

ALERTS

The Biden Administration Issues Its COVID-19 Plan

09.2021

Overview: On September 9, 2021, the Biden Administration issued a variety of measures designed to promote COVID-19 safeguards and decrease the spread of the COVID-19 virus. Such measures included two Executive Orders and President Biden's COVID-19 Action Plan, all three of which greatly impact employers of varying sizes and industries. The Plan and each Executive Order are discussed in more detail below.

Executive Order on Mandatory Coronavirus Disease 2019 Vaccination for Federal Employees

The Executive Order on "Mandatory Coronavirus Disease 2019 Vaccination for Federal Employees" requires that each Executive agency implement a program to require COVID-19 vaccination for all of its federal employees, with exceptions only as required by law. The Executive Order states that the Safer Federal Workforce Task Force will issue guidance on how agencies are to implement the requirement within seven (7) days of September 9, 2021.

Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors

The Executive Order on "Ensuring Adequate COVID Safety Protocols for Federal Contractors" requires that federal contractors and subcontractors abide by the guidance published by the Safer Federal Workforce Task Force, slated to be issued by September 24, 2021. Such guidance will apply to any location in which an individual is working on, or in connection with, a federal government contract or contract-like instrument, that is: (a) a procurement contract or contract-like instrument for services, construction, or a leasehold interest in real property; (b) a contract or contract-like instrument for services covered by the Service Contract Act, 41 U.S.C. 6701 *et seq.*; (c) 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 (d) 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 dependents, or the general public.

There are very limited exceptions to the types of contracts or contract-like instruments that are covered by this Executive Order. Such exceptions include grants; contracts or 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 of \$250,000; employees who perform work outside of the United States or its outlying areas; and subcontracts solely for the provision of products.

President Biden's COVID-19 Action Plan Path Out of the Pandemic

THE BIDEN ADMINISTRATION ISSUES ITS COVID-19 PLAN

President Biden's COVID-19 Action Plan sets out a six-pronged comprehensive national strategy which includes the following goals: (1) vaccinating the unvaccinated; (2) further protecting the vaccinated; (3) keeping schools safely open; (4) increasing testing and requiring masking; (5) protecting our economic recovery; and (6) improving care for those with COVID-19. In addition to the broad goals identified above, President Biden's COVID-19 Action Plan also identifies several specific strategies. These include:

- Requiring all employers with 100+ employees to ensure that their workers are vaccinated or tested on a weekly basis with negative results before coming to work. OSHA will issue an Emergency Temporary Standard (ETS) to implement this requirement with expected further details on implementation. The type of employees (full-time, part-time, etc.) subject to this mandate, any exceptions to the rule, as well as other details employers should be aware of, will be explained in later guidance.
- Requiring the vaccination of all federal workers and for millions of federal contracts and subcontractors.
- Requiring COVID-19 vaccinations for over 17 million health care workers at Medicare and Medicaid participating hospitals and other health care settings. The Centers for Medicare & Medicaid Services (CMS) is also taking action to 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 follows on the heels of CMS' August 2020 Interim Final Rule that established testing and contact-tracing requirements for long-term care centers.[1] "Health care settings" is not defined in the COVID-19 Action Plan.
- Calling on large entertainment venues to require proof of vaccination or testing for entry.
- Requiring employers to provide paid time off for employees to get vaccinated. OSHA is developing a rule that will require employers with more than 100 employees to provide paid time off for the time it takes for workers to get vaccinated or to recover if they are under the weather post-vaccination. This requirement will be implemented through OSHA's ETS. The Department of Labor is expected to issue additional guidance specifically regarding this issue.

Failure to comply with the above could result in fines as great as \$14,000 against non-compliant employers. Moreover, the mandates described above will continue to change as the Biden Administration and the Department of Labor issue additional guidance, FAQs, and other information to help employers navigate COVID-19 in the workplace.

Separately, several governors and the Republican National Committee have threatened legal action against President Biden for implementing these Executive Orders and for his COVID-19 Action Plan, which will affect nearly 100 million Americans. Given the legal uncertainty surrounding the mandates as well as the pending guidance to be issued by OSHA, employers should remain diligent in monitoring how the law is changing.

[1] The CMS interim rule can be accessed at [cms.gov/files/document/qso-20-38-nh-revised.pdf](https://www.cms.gov/files/document/qso-20-38-nh-revised.pdf)