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New Surge Brings New Mandates: The Biden Administration Tries a New Tactic

Human Resources & Employment

The Biden administration announced this week that it would mandate COVID-19 vaccinations (with exceptions for disabilities and sincerely held religious beliefs) for a staggering number of Americans. The latest mandate – covering federal workers, federal contractors, and healthcare workers at hospitals and other health institutions that participate in Medicare and Medicaid social programs – is the boldest attempt yet to curb the vaccine hesitancy and resistance that has contributed to the recent increase in cases, hospitalizations and deaths as the Delta variant continues to spread.

In addition to the mandate, the administration also announced that it would order the Department of Labor's Occupational Safety and Health Association (OSHA) to issue a rule, called an emergency temporary standard, that large employers (those with at least 100 employees) must mandate vaccination or weekly testing. Employers will also be required to offer paid time off for employees to be vaccinated. Employers who do not comply may face fines up to \$14,000 per violation. OSHA oversees workplace safety, and recently it issued another emergency temporary standard regarding PPE for healthcare facilities.

[As we wrote about in May](#), the EEOC took the position that vaccines are not medical examinations under the ADA, and that employers can require them (again, with exceptions). The EEOC also gave employers permission to offer incentives to encourage employees to be get vaccinated. With this week's announcement, it seems the administration is trading the carrot for the stick.

Covered employers should prepare for the new mandate and ensure that staff is trained to comply with existing duties, including maintaining confidentiality in collecting vaccination status, engaging in the interactive process when handling requests for reasonable accommodations, and following applicable federal, state and local guidelines surrounding time off for vaccination and recovery. As we await details on the OSHA emergency temporary standard, including its paid leave component, employers can take steps now to ensure a smooth transition to mandating vaccination.

It remains to be seen how the administration's requirements, particularly the rule covering private employers not associated with federal programs and contracts, will withstand legal challenges. However, with employers both big and small considering whether to mandate vaccinations, the federal government's prior encouragement, and now requirement, that covered employees must now be vaccinated should provide some comfort that a mandate is something American employers can adopt.

If you would like more information or would like to discuss these issues further, please contact a member of Gould & Ratner's [Human Resources and Employment Practice](#) or visit our [Coronavirus/COVID-19 Resources page](#).