

Biden Administration COVID-19 Vaccine Mandates

OSHA Emergency Temporary Standard (ETS)

- Businesses with 100 or more employees
- Mandates vaccination or (weekly) testing of un-vaccinated employees (most likely rapid/antigen tests)
- Expected to be issued in the next couple of weeks, currently in review by Office of Management and Budget (no public review process for ETS)
- VOSHA can either adopt or expand on these mandate requirements (within 30 days)

Executive Order Requiring Federal Contractors to Vaccinate All Employees

- mandates that all employees of federal contractors be vaccinated by December 8th or the first day of performance of any new covered contract
- Allows for certain medical & religious exemptions
 - Under exemptions testing and other measures (i.e. masking & social distancing) shall be implemented
 - “Other” Exemptions – Personal, political, secular, etc. not required to be accommodated

Biden Administration COVID-19 Vaccine Mandates

- Businesses will need to provide proof of vaccination status (copy of vaccination card or attestation)
- No clear guidance as of yet who covers the cost of testing & time it takes for employees to get tested (i.e. employer or employee), however the ETS will require employers to provide paid time off for workers to get vaccinated.
- Violations of the new ETS would be likely be considered either “serious” or “willful.” The current maximum penalty for a “serious” violation is \$13,653 per violation. The current maximum penalty for a “willful” violation is \$136,532. 29 C.F.R. § 1903.15(d), 86 Fed. Reg. 2964 (Jan. 14, 2021).



Biden Administration COVID-19 Action Plan

- On September 9, 2021, President Biden announced his six-pronged COVID-19 Action Plan.
 - Vaccinating the Unvaccinated;
 - Further Protecting the Vaccinated;
 - Keeping Schools Safely Open;
 - Increasing Testing & Requiring Masking;
 - Protecting our Economic Recovery; and
 - Improving Care for Those with COVID-19.
- **The First Prong: Vaccinating the Unvaccinated**
 - Requiring All Employers with **100+ Employees** to Ensure Employee Vaccination or Testing
 - Requiring Vaccination for Federal Workers and Certain **Federal Contract Employees**
 - Requiring Employers to Provide **PTO** for Employees to Get Vaccinated

Source: Seyfarth Shaw LLP

Proposed OSHA Emergency Temporary Standard



- All employers with 100 or more employees will have to require that workers:
 - Are vaccinated; or
 - Undergo weekly COVID-19 testing
- Employers can require vaccinations with no testing option
 - Subject to accommodations
- Employers / employees covered
 - “100 or more employees” will be counted company-wide, not by worksite
 - Will likely include seasonal employees (employer should count peak employment during prior year)
 - The ETS will **not** apply to employees who never come in to work (i.e., **fully** remote)
 - Will apply to employees who come into work (even once) or who work outside the office with others
- Proof of vaccination will likely be met with attestation
- Employers will have to provide time off for vaccination

Source: Seyfarth Shaw LLP

What's Next for the ETS



- ETS will be issued in “coming weeks”
 - Health care ETS took six months from announcement to becoming effective
 - Biden Administration seems to have a faster process in mind
- Immediate effect in states where federal OSHA has jurisdiction
 - Health care ETS phased in requirements at 15, 30 days
 - Note that Montana, Florida, and Texas are all covered by federal OSHA
- OSHA state plans will have 30 days to adopt as effective or more restrictive rule i.e. Vermont VOSHA

Source: Seyfarth Shaw LLP



September 24, 2021 Safer Federal Workforce Task Force Guidance



- Covered contractors: primes and subs who are party to covered contracts.
- Covered contractor employees: any full-time or part-time employee of a covered contractor working on or in connection with a covered contract or working at a covered contractor workplace. **This includes employees of covered contractors who are not themselves working on or in connection with a covered contract.”**
- Residences are not covered workplaces, **BUT remote workers are nonetheless subject to the vaccine mandate.**
- Requires vaccination – subject to accommodations - and documentation.
- Employee vaccination deadline of **December 8, 2021.**
- **Agencies are strongly encouraged to apply the Guidance into contracts that are not covered by the order, as well as into existing contracts and contract-like instruments prior to the date upon which the order requires inclusion of the clause.**

Source: Seyfarth Shaw LLP

Risk of Non-Compliance



Penalties for Non-Compliance:

- Breach of Contract
- Termination for Default
- False Claims Act
- Suspension/Debarment
- CPARS

Source: Seyfarth Shaw LLP

Accommodations Issues – Main Types of Exemptions

Medical/Disability

- ADA, Rehabilitation Act, Title VII, and many state laws govern protections and accommodations based on disability and/or medical conditions
- Employers required to give **reasonable accommodations** absent **undue hardship**
- Generally cannot exclude individuals from the workplace for health or safety reasons unless “**direct threat**” even with reasonable accommodation

vs.

Religious

- Title VII protects employees who have a sincerely held religious belief, practice, or observance that prevent them from taking a vaccine
- Covers more than traditional religions
- Employers required to give **reasonable accommodations** absent **undue hardship** (more than de minimis cost)

The “Other” Exemptions – Personal, political, secular, etc. not required to be accommodated; not allowed under some mandates

Source: Seyfarth Shaw LLP