

Biden's New COVID-19 Action Plan and Proposed OSHA Emergency Temporary Standard: What Does It Mean For Private-Sector Employers?

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Rules governing the employment sector are evolving more than ever thanks to the COVID-19 pandemic. In less than a month since we published our last article discussion, 10 Considerations for Employers Contemplating Mandatory Vaccination Policies, President Biden released a comprehensive new COVID-19 Action Plan that, among other things, announced imminent vaccine mandates covering broad categories of employees in both public and private sectors. While such rapid changes in federal COVID-related regulations and guidance seem fairly commonplace for these pandemic-era times, Biden's Action Plan takes a bold new step towards the United States' efforts to increase COVID-19 vaccination rates by proposing sweeping vaccination mandates not only for federal government employees and federal contractors, but for employees of large private-sector employers as well.

Specifically, the Action Plan directs the Department of Labor's (DOL) Occupational Safety and Health Administration (OSHA) to develop an Emergency Temporary Standard (ETS) requiring private-sector employers with 100 or more employees "to ensure that 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." The ETS will also require covered employers to provide paid time off to employees to get vaccinated and recover from any side effects associated with getting vaccinated. The impact of this ETS is expected to be substantial—the administration estimates that over 80 million workers in private-sector businesses will be covered by its requirements. Because the ETS has not yet been issued, however, much ambiguity remains as to exactly how the ETS will be implemented and what, if any, penalties covered employers may face for noncompliance.

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With the impending publication of the ETS as contemplated in Biden's Action Plan looming, many private-sector employers, especially those large enough to fall under the ETS' proposed mandate, will need to move quickly from the consideration stage and start promptly taking action towards the implementation of mandatory vaccination policies for their employees—whether they like it or not. And while some such employers may not take kindly to having the federal government tell them what to do, in many ways the ETS benefits employers by taking the pressure off them having to make such difficult policy decisions for their workforce themselves. Indeed, many large employers who may have wanted to implement vaccine mandates sooner for health and safety reasons but were hesitant to do so out of fear of potential pushback can now divert that blame and resulting backlash elsewhere, and, since many of the competitors of covered employers are likely to be subject to the ETS' requirements too, the risk posed to employers of losing talent as a result of rolling out such a mandate is likely to be minimized to some extent as well. For employers who have already rolled out vaccine mandates for their employees prior to the president's latest announcement, the ETS will serve to affirm their decision to do so.

What's more, the ETS mandates may help to enable employers to accomplish full (or close to it) vaccination status of their workforce, thereby greatly reducing the risk of liability and potential harm posed by incidents of COVID-19 exposure in the workplace. This is especially critical for employers with offices in areas of the country with rapid community spread, where incidents of exposure can sometimes feel unavoidable in a large office environment. Still, the Action Plan and proposed ETS are sure to face a significant political pushback and are expected to face court challenges in the coming weeks. Nonetheless, speaking as someone who lives in Orlando, FL—a city so inundated with COVID cases at present that it is actively pleading with its residents to conserve water to ensure that it has enough for the amount of oxygen needed to power the ventilators in use at our hospitals—it's hard for this author not to see a silver lining to this Action Plan, even though many employers will surely lament its imposition.

Employers who have questions about their legal obligations under Biden's new Action Plan, the proposed ETS, or the best practices for implementing mandatory vaccination policies for their workplace should contact Bailey Glasser's Labor & Employment team for assistance.

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