

PLUNKETT COONEY
DETERMINED. DISTINCTIVE. FEARLESS.®

Delta Variant Update

New Federal COVID-19 Vaccination,
Testing & Mask Rules for Employers

Presented by
Laura M. Dinon
Courtney L. Nichols
Claudia D. Orr


Today's Presenters



Courtney L. Nichols
 (248) 594-6360
 cnichols@plunkettcooney.com



Laura M. Dinon
 (231) 348-6417
 ldinon@plunkettcooney.com



Claudia D. Orr
 (313) 983-4863
 corr@plunkettcooney.com

Delta Variant Update

PLUNKETT COONEY
DETERMINED. DISTINCTIVE. FEARLESS.®

Today's Topics

- President Biden's COVID-19 initiatives
 - Vaccination mandates (and exemptions)
 - Masks
 - Testing
 - Financial assistance
- Updates to the CDC guidance
- What's on the Horizon?
- Q&A

Delta Variant Update

PLUNKETT COONEY
DETERMINED. DISTINCTIVE. FEARLESS.®

President Biden's COVID Initiatives

- Sept. 9 - announcement by President Biden
- Masks, vaccinations, testing and financial support
- Expect it will take time to implement (some initiatives longer than others)
- There will be challenges along the way.
- Let's break it down!

Delta Variant Update



Vaccinations for Federal Employees & Federal Contractors

- Sept. 9: Executive Order 14043 requiring all federal employees to be vaccinated (testing not an option unless exemption)
- Includes only "executive branch" employees (excludes employees of Congress and Supreme Court due to separation of powers)
- "Subject to such exemptions as required by law"
 - (medical, religious exemptions)
- Press secretary suggests deadline in "about 75 days" or face progressive discipline – White House guidance says by Nov. 22.

Delta Variant Update



Federal Employees & Contractors

- Executive Order 14042– requiring federal contractors get vaccinated.
- Applies to new contracts and extensions or renewals of contracts on or after Oct. 15.
- Doesn't apply to grants or recipients of grants.
- Doesn't apply to contracts with Indian tribes, smaller contracts, work performed outside of United States; subcontracts for products only.

Delta Variant Update



Medicare/Medicaid Participants

- Vaccine mandate by Centers for Medicare & Medicaid Services (CMS):
 - Includes hospitals, nursing homes, dialysis facilities, ambulatory surgical settings, and home health agencies, **among others**, as a condition for participating in the Medicare and Medicaid programs
 - Applies to clinical staff, individuals providing services under arrangements, volunteers, and staff who are not involved in direct patient, resident or client care

Delta Variant Update



Vaccine Mandates For Teachers/Staff

- Mandate accomplished through federal departments.
- U.S. Department of Health and Human Services (part of the Administration for Children and Families) - for the Head Start and Early Head Start Programs:
 - Goal: fully in-person, keep centers open.
 - All staff and “certain” contractors must be **fully vaccinated** by January 2022 (i.e., 14 days after second Pfizer/Moderna shots or after J & J single shot).

Delta Variant Update



Vaccine Mandates for Teachers/Staff

- Department of Defense - for the 160,000 K-12 programs for students of military families across United States and abroad
- Department of Interior, Bureau of Indian Education - for employees of the 53 schools on and off Tribal lands

Delta Variant Update



Vaccinations for Teachers/Staff

- Between the Head Start, Early Head Start, military schools and schools on/off Tribal lands:
 - One million children are served (many who are not yet eligible for vaccinations).
 - Estimated 300,000 teachers/staff are subject to mandate.

Delta Variant Update



Other Notable Developments



Delta Variant Update



Additional Action For Schools

- American Rescue Plan made \$130 billion available to support schools & HHS provided another \$10 billion for COVID testing at schools.
- Department of Education plans to make additional funds available to assist schools/districts when funding has been withheld or cut by their state leaders and schools will be able to apply to the Department of Education soon.
- The Department of Education is asked to investigate such things as state mask mandate prohibitions.

Delta Variant Update



Large Venues

- MDHHS recommends (but does not require):
 - Not fully vaccinated wear masks while in crowded spaces outdoors and practice social distancing
 - Stay within your group, six feet from other groups.
 - Only consume food and beverages while seated in designated areas, with groups no larger than six.
 - Individuals should self-screen before attending large events.

Continued

Delta Variant Update



Large Venues

- Use sanitizer, contactless practices wherever possible.
- Anyone not fully vaccinated should be tested 1-3 days before the event.
- President Biden is asking entertainment venues to “require that their patrons be vaccinated or show a negative test for entry.”

Delta Variant Update



CDC Guidance on Large Venues

- Advise people to stay home if sick or symptomatic.
- Recommends screening of attendees
- Require all attendees and staff to wear masks (except small children or medically unable).
- Require good hygiene of staff and ensure good supplies available.
- Clean and disinfect regularly.

Delta Variant Update



CDC Guidance – Large Venues

- Provide good ventilation for indoor events.
- Ensure water systems are safe from Legionnaires’ disease.
- Modify layout of events to provide physical distance.
- Provide physical guides to direct traffic flow and separate people.
- Limit food and beverage to certain areas, make order and pickup contactless.

Delta Variant Update



Testing Availability

- White House is:
 - Expanding number of retail pharmacy testing sites for free to 10,000
 - Improving access to rapid testing with Walmart, Amazon and Kroger agreeing to sell at cost for next three months
 - Medicaid must cover at home tests for free for beneficiaries.
 - Using Defense Production Act to ensure adequate supplies

Delta Variant Update



Federal Property & Interstate Transportation

- Executive Order 13998 – Domestic and International Travel:
 - Requires masks in/on airports, commercial aircraft, trains, public maritime vessels (including ferries), intercity bus services, all other forms of public transportation or “regular, continuing shared-ride surface transportation services that are open to the general public” (and now doubles fines for violations)
- Executive Order 14003 – Protecting Federal Workforce:
 - Requires masks, social distancing and other safety measures by all persons in federal buildings or on federal lands (also including federal employees, federal contractors)

Delta Variant Update



Financial Support for Small Businesses

- American Rescue Plan (ARP) tax credits are available to employers who paid employees who stayed home due to COVID-19 (FFCRA) related reasons between April 1 and **Sept. 30, 2021**.
- No news yet regarding further extension of tax credits for those who choose to continue approved FFCRA leave.

Delta Variant Update



Current CDC Guidance – 7/27/21

- Recommendations for fully vaccinated:
 - Wear a mask in public indoor settings in areas of substantial or high transmission.
 - Choose to wear a mask regardless of transmission level particularly if at risk or have at-risk or not fully vaccinated people in household.
 - Get tested 3-5 days following a known exposure to someone with suspected or confirmed COVID-19 and wear a mask in public indoor settings for 14 days after exposure or until a negative test result.

Delta Variant Update



Current CDC Guidance – 7/27/21

- Recommendations for unvaccinated:
 - Get vaccinated.
 - Properly wear face coverings over your nose and mouth.
 - If working outdoors, can opt not to wear face coverings unless work closely with others.
 - Stay far enough away from other people so you do not breath in particles from them, generally at least six feet.

Continued

Delta Variant Update



Current CDC Guidance – 7/27/21

- Ask employer about flex schedules, remote work, taking meetings and work outside when possible.
- Learn about building ventilation.
- Practice good personal hygiene and wash your hands often.
- Always cover mouth and nose if coughing or sneezing.

Continued

Delta Variant Update



Current CDC Guidance – 7/27/21

- Be alert for COVID-19 symptoms and get tested if any appear.
- Get tested regularly, especially if in an area of substantial transmission.

Delta Variant Update



Quarantine/Isolation Rules

- Michigan law – PA 238/339
 - Signed into law on 10/22/2020 and amended on 12/30/2020.
 - Provides legal protections to employees who cannot work for covered COVID-19 reasons
 - Employees who comply with quarantine or isolation guidelines or orders may not be discharged, disciplined, or otherwise retaliated against.
- Key takeaway: stay up-to-date on isolate/quarantine rules and beware: potential retaliation claims

Delta Variant Update



Large Employer (100+) Mandate



Delta Variant Update

PLUNKETT COONEY
DETERMINED. DISTINCTIVE. FEARLESS.®

Sept. 9, 2021 Announcement

- Pres. Biden announced that the U.S. Department of Labor is developing an emergency rule to require all employers with 100 or more employees to ensure their workforces are fully vaccinated or show a negative test at least once per week.
- OSHA is expected to issue an emergency temporary standard (ETS) to carry out the requirement.
- The ETS is expected to affect more than 80 million workers.
- Private employers are also expected to be required to give workers PTO to get vaccinated or recover from vaccine side effects.

Delta Variant Update

PLUNKETT COONEY
DETERMINED. DISTINCTIVE. FEARLESS.®

ETS Process

- Provisions for an ETS are outlined in Section 6 of the OSH Act.
- OSHA does not have to go through the full rulemaking process – can skip requirement for notice, public comment, and public hearing.
- Once issued, ETS is effective and OSHA begins rulemaking for a permanent standard. ETS is valid until permanent standard is promulgated (must be within six months of publication of ETS in the Federal Register).
- State plans:
 - MI-OSHA –has 30 days from issuance of ETS to draft/issue its own (equally protective) standard

Delta Variant Update

PLUNKETT COONEY
DETERMINED. DISTINCTIVE. FEARLESS.®

Does OSHA/DOL Have Authority To Require Mandatory Vaccination/Testing?

- Numerous legal challenges expected regarding scope of authority and legality of the mandate/anticipated ETS.
 - Several governors have already promised to try to block the ETS from taking effect in their states (MI is not one).
- OSHA already imposes one vaccination requirement on employers: must offer the hepatitis B virus vaccination to all workers who have occupational exposure (but, notably, employees can decline without losing their job).
- ETS authority in place if: (1) American workers are in grave danger due to an exposure to COVID-19; and (2) an emergency standard is needed to protect them.

Delta Variant Update



Expected ETS Provisions

- Basic requirement: must demonstrate all employees are vaccinated OR test weekly for COVID-19 to stop the spread of the disease in the workplace.
- 100 employees will be counted on a company-wide basis, not by location, thereby covering more people.
- Unknown whether vaccine-or-test requirement will apply to all employees (including those working remotely) or only those working in offices/with other employees.

Delta Variant Update



Expected ETS Provisions

- ETS expected to mirror healthcare ETS and require employers to provide reasonable paid time off for vaccination and possible side effects.
- ETS will allow employers to require use of PTO to cover this time off.
- Testing option viewed as a relatively straightforward way to respond to requests for disability/religious accommodations.
 - Also may help government with response to constitutional/legal challenges

Delta Variant Update



Expected ETS Provisions

- ETS will specify who pays for testing.
- Administration has taken steps to cut costs with private testing companies and Medicaid recipients test for free.
- Unlikely that the ETS will require employers to systematically report vaccination and testing data.
- Will likely have record-keeping requirements, such as the form in which employers must collect vaccination and testing information.

Delta Variant Update

PLUNKETT COONEY
DETERMINED. DISTINCTIVE. FEARLESS.™

ETS Penalties

- Serious violations of the ETS – likely fine \$13,653 per violation
- Willful violations of the ETS – likely fine \$136,532 per violation

Delta Variant Update

PLUNKETT COONEY
DETERMINED. DISTINCTIVE. FEARLESS.™

What Do We Do Now?

- Actions to consider now (if covered employer):
 - Encourage vaccination *now*.
 - Get informed about employees' vaccination status.
 - To whom/how reported?
 - Ensure measures are in place for keeping vaccination and testing information confidential and secure:
 - Separate from personnel file
 - HIPAA does not prohibit employees from providing proof of vaccination (i.e., picture of vaccine card)

Continued

Delta Variant Update

PLUNKETT COONEY
DETERMINED. DISTINCTIVE. FEARLESS.™

What Do We Do Now?

- Begin considering testing protocols and audit processes to ensure accurate record-keeping and compliance.
- Consider whether there are any CBA obligations applicable to your company.
- Map out what happens when tests results come back positive.

Delta Variant Update

PLUNKETT COONEY
DETERMINED. DISTINCTIVE. FEARLESS.®

When Will We Know More?

- Hopefully within two weeks – but unclear as of now
- ETS will address many of the questions posed regarding the specific processes/requirements that will become effective and when.
- We will continue to monitor and provide prompt updates/follow-up programming as needed.

Delta Variant Update

PLUNKETT COONEY
DETERMINED. DISTINCTIVE. FEARLESS.®

We Want to Hear From You!



Delta Variant Update

PLUNKETT COONEY
DETERMINED. DISTINCTIVE. FEARLESS.®

Today's Presentation


Events

Register Now - Delta Variant Update Webinar

New Federal COVID-19 Regulations for Employers
 09/16/2021 | 9 a.m. to 10 a.m.
 Free

ATTORNEYS
 Laura M. Dixon
 Courtney L. Nichols
 David G. Orr

PRACTICE AREAS
 Employment Litigation
 Human Resources Business
 Labor & Employment Law



Delta Variant Update
 New Federal COVID-19 Vaccination,
 Testing & Mask Rules for Employers


Delta Variant Update
 New Federal COVID-19 Vaccination, Testing & Mask Rules for Employers

Date: Sept. 16, 2021
 Time: 9 a.m. to 10 a.m.
 Cost: Complimentary

PLUNKETT COONEY
 DETERMINED. DISTINCTIVE. FEARLESS.®

The Sophisticated Employer Blog

THE SOPHISTICATED EMPLOYER BLOG
 Your legal resource for workforce management



Subscribe

RSS
 Email

Plunkett Cooney LinkedIn Page
 Plunkett Cooney Twitter Page
 Plunkett Cooney Facebook Page

Was the bar for Actionable Federal Discrimination Claims Just Lowered?

APPELLATE COURT'S RULING APPEARS TO HAVE MADE IT EASIER TO BRING EMPLOYMENT DISCRIMINATION CLAIMS UNDER FEDERAL LAW.

Continue Reading

[READ EMPLOYMENT DISCRIMINATION, EMPLOYMENT LIABILITY, EQUAL EMPLOYMENT OPPORTUNITY, COMPLIANCE, DISCRIMINATION](#)

Delta Variant Update

PLUNKETT COONEY
 DETERMINED. DISTINCTIVE. FEARLESS.®

Thank You!

*Have
 Great
 Day*

Delta Variant Update

PLUNKETT COONEY
 DETERMINED. DISTINCTIVE. FEARLESS.®
