

President Biden Mandates Vaccines for Tens of Millions of Workers

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As part of [a series of actions](#) aimed at halting the spread of COVID-19, including the highly contagious Delta variant, President Biden recently announced that the Occupational Safety and Health Administration (OSHA) is developing a rule that will require all employers with 100 or more employees to ensure their workforce is fully vaccinated or require any workers who remain unvaccinated to produce a negative test result on at least a weekly basis before coming to work.

Additionally, President Biden signed two executive orders on September 9, 2021, to require vaccinations for federal executive branch employees, some federal contractor employees, and workers in hospitals and other institutions that receive federal funding. Collectively, these efforts will affect more than 90 million workers.

Vaccine Mandates for Employers with 100+ Employees

President Biden directed OSHA to issue an Emergency Temporary Standard (ETS #2) to require all employers with 100 or more employees to ensure their workers are vaccinated or tested weekly. This will be the second ETS issued by OSHA since the onset of the pandemic: the first ETS ([ETS #1](#)) is applicable to health care employers and those with health care services within their places of employment. ETS #1 is set to expire on December 31, 2021.

Draft regulations have not been released, and neither President Biden nor OSHA have provided any specific details; although during a recent Q&A Session with the Solicitor of Labor, Seema Nanda (the top attorney responsible for enforcement actions of OSHA regulations), OSHA representatives did state that they expect the release within “the coming weeks.” Once issued, ETS #2 could become effective almost immediately. At this point, there is no guidance on whether employers must pay for the vaccinations and the tests, or how OSHA will enforce the ETS.

Vaccine Mandates for Federal Employees

President Biden’s [Executive Order on Requiring Coronavirus Disease 2019 Vaccinations for Federal Employees](#) requires that all federal executive branch employees be vaccinated against COVID-19,

“subject to such exceptions as required by law.” The Safer Federal Workforce Task Force (Task Force) will issue guidance within seven days of the order’s issuance addressing agency implementation of the COVID-19 vaccination programs.

Vaccine Mandates for Federal Contractors

President Biden’s [Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors](#) requires some federal contractors and subcontractors be vaccinated against COVID-19. To accomplish this, the order requires that executive departments and agencies ensure that federal contracts include a clause in their contracts or contract-like instruments specifying that the contractor or subcontractor shall comply with the guidance published by the Task Force. The clause will apply to **any** workplace location in which an individual is working “on or in connection with a Federal Government contract or contract-like instrument.”

By September 24, 2021, the Task Force shall “provide definitions of relevant terms for contractors and subcontractors, explanations of protocols required of contractors and subcontractors to comply with workplace safety guidance, and any exceptions.” The Task Force’s guidance must then be approved by the Director of the Office of Management and Budget.

Further, the Federal Acquisition Regulatory Council will amend the Federal Acquisition Regulation to require in all contracts a clause mandating compliance with the Task Force guidance. It must take initial steps to prepare offices for the use of the clause by October 8, 2021. For contracts entered into on or after October 15, 2021, that are not subject to the Federal Acquisition Regulation, federal agencies are to take steps to ensure that the contracts and contract-like instruments include the clause mandating compliance with Task Force guidance.

The order applies to new contracts and contract-like instruments, new solicitation for contracts or contract-like instruments, extensions or renewals of contracts or contract-like instruments, and the exercise of an option on an existing contract or contract-like instrument, if:

- it is a procurement contract or contract-like instrument for services, construction, or a leasehold interest in real property;
- it is a contract or contract-like instrument for services covered by the Service Contract Act;
- it is a contract or contract-like instrument for concessions, including any concessions contract excluded by department of Labor regulations at 29 C.F.R. 4.133(b); or
- it is a contract or contract-like instrument entered into with the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their departments, or the general public.

The order does not apply to:

- grants;
- contracts, contract-like instruments, or agreements with Indian Tribes under the Indian Self-Determination and Education Assistance Act;

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- contracts or subcontracts whose value is equal to or less than the simplified acquisition threshold, which threshold is currently \$250,000.00;
 - employees who perform work outside the United States or its outlying areas, as defined in the [Federal Acquisition Regulation](#); or
 - subcontracts solely for the provision of products.

The order applies to contracts or contract-like instruments (as described above) entered into, extended, renewed, or option exercised after October 15, 2021. It borrows the definition of “contract or contract-like instrument” from the Department of Labor’s proposed rule, [Increase the Minimum age for Federal Contractors](#).

Vaccine Mandates for Health Care Workers at Medicare and Medicaid Participating Hospitals and Other Health Care Settings

Finally, President Biden announced The Centers for Medicare & Medicaid Services (CMS) will require COVID-19 vaccinations for workers in most health care settings that receive Medicare or Medicaid reimbursement, including but not limited to hospitals, dialysis facilities, ambulatory surgical settings, and home health agencies. This new requirement builds on CMS’s existing vaccination requirement for nursing facilities, and will apply to nursing home staff as well as staff in hospitals and other CMS-regulated settings, including clinical staff, individuals providing services under arrangements, volunteers, and staff who are not involved in direct patient, resident, or client care. These requirements will apply to approximately 50,000 providers and cover a majority of health care workers across the country.

What Employers Should Do

Although litigation is anticipated over the enforcement of this new ETS, there is historical legal precedent for the government to require inoculations, including from a 1905 U.S. Supreme Court decision—[Jacobson v. Massachusetts](#). This decision was cited earlier this year by a federal appellate court when it [upheld](#) a vaccination mandate applicable to students at Indiana University.

Employers with 100 or more employees should not wait to act until OSHA issues ETS #2. No matter what an employer’s current policy and procedure is with regard to employee vaccinations, employers should seek immediate legal assistance to prepare for the ETS and ensure that they have the right policies and procedures in place to comply with the forthcoming rule. All employers in the health care industry should already be doing the same.

Additionally, any employer that might have a contract or contract-like instrument covered by President Biden’s executive order should seek legal advice to confirm whether a mandatory vaccine policy is necessary, and, if one is, how to best implement it.

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