

President Biden's COVID-19 Action Plan— What Employers Want to Know

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On September 9, 2021, President Biden released his COVID-19 Action Plan, Path Out of the Pandemic (the “Plan”). The Plan mandates vaccination against COVID-19 for employees working for employers that have 100 or more employees, as well as employees that work for the federal government or healthcare entities, and/or are federal contractors. The following Q&As address some of the common employer concerns regarding Biden's Plan and the upcoming OSHA Emergency Temporary Standard (ETS).

1. ***Will the White House issue an executive order regarding the ETS?***

No, we do not anticipate that the White House will release an official executive order regarding the ETS. While an executive order was published on the federal contractor vaccination requirement, President Biden has the authority to direct OSHA to develop an ETS without issuing an executive order.

2. ***If there is no executive order to be challenged, will we have an opportunity to provide comment on the ETS before it takes effect?***

No, there will likely be no opportunity for comment before the ETS takes effect immediately upon publication in the *Federal Register*. The president has asked OSHA to issue the ETS as soon as possible. OSHA will ask stakeholders to provide comment afterwards, when the agency considers approving a permanent standard.

3. ***What can we do to voice our concerns about the ETS before publication?***

Write a letter or join a coalition to write a letter on your behalf addressing your concerns. Littler Workplace Policy Institute (WPI) is joining forces with the business community to assist employers with their concerns. Data that describes infeasibility of implementation, issues with compliance and enforcement, or extensive cost measures will likely be helpful information to OSHA's formulation of certain provisions in the ETS. If most employers cannot comply with the standard as drafted, OSHA's efforts will be futile and will likely render the regulation ineffective and could lead to extensive litigation.

4. ***There already was a healthcare COVID-19 regulation published in June. Can OSHA issue a new ETS now at this late juncture?***

Yes, they can, although it is quite rare. OSHA published its last ETS in 1986. Under certain limited conditions, OSHA may set emergency temporary standards that take effect immediately until superseded by a permanent standard. OSHA must be able to

demonstrate a “grave danger” due to exposure of a “new” hazard such that an emergency standard is needed to protect workers. Once the standard is published in the *Federal Register*, it becomes effective. The standard will be considered the proposed permanent standard until stakeholders provide comment through the permanent rulemaking process. The validity of an emergency standard may be challenged in an appropriate U.S. court of appeals.

5. *When will the ETS be issued?*

OSHA’s track record during the pandemic tells us it may take some time for OSHA to develop a draft. OSHA stated it plans to issue the ETS within 2-8 weeks.

6. *When will the ETS be effective?*

The ETS will be effective once the standard is published in the *Federal Register*.

7. *What will the duration of the ETS be?*

The ETS will be effective until a permanent rule is issued. The ETS will be considered the proposed permanent rule until stakeholders provide comment and it goes through a permanent rulemaking process. It is possible, if the ETS gets challenged and/or stayed during the pendency of litigation, that the duration may be shorter.

8. *Will the ETS have any requirements for customers or third parties (vendors)?*

The ETS will likely include requirements for customers and third parties. OSHA’s multiple employer COVID compliance directives have indicated that employers are required to take measures to protect all workers in their worksites, even those who are not their employees. Employers are also required to protect their own employees from hazards created by customers and other third parties. Because COVID is a highly infectious disease, OSHA will likely include requirements on how employers must limit customer and third-party interactions with employees, as well as take care to ensure that other workers in their worksites are not similarly exposed to COVID. In several states we have seen customer and third-party requirements on occupancy, physical distancing, or masking requirements.

9. *What else will likely be included in the ETS?*

The ETS might include requirements for a written plan, vaccinations, testing, masking, physical distancing in the workplace, compliance with CDC guidance, engineering controls such as filtration or ventilation processes, paid time off for vaccinations or testing, paid time off for ill employees, incentive plans for vaccinations, policies for communicating information to employees, cleaning procedures, recordkeeping procedures, and more.

10. How will the ETS calculate 100 employees? Per worksite, per organization or per enterprise?

In some of its debriefings regarding the regulation, OSHA has indicated that the ETS will likely calculate the 100-employee requirement to mean 100 employees in an enterprise, not 100 employees per worksite. OSHA should address this question in a further FAQ before issuing the ETS.

11. How will this affect state plans already in place?

Generally, federal OSHA does not have jurisdiction where there are state plans, but state standards must be at least as stringent as federal standards. If the federal standard requires vaccine mandates for enterprises, many states may have to revise their plans or adopt the federal ETS.

12. Does the ETS apply to remote employees or just office workers?

It depends. OSHA generally only has jurisdiction over worksites where an employer can expose, control, correct or create a hazard. This means that the ETS will likely apply when workers visit any assigned work location, regardless of whether the employer actually controls the location. In that instance, the employer may be considered the exposing employer and will likely have to adopt protocols under the ETS to protect its employees. The ETS will not apply to employees who telecommute, *i.e.*, work remotely from home.

13. What will employers use to verify vaccine status?

OSHA has not answered this question yet. The ETS will likely provide specific guidance on vaccine verification. Note that there may be a potential conflict between the ETS's vaccine mandate and certain state laws, such as in Montana, where employers are prohibited from taking any adverse action based on an employee's vaccination status. Employers should start considering feasible processes to determine vaccination status in a manner that also complies with state law.

14. Will the vaccination mandate be satisfied after one vaccination dose?

OSHA will likely require the employee to be fully vaccinated because data shows that partially vaccinated individuals are not sufficiently protected from the Delta variant. Fully vaccinated means 14 days after completing two doses of the Pfizer or Moderna vaccine, or one dose from the Johnson & Johnson/Janssen vaccine.

15. How will things change in the ETS if the FDA approves a booster shot for the vaccinations?

Eventually, we may see a change in definition of "fully vaccinated" to mean three shots of Pfizer. Once Moderna and Johnson & Johnson obtain FDA approval and there is

sufficient quantity of the shots available, we could see that fully vaccinated means at least three shots of Moderna and possibly two shots of Johnson & Johnson/Janssen.

16. Under the Plan, is it likely that employers can require vaccinations instead of allowing for testing?

Yes, but not for all workers. Some workers may require an accommodation for medical or religious reasons. One manner to accommodate these types of requests would be to grant an exemption from the vaccine requirement and instead require frequent testing. Employers can also allow certain employees to work remotely.

17. Under the Plan, do employers need to pay for time spent testing?

While the Plan includes efforts aimed at reducing the costs of home rapid tests, it is not yet clear whether the ETS will include directives about whether employers or employees will bear the burden of the cost of testing, or whether time spent testing should be considered compensable time. Without any directive in the ETS on these questions, existing federal and state wage/hour law will apply to an employer's program under the ETS. Biden's plan states that top retailers will sell at-home rapid tests at cost for the next three months. The Plan also expands free testing by increasing the number of retail pharmacy sites around the country where anyone can get free testing. Even if an employer intends to use free testing, the employer will likely have to pay employees for the time they take to administer the test. Employers will also have to train employees if they are providing a home rapid test to ensure employees are properly administering the test in order to return accurate results.

18. Under the Plan, do employers need to pay for time spent getting vaccinations?

The Plan includes direction to "ensure that no worker loses a dollar of pay because they got vaccinated." Accordingly, we anticipate that the ETS will provide expanded paid time off for the time spent getting vaccinations and the time it takes the employee to recover from any effects of the vaccination. In some states, there are already requirements for COVID paid sick leave that cover vaccination time.

19. Can covered employers ask for and receive test results?

Yes. If the ETS requires disclosure of the test results for compliance, the employer must ask for employees' results. The employer must analyze its processes to ensure confidentiality compliance under the ADA and state law. Employers should review state confidentiality and privacy laws to determine if additional measures need to be adopted.

20. If an employee refuses vaccinations or testing, is the employer allowed to fire the employee?

Possibly. If an employer is mandating vaccinations and accommodating only those employees with medical or religious exemptions, they can terminate the employment of those employees who do not qualify for an exemption. Employers should be mindful about ensuring consistency in their treatment of those employees who refuse to comply with a mandatory vaccination requirement and do not qualify for an exemption.

If an employer is allowing for testing in lieu of vaccinations, and the employee refuses to test, the employer may have grounds to terminate, so long as the employee does not need an accommodation relating to testing.

Employers should conduct a case-by-case analysis to determine whether the person needs an accommodation, and which accommodation is appropriate. The employer can also look for other accommodations instead of testing such as remote work options or paid or unpaid leave.

21. *For the executive order issued relating to federal contractors, to whom does the federal contractor mandate apply?*

The new contract clause will “apply to any workplace locations in which an individual is working on or in connection with a Federal Government contract or contract-like instrument.” The “on or in connection with” standard is borrowed from the federal contractor minimum wage requirement.

Employees perform services “on” a contract when they perform the work required by the contract, and perform “in connection with” a federal contract when they perform services not required by the contract, but are necessary to the performance of the contract’s services, such as custodial, security, or maintenance services at facilities that perform both commercial and government work. The executive order applies to “any workplace locations . . . in which an individual is working on or in connection” with a contract.

The executive order is ambiguous about several important issues. Generally, federal contractor requirements are related to employees performing work. The executive order focuses on safety regulations and orders directly related to conditions of the workplace rather than the contract on which employees are performing work. Thus, if a federal contractor is working at a commercial location, it is ambiguous whether the entire facility and workforce will need to abide by the requirement or just the federal contractor.

This is a rapidly evolving area rife with uncertainty. We will continue to monitor federal agency and executive actions, and report on significant developments.