



Biden Pushes OSHA And Employers Along His ‘Path Out Of The Pandemic’

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Last week, President Joe Biden publicly called for the Occupational Safety and Health Administration (OSHA) to develop an Emergency Temporary Standard (ETS) requiring all employers with 100 or more employees to ensure their workers are fully vaccinated or require workers to produce weekly test results negative for COVID-19. The ETS also is to require employers to provide paid time off to workers seeking vaccination or to recover from vaccination.

The administration estimates that this unprecedented move will result in compulsory vaccination for an additional 80 million Americans working for private employers.

Biden’s announcement signals round two of his push for OSHA to issue sweeping pandemic planning requirements impacting workplaces across the country. In January, the White House issued an executive order requiring the Secretary of Labor to issue, through OSHA, revised safety guidance to employers on mitigating the risk of transmissibility of and illness from COVID-19, and then to consider and issue an emergency temporary standard and enforcement guidelines. At that time, the prevailing debate was over mask mandates.

The resulting June 21, 2021, publication of OSHA’s ETS required pandemic safety planning, including masking, for most healthcare settings. OSHA encouraged vaccination through the provision of mandatory paid time for

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receiving the vaccine and for any side effects. However, OSHA declined to extend the ETS to other sectors of the economy, and largely deferred to the Centers for Disease Control (CDC) for guidance on preventative measures to reduce the transmissibility of the virus.

Since then, the CDC has reported widespread transmission of the delta variant, which accounts for over 99 percent of COVID-19 cases in the U.S. As a consequence, the CDC has recommended universal masking throughout the country except for a handful of counties. While the CDC promotes the safety and efficacy of existing COVID-19 vaccinations, it too has stopped short of recommending universal vaccination.

The administration now is directing federal agencies to take mandates further. President Biden issued two executive orders requiring vaccines for [most federal employees](#) and [federal contractors](#). As to federal contractors, the executive order is intended to be broadly applied to most federal contracts and subcontracts with limited exceptions. The administration is requiring the White House Safer Federal Workforce Task Force to issue guidance on COVID-19 safety protocols for federal contractors by Sept. 24. Although not specifically stated in the executive order, President Biden made clear that such protocols will include vaccination requirements.

Federal agencies would have until Oct. 8 to update policies and take necessary steps to comply with the guidance. It is anticipated that compliance will be required for new federal contracts, as well as extensions, renewals, etc., entered after Oct. 15. However, much remains to be seen in forthcoming guidance.

The administration also announced that it is requiring the Centers for Medicare & Medicaid Services to mandate vaccination or weekly testing for healthcare workers, service providers and volunteers in health care settings that receive Medicare or Medicaid reimbursement.

But of even greater scope, the White House now seeks to leverage OSHA's nationwide workplace safety regulations to issue what is in effect a universal vaccination mandate, and to back that mandate up with OSHA's enforcement capabilities – which are already stretched thin by pandemic-related complaints and investigations. Those enforcement capabilities include stiff fines, with the White House seeking up to \$13,653 per violation for a “serious” citation.

The clock now is running for government and the private sector to act on the administration's initiative. OSHA first must determine that workers are in grave danger due to agents that are physically harmful or new hazards, and that an emergency standard is needed to protect them. If so, OSHA may publish a new ETS in the Federal Register. The ETS will go into effect immediately upon publication. However, it will be subject to a public comment period of 30 to 60 days, likely public hearings, and a final ruling within six months. Individuals believing themselves to be aggrieved by the ETS may, within 59 days of publication, file a petition for judicial review with their U.S. Court of Appeals. Constitutional challenges are likely to be raised by some states.

OSHA's enforcement of a new ETS requiring universal vaccination among employers will likely face delays and roadblocks, leaving the question of a national vaccination mandate in the private sector far from settled. Our team of labor and employment attorneys have been actively monitoring and analyzing national and local regulatory and public health developments, and

helping employers navigate the daily challenges of this pandemic environment. We will continue to bring you updates on these critical areas of safety compliance.