

President Biden Announces Mandatory Vaccination Requirement for Private Employers

OSHA, Vaccination Requirements / September 13, 2021 / F. Colin Durham and Douglas C. Bracken

On September 9, 2021, President Biden announced a six-pronged plan to combat the ongoing COVID-19 pandemic in the United States. The first prong of the plan is "Vaccinating the Unvaccinated." A central component of this first prong demands that the U.S. Occupational Safety and Health Administration (OSHA) develop and implement a new emergency temporary standard (ETS) to require employers with more than 100 employees mandate that their employees are fully vaccinated or produce a negative COVID-19 test at least once per week. In a statement following Biden's announcement, OSHA estimated the requirement would impact over 80 million workers in private sector businesses.

OSHA oversees workplace safety, and will likely contend its authority extends to vaccine mandates. Under limited conditions, OSHA is legally authorized to set emergency temporary standards that take effect immediately and remain effective until suspended by the adoption of a permanent standard. To issue an ETS, the agency must determine that workers are in grave danger from exposure to toxic substances or agents determined to be toxic or physically harmful, or to new hazards, and that an emergency standard is needed to protect workers. The agency previously issued an ETS in June of 2021 requiring health care employers to provide protective equipment, to provide adequate ventilation, and to ensure social distancing, among other measures aimed at COVID-19.

It is uncertain when OSHA will issue the announced ETS or whether employers will be required to pay for the vaccinations and/or testing. However, according to an OSHA press briefing shortly after Biden's announcement, the agency expects to issue the ETS within "the coming weeks." And we expect OSHA will require employers not only to pay for the mandated vaccines and/or testing, but also to provide paid leave to get vaccinated and recover from any potential side effects, given that OSHA's prior COVID-19 ETS required healthcare employers to pay for employee vaccinations and to provide a brief amount of paid leave to employees to get vaccinated and recover from any potential side effects (see 29 CFR 1910.502(m)).

Adding to the uncertainty was the immediate announcement by the Republican National Committee and approximately fourteen (14) Republican governors that they will challenge any vaccination mandates issued by the federal government in the courts. Any challenge to the anticipated ETS will likely focus on whether OSHA has the authority to issue a mandate; whether the mandate could be found to be discriminatory; and/or whether OSHA denied due process to people who were already immune. Ultimately, whether private employers will indeed be required to mandate vaccination or weekly testing in lieu of vaccination as President Biden announced will likely still be subject to a politically-charged battle in the courts. Although employers may feel compelled to mandate COVID-19 vaccinations, whether they are legally required to do so remains to be seen.

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