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President Biden COVID-19 Action Plan Calls for Vaccine Mandates and Other COVID-19 Safety Measures

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On September 9, 2021, President Biden issued his "Path Out of the Pandemic" COVID Action Plan (the "Plan"), which, among other mandates, calls upon the Occupational Safety and Health Administration ("OSHA") to create and issue Emergency Temporary Standards requiring employers with 100 or more employees to require either COVID vaccinations or weekly COVID testing for unvaccinated workers, as well as to provide paid time off for employee vaccinations or to recover from receiving the vaccination.

The Plan also requires the Centers for Medicare & Medicaid Services ("CMS") to require COVID vaccinations for employees in health care centers that receive Medicare or Medicaid reimbursement, including hospitals, dialysis centers, ambulatory surgery centers, and home health agencies. CMS had already announced in August that it was developing an interim final rule that would require vaccinations for employees of nursing homes, and CMS will now expand this rule to include other health care entities.

As part of the Plan, the President also signed two Executive Orders, one requiring all federal executive branch workers to be COVID vaccinated and a second requiring COVID vaccinations of employees of federal contractors and subcontractors. The President had previously ordered mandatory vaccinations to all employees of several major federal agencies, including the Departments of Defense and Veterans Affairs.

With respect to schools, the Plan mandates vaccinations for teachers and employees of Head Start programs and other schools run by federal agencies. The Plan calls on state governors to mandate vaccines for teachers and other school employees, but is silent as to vaccine mandates for children.

The Plan has other provisions designed to provide more access to COVID tests, funding for COVID safety measures, and improved care for those with COVID, including increasing support for over-burdened hospitals.

Yesterday's announcement puts employers on notice of major changes coming, but the Plan itself also leaves many questions unanswered. Here are some of those questions and their answers, at least as of now:

1. Does the Plan require employers with more than 100 employees to mandate vaccines now?

No. The Plan has asked OSHA to issue Emergency Temporary Standards, which under the Administrative Procedure Act requires a process of notice and comment periods. In January 2021, the President ordered OSHA to create new COVID-19 standards for health care employers, and those did not become effective until June 2021. While the process may not take that long this time, we know that these new standards will not appear overnight.

2. The Plan states that employers will be able to offer weekly COVID testing as an alternative to vaccines. Who will pay for that?

The Plan does not answer the question of who will pay for mandatory COVID testing as an alternative to vaccines, but the Plan provides that it will be the responsibility of the employee to produce a negative test result on at least a weekly basis before coming to work. As it does for most of its safety regulations, OSHA could require employers to bear the cost of such testing or put the imposition on the unvaccinated employee. It is also possible that the federal government will extend its COVID-related employer tax credits and expand them to include such COVID testing.

3. Will the vaccine and/or testing mandate include remote employees?

This is another question not answered by the Plan. The Plan itself states: "…or require any workers who remain unvaccinated to produce a negative test result on at least a weekly basis before coming to work." (Emphasis added). This could mean that remote workers who never "come to work" may be excluded from this mandate.

4. Will health care employers or federal contractors be able to allow weekly testing as an alternative to vaccines?

There is no indication in the Plan that health care employers, who will receive their vaccine mandate through the CMS, will be able to provide weekly testing as an alternative. Again, we will have to wait until the standards are issued before knowing the answer to this question. With respect to federal contractors, the Executive Order does not provide weekly testing as a substitute for vaccines.

5. What about employees who will request exemptions from the vaccine for religion or medical reasons?

The OSHA and CMS mandates and the Executive Orders cannot bypass or override the requirements of Title VII and the Americans with Disabilities Act, which allow employees to request reasonable accommodations for religious and disability based reasons. However, the standards may provide more cover for employers, particularly in health care, to defend themselves against lawsuits under these statutes by arguing that remaining unvaccinated is an "undue burden" under those laws.

6. Does the Plan order school districts to mandate COVID vaccines?

Not explicitly, unless your educational program is run by the Department of Defense, Bureau of Indian Affairs, or Head Start/Early Head Start programs. The Plan basically asks state Governors to mandate vaccines, but does not require them to do so. However, we continue to evaluate the Department of Safety and Professional Services' (the state entity responsible for public sector employee health and safety regulations) response to the Plan and will update this response when more specific information is known.

The Biden Plan will take some time to be fully fleshed out and go into effect. Many groups have already vowed legal challenges to the Plan, which may further delay actual implementation of parts of the Plan.

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