

Mandatory Vaccinations and the Federal Government's "Path out of the Pandemic"

This information is still in development and TO BE DETERMINED. TPM can only provide insight as it has been given to date (by the Biden Administration). Please be aware, this Path out of the Pandemic "Plan" is not yet a rule, as OSHA has yet to issue a rule or Emergency Temporary Standards.

The information herein can be used as a forecast to the OSHA rule, but the rule and guidance to follow OSHA publications may not be exactly as is stated in the plan, so the plan information below is indicative but not dispositive as to what will ultimately be in effect.

On September 9, 2021, President Biden announced his Path Out of the Pandemic Plan, which includes mandatory COVID-19 vaccination for certain employees in the private sector and employees that work for companies with Federal Contracts. The plan also requires covered private employers to give workers paid time off to obtain the vaccination and to recover from any side effects due to the vaccination.

Requiring All Employers with 100+ Employees to Ensure their Workers are Vaccinated or Tested Weekly

The Department of Labor's Occupational Safety and Health Administration (OSHA) is developing a rule that will require all employers with 100 or more employees to ensure their workforce is fully vaccinated or require any workers (absent disability or religious accommodations) who remain unvaccinated to produce a negative test result on at least a weekly basis before coming to work. OSHA has been tasked with issuing an Emergency Temporary Standard (ETS) to implement this requirement. This requirement will impact over 80 million workers in private sector businesses with 100+ employees.



Path Out of the Pandemic?

- ▲ OSHA officials have stated that employers do not have to offer the weekly testing as an option and may require all employees to be vaccinated, subject to accommodations.
- ▲ OSHA has stated the ETS will be released "in a matter of weeks," but no specific date has been announced.
- ▲ Proof of Vaccination: Currently, with regard to Federal Contract employees, an

attestation of vaccination by the covered contractor employee is not an acceptable substitute for documentation of proof of vaccination. This will likely be the case for private employees as well, individuals will need to prepare to show a proof of vaccine card or record.

- ▲ Counting Employees: Guidance is expected within the ETS as to how employees will be counted (i.e., in aggregate, at one location, joint-employer requirements, etc.). OSHA has noted that the threshold count will likely be off of total organizational headcount.
- ▲ Testing: No details on who is responsible for the cost of testing has yet been provided.
- ▲ OSHA Penalties/Fines: Employers who do not comply with the ETS could face OSHA citations and penalties of up to \$14,000 per violation.
- ▲ Recordkeeping: We are not yet aware of requirements, however, if retention of proof of vaccination and testing is required, there will be substantial documentation requirements.
- ▲ Legal Challenges: Multiple state governors have promised to challenge the mandatory vaccinations for private businesses, which has the potential to

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delay the new requirements until legal challenges are resolved. While litigation is almost guaranteed, it is still a good idea to begin preparing for the upcoming ETS requirements.

- ▲ Religious and Medical exemptions will be allowed, but specific guidance has not yet been released. The guidance for Federal Contractors, which the private employer rules may align with, can be found below.

Requiring Employers to Provide Paid Time Off to Get Vaccinated

OSHA is developing a rule that will require employers with more than 100 employees to provide paid time off for the time it takes for workers to get vaccinated or to recover if they are under the weather post-vaccination. This requirement will be implemented through the ETS.

Requiring Vaccinations for all Federal Workers and for Millions of Contractors that Do Business with the Federal Government

Building on the President's announcement in July to strengthen safety requirements for unvaccinated federal workers, the President has signed an Executive Order on "Ensuring Adequate COVID Safety Protocols for Federal Contractors" to take those actions a step further and require 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.

The order applies to new, extended, newly optioned or renewed contracts (or contract-like instruments) entered into on or after October 15, 2021, and whose value exceeds \$250,000.

- ▲ Covered contractor employees must be fully vaccinated no later than December 8, 2021.
- ▲ On September 24, 2021, The Safer Federal Workforce Task Force issued guidance on implementation that can be found here: https://www.saferfederalworkforce.gov/downloads/Draft%20contractor%20guidance%20doc_20210922.pdf
- ▲ As of October 15, 2021, covered agencies must take steps to ensure that covered contracts will include a clause that specifies that the contractor or subcontractor shall, for the duration of the contract, comply with all guidance for contractor or subcontractor workplace locations published by the Safer Federal Workforce Task Force.
- ▲ Overview of Workplace Safety Protocols for Federal Contractors and Subcontractors.

- ▲ Pursuant to the guidance issued today, and in addition to any requirements or workplace safety protocols that are applicable because a contractor or subcontractor employee is present at a Federal workplace, Federal contractors and subcontractors with a covered contract will be required to conform to the following workplace safety protocols:

1. COVID-19 vaccination of covered contractor employees, except in limited circumstances where an employee is legally entitled to an accommodation;
2. Compliance by individuals, including covered contractor employees and visitors, with the Guidance related to masking and physical distancing while in covered contractor workplaces; and
3. Designation by covered contractors of a person or persons to coordinate COVID-19 workplace safety efforts at covered contractor workplaces.

- ▲ **Covered contractor employee** means any full-time or part-time employee of a covered contractor working on or in connection with a covered contract or working at a covered contractor workplace. This includes employees of covered contractors who are not themselves working on or in connection with a covered contract, but does not include contractor employees who only perform work outside the United States or its outlying areas. Covered contractor workplaces are locations controlled by a covered contractor at which any employee of a covered contractor working on or in connection with a covered contract is likely to be present during the period of performance for a covered contract.

- ▲ **Vaccination of Covered Contractor Employees** - Covered contractors must ensure that all of their covered employees are fully vaccinated for COVID-19, unless the employee is legally entitled to an accommodation. Covered contractor employees must be fully vaccinated no later than December 8, 2021. After that date, all covered contractor employees must be fully vaccinated by the first day of the period of performance on a newly awarded covered contract, and by the first day of the period of performance on an exercised option or extended or renewed contract when the clause has been incorporated into the covered contract. Contractor employees working on a covered contract from their residence also must comply with the vaccination requirement for covered contractor employees.

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▲ **Masking and Physical Distancing While in Covered Contractor Workplaces** - Covered contractors must ensure that all individuals, including covered contractor employees and visitors, comply with published CDC guidance for masking and physical distancing at a covered contractor workplace. The Task Force's guidance issued today includes more details on these masking and physical distancing requirements, which do not apply to the residences of covered contractor employees.

▲ **COVID-19 Coordinator Designation** - Covered contractors must designate a person or persons to coordinate implementation of and compliance with these workplace safety protocols at covered contractor workplaces. Their responsibilities to coordinate COVID-19 workplace safety protocols may comprise some or all of their regular duties.

Who is responsible for determining if a covered contractor employee must be provided an accommodation because of a disability or because of a sincerely held religious belief, practice, or observance?

A covered contractor may be required to provide an accommodation to contractor employees who communicate to the covered contractor that they are not vaccinated for COVID-19, or that they cannot wear a mask, because of a disability (which would include medical conditions) or because of a sincerely held religious belief, practice, or observance. A covered contractor should review and consider what, if any, accommodation it must offer. The contractor is responsible for considering, and dispositioning, such requests for accommodations regardless of the covered contractor employee's place of performance. If the agency that is the party to the covered contract is a "joint employer" for purposes of compliance with the Rehabilitation Act and Title VII of the Civil Rights Act, both the agency and the covered contractor should review and consider what, if any, accommodation they must offer.

TPM IS WORKING TO KEEP EMPLOYERS UP-TO-DATE ON ALL NEWS & RELEASES WITH REGARD TO MANDATORY VACCINATIONS AND WILL PROVIDE CURRENT INFORMATION AS IT BECOMES AVAILABLE.

LEGAL BRIEFING

Source:
Bloomberglaw

NYC Schools to Enforce Vaccine Mandate

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U.S. Supreme Court Justice Sotomayor allows NYC Schools to Enforce Vaccine Mandate

On October 1, 2021, U.S. Supreme Court Justice Sotomayor

let New York City start enforcing its requirement that school employees be vaccinated against COVID-19 or lose their jobs, rejecting an effort by teachers and staff members who sought to block the mandate. The mandate allowed for religious and medical exemptions, however, weekly testing as an alternative to getting vaccinated was not an option.

Sotomayor, who is assigned to consider emergency requests out of the New York-based 2nd U.S. Circuit Court of Appeals, made no comment in turning down the emergency request. The city can now enforce the requirement, which was scheduled to take effect Friday, for its 148,000 teachers and staff.

The challengers told the court the mandate will cause thousands of unvaccinated public school employees to lose their jobs. The court has given state and local governments leeway to adopt COVID-19 measures, except when they affect religious worship. In August, Justice Amy Coney Barrett turned away a challenge to Indiana University's requirement that all students be vaccinated unless they have a religious or medical exemption.

Those challenging the vaccine mandate tried to show that the city treated school staff more harshly than other municipal workers. Unlike the latter group, school workers can't opt out of the mandate by agreeing to weekly testing. The school mandate allows exemptions for medical and religious reasons.

