

Path Out of the Pandemic: Considerations for Employers and Government Contractors

On September 9, President Biden issued a sweeping new COVID-19 action plan, “Path Out of the Pandemic” (“Plan”), which affects employees working for large private employers, the federal government, federal contractors and health care entities. In one of the Plan’s provisions, the Biden administration directed the Occupational Safety and Health Administration (OSHA) to issue emergency regulations mandating that employers with at least 100 employees require their employees to either be fully vaccinated or present a negative COVID-19 test result at least once a week. This potential mandatory vaccination requirement will also have an impact on certain employee benefit plan considerations. The Plan also requires large entertainment venues to screen customers’ vaccine status before permitting entry, and it expands access to federal financial assistance for many businesses. These new requirements are still being finalized, and labor unions and states are raising questions about enforcement and bargaining duties where collective bargaining agreements exist.

Employers of 100 or More Employees

As noted above, the Plan directs OSHA to develop an Emergency Temporary Standard (ETS) that will require all employers with at least 100 employees to ensure their workforce is fully vaccinated or else subjected to weekly COVID-19 testing before coming into work. The ETS will also require covered employers to provide employees paid time off to get vaccinated and to recover from side effects associated with the COVID-19 vaccine.

It remains to be seen how the ETS will be worded and implemented and what OSHA’s timeline for issuance and

effective date will be, but the expectation is that it will be expedited for potential release next week.

Health Care Workers

The Plan also provides that the Centers for Medicare and Medicaid Services will begin requiring vaccinations for employees in most health care settings, including hospitals, dialysis facilities, ambulatory surgical settings and home health agencies, as a condition for continued federal funding. For those health care employees, presenting a negative COVID-19 test result will not be an option. The administration had previously imposed such a condition on nursing homes only. The new requirement will likely impact approximately 50,000 providers and 17 million workers.

Executive Branch Employees and Federal Contractors

President Biden signed two executive orders mandating vaccinations for all executive branch employees and for employees of some federal contractors and subcontractors.

The orders enhance and supplement the president’s July 29, 2021 directive requiring employees and onsite contractors to disclose their vaccination status and, if they are not vaccinated, to mask, socially distance and undergo regular testing. The new orders eliminate the testing option for those who are not vaccinated unless they receive an approved exemption. Thus, federal employees will no longer have the option to “test out” of vaccination.

The White House has indicated that while disability or religious exemptions may be approved on a restricted basis, workers who do not qualify for such exemptions will be

subject to a 75-day “ramp-up” period in which they must become fully vaccinated.

Requirements for Federal Contractors

The order targeted at federal contractors outlines what should be implemented and how over the next month. Agencies must ensure that to the extent allowed by law, contracts and contract-like instruments (including subcontracts at any tier) incorporate a clause that “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 Safer Federal Workforce Task Force.” The order further provides that the clause will apply to workplace locations in which an individual is working on or in connection with a federal contract or contract-like instrument.

The order instructs agencies to ensure that contracts have a clause requiring contractors and subcontractors to comply with all guidance for contractor workplaces issued by the Safer Federal Workforce Task Force (“Task Force”). The order directs the Task Force to issue guidance by September 24, 2021 that will further explain the requirements and any exceptions. The Office of Management and Budget must then approve it and publish new vaccination requirements in the *Federal Register*.

The order also directs the Federal Acquisition Regulatory Council to amend the Federal Acquisition Regulation to include these requirements in federal procurement solicitations and contracts. The Federal Acquisition Regulatory Council is also under an October 8, 2021 deadline to “take initial steps to implement appropriate policy direction to agency acquisition offices” to help them comply with the order.

Applicability

The order applies to new contracts or new contract-like instruments in addition to new solicitations, extensions, renewals and/or exercises of an option for an existing agreement. The order notes that the definition “contract or contract-like instrument” aligns with that of the executive order on increasing the minimum wage for workers on federal contracts issued in July 2021.

The order does not cover:

- Grants
- Contracts or contract-like instruments or agreements with Indian Tribes (as outlined in the Indian Self-Determination and Education Assistance Act)
- Contracts or contract-like instruments with values equal to, or less than, the simplified acquisition threshold
- Employees who work outside the U.S.
- “Subcontracts solely for the provision of products”

As mentioned above, the order does not currently provide federal contractors with an option to test out of the vaccination mandate.

Additional Considerations for Federal Contractors

Federal contractors should consider:

- Establishing an internal working team to oversee the process for all impacted contracts and employees and a point of contact for each federal agency with which they have a contract.
- Providing a communication to impacted employees about the new requirements being implemented, with more details to follow as contracting agencies roll out their agency, contract or site-specific requirements.
- Assessing how the new requirements may combine, overlap or conflict with current state or local mandates, or the contracts’ own requirements, on vaccines, testing or other COVID-19 safety protocols.
- Reviewing accommodation policies and interactive process regarding vaccinations, testing and mask requirements and preparing to engage in this process with employees and, potentially, contracting officers.
- Determining whether any costs associated with these obligations can be billable to the federal agency.
- Preparing for bargaining obligations that may exist with unionized workforces.
- Reviewing federal, state and local wage and hour law implications with respect to time taken for testing and related expenses.

Vaccine Mandate-Related Employee Benefit Compliance Issues

An employer that provides or otherwise pays for vaccination or testing for employees will need to consider the following issues:

- Does paying for vaccination/testing create a group health benefit that is subject to ERISA, COBRA and HIPAA?
- If so, how will the employer comply with the plan documentation, employee disclosure, COBRA, HIPAA privacy and other compliance requirements applicable to group health plans?
- Will HIPAA require that the employer obtain an authorization from each employee to receive or use the vaccination or testing results for employment purposes?

Given the lack of specific guidance in this area, these determinations should be made with the assistance of legal counsel.

Employers that have already implemented or are considering implementing a vaccination-based wellness program (such as a group health plan premium surcharge or discount) should consider the impact a vaccination or testing mandate may have on that program. Depending on the design of the wellness program, the vaccination or testing mandate could cause the program to fail to meet certain legal requirements – or render the program moot.

Proof of Vaccination or Negative Test Requirement for Entertainment Venues

The Plan requires entertainment venues, including sports arenas, large concert halls and other venues where large groups gather, to require that patrons be vaccinated or show a negative test upon entry. This directive may preempt some state and local prohibitions on businesses asking patrons to verify their vaccination status.

Access to Testing

To expand access to testing, the Plan calls for a federal investment of nearly \$2 billion to procure 280 million rapid and at-home tests, increasing the availability of these tests for employers that require their employees to undergo regular testing. Medicaid will also be required to cover at-home tests. In many cases, however, employers that offer employees the option of regular COVID-19 testing in lieu of vaccination will face costs associated with such tests, including the possibility that employees in some

jurisdictions must be compensated for time spent undergoing such tests.

FOR MORE INFORMATION

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Additional Resources

We have assembled a firmwide multidisciplinary task force to address clients' business and legal concerns and needs related to the COVID-19 pandemic. Please see our [COVID-19 Task Force](#) page for additional information and resources.

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