



PRESIDENT BIDEN ANNOUNCES SWEEPING NEW COVID VACCINATION AND TESTING REQUIREMENTS AIMED AT THE PRIVATE SECTOR

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Late last week — 18 months after the United States entered the battle against COVID-19 — President Biden announced the federal government will take sweeping steps to mandate vaccination and testing requirements that could affect nearly 80 million workers, including millions in the private sector.

The Administration directed the Department of Labor's Occupational Safety and Health Administration (OSHA) to develop a rule — through an "Emergency Temporary Standard" (ETS) — to require employers with 100 or more employees to ensure their workforces are fully vaccinated against COVID-19 or require their unvaccinated employees to produce a negative test result on a weekly basis before coming to work. The Administration directs OSHA to require applicable employers to provide paid time off for the affected employees to use to become vaccinated or to recover from any post-vaccination health responses. Failure to comply could lead to penalties.

In addition, the Administration issued an executive order mandating federal workers and private sector employees of federal contractors to become vaccinated, eliminating the vaccinate or test option permitted previously. The executive order directs the Safer Federal Workforce Task Force to provide further guidance by Sept. 24, 2021. For more information on the executive order, see the White House's publication [here](#).

The other notable movement is the Centers for Medicare & Medicaid Services' action to require workers in most health care settings, which receive Medicare and Medicaid reimbursement, to vaccinate themselves against COVID-19. This extends to "hospitals, dialysis facilities, ambulatory surgical settings, and home health agencies." It also includes "nursing home staff" and "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." For more information, see the White House's COVID-19 action plan [here](#).



[These developments do not alter existing employer requirements to provide reasonable accommodations, if available, for eligible employees with disabilities or sincerely held religious beliefs.](#) It is also important to note that an ETS is a temporary designation that remains in effect for six months, after which OSHA must finalize a permanent standard under the formal rulemaking process.

Employers should expect legal challenges from states and private businesses arguing against the constitutionality of the federal government implementing a nationwide vaccine mandate through OSHA. One perspective already presented is that OSHA is an agency specifically tasked with implementing regulations governing workplace safety, and here, the federal government attempts to use OSHA's powers to implement a mandate targeted to remedy a public health hazard not specific to the workplace. In other words, OSHA would be turning American employers into the enforcement mechanism for a nationwide health hazard.

While these recent developments are almost certain to tie up courts across the country, employers with workforce of at least 100 employees and federal contract employers would be wise to begin preparation immediately by, at the very least, identifying who in their workforce is unvaccinated and preparing policies for impending implementation and strategies for communicating any changes to their workforces.

Bell Nunnally will continue to monitor this development and update once the Department of Labor and OSHA make the Rule available.

Related Practices

Labor and Employment

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