

# NOW & NEXT

## Labor & Employment Alert

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### President Biden orders vaccination mandate for large employers

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President Biden outlined his plan to ramp up the fight against COVID-19, including a requirement that all US companies with 100 or more employees ensure that their workforce is “fully vaccinated” or tested for COVID-19 on a weekly basis.



#### What's the Impact

- / The ETS is expected to be published in coming weeks and to take effect this fall
- / Employers also will be required to provide paid leave for vaccination and vaccination recovery
- / Many questions remain regarding how employees will be counted, who will pay for testing, and what types of exemptions will be permitted

On September 9, 2021, President Biden announced a [six-prong plan](#) to combat COVID-19 and specifically the surge of the Delta variant in the United States (the “Plan”). As part of this Plan, President Biden instructed the federal Occupational Safety and Health Administration (“Fed/OSHA”) to issue an Emergency Temporary Standard (“ETS”) which will require all companies with 100 or more employees to ensure that their workforce is “fully vaccinated” and to

require any employees who remain unvaccinated to undergo testing on at least a weekly basis and provide a negative test result to the company before entering the workplace. This ETS is expected to be published in coming weeks and to take effect this fall. Under the new Plan, employers with more than 100 employees also will have to provide (a currently unspecified amount of) paid time off to employees to get the vaccine and for any recovery time after getting vaccinated.

## What is an ETS and what does it mean for states with their own OSHA plans and guidance?

An ETS is a temporary standard issued by Fed/OSHA to address a specific safety issue in an expedient manner. As an ETS, the rule will undergo an expedited review process and will not be subject to public comment prior to being issued. Additionally, when Fed/OSHA issues an ETS, state Occupational Safety and Health plans must adopt identical or “at least as effective” standards or demonstrate that an existing state standard is at least as effective as the new federal standard. The ETS does not limit state or local mandates or guidance which are not inconsistent with the ETS and which may be further reaching than the new federal standard nor does it preempt the additional enforcement powers that states have.

## How will the ETS be enforced?

While Fed/OSHA has broad investigative and enforcement authority, most Fed/OSHA investigations begin with either employee complaints or reportable incidents. After such investigations, Fed/OSHA can assess penalties of up to almost \$14,000 per violation for other-than-serious and serious violations, meaning that a failure to comply with this mandate could get very costly for employers very quickly, and employers are encouraged to engage experienced OSHA counsel at the earliest awareness of any complaint or communication.

## How will the 100-employee threshold be counted?

As many employers know well, there are various ways to count employees: All employees at a particular site? All employees in the United States? All employees working for the same “integrated employer”? At this early stage, it is not yet clear what standard will apply. Given the sweeping nature of the mandate, and President Biden’s clearly stated objective to ensure as many individuals are vaccinated as possible, however, we expect that this threshold will be applied as broadly as possible.

## Will employers have to pay for testing? What types of tests can be used to meet the testing requirement for unvaccinated employees?

The Plan as announced does not specify who will pay for the costs of the required weekly tests, whether employers will be required to provide paid time off for testing, or what tests employers may accept to meet the requirement that unvaccinated employees provide proof of a negative COVID-19 test at least weekly.

The fourth prong of the Plan, however, focuses on increasing testing, as well as continued mask requirements on interstate public transportation and in airports and on federal property. As part of increasing testing, President Biden is taking steps under the Defense Production Act to accelerate the production of rapid COVID-19 tests, including at-home tests. The Plan also announces that several retailers would be selling at-home rapid test kits at cost and that Medicaid would now cover at-home tests. The Plan also expands free testing at pharmacies.

### Will this ETS apply to remote workers?

While we need to wait and see the exact language and requirements of the ETS, the phrasing of President Biden's announcement, as well as the White House publication on the Plan, point to the requirement being for employees who are "coming to work" as opposed to those who are working from home. However, the ETS will likely have exemptions for those workers that do not have work-related contact with other persons.

### How will "fully vaccinated" be defined?

The Centers for Disease Control ("CDC") currently considers an individual to be "fully vaccinated" two (2) weeks after either their second dose in a 2-dose series, such as the Pfizer or Moderna vaccines, or their only dose of a single-dose vaccine, such as the Johnson & Johnson Janssen vaccine. Despite the current debate surrounding booster shots, it is expected that the ETS will track the existing CDC guidance.

### Will there be exceptions to the vaccine requirement for medical conditions and sincerely held religious beliefs?

Statements made by President Biden and other White House officials indicate that the vaccine requirements announced as part of the Plan will allow for vaccination exemptions for those with medical conditions or sincerely held religious beliefs which prevent vaccination. It is not clear whether the ETS will provide more guidance than the somewhat sparse FAQs on this topic issued by the EEOC regarding required ADA and Title VII exemptions to vaccine requirements.

Nonetheless, it would appear that any unvaccinated employees (regardless of exemption status) will still be subject to the weekly requirements to provide proof of a negative test to their employer.

### Will employers who have already issued vaccine mandates be affected?

While employers who have issued vaccine mandates are certainly ahead of the curve in complying with this mandate, they are not necessarily off the hook. For instance, if any employees were granted medical or religious exemptions to their policies, the employer will need to ensure that such unvaccinated employees submit to weekly testing, to the extent such testing was not already required as a reasonable accommodation.

## Will the ETS have recordkeeping requirements?

At this point it is unclear whether the ETS will specify what documentation will be required from employees to demonstrate vaccination status and testing results and/or how it must be maintained by the employer. However, the EEOC has stated that proof of vaccination and other confirmation of vaccination status, as well as COVID-19 test results, are confidential medical information and, therefore, subject to the ADA record keeping requirements. Thus, if employers are required to collect this documentation, it will need to be maintained confidentially and separate from an employee's personnel file.

## What else is in President Biden's Plan that employers need to know?

There is a lot in the Plan and a lot in the announcement that needs to be fleshed out in coming weeks as OSHA and other agencies work to implement the Plan. In addition to the above requirements for employers with more than 100 employees, the Plan also requires that all federal executive branch workers and employees of federal contractors as well as workers who work in most healthcare settings that receive Medicare or Medicaid reimbursement—including but not limited to hospitals, dialysis facilities, ambulatory surgical settings, and home health agencies, including staff who are not involved in direct patient care and volunteers in covered facilities—get vaccinated against COVID-19. This healthcare worker requirement builds on the recently announced vaccine requirement for employees in nursing homes that receive Medicare or Medicaid reimbursement.

The Plan also provides avenues for small businesses to more readily access the COVID Economic Injury Disaster Loan ("EIDL") program and the funds still available through that program. The Plan also streamlines the Paycheck Protection Program ("PPP") loan forgiveness process to make it easier for small businesses which used the PPP funds to keep employees on payroll during the pandemic.

This employment alert is just part of the overlapping web of issues facing businesses as a result of the COVID-19 pandemic. We recently hosted a [webinar](#) featuring a conversation about vaccine mandates and how some employers have been implementing them, and our Nixon Peabody team will continue to provide [updates](#) on other issues facing employers and solutions to assist them in navigating these turbulent times.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

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