President Biden is ramping up measures aimed at slowing the spread of COVID-19. He announced a series of new actions on September 9, 2021, including a plan
to require all employers with 100 or more employees to ensure their workforce is fully vaccinated or require any unvaccinated workers to produce a negative test result on at least a weekly basis. The mandate will be implemented through an Emergency Temporary Standard (ETS) issued by the Occupational Safety and Health Administration (OSHA). President Biden also recently issued two executive orders, one requiring vaccinations for all federal executive branch employees, and another requiring vaccinations for some employees of federal contractors and of hospitals and other institutions that receive federal funding.

On August 5, 2021, the California Department of Public Health became the first state to issue an order requiring COVID-19 vaccinations for healthcare workers. And other states have followed suit, requiring some or all healthcare workers to be vaccinated, including New Jersey, Washington, New York, New Mexico, Rhode Island, Maryland, Illinois, Colorado, and Washington D.C.

These most recent actions have prompted several questions, especially given how much remains unknown. OSHA has not yet issued the new ETS announced by the White House. We know more about the requirements applicable to federal contractors, thanks to the White House Executive Order and guidance issued by the Safer Federal Workforce Task Force. Based on what has been released to date, we have compiled a list of frequently asked questions and answers based on the guidance currently available. We will update these answers as more information becomes available.

HEALTH CARE EMPLOYERS

Q: How does this impact health care employers subject to OSHA’s existing healthcare-related emergency temporary standard?

A: On June 10, 2021, OSHA issued an ETS applicable to certain healthcare settings. The healthcare ETS mandated numerous prevention strategies—including screening, social distancing, physical barriers, and training—but did not go so far as to require vaccinations or weekly testing.

Those employers covered by the healthcare ETS will thus have to undertake a new analysis to determine if they also fall under the large-employer mandate and/or the expanded Centers for Medicare & Medicaid Services (CMS) mandate, detailed below. In other words, compliance with the current healthcare ETS will not suffice to comply with the new rules for some employers.

Q: Are any new requirements specific to health care employers?

A: Yes. As we previously reported, President Biden announced that 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 healthcare workers across the country. The guidance from CMS has not yet been issued.

**MANDATE FOR PRIVATE EMPLOYERS WITH 100 OR MORE WORKERS**

**Q:** How do you count workers for the 100-employee threshold?

**A:** President Biden’s announcement did not clarify how to count workers for the 100-employee threshold, nor has OSHA released draft regulations to date. Until otherwise defined, it should be assumed that all U.S. workers will be counted toward the 100-employee threshold, based on the aggregate number of workers across all sites.

**Q:** When will the mandate take effect?

**A:** We expect the ETS will be issued in the coming weeks, and then employers will have a certain amount of time to comply after the regulation is issued. Employers may be left with a very tight timeframe to come into compliance, as the ETS applicable to healthcare workers provided employers only 14 days to comply with most requirements and 30 days to comply with other requirements. Multiple companies have already requested that Labor Secretary Marty Walsh allow 90 days of lead time for employers to implement the forthcoming mandate.

**Q:** How long will the ETS last?

**A:** The ETS will be effective until OSHA issues a permanent rule.

**Q:** How will employers comply with the mandate, and what exceptions are expected?

**A:** To comply with the mandate, employers must require that their employees submit proof of their full vaccination status or produce a weekly negative test result as a condition of continued employment. Employers must generally provide exemptions to the vaccine requirement for employees with disabilities or medical conditions that preclude the vaccine and those with sincerely held religious beliefs, observances, or practices that conflict with getting vaccinated. But, the testing alternative under the ETS would accommodate those who cannot be vaccinated.

**Q:** Will the mandate be challenged?

**A:** Yes. We fully expect that the forthcoming mandate will be met with fierce legal challenges from state governments and private businesses alike. We do not anticipate that constitutional challenges to the vaccine mandate will be successful for many reasons, but most likely because there is a (weekly) testing alternative to receiving the vaccine. Federal courts have also rejected previous constitutional challenges to vaccine mandates, provided that they are not discriminatory in
nature. For example, the Seventh Circuit refused to issue an injunction pending the outcome of a constitutional challenge to Indiana University’s vaccine mandate.

The most straightforward challenge to President Biden’s vaccine mandate will likely concern the validity of the forthcoming OSHA regulation itself, in the form of an ETS, which is intended to address emergency situations. Since its inception, OSHA has only issued ten (10) emergency standards, with varying levels of legal success, leaving the anticipated ETS vulnerable to legal challenge considering the lack of precedent. In addition, OSHA is tasked with regulating workplace safety on a national level. If the vaccine mandate is not carefully tailored to address a clear national workplace safety risk, there will be grounds to challenge the rule, as spikes and declines in COVID-19 cases have varied considerably by region.

Challenges to the mandate could take years to litigate, and in the meantime, steep fines may be imposed for non-compliance. We therefore anticipate that employers will largely comply with the ETS when issued rather than rely on the prospect of legal challenges.

**Q: How will the mandate be enforced?**

**A:** There are no specifics on how the anticipated OSHA mandate will be enforced. However, we anticipate that OSHA will use its authority to investigate complaints and conduct workplace inspections, as well as issue penalties for violations of workplace standards and for failure to abate once a citation has been issued.

**Q: What do employers need to do right now?**

**A:** Employers should be creating a vaccination policy that complies with the anticipated OSHA mandate, i.e., requiring your employees to provide proof that they are fully vaccinated, or require them to submit to weekly testing, once the rule takes effect. Also, employers may want to consider whether it is in their interest to mandate vaccines for all employees and forego the testing option. Knowledge of the percentage of fully vaccinated workers will aid in this decision. Therefore, employers should begin collecting this information immediately if they have not already.

It is also important that employers begin developing policies and best practices for collecting employees’ proof of vaccination and test results as well as procedures to address requests for medical and religious accommodations.

**Q: Will any employers be exempt from the mandate?**

**A:** The announcement from the Biden Administration did not address this issue, but it will likely cover all employers with more than 100 employees. For the time being, it is safe to assume all employers will be subject to the mandate, so long as they meet the 100-employee threshold.

**Q: Will any employees be exempt from the mandate, such as fully remote employees?**
A: While we do not anticipate that the mandate will apply to fully remote workers, it should be noted that the Executive Order applicable to federal contractors does require that even fully remote workers covered by the order be vaccinated.

We also expect OSHA to announce further details concerning employees who work remotely part of the time or need to travel or visit customers’ locations as part of their jobs.

Q: How should employers confirm employees’ vaccination status?

A: President Biden’s announcement did not state how employers may confirm whether their employees are vaccinated. Some states have outlined that employers may request a copy of an employee’s COVID-19 vaccine card, request to view an employee’s vaccine record, or have an employee sign an attestation of vaccination. Pending further guidance from OSHA, these methods of confirming employee vaccination status are options to consider. Again, notably the federal contractor guidance limits what can be accepted as proof of vaccination status to (a) a copy of the record of immunization from a health care provider or pharmacy, a copy of the COVID-19 Vaccination Record Card (CDC Form MLS-319813_r, published on September 3, 2020), (b) a copy of medical records documenting the vaccination, (c) a copy of immunization records from a public health or State immunization information system, or (d) a copy of any other official documentation verifying vaccination with information on the vaccine name, date(s) of administration, and the name of health care professional or clinic site administering vaccine.

Q: How should employers maintain records of employees’ vaccination status and negative test results?

A: Employees’ vaccination status and test results constitute confidential medical information. This information must be kept confidential and secure, separate from an employee’s personal file.

Q: How should employers prepare to conduct weekly testing?

A: Employers who choose not to mandate vaccination but have 100 or more employees should begin to consider how to roll-out a mandatory testing program. Things to consider are: (1) the cost and administrative burden of offering on-site testing for employees, (2) permitting employees to self-administer tests at home (assuming such at home tests comply with the ETS), or (3) sending them to an off-site third-party location. In addition, establish policies and best practices for collecting and reviewing test results—consider using an app to tracks test results or identify a team to receive and review test results manually. Employers should be prepared to maintain results as confidential medical information.

Q: What are the expected costs associated with weekly testing?

A: Depending on whether the anticipated OSHA mandate requires employers to cover the cost of weekly testing of unvaccinated employees, employers will want to consider low cost/convenient options. Employers may consider directing employees
to public sites that provide COVID-19 testing. Walmart, Amazon, and Kroger have indicated they will sell home tests at cost for the next three months.

Additionally, the Department of Labor (DOL) has stated that employers must pay non-exempt employees for time spent undergoing testing during the employee’s workday. Specifically, the DOL issued guidance stating: “undergoing COVID-19 testing may be compensable because the testing is necessary for them to perform their jobs safely and effectively during the pandemic. For example, if a grocery store cashier who has significant interaction with the general public is required by her employer to undergo a COVID-19 test on her day off, such time is likely compensable because it is integral and indispensable to her work during the pandemic.” Additionally, many states may require employees to be compensated for their time in getting tested.

**REQUIREMENTS FOR FEDERAL CONTRACTORS**

**Q: What contracts are covered by the Executive Order?**

**A:** The Executive Order applies to contracts or contract-like instruments entered into, extended, renewed, or option exercised after October 15, 2021. 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.

**Q: What contracts are NOT covered by the Executive Order?**

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;
- 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

prime contracts and subcontracts solely for the manufacture of products.

According to the Safer Federal Workforce Task Force guidance released on September 24, 2021, the Executive Order applies to solicitations issued on or after October 15, 2021, but does not apply to FAR-based contracts issued before November 14, 2021, unless the contract is awarded pursuant to a solicitation issued after October 15. Agencies are encouraged, but not required, to apply the Executive Order to contracts awarded between October 15 and November 14.

Q: What employees must get vaccinated?

A: According to the Safer Federal Workforce Task Force guidance released on September 24, 2021, which we have previously written about here, the workplace protocols will apply to all covered contractor employees in workplaces with individuals working on or in connection with a government contract or subcontract, regardless whether these employees themselves directly work on the contract, and this covers even those employees working remotely if such employees work on or in connection with a government contract or subcontract.

Q: Is there a regular testing alternative like there is for private employers with 100+ employees?

A: The Safer Federal Workforce Task Force guidance released on September 24, 2021 does not include a testing option in lieu of vaccination. In other words, vaccination is the only means for compliance.

Q: Can I terminate an employee who refuses to comply?

A: It depends. Employers will have the ability to terminate an employee for refusing to comply with the mandatory vaccination requirements of the Executive Order unless the employee has requested an accommodation based on the employee’s medical condition or sincerely held religious belief. Such employee accommodation requests must be evaluated on a case-by-case basis.

Q: Are any employees exempt from the requirement?

A: Yes, as provided above, certain employees who are not in a location in which the government contract work is performed may be exempted. In addition, the Executive Order recognizes that employers must consider exemptions for an employee who cannot be vaccinated because of a medical condition or sincerely held religious belief.

But, as we stated above, even fully remote employees are covered by the vaccination mandate.

Q: What should I do about religious and medical exemptions?
**A:** Employers should evaluate each request individually and make determinations whether such accommodations requests are reasonable and should be granted.

**Q:** Will the mandate be challenged?

**A:** While this federal contractor mandate could face a legal challenge, any challenge will be likely overshadowed by the vaccination requirement for employers with 100 or more employees. The President traditionally has been able to use Executive Orders and regulations to dictate requirements for federal contractors, like federal employees, and these have usually been upheld as a benefit of doing business with the federal government.

**Q:** What do federal contractors need to do right now?

**A:** Federal contractors should review their proposed federal contracts and be prepared for amendments to their existing contracts. Federal contractors should be collecting vaccination information from their employees and begin preparing mandatory vaccination policies.

**CONSIDERATIONS FOR IMPLEMENTING MANDATORY VACCINE PROGRAMS**

**Q:** Do you anticipate pursuing federal contracts (i.e., becoming a federal contractor) in the near future?

**A:** As discussed above, many federal contractors will be required to implement mandatory vaccine programs. Therefore, if your business anticipates pursuing federal contracts that are subject to the vaccination requirement, you should strongly consider implementing a mandatory vaccine program sooner than later. Whether or not an employer has a mandatory vaccine program may be a factor in the award of the federal contact.

**Q:** Do you anticipate your workforce growing to 100 or more employees in the near future?

**A:** As discussed above, OSHA is expected to mandate mandatory vaccine programs for employers with 100 or more employees. Employers should evaluate the likelihood of reaching the 100 employee threshold in the near future.

**Q:** What should employers do about religious and medical exemptions?

**A:** As discussed above, Employers must generally provide exemptions to the vaccine requirement for employees with disabilities or medical conditions that preclude the vaccine and those with sincerely held religious beliefs, observances, or practices that conflict with getting vaccinated. All such requests should be considered on a case-by-case basis. Therefore, employers should be prepared to address questions about accommodations by having standard forms and established processes for collecting and reviewing requests. Several of the factors to consider
with respect to accommodation requests include weekly testing alternatives, mandating the wearing of masks, ability to socially distance, and risk of transmission (by co-workers and the public) at the workplace.

Q: **How should employers keep track of which employees are fully vaccinated, which employees are getting regularly tested, and which employees are not complying?**

A: Some employers are using apps or electronic tracking, while others are keeping track manually. In either case, the employer should maintain the sensitive information just as it treats other confidential employee medical information.

Q: **What information do employers need to collect from employees who say they are already fully vaccinated?**

A: This answer depends on whether the employer is a federal contractor or a private employer. Federal contractors must review one of the following documents for employees performing work related to the federal contract or employees working in the same facility as employees performing work on the federal contract: (a) a copy of the record of immunization from a health care provider or pharmacy, (b) a copy of the COVID-19 Vaccination Record Card (CDC Form MLS-319813_r, published on September 3, 2020), (c) a copy of medical records documenting the vaccination, a copy of immunization records from a public health or State immunization information system, or (d) a copy of any other official documentation verifying vaccination with information on the vaccine name, date(s) of administration, and the name of health care professional or clinic site administering vaccine. An employee’s signed attestation of vaccination is not permitted for federal contractors.

Though not yet known, it is likely that the OSHA ETS will have similar requirements.

Q: **Do employers need to pay employees for their time spent getting vaccinated or for their time spent recovering from an adverse reaction to the vaccine?**

A: As discussed above, employers will be required to pay non-exempt employees for time spent getting vaccinated if the vaccine is mandatory, according to DOL guidance. It is also likely that the OSHA ETS will provide for expanded paid time off for employees’ time spent getting vaccinated and any additional work days it takes the employee to recover from effects of the vaccination. Some states already have requirements for COVID paid sick leave that cover such vaccination time.

Q: **Will employers be liable if an employee suffers an adverse reaction to the vaccine?**

A: Generally, no. Also, if an employee needs to miss work due to an adverse reaction to the vaccine, the incident does not need to be recorded on an OSHA 300 Log, according to OSHA’s current guidance which states it will reevaluate its position in May 2022.
Q: Can an employer terminate an employee for falsely claiming to be vaccinated?

A: Yes, an employer generally can terminate an employee who is dishonest and falsely claims to be vaccinated when he or she has not, or if the employee submits false medical records indicating they were vaccinated.

Q: Going forward, can an employer refuse to hire anyone who is not fully vaccinated?

A: Yes, an employer generally can refuse to hire an employee who refuses to become vaccinated, subject to certain accommodations that might apply (as discussed above).

Q: Should employers be worried about losing members of their workforce (on top of the existing labor shortage) if they mandate vaccination, if not subject to one of the government mandates?

A: Possibly. For a variety of different reasons, many individuals are opposed to getting vaccinated. Further, the lower rate of vaccinations are more prevalent in certain geographic areas and/or in certain industries. Accordingly, there is potential risk that certain employees will choose termination over getting vaccinated. To better understand the risk employers should engage in programs to educate employees as to the safety of the vaccine and actively engage with employees as to the basis for their reservations/opposition to the vaccine.

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