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### President Biden Announces COVID-19 Action Plan Including Mandatory Vaccinations or Weekly Testing



Date Sep 10, 2021

On September 9, 2021, President Biden announced a COVID-19 Action Plan comprised of six main components. This Alert will focus on the “Vaccinating the Unvaccinated” component and its impact on employers.

According to President Biden, almost 80 million Americans who are eligible to be vaccinated have not gotten their first shot. He has directed the Occupational Safety and Health Administration (OSHA) to develop a rule requiring all employers with 100 or more employees to ensure their workforce is fully vaccinated or require unvaccinated workers to produce a negative test at least weekly before coming to work. OSHA will issue an Emergency Temporary Standard (ETS) to implement this requirement. The ETS will require employers to give workers paid time off to get vaccinated and to recover from any side effects. OSHA would have the authority to fine businesses that do not comply up to \$14,000 per violation.

OSHA only has the authority to issue an ETS without utilizing the regular rulemaking process if it determines two requirements are met: (1) workers are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful, or from new hazards; and (2) an ETS is necessary to protect workers from that danger. An ETS serves as a proposed permanent standard. It is then subject to the usual procedure for adopting a permanent standard, except that a final ruling should be made within six months. The validity of an ETS may be challenged in a U.S. Court of Appeals. It is expected that this ETS will be challenged in court. One possible challenge is the argument that requiring employers to provide paid leave for vaccinations and side effects exceeds OSHA's jurisdiction.

The timing of the ETS and its effective date are unknown. OSHA's previous ETS for employers in the health care sector may be instructive. It took months for that ETS to be posted on OSHA's website. It was posted on June 10, 2021. However, an ETS must be published in the Federal Register and provide an effective date. The ETS for employers in the health care sector was published in the Federal Register and became effective on June 21, 2021. Compliance with its requirements did not start until two weeks later. Based on these timelines, it will take weeks before the new ETS becomes effective.

Given the skeletal outline of the plan, many questions remain unanswered. Some include the following:

- » How will the 100 employee threshold be calculated? Will it be based on the number of employees in a corporate entity alone or will related entities be included in the number?
- » What about exceptions for disabilities or sincerely held religious beliefs as to the vaccines and weekly testing?
- » Who pays for any costs to get the vaccine or weekly testing? Will OSHA'S ETS require these to be implemented at no cost to employees?
- » How much paid leave time will employers be required to provide for employees to be vaccinated and recover from any side effects? In the ETS for employers in the health care sector, OSHA said “reasonable time.” In explanatory text to the ETS, OSHA said it would presume that if an employer makes available up to four hours of paid leave for each dose of the vaccine as well as up to eight hours per dose for any side effects, the employer would be in compliance with the “reasonable time” requirement.
- » How will employers verify employees' vaccination status and weekly testing results?

President Biden's plan also included an executive order requiring all federal executive branch workers to be vaccinated as well as all employees of contractors that do business with the federal government.

President Biden's plan also announced that the Centers for Medicare & Medicaid Services (CMS) is taking action to require 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 care agencies. This action builds on the vaccination requirement for nursing facilities recently announced by CMS and will apply to nursing home staff as well as staff in hospital 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. These requirements will apply to approximately 50,000 providers and cover a majority of health care workers across the country.

Finally, President Biden's plan calls on large entertainment venues such as sports arenas, large concert halls, and other large venues to require that their patrons be vaccinated or show a negative test for entry.

President Biden's multi-pronged plan is likely to be complex and onerous to implement. FordHarrison will monitor developments and publish additional Alerts as information is available and will conduct a webinar to provide additional guidance to our clients. If you have not signed up to receive our webinar invitations and would like to do so, please click on the link below.

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If you have any questions regarding this Alert, please contact the author, [Rick Warren, rwarren@fordharrison.com](mailto:rwarren@fordharrison.com), a partner in our Atlanta office, who is a member of the firm's [Coronavirus Taskforce](#) and regularly handles workplace safety and OSHA matters. Of course, you can also contact the FordHarrison attorney with whom you usually work.

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