

What Employers Need to Know About President Biden's "Path Out of the Pandemic" COVID-19 Action Plan

September 16, 2021 | Corey F. Higgins | Articles

Last Thursday, President Biden announced a broad sweeping, 6-part COVID-19 Action Plan entitled, "Path Out of the Pandemic" ([President Biden's COVID-19 Plan | The White House](#)) aimed at combatting the spread of COVID-19 and its variants. Below are a few of the key elements of the President's COVID-19 Plan.

Mandatory Vaccinations or At Least Weekly Testing for Employers with 100 or More Employees

Included in the President's plan is a requirement that all employers with 100 or more employees must require their employees to be fully vaccinated or to produce on at least a weekly basis a negative COVID-19 test result before they may come to work. The Biden administration has tasked the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) with promulgating a rule, also known as an Emergency Temporary Standards (ETS), to implement these requirements.

OSHA's ETS will also require employers to grant paid time off for employees to get vaccinated and to recover from any side effects of the vaccine. While the ETS has not yet been published, we anticipate that the requirement for leave may be the same or similar to the present OSHA vaccination leave requirements that are in place for certain workers in the healthcare field under a previous ETS, 29 C.F.R. § 1910.502(m). For



Related People

Corey F. Higgins

applicable employees, this rule requires paid leave for a reasonable time (which is not defined, but OSHA has provided guidance on time periods presumed to be in compliance) in order to get a vaccination or to recover from side effects. The rule does not require additional leave time, but permits employers to satisfy the requirement of paid leave through the use of paid sick time or other forms of leave already accrued and/or available to the employee.

Note that, in Massachusetts, employees are presently entitled to paid time off to get the vaccine and to recover from any side effects from it pursuant to Chapter 16 of the Acts of 2021, An Act Providing for Massachusetts COVID-19 Emergency Paid Sick Leave. While leave under this law is capped at \$850 per week, we anticipate that the OSHA ETS will require paid leave at an employee's full rate, which certain employees may not receive under the Massachusetts law, depending on their rate of pay and the circumstances of their use of leave. However, the Massachusetts COVID-19 Emergency Paid Sick Leave law is set to expire on or before September 30, 2021, so employers with 100 or more employees should be prepared to permit employees who have not yet been vaccinated to take other paid leave, or provide additional leave, in order for employees to obtain a vaccination and to recover. We will provide an update on the specific details of the leave requirement when available. Please note that although Massachusetts is covered by OSHA's Safety Standards, not all of OSHA's regulations necessarily apply to Massachusetts' public sector employers or their employees. If OSHA's ETS COVID-19 rules amend an existing standard that has been expressly incorporated into the state's program, it will apply. If the ETS COVID-19 rule is a new standard, however, the Massachusetts Department of Labor Standards may need to amend its regulations to incorporate the new OSHA standard. We are closely monitoring the issue and will send an update as soon as more details are available.

Expansion of Mandatory Vaccinations for Healthcare Employers and Their Employees

President Biden's COVID-19 Action Plan also calls on the Centers for Medicare and Medicaid Services (CMS) to require COVID-19 vaccinations for workers in most healthcare settings that receive either Medicare or Medicaid reimbursement, including hospitals, dialysis facilities, home health agencies, and ambulatory surgical settings. CMS had previously

mandated vaccinations for nursing home staff. The President's Plan now expands the mandatory vaccine requirement to staff in hospitals and other CMS-regulated settings, including clinical staff, volunteers, individuals providing services under arrangements with the healthcare facilities, and staff who are not involved in direct patient, resident, or client care. CMS' mandate will create consistent standards across the U.S.

President Biden's Executive Orders Requiring Vaccinations for All Executive Branch Employees and Employees of Some Federal Contractors

President Biden has also issued two executive orders mandating vaccinations for all executive branch employees and for employees of some federal contractors.

The President's Executive Order on Requiring Coronavirus Disease 2019 Vaccination for Federal Employees applies to all employees of the executive branch of the Federal government.

With regard to the Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors, the Safer Federal Workforce Task Force will issue guidance by September 24, 2021 laying out the requirements for federal contractors. This Executive Order will apply to "any workplace locations (as specified by the Task Force Guidance) in which an individual is working on or in connection with a Federal Government contract or contract-like instrument."

Neither of President Biden's Executive Orders for executive branch employees and employees of federal contractors permit testing as an alternative to being vaccinated, unless an employee is exempted from being vaccinated under either the Americans with Disabilities Act (ADA) due to a disability or Title VII of the Civil Rights Act of 1964 on the basis of a sincerely held religious belief.

The above are just a few elements of President Biden's Path Out of the Pandemic Action Plan. We will continue to keep close watch on OSHA's ETS rule, the CMS mandate, and the Safer Federal Workforce Task Force's guidance and will publish an update as soon as more information becomes available. In the meantime, if you have any questions, please do not hesitate to contact any member of our Firm's Labor, Employment and Employee Benefits Group.

