

New COVID-19 Action Plan, “The Path Out of the Pandemic”

As you know, on September 9, President Biden announced a new COVID-19 Action Plan, titled “The Path Out of the Pandemic” (The POP). The POP takes a six-pronged approach to combatting COVID-19. The first prong of The POP outlines measures to reduce the number of unvaccinated Americans through regulation. Below, we’ve summarized the issues that counties will face regarding the new regulations. The regulations to effectuate THE POP are not yet published, and it is possible that the regulations will include some type of exclusion for states/municipalities, though this is unlikely.

New Executive Orders direct federal agencies to draft regulations to require vaccinations for all many employees across the United States.

1. Executive Order No. 13991 requires all Federal executive branch workers to be vaccinated in accordance with guidance to be issued by the Safer Federal Workforce Task Force (the “Task Force”), established by. This Executive Order builds upon previous vaccination requirements made in July 2021 for federal employees, by taking away the option for routine testing in lieu of vaccination.
2. The Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors requires vaccinations for all employees working on or in connection with covered federal government contracts and subcontracts, with limited exceptions.

3. Another Executive Order requires the Department of Labor’s Occupational Safety and Health Administration (OSHA) to develop a regulation requiring employers with 100 or more employees to ensure their workforce is fully vaccinated or require any workers who remain unvaccinated to produce a negative test result on at least a weekly basis. The White House announced that OSHA will issue an emergency temporary standard (ETS) to implement this requirement.
4. And another Executive Order instructed the Centers for Medicare and Medicaid Services (CMS) to develop a rule requiring workers in health care settings that receive Medicare and Medicaid reimbursements to implement vaccination and testing protocols. This regulation would be released as an Interim Final Rule, and would be an extension of CMS’s impending rule that would require vaccination for nursing home employees previously announced.

In addition to employees of executive agencies of the federal government, the following employers will be required to implement vaccine mandates under the regulations to be developed in accordance with the Executive Orders:

1. Federal contractors: The EO applies to new contracts or solicitations issued on or after October 15, 2021, as well as extensions or renewals of existing contracts, or modifications on existing contracts, that occur on or after October 15, 2021. For existing contracts the order states that “agencies are strongly encouraged to the extent permitted

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by law, to ensure that the safety protocols required under those contracts and contract-like instruments are consistent with the requirements” published by the Task Force. The Task Force issued guidance on September 24, 2021, which was a week later than required by the EO. According to the Task Force’s guidance, a “covered contractor employee” is 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. The Federal Acquisition Regulatory (“FAR”) Council began to oversee the implementation of the Task Force recommendations on October 8, 2021.

2. Healthcare settings that accept Medicaid/Medicare: This includes nursing homes, hospitals, dialysis facilities, ambulatory surgical settings, and home health agencies among other health care facilities. CMS has indicated that it is developing an Interim Final rule with Comment Period that will be issued sometime in October.
3. Employers with 100+ employees: Private employers with more than 100 employees that are subject to the Occupational Safety and Health (OSH) Act of 1970, which according to OSHA “covers most private sector employers and workers in all 50 states, the District of Columbia and other U.S. jurisdictions either directly through Federal OSHA or through an OSHA-approved state plan.” State Plans are OSHA-approved workplace safety and health programs operated by individual states or U.S. territories. State Plans are monitored by OSHA and must be at least as effective as OSHA in protecting workers and in preventing work-related injuries, illnesses and deaths. Accordingly, States with OSHA-approved State plans will likely be required to implement the OSHA vaccine mandate. **Although OSHA**

generally does not apply to local governments and municipalities, counties and other municipalities with 100 or more employees in New York and other states with OSHA-approved state plans that cover state and municipal workers will likely be subject to OSHA’s impending vaccine rule. Therefore, local governments and municipalities in states, like New York, should prepare for the mandate to apply. When OSHA promulgates the ETS, these states with OSHA-approved state plans will be required to amend their standards to be identical or “at least as effective as” the new standard, or show that an existing State standard covering this area is “at least as effective” as the new Federal standard. In New York, this action will be taken by NYSDOL and PESH. **The timeline for the release of OSHA’s ETS is unknown at this time, but on October 14, 2021 it was reported that the final draft of OSHA’s rule had been sent to the White House for final review, suggesting an impending release.** Once published, an ETS may remain in place for only up to six months, after which it must be replaced by a permanent OSHA standard. A permanent OSHA standard, unlike an ETS, must undergo a formal rulemaking process subject to a notice and comment period. Adoption of the ETS by state plans must be completed within 30 days of the promulgation date of the ETS and must remain in place as long as the ETS is in place.

Employers subject to the above vaccine mandates should begin to prepare for The POP by drafting policies and forms, and developing processes and procedures, that may be necessary to track employee vaccinations, medical and religious exemptions, and employee testing status.

4818-0430-5663, v. 1