

## **CLIENT ALERT**

### **An Early Look at What Employers Need to Know About President Biden's *Path Out of the Pandemic COVID-19 Action Plan* and Vaccine Mandates**

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On September 9, President Biden issued a multi-faceted national plan known as the Path Out of the Pandemic COVID-19 Action Plan (Plan) to combat the spread of COVID and, specifically, new variants. As part of this national strategy, President Biden issued a series of Orders and a directive to the Occupational Safety and Health Administration (OSHA). A summary of the key aspects of the Plan is set forth below:

1. **Executive Order mandating that federal employees be vaccinated.**

The first Executive Order which President Biden signed requires that all federal employees of executive agencies be vaccinated and that federal executive agencies implement a corresponding COVID-19 vaccination requirement program. The President directed the Safer Federal Workforce Task Force (Task Force) to issue guidance in connection with this vaccination mandate by September 16. According to an update issued by the Task Force on September 13, federal employees have until November 22, 2021 to be fully vaccinated in accordance with this Executive Order. Any exceptions to the mandate will be those “required by law” which, at this time, appear to be exemptions based upon individuals with disabilities and those who refuse the vaccination on religious grounds, as well as, presumably, pregnancy accommodations.

2. **Separate Executive Order mandating vaccination for federal contractors and subcontractors.**

President Biden issued a second Executive Order directed specifically to federal contractors (*Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors*). This Order does not contain any immediate workplace requirements. Instead, the White House announced that the requirements associated with this Order will be established by the Task Force by September 24 and will include a vaccine mandate. The second Order requires that a new “contract clause” created by federal executive agencies must be inserted into contracts and contract-like instruments that are entered into on or after October 15. “*This clause shall specify that the contractor or subcontractor shall, for the duration of the contract, comply with all guidance for contractor or subcontractor workplace locations published by the [Task Force], provided that the Director of the Office of Management and Budget approves the Task Force Guidance and determines that the Guidance, if adhered to by contractors or subcontractors, will promote economy and efficiency in federal contracting.*” The clause



will apply to any workplace locations specified by the Task Force Guidance in which an individual is working on or in connection with a federal government contract or contract-like instrument. Accordingly, the new rules will apply to any new contract or new contract-like instrument, including a new solicitation, extension, or renewal or exercise of an option if it is:

- a contract covered by the Service Contract Act (SCA);
- a procurement contract for services, construction or a leasehold in real property;
- a contract for concessions, including concessions excluded generally under the SCA; or
- a contract in connection with federal property or lands offering services for federal employees, dependents, or the general public.

Contracts which are not covered under the new Executive Order include the following:

- subcontracts solely for the provision of products;
- grants;
- agreements involving employees performing work outside the U.S.;
- contracts or contract-like instruments with Indian Tribes; and
- contracts or subcontracts with a value equal to or less than the FAR simplified acquisition threshold.

Technically, the Executive Order provides that contract clause requirements begin October 15, 2021. However, the new Order strongly encourages agencies, to the extent permitted by law, to ensure that the safety protocols in the Executive Order, including the vaccination requirement, apply to *existing contracts prior to October 15*.

3. A new directive issued to OSHA to require that all employers with 100 or more employees require their workers to be vaccinated or to test them weekly, and pay them for time spent in connection with the vaccination.

President Biden's Plan includes a directive to OSHA to develop an Emergency Temporary Standard (ETS) which will mandate that employers with 100 or more employees take appropriate measures to make sure that employees are either fully vaccinated, or for employees who are not vaccinated, that they produce negative test results on at least a weekly basis before coming to work. President Biden directed that the new ETS include a provision for paid time off for employees to receive the



vaccination, and payment for recuperation time, if they experience serious side effects as a result of the vaccination.

The Plan and, specifically, the Executive Orders have already prompted threats of litigation by several governors throughout the country. The impact of any such litigation, of course, remains to be seen.

4. Questions currently left unanswered.

The Executive Orders and the Plan itself leave unaddressed a number of questions, including the following:

1. Is OSHA legally authorized to issue such a broad ETS?
2. Will employers be reimbursed by the federal government for payments which they make to employees in connection with time spent getting vaccinated and/or time spent recuperating from serious side effects to the vaccine?
3. What are the potential wage and hour (and, specifically, overtime) ramifications of the mandatory vaccination requirement?
4. Will the mandatory vaccination requirements apply to employees of federal contractors who work remotely? [Note: The Task Force recently announced that the vaccination mandate covers *federal employees* working remotely unless they fall under an exemption.]
5. What are the testing logistics associated with the new ETS?
6. Will the new Guidance contain liability protections for employers?
7. Will the new ETS preempt any state and local laws that may prohibit discrimination on the basis of vaccination status?

5. Next steps.

In light of the Executive Orders and the directive to OSHA, employers should consider the following:

1. Continue to determine whether employees are vaccinated.
2. Decide whether vaccinations will be mandatory.
3. Establish a process for handling requests for religious, disability, and pregnancy exemptions.
4. Ensure that information provided in connection with disability accommodation requests is maintained in a confidential manner.



5. Establish procedures for employees who refuse to get vaccinated and/or, as the case may be, tested.
6. Train managers on the new Executive Orders and their impact.
7. Follow established procedures for handling employee accommodation requests associated with COVID-19.

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