

Blog Post

Broad Vaccine Mandates Ahead

September 13, 2021

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Private employers with 100 or more employees will be required to ensure their employees are either “fully vaccinated” or provide proof of a negative COVID-19 test at least once a week, under President Biden’s new six-prong COVID-19 Action Plan (the “Plan”) announced September 9, 2021. The Plan also includes vaccination requirements for employees of healthcare facilities receiving Medicare or Medicaid reimbursements, federal employees and contractors, and certain schools and programs.

Vaccine or Weekly Testing Required for Employers with 100 or More Employees

This sweeping new vaccination requirement will be part of a forthcoming Emergency Temporary Standard (ETS) to be developed by the U.S. Department of Labor’s Occupational Safety and Health Administration (OSHA) requiring compliance by all private employers with 100 or more employees. Employees are to be counted company-wide, not by individual site.

The ETS will be effective initially for a six-month period, until a permanent rule is promulgated. Since this is an emergency standard, OSHA will not be accepting public comment or input on the formulation of the ETS. However, once the ETS is issued, OSHA will invite comments and suggested changes in order to implement a permanent rule.

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During a late afternoon briefing on Friday, September 10, 2021, OSHA representatives stated that the ETS will not apply to remote workers who do not come into the workplace. However, it will apply not only to employees who come into the workplace, but also to employees who work outside of the worksite but around others. The ETS is expected to require employers to provide employees paid time off to get vaccinated or to recover from any vaccine-related side effects. The Plan is silent with respect to whether employers will be expected to provide paid time off to employees for testing, or whether employers will be required to pay for such testing. Indeed, during the briefing, OSHA representatives stated that they do not know at this time who will be required to pay for weekly testing, if it is offered in lieu of vaccination.

OSHA representatives also stated that that the agency has not yet decided on the process employers are to follow for verifying an employee's vaccination status. OSHA expects to address both issues in the ETS.

If there is a state workplace safety standard in effect, that standard will have to be amended to be at least as effective as the new federal standard. Further, OSHA clarified in the briefing that the ETS will allow employers to require vaccination and not permit a testing alternative, except where required by law as a religious or medical accommodation.

With regard to compliance specifics and the timeline for complying, in a White House briefing September 13, OSHA stated that the ETS will provide the answers. Further, OSHA expects to have a Q&A posted later this week addressing general questions such as coverage and information regarding state plans and covered public employees.

Further, OSHA encourages employers who are not subject to the ETS to follow CDC guidance,

including circumstances where employees are exposed to persons with unknown vaccination status.

While a publication date for the ETS is unknown, the White House announced it should be published in the coming weeks, with an effective date shortly thereafter. OSHA has the authority to issue citations for non-compliance with a penalty of up to \$14,000 per violation.

Vaccine Mandates in Healthcare Settings

The Plan calls on the Centers for Medicare & Medicaid Services (CMS) to require COVID-19 vaccinations for workers in most healthcare settings. This anticipated action builds on the Administration's August 18, 2021 announcement of a vaccination requirement for nursing facilities, and will apply to any healthcare facility receiving Medicare or Medicaid reimbursement. This includes not only nursing home staff, but also staff in hospitals, dialysis facilities, ambulatory surgical centers, and home health agencies. It will also extend to clinical staff, individuals providing services under arrangements, as well as volunteers and staff who are not involved in direct patient, resident, or client care. The new requirement will be a condition of participating in the Medicare and Medicaid programs and will be issued through emergency regulations as an Interim Final Rule with Comment Period that is expected to be published in October 2021. In the meantime, CMS expects certified Medicare and Medicaid facilities "to act in the best interest of patients and staff by complying with new COVID-19 vaccination requirements" before the Interim Final Rule is effective, and strongly recommends that unvaccinated health care workers begin the vaccination process immediately.

Pending publication of the Interim Final Rule, there are several unanswered questions, including:

- Whether this anticipated action includes a testing alternative for employees. In stark contrast to announcement and information provided about the anticipated ETS by OSHA, the Plan does not state the CMS action would permit testing as an alternative to vaccination.
- The extent to which physician practices are covered by this requirement. The CMS press release has a hyperlink to the following site for Medicare facilities, <https://www.cms.gov/Outreach-and-Education/Find-Your-Provider-Type/Facilities/Facilities-page>, which includes “all fee-for-service facilities.”
- How this new requirement will affect the existing shortage of health care workers during the surge in COVID-19 cases due to the delta variant.

Additionally, OSHA has clarified that guidance will be forthcoming for healthcare settings already subject to the current COVID-19 Healthcare ETS, which does not require that employees be vaccinated. As a result of the Plan, entities covered by the COVID-19 Healthcare ETS may need to revise their OSHA compliance plans.

Vaccine Mandates for Federal Executive Branch Employees and Federal Contractors

The Plan, through adoption of an Executive Order, requires all employees of the federal executive branch to be vaccinated, and does not permit testing in lieu of vaccination. This EO acknowledges that the vaccination requirement will be “subject to such exceptions as required by law,” which appears to contemplate that federal employees with qualified disabilities and/or sincerely held religious beliefs will be able to seek exemptions. This EO, which goes into effect immediately, requires the Safer Federal Workforce Task Force (which was established by EO on January 20, 2021) to issue guidance by September 16, 2021 on how federal

agencies are to implement the vaccination requirement. According to Press Secretary, Jen Psaki, during a press conference on September 9, 2021, the White House expects federal executive employees will have 75 days to obtain the vaccine. Further, federal workers who fail to comply will face counseling and progressive disciplinary action.

Similarly, through a second Executive Order included in the Plan, federal contractors and subcontractors also will be required to mandate their employees be vaccinated against COVID-19. This second EO, which also goes into effect immediately, requires the Safer Federal Workforce Task Force to issue guidance, definitions, and protocols by September 24, 2021 on how federal contractors are to implement the vaccination requirement. The EO further directs agencies to take steps by October 8, 2021 to ensure that federal contracts comply with the Task Force's guidance and protocols, and that all new contracts entered into on or after October 15, 2021 incorporate the terms of such guidance and protocols. The Executive Order, however, does not address whether employees of federal contractors subject to the forthcoming mandate will be provided with an option of weekly COVID testing, similar to that which will be provided in the OSHA ETS for private employers with 100 or more employees.

Vaccine Mandates for Teachers and Staff

The Plan also requires the Department of Health and Human Services to initiate rulemaking to require vaccination for teachers and staff of Head Start and Early Head Start programs, Department of Defense schools, and the Bureau of Indian Education-operated schools. It does not appear at this time that there will be an alternative for testing in lieu of vaccination.

Further, as emphasized by OSHA during the briefing, the President has called upon state governors to require vaccination of teachers

and school employees. Notably, OSHA standards and regulations do not apply to public employees. However, states are permitted to operate their own state plans, which require coverage for public employees, and are approved by OSHA. Thus, under an applicable state plan, public teachers and staff also may be required to be vaccinated.

Other Considerations

In the September 10 briefing, OSHA indicated that if an employer is subject to more than one requirement or standard, the employer will be required to comply with all of them, but the requirements and standards will not be inconsistent. Employers with Collective Bargaining Agreements will have collective bargaining obligations; OSHA advised that the ETS will not change those obligations any more than any other OSHA standard would.

Further, in the White House briefing today, it was revealed that in looking to continue protecting vaccinated individuals, the Plan contemplates the use of booster shots. However, that portion of the Plan is currently under review by the Food and Drug Administration (FDA), and the FDA and CDC will decide when and to whom boosters should be given.

Stay Tuned

There remain many unanswered questions, and there may be legal challenges in store. Employers should monitor ongoing developments and new guidance and be prepared to pivot accordingly. For assistance with workplace vaccination and other COVID-19 issues, contact your Akerman attorney.

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