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Federal Mandate for COVID-19 Vaccine: What's Next? • September 2021

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We already know that employers can mandate the COVID-19 vaccine, as outlined in previous articles where the Equal Employment Opportunity Commission (EEOC) made it clear in 2020, subject to the ADA (medical conditions) and Title VII (religious objections). Since then, politicians in a number of states had been working to make it illegal for employers to mandate the requirement. If not for President Biden's Executive Order on September 9, there would have been a patchwork of state by state regulations to manage. Now, it is likely that there will be some litigation in one or more of the states against the Executive Order. This mandate looks to be headed to the Supreme Court. While the court in the past allowed that employers can mandate vaccines, the question now becomes: can the federal government mandate employers to get their employees vaccinated.

Even before the Executive Order, more and more employers were considering their own mandates to get business that had been derailed by COVID-19, back on track. This had been a dramatic shift from where employers were originally when the vaccine first became available. Now, this federal mandate may encourage some employers to get a mandate into place, where they may have been hesitant to do so before.

So what was President Biden's Executive Order all about?

The order will apply to employers with more than 100 employees. It directs the Department of Labor's (DOL) agency, the Occupational Safety and Health Administration (OSHA), to develop an Emergency Temporary Standard (ETS) to (1) ensure that employees are vaccinated or require weekly COVID-19 testing, and (2) provide paid time off for employees to be vaccinated or to recover from side effects of the vaccines. The use of an ETS is not new. This allows state and federal agencies to take quick action in an emergency situation. It enables them to issue standards that can remain in place for six months. Once that time has passed, they then have to make them permanent regulations. Whether this ETS will become formal regulations will likely depend on where we are with the virus at that point in time. It is likely that they will become permanent regulations, given the virus activity continuing throughout the world.

The Executive Order also applies to Executive Branch Employees and Federal Contractors, who must be vaccinated within the next 75 days. This directive will still be subject to the ADA and Title VII exceptions mentioned in previous articles, and there will be no option to opt-out with weekly testing. Further guidance is to be issued by September 24th.

Finally, it also applies to Health Care Providers. The Centers for Medicare and Medicaid Services (CMS) is to issue rules that require healthcare facilities that receive federal funds (eg. Medicaid) to require vaccines. This will be similar to the nursing home rules already in place, but will broaden its application to include hospital, dialysis facilities, ambulatory surgical settings, and home health agencies.





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Important Questions to be Answered...

Since further guidance has not yet been released, there are many questions that cannot yet be answered. For example, will it apply to all employees? The DOL has stated that it will not apply to remote workers if they do not go into the office or facility with other employees. It is yet unclear how to fully define this category.

• **How will we determine the 100 employee threshold?**

Is it 100 and over, or more than 100? Will controlled group rules apply? Will we count full time and part time? It is unclear.

• **When will the requirement go into effect?**

At this juncture, we only know that the DOL states that rules will be released in “upcoming weeks.”

• **How will the paid leave requirement work?**

The DOL has stated that they will allow employers to require that employees use existing PTO or sick leave, where applicable.

• **If weekly testing is required, who will pay for it?**

Health plans are not required to pay for testing for employment purposes. Will the employer or the employee have to pay?

• **How can employers administer weekly testing if they decide to do so?**

Which test would be required? How do we track whether employees got tested? What discipline can be applied if they don't get the test or fail to report results?

Right now there are more questions than answers, but in the coming weeks we will have further information to act upon. If you are unclear on how to apply this Executive Order and ETS to your organization, reach out to a member of the Starkweather Benefits team. We are here to assist.

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