses in certain federal contracts that will require contractors and their sub-tier subcontractors to comply with all guidance issued by the Task Force, insofar as it may

Attorneys

Glen Doherty
Michael Hecker
Charles H. Kaplan
Jason Markel
Michael Zahler
Jane Bello Burke

Practices & Industries

Occupational Safety & Health Act
(OSHA)

PRESIDENT BIDEN MANDATES COVID VACCINATIONS FOR FEDERAL EMPLOYEES AND CONTRACTORS BY EXECUTIVE ORDERS, WITH OSHA MANDATE ON THE HORIZON FOR THE PRIVATE SECTOR

be applicable to contractors and subcontractors. “If you want to do business with the federal government, get your workers vaccinated,” said Biden. The Executive Order takes effect immediately and is applicable to all new contracts, new solicitations, extensions and renewals of existing contracts, and the exercise of options under existing contracts, with limited exceptions. The Task Force was directed to issue additional contractor and subcontractor guidance by September 24 that will include relevant definitions, explanations of protocols, and exceptions.

Health Care Workers

The President’s Plan and remarks also targeted the health care industry, and will require more than 17 million healthcare workers to submit to vaccination using the leverage of the Centers for Medicaid and Medicare Services (“CMS”) and Medicare and Medicaid reimbursement funding. Hospitals, nursing homes, dialysis centers, ambulatory surgical centers, home health agencies, and other CMS-regulated healthcare settings that receive Medicare or Medicaid funding from the federal government will be required to mandate vaccinations for all staff, including those who are not involved in direct patient, resident, or client care. CMS is expected to issue an Interim Final Rule in October, with a comment period.

Teachers and School Staff

The President’s Plan also contemplates a forthcoming rulemaking from the Department of Health and Human Services that will require teachers and staff at Head Start and Early Head Start programs, teachers and child and youth program personnel at the Department of Defense (“DOD”), and teachers and staff in Bureau of Indian Education-operated schools to get vaccinated. The Plan further calls upon State Governors to initiate vaccination mandates for teachers and school staff members in their respective States.

Private Sector Employers

In the private sector, President Biden’s Plan discloses that the Occupational Safety and Health Administration (“OSHA”) is developing a new Emergency Temporary Standard (“ETS”) that the White House claims will affect more than 80 million workers. Earlier this year, OSHA issued an ETS applicable to settings where employees provide healthcare services or healthcare support services, as discussed in a [prior alert](#). The forthcoming vaccination ETS is expected to require private employers with more than 100 employees to mandate vaccinations for all of their employees, or submit to regular testing. Employees who remain unvaccinated will be required to submit negative COVID test results on at least a weekly basis. Whether the ETS will draw distinctions between those employees refusing to be vaccinated versus those employees unable to be vaccinated for health-related reasons, remains to be seen. For example, will the employer, the refusing employee, or the federal government bear the cost of the opt-out tests? The ETS is expected to require employers to provide paid time off for employees to obtain vaccinations, including recovery time associated with post-vaccination reactions. While much remains unknown at this time, the new ETS will undoubtedly create additional administrative burden, compliance obligations, and expense for employers. Non-compliant employers could be subjected to OSHA penalties of up to \$14,000 per violation.

PRESIDENT BIDEN MANDATES COVID VACCINATIONS FOR FEDERAL EMPLOYEES AND CONTRACTORS BY EXECUTIVE ORDERS, WITH OSHA MANDATE ON THE HORIZON FOR THE PRIVATE SECTOR

Action Plan

Employers should be mindful that the forthcoming OSHA ETS, CMS Interim Final Rule, and other rulemakings that follow from President Biden's Plan will likely afford little time for employers to respond and become compliant. Employers who may be within the scope of any forthcoming federal rulemakings, regulations, or guidance should be prepared to act quickly, and should continue to monitor the situation closely to ensure that compliance occurs in a timely manner. The applicability of any exceptions will need to be evaluated carefully. And while President Biden's Plan will result in the imposition of new federal requirements, employers may also be subject to other State or local mandates, guidance, or recommendations.

If you have questions about OSHA's forthcoming vaccination ETS or COVID-19 guidance, mandatory vaccination requirements, or other general questions about OSHA compliance, please contact [Jason Markel](tel:716.848.1395) (716.848.1395), [Glen Doherty](tel:518.433.2433) (518.433.2433), or [Charles Kaplan](tel:646.218.7513) (646.218.7513). For questions relating to forthcoming CMS rules or Medicare/Medicaid issues, please contact [Jane Bello Burke](tel:518.433.2404) (518.433.2404).