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September 2021

What Employers Need to Know About President Biden's "Path Out of The Pandemic"

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On September 9, 2021, President Biden announced his [new comprehensive national strategy](#) to combat COVID-19. The action plan, entitled "Path Out of the Pandemic," intends to further a "whole-of-government" approach by using regulatory powers designed to substantially increase the number of Americans covered by vaccination requirements.

In his speech, President Biden announced that he has directed the U.S. Department of Labor's Occupational Safety and Health Administration ("OSHA") to develop an Emergency Temporary Standard ("ETS") that requires the following of private employers with 100 or more employees: (1) "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"; and (2) provide paid leave to employees who are unable to work because they are undergoing and/or recovering from vaccination, which is a current recommendation under OSHA's "Protecting Workers" guidance. While the President outlined basic concepts that he expects to be included in the ETS, we will not know any specific details about employer obligations until an ETS is actually published.

OSHA is empowered to issue an ETS upon determining that: (1) employees are subject to a grave danger from exposure to substances or agents determined to be toxic or physically harmful; and (2) an emergency standard is necessary to protect employees from such danger. The process for issuing an ETS is expedited. However, employers are typically afforded a grace period between publication of an ETS and enforcement of any standard issued.

Numerous governors, the Republican National Committee, and private organizations have voiced an intention to challenge an OSHA ETS as outlined by the President. Until an ETS is issued, it will be difficult to assess the likelihood of whether it will be upheld. However, in June 2021, OSHA used its authority to issue an ETS delineating COVID-related precautionary measures for covered healthcare employers. Also, prior to the current pandemic, OSHA issued rules concerning vaccinations (e.g., the Hepatitis B vaccine).

Although no specific ETS details are known at this time, and there will likely be a grace period prior to implementation, private employers with 100 or more employees should consider planning for the vaccine mandate outlined in the President's speech. One preparatory step for employers may be surveying their workforces to determine who is and who is not vaccinated. The Equal Employment Opportunity Commission confirmed that employers are permitted to require employees to present proof of vaccination (e.g., vaccine card, note from health care provider). Any such documentation must be stored confidentially and separate from employees' personnel files.

Private employers with federal contracts need to move more quickly to act in accordance with the September 9, 2021 [Executive Order](#) on Ensuring Adequate COVID Safety Protocols for Federal Contractors ("EO"). The EO requires that all contracts or contract-like instruments that are new, renewed, extended, or exercised with the federal government include a clause specifying that the employer will follow all guidance published by the Safer Federal Workforce Task Force. The Safer Federal Workforce Task Force will issue Task Force Guidance to explain the initial required safety protocols by September 24, 2021, and the clause must be included in contracts, effective October 15, 2021. While we will not know the safety protocols until issuance of the guidance, President Biden's September 9, 2021 speech indicated that all federal contractors would be required to mandate vaccines.

The White House anticipates that its action plan will apply to more than 80 million private sector workers. Among the questions that will need to be answered by the ETS and the Task Force Guidance are the details of the federal mandates, the implementation timelines, who pays for COVID-19 testing, the type of verification required for vaccination proof, how enforcement will occur, and how the mandates will work in conjunction with disability and religious accommodation requirements of the Americans with Disabilities Act and Title VII of the Civil Rights Act.

Employers should contact any member of **Bodman's Workplace Law Group** to discuss these developments in federal law. Bodman cannot respond to your questions or receive information from you without first clearing potential conflicts with other clients. Thank you for your patience and understanding.

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