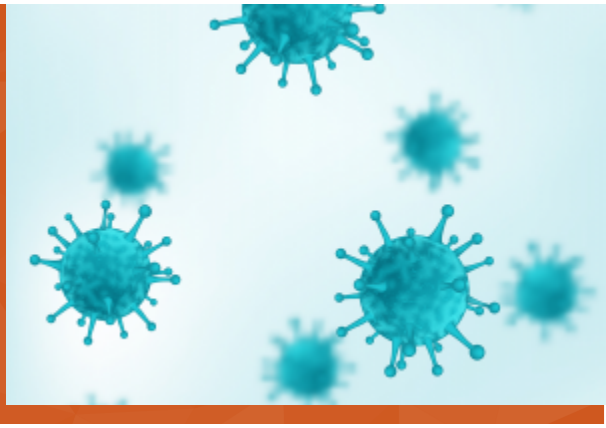
COVID-19 Alert: Public Vaccine Mandate

Biden Administration Announces Public Vaccine Mandates That Require Action by Large Private Employers, Federal Contractors, and Healthcare Employers



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On September 9, 2021, the Biden Administration announced the Path Out of the Pandemic – a strategic plan to respond to the continued spread of COVID-19 (the "Plan"). In general, the Plan outlines a broad-brush approach to combating the continued ill-effects of the pandemic, including:

- Strategies to increase vaccination rates;
- Strategies to maintain school operations;
- Strategies to implement additional safety regulations; and
- Strategies to implement additional economic stimulus programs.

The widely reported-on, cornerstone of the Plan is a mandate that, *when implemented*, will require large employers, federal contractors, and healthcare employers to adopt mandatory vaccination policies for their employees (the "Vaccine Mandate").

The basic elements of the Vaccine Mandate are discussed below:

SCOPE

The Biden Administration has not yet published specific regulations that implement the Vaccine Mandate. As such, as of the date of this publication, the Vaccine Mandate is not operative, and there is no specific timeline for its implementation. However, President Biden has taken certain preliminary actions that indicate the potential scope of the Vaccine Mandate. Specifically, coincident with the announcement of the Plan, President Biden:

- Instructed the federal Occupational Safety and Health Administration ("OSHA") to develop a rule that will require all employers with **100 or more employees** to ensure their workforce is fully vaccinated or require any workers who remain unvaccinated to produce a negative test result on at least a weekly basis before coming to work. OSHA is expected to issue an Emergency Temporary Standard ("ETS") to implement this requirement.
- Signed an Executive Order that requires all federal executive branch workers to be vaccinated. The President also signed an Executive Order directing that this standard be extended to employees of contractors that do business with the federal government.
- Instructed the Centers for Medicare & Medicaid Services ("CMS") to take 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.

TIMING

President Biden's instructions imply that regulations that implement the Vaccine Mandate will be fast-tracked. However, there are several practical realities that may result in delay:

- The Vaccine Mandate requires a number of complex questions to be answered: How do you count employees for purposes of the 100-employee threshold? Will the Vaccine Mandate apply to remote workers? Will booster shots be required? What types of government contractors will be covered? Who pays for COVID-19 testing? Will there be religious or medical exemptions? As such, as a practical matter, it will take some time to generate coherent regulations.
- Once regulations are published, legal opposition to the Vaccine Mandate is certain. Such legal actions will invariably cause further delay in the implementation of the Vaccine Mandate.

Accordingly, while it is prudent for employers to begin preparations for the Vaccine Mandate now, it may be several months before any concrete action will be required of employers.

ENFORCEMENT

While specific details related to the enforcement of the Vaccine Mandate have not yet been announced, it is being reported that non-compliant employers will be subject to significant financial penalties. It is also being reported that the regulations will be structured to incentivize whistleblower claims as the primary enforcement mechanism.

HOW TO PREPARE

In anticipation of the Vaccine Mandate, covered employers may consider the following preparation strategies:

- Collecting information related to employee headcount and employee vaccination status;
- Identifying and training a management team to oversee Vaccine Mandate compliance; and
- Understanding logistics around mass COVID testing of employees.

This will be a significant undertaking for most employers, and planning should begin as soon as possible. Employers should continue to monitor any new announcements from the Biden Administration and OSHA.

Morse is focused on helping our clients navigate and understand the different elements of the Vaccine Mandate. Please contact Matthew Mitchell should you have questions concerning this subject, or any other COVID-19 response matters.

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