

Human Resources BULLETIN



President Biden Introduces Expansive COVID-19 Action Plan

● **September 13, 2021** ●

On **September 9, 2021**, President Biden introduced the [Path out of the Pandemic COVID-19 Action Plan](#). The intent of the plan is to provide a comprehensive national strategy and utilize every available tool to combat COVID-19 as the nation continues to be challenged by the COVID-19 pandemic. This more extensive approach to battling the pandemic follows President Biden's previously issued executive orders for mandatory vaccinations for both [Federal employees](#) and [Federal contractors](#).

To achieve the action plan's objectives, The Department of Labor's Occupational Safety and Health Administration (OSHA) has been instructed to issue an Emergency Temporary Standard (ETS) requiring employers with 100 or more employees to ensure that all employees are fully vaccinated or able to produce a negative COVID-19 test result on at least a weekly basis.

OSHA has also been directed to require employers with 100 or more employees to provide paid time off for employees to obtain a vaccination and, if necessary, recover from the vaccination.

President Biden's Path Out of the Pandemic COVID-19 Action Plan also introduced that the Centers for Medicare and Medicaid Services (CMS) will be taking action to require COVID-19 vaccination for staff in most health care facilities that receive Medicare or Medicaid reimbursement. Some significant aspects of the plan that may impact employers are discussed below.

Vaccination or Weekly COVID-19 Testing Required for Employees (applies to employers with 100 or more employees)

OSHA will issue an ETS that will require all employers with 100 or more employees to ensure their workforce is fully vaccinated or require any workers who are unvaccinated to produce a negative test result on a weekly basis before coming to work.

The Vaccination/Testing requirements in the OSHA ETS, when released, will apply to employers with 100 or more employees and impact over 80 million workers in private sector businesses.

Required Vaccination for Staff in Most Health Care Facilities that Receive Medicare or Medicaid Reimbursement

As directed by the COVID-19 Action Plan, The Centers for Medicare and Medicaid Services (CMS) will require COVID-19 vaccinations for workers in most health care settings that receive Medicare or Medicaid reimbursement.

The requirements will apply to approximately 50,000 providers and cover a majority of health care workers across the country.

This will be highly impactful to the healthcare industry given the size and significance of the Medicare and Medicaid programs.

Requirement for Employers to Provide Paid Time Off for Employee Vaccination and Recovery

It is intended through the Path out of the Pandemic COVID-19 Plan, that OSHA require employers with 100 or more employees to provide paid time off for vaccination and recovery from vaccination, if necessary. The OSHA ETS will implement this requirement.

Next Steps

Employers will need to closely monitor the specific requirements established by the government agencies responsible for carrying out President Biden's COVID-19 plan over the coming weeks and months.

Timeline: Although it is unclear exactly when OSHA's ETS will be finalized, it is expected that OSHA will take an aggressive approach to the timeline for drafting the ETS, possibly targeting completion within the next month. Once the ETS is finalized, it will likely

be another 75 days before OSHA begins enforcing the newly effectuated ETS. The ETS will have an immediate effect in the 29 states where Federal OSHA has jurisdiction and the states with OSHA state plans will either have to adopt the ETS or “just as effective measures” within 15-30 days.

An ETS can only exist for 6 months, at which time it must be replaced by a permanent OSHA standard or it will expire. Instituting a permanent standard requires the normal notice and comment period.

Enforcement: Companies that fail to comply with the ETS requirements will face a \$13,600 penalty per violation. It is likely that the penalty will apply to each facility inspected by OSHA where a covered employer has not implemented a mandatory vaccine policy or otherwise complied with the ETS. It is possible, however, that the penalty could apply on an employee by employee basis, although that is unlikely.

OSHA has several options for facilitating enforcement including (1) utilizing its existing employee hotline where workers can report issues to begin the investigative process; (2) requiring businesses to certify in writing that they are in compliance; and/or (3) conducting on-site inspections of businesses throughout their jurisdiction. Mass on-site inspections are highly unlikely as an option because OSHA only currently employs 1,850 inspectors on staff.

Employer/Employee Impact: At this point, it is difficult to discern exactly how the final ETS will be drafted and what that will mean for employers and employees. It is likely that employers faced with stiff penalties will be more vigilant scrutinizing employee vaccine exemptions/opt-outs based on religious and/or medical reasons. Employees need to be prepared for the possibility of more workplaces mandating vaccinations as a result of the ETS, which could lead to negative consequences for failure to comply such as terminations and fines.

Some key areas that require clarification in the final ETS include the impact on remote workers, determining the 100 employee threshold, what type of testing will be required and who pays for it, and whether employers will need to obtain proof of vaccination.

Final Thoughts

There will most certainly be legal challenges to any attempts by OSHA to enforce the ETS so employers will need to keep a close eye on developments that occur as this situation progresses. That being said, employers should prepare for implementation in case these legal challenges fail. Recommended actions at this point are (1) for employers to assess

whether they are going to mandate vaccines or require weekly testing; (2) draft template policies and procedures to create a framework for implementation when the final ETS is released including how to handle religious and medical accommodation requests; (3) develop a procedure for tracking test results or obtaining proof of vaccination; and/or (4) prepare for OSHA enforcement.

Should this ETS come to fruition, employers and employees will both be significantly impacted and having a plan in place will significantly ease the administrative burdens that will exist upon implementation. It is highly recommended that employers take a proactive approach to preparation to avoid confusion amongst the workforce and compliance concerns. We will continue to keep you apprised as this situation progresses.

ADDITIONAL RESOURCE

[President Biden's COVID-19 Plan | The White House](#)
[Executive Order on Requiring Coronavirus Disease 2019 Vaccination for Federal Employees](#)
[Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors](#)