

New Federal “Mandates” for COVID-19 Vaccination: What Do Employers Need to Know Now?

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New York Law Journal/Labor & Employment Law Alert

09.24.2021

On September 9, 2021, President Biden announced some sweeping changes in the way the federal government is combating the COVID-19 pandemic as part of the administration’s Path out of the Pandemic action plan. In addition to encouraging Americans to get vaccinated, the President announced the following:

- The Department of Labor’s Occupational Safety and Health Administration (OSHA) is developing an emergency rule to require employers with 100 or more employees to ensure their workforces are fully vaccinated or show a negative test at least once a week.
- OSHA will also require employers with 100 or more employees to give unvaccinated workers paid time off to get vaccinated.
- He had signed an Executive Order requiring federal contractors to ensure that their employees be vaccinated.

Employers are, understandably, curious as to the details of these rules. As of now, however, the details are few, because the rules have yet to be issued. OSHA may act swiftly on these announcements, but in the federal bureaucracy, “swiftly” is a relative term. The relevant administrative agencies must work through the statutory authority that they have been given by Congress and craft a rule that is within that authority and can, at least arguably, withstand scrutiny by a court.

Mandating Large Employers to Require Vaccination

Usually, federal agencies must go through a relatively lengthy process before issuing binding regulations. However, the federal Occupational Safety and Health Act (OSH Act) authorizes the Secretary of Labor to issue occupational safety and health regulations upon a finding that a particular standard is necessary to reduce a significant risk of material health impairment. The OSH Act provides that the Secretary shall issue an emergency temporary standard if he or she finds that the standard is necessary to address a grave danger to workers. In issuing emergency standards, the Secretary is required to provide a comprehensive statement of the dangers that justify the emergency standard so that, among other reasons, a court can determine whether the situation fits the statutory standard.

The Secretary issued relatively [narrow emergency standards](#) earlier this year for the healthcare industry. It took about five months for OSHA to issue the healthcare emergency standard, during which time it was narrowed significantly from its initial scope that would have covered all industries. Six weeks of that process were spent on the review by the Office of Information and Regulatory Affairs. The President's directive here – to mandate vaccine requirements for all large employers – will require a significant justification, which may take time. Once the emergency standard is issued, it will likely allow some time, perhaps a month or so, for employers to comply with the standard because, among other things, achieving “fully vaccinated” status necessarily requires a waiting period between the first and second doses of a two-dose vaccine such as the Comirnaty (formerly known as the Pfizer-BioNTech vaccine) and Moderna vaccines.

Until the temporary standard is issued, the legal landscape for employers large and small has not changed. What has changed is the practical landscape. While employers that do not want to mandate vaccinations and/or testing may still legally not do so (for now) unless they are already subject to state-imposed vaccine/testing mandates like those impacting the healthcare industry in some states, those employers that have been waiting to issue such mandates now have more reason to move forward with such plans. Employees will be more understanding of their employer's desire to comply with forthcoming regulations, will be less inclined to believe that they can go to a different employer that will not mandate vaccines and will have more economic incentive to be vaccinated. Moreover, the risk that an employer gets sued for a vaccine/testing mandate, already pretty low, has further decreased with this announcement.

Given the weekly testing requirement for employees who remain unvaccinated, it is hoped that OSHA's forthcoming temporary standard will address who is responsible for paying the potentially expensive cost of that testing, recognizing that health insurers may not be willing to cover the costs of testing that is not ordered by a healthcare professional.

Employers that wish to move forward with vaccine/testing mandates (subject to reasonable accommodations for disability or religious issues) can do so with more confidence. Employers that do not yet wish to do so can wait – for perhaps a week, a month or maybe more – to see what the temporary standard actually says.

Pay for Time Off to Get Vaccinated

The President's promise that large employers will give workers paid time off to get vaccinated similarly requires the Department of Labor to issue regulations. Reasonable paid time off to get vaccinated, or recover from the side effects of the vaccine, is a requirement under OSHA's healthcare emergency temporary standard, as well as under state or local laws in some localities (e.g., New York State; Cook County, Illinois; and the city of Philadelphia). While it remains to be seen whether OSHA will take a similar approach with its emergency standard for large employers, or attempt to impose a broader mandate, it seems likely that it will take a similar approach. Such a mandate may be challenged as exceeding OSHA's statutory authority.

As with the large employer vaccine/testing mandate, however, a purported requirement that employers provide paid time off will likely work mostly through encouraging voluntary compliance. Many employers are already providing employees with incentives to get vaccinated, such as paid time off for vaccination and similar paid time off if people have a reaction to the vaccine, or more generous incentives. The prospect of a regulatory requirement for such pay may cause more employers to voluntarily offer such pay, and may result in more employees requesting or demanding such pay.

For now, as with the other potential mandates, employers may choose to move forward with prospective compliance on the grounds that it is a cost-effective way to encourage vaccination. Alternatively, employers may wait until the Department of Labor issues the

details of its proposed regulations, including its support for its emergency rule making, before deciding to provide employees with paid time off in jurisdictions where it is not already required by state or local law.

Federal Contractors

The executive branch has far more direct authority over those seeking to do business with it through federal contracts than over employers generally. The executive branch is allowed to insert provisions in federal contracts that require those that want to do business with the federal government to do all sorts of things – from adopting Affirmative Action Plans to paying higher minimum wages (in excess of the level applicable to all employers) to certain classes of employees.

The Executive Order concerning mandatory vaccination provides that new federal contracts entered into on or after October 15, 2021, as well as contract extensions, options, renewals and the like entered into after that date, contain a provision that requires the contractor to follow guidance issued by the Safer Federal Workforce Task Force. That task force is directed to issue guidance by September 24, 2021, and such guidance, according to the Office of Management and Budget, will require vaccination. It is unlikely the alternative of weekly testing will be an option for those in the federal supply chain with contracts, extensions, options, task orders, or other modifications on or after October 15, 2021.

Employers that do not wish to be bound by this Executive Order could, of course, simply not enter into any such contracts. However, that seems very unlikely given both the economics of government contracting and the prospect of a comprehensive mandate that would do the same thing coming from the Department of Labor. For more on the government contracting aspect of the vaccine mandate program, see this analysis from our [government contracts group](#).

Conclusion

The President's announcement did not immediately change the legal landscape, but it gives employers that want to mandate vaccines more comfort that they can do so and provides practical justification to employees. Employers outside the federal contractor supply chain that are not eager to mandate vaccinations can, for now, take a wait-and-see approach.

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