

# FYI<sup>®</sup> Alert

## For Your Information<sup>®</sup>

### **Job or job? Biden's COVID-19 action plan includes vaccine mandates**

On September 9, the Biden administration issued its COVID-19 Action Plan. The plan includes sweeping new employer mandates aimed at increasing workforce vaccination rates across the country. Legal challenges are expected as further details emerge.

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#### Background

President Biden announced vaccination requirements for the federal government in July and called on the private sector to do more to encourage vaccination. With patience wearing thin for Americans who remain unvaccinated, the White House issued the [Path Out of the Pandemic: President Biden's COVID-19 Action Plan](#) on September 9. It broadly outlines a plan to mandate COVID vaccinations for millions and imposes substantial obligations on employers across the country.

#### Employer mandates

To boost COVID-19 vaccination rates in the U.S., the president's plan would require employers to ensure their workers are vaccinated or tested. It provides specific requirements for private sector employers, federal contractors, and healthcare employers.

#### Private sector employers

To implement these requirements, the Department of Labor's Occupational Safety and Health Administration (OSHA) is tasked with developing an Emergency Temporary Standard (ETS) that generally will compel all employers with 100 or more employees — but not smaller employers — to ensure their workforce is fully vaccinated or require any workers who remain unvaccinated to produce a negative COVID-19 test result on at least a weekly basis before coming to work. The plan also directs OSHA to require covered employers to provide employees with paid time off to get vaccinated or recover from any side effects of the vaccine. Additional employer obligations and specific requirements will depend on the timing and provisions of the ETS, and whether it withstands almost certain legal challenges.

**Buck comment:** It is unclear how the new ETS will fit in with OSHA's current COVID-19 Healthcare ETS or its impact on the 28 OSHA-approved State Plans, such as California's and Virginia's.

### Federal contractors

A new Executive Order requires certain government contractors and subcontractors to comply with guidance to be published later this month by the Safer Federal Workforce Task Force (Task Force Guidance or Guidance), provided it is approved by the Director of the Office of Management and Budget (Director). While it is unclear what the full guidance will include, it is expected to require employees who work on or in connection with certain government contracts to be vaccinated. However, it would appear from the executive order that the requirement likely will apply only to new contracts or to extensions or renewals, the exercise of an option, or modifications to existing contracts.

**Buck comment.** Another Executive Order issued on September 9 mandates vaccines for employees of the executive branch, with exceptions only as required by law. Unlike a prior order, it does not reference a testing option for federal workers.

### Healthcare employers

The plan also requires vaccinations for healthcare workers at Medicare and Medicaid participating hospitals and other healthcare settings. A statement from the Centers for Medicare & Medicaid Services (CMS) confirmed that emergency regulations requiring vaccinations for nursing home workers will be expanded to include hospitals, dialysis facilities, ambulatory surgical settings, and home health agencies, among others, as a condition for participating in the Medicare and Medicaid programs. It also appears to cover staff not involved in direct patient, resident, or client care.

CMS noted that it is developing an Interim Final Rule with a Comment Period that will be issued in October. In the meantime, CMS "expects" certified Medicare and Medicaid facilities to comply with new COVID-19 vaccination requirements.

### In closing

The administration's plan would require many employers to adopt a vaccination and/or testing policy if they have not already done so. With an ETS expected within the coming weeks, employers that are likely to be impacted by these actions should begin to consider the broad range of compliance, operational and administrative challenges surrounding mandated vaccination and testing and steps they may have to take to comply.

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