

Biden Administration To Require COVID-19 Vaccinations for Large Employers

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President Biden announced at a press conference at 5:00 p.m. on September 9, 2021, a new, six-pronged national strategy to combat COVID-19 while keeping businesses and schools open.

A link to the Plan can be found here:

<https://www.whitehouse.gov/covidplan/>

President Biden directed the United States Department of Labor's Occupational Safety and Health Administration ("OSHA") to issue an Emergency Temporary Standard ("ETS") requiring that all employers with more than 100 (100+) employees either (1) ensure that their workers are vaccinated against COVID-19; or (2) test their unvaccinated employees at least weekly (with said test producing a negative test result before the unvaccinated employee is allowed to come to work). For employers with multiple locations or related companies that individually employ less than 100 employees, but collectively employ 100+ employees, guidance has not yet been issued regarding whether such locations and/or related companies are to be combined for purposes of the 100+ employee threshold. It is also yet to be determined whether employees who work exclusively from home will be subject to the requirements.

The President also has signed an Executive Order requiring all employees of the executive branch of the federal government and contractors who do business with the federal government to now have a fully-vaccinated workforce.

The Centers for Medicare & Medicaid Services ("CMS") is taking action to require workers in most healthcare settings (those that receive Medicare or Medicaid reimbursement) to be vaccinated (without the option of weekly testing). This requirement will apply to most hospital, dialysis facility, ambulatory surgical, and home health agency employers. The Plan explains that this "action builds on the vaccination requirement for nursing facilities recently announced by CMS, 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." It is yet to be determined which health care employers are not subject to this forthcoming mandate.

The Plan directs the Department of Health and Human Services ("HHS") to undertake rulemaking mandating

vaccinations for teachers and staff at Head Start and Early Head Start Programs.

The Plan also describes several enhancements being made to resources for business owners. The Small Business Administration ("SBA") is increasing the maximum amount that a small business can borrow under the COVID Economic Injury Disaster Loan ("EDIL") program from \$500,000.00 to \$2,000,000.00. These funds can be used to "hire and retain employees, purchase inventory and equipment, and pay off higher-interest debt." The SBA "will ensure that no small business has to start repaying these loans until two years after they receive the funding." To ensure that "Main Street businesses" have additional time to access these funds, the SBA is offering an exclusive, 30-day window for these businesses wishing to borrow \$500,000.00 or less. Finally, a Community Navigator Program is being started to connect small businesses to the federal, state, and local resources that they need.

Lawsuits will most certainly be filed challenging the anticipated rules. A federal judge could issue an injunction prohibiting the implementation of OSHA's (forthcoming) rules. However, whether a ruling in any such lawsuit will be made before OSHA's (forthcoming) deadline goes into effect is unknown. In the interim, larger employers should prepare to comply with the vaccine mandate and frequently check for further guidance on unsettled issues such as whether the employee count will include part-time, full-time, and temporary workers, who will bear the financial costs for weekly testing, whether the vaccine mandate covers remote workers, and whether time spent obtaining a test and awaiting results is compensable time.

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