

PUBLICATION

What Every Employer Should Know About President Biden's Path Out of the Pandemic Plan

Authors: Christie M. Hayes, Martha L. Boyd, Sharonda Childs Fancher

September 10, 2021

On September 9, 2021, President Biden unveiled his Path Out of the Pandemic COVID-19 Action Plan (the Path Out Plan or Plan). To date, there are over 175 million fully vaccinated Americans. The President's Path Out Plan squarely addresses the nearly 80 million Americans eligible to be vaccinated who have not yet gotten their first shot. The Path Out Plan contains six major prongs and represents a sweeping overhaul of current COVID-19 measures for a staggering number of Americans.

All Employers with 100+ Employees: Mandatory Vaccination or Weekly Testing

Under the first part of the Path Out Plan, President Biden will direct the Department of Labor's Occupational Safety and Health Administration (OSHA) to develop a rule that will require all 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 before coming to work. The Path Out Plan calls on OSHA to issue an Emergency Temporary Standard (ETS) to implement this requirement. The White House estimates this requirement will impact over 80 million workers in private sector businesses with 100+ employees. In addition, the Path Out Plan will provide paid time off for vaccination for most workers and for those workers who have adverse side effects from vaccination. It is not yet known what the parameters of the paid time off will be, but the ETS specific to health care employers issued by OSHA earlier this year already contains various time-off provisions and medical removal protection benefits which are likely to serve as a template for the paid time off required by this ETS.

While not explicitly outlined in the Path Out Plan, mandatory vaccination may implicate other concerns for employers with mandatory vaccination policies, including but not limited to health care plans, disability insurance and workers' compensation claims. The precise wording of any ETSs are expected to set the parameters for when and how religious or medical exemptions may come into play. The Equal Employment Opportunity Commission (EEOC) has already updated their technical guidance on COVID-19 to clarify that any vaccination with FDA authorization is not a "medical examination" for purposes of the Americans with Disabilities Act (ADA). Employers may also need to consider the cost of COVID-19 testing, including whether they will cover the costs or arrange other methods for employees to cover their own testing and provide results.

We expect the new ETS to be subject to immediate legal challenges, so stay tuned.

Federal Executive Branch Workers and Government Contractors: Mandatory Vaccination

President Biden has signed an Executive Order that will require all federal executive branch workers to be vaccinated without a testing option. This Executive Order does not directly include federal court or legislative employees. The President also signed an Executive Order directing that this vaccination requirement be extended to some employees of federal contractors that do business with the federal government. A Safer Federal Workforce Task Force will issue guidance on or before September 24, 2021, that will further explain the requirements involving federal contractors and any exceptions. Pursuant to this Executive Order, these requirements will "apply to any workplace locations (as specified by the Safer Federal Workplace Task Force

Guidance) in which an individual is working on or in connection with a Federal Government contract or contract-like instrument."

Health Care Employees at Medicare and Medicaid Participating Facilities

Under another prong of President Biden's Path Out Plan, the Centers for Medicare & Medicaid Services (CMS) is taking action to require COVID-19 vaccinations for employees in most health care settings that receive Medicare or Medicaid reimbursement, including but not limited to hospitals, ambulatory surgical settings, and home health care agencies. This action builds on the vaccination requirement for nursing facilities recently announced by CMS and will apply to nursing home staff as well as staff in hospitals and other CMS-regulated settings, including clinical staff, individuals providing services under private arrangements, volunteers, and staff who are not involved in direct patient, resident, or client care. These requirements will apply to approximately 50,000 providers and covers a majority of health care workers across the United States.

Large Indoor Entertainment and Sports Venues

President Biden's Path Out Plan also calls upon large entertainment and sports venues to require patrons to be vaccinated or produce a negative COVID-19 test. In his September 9, 2021 speech rolling out his Path Out Plan, President Biden specifically mentioned large entertainment venues, sports arenas, concert venues and movie theaters. Venues considering any such requirements should review local or state laws regarding vaccination requirements, as some states have enacted laws prohibiting business entities from requiring customers to provide proof of vaccination.

School Initiatives

The President's Path Out Plan includes requirements that teachers and staff at Head Start and Early Head Start programs, teachers and child and youth program personnel at the Department of Defense (DOD), and teachers and staff at Bureau of Indian Education-operated schools obtain vaccination. The Department of Health and Human Services will initiate rulemaking to implement this policy for Head Start and Early Head Start programs. Additionally, the Path Out Plan calls for Governors to require vaccinations for teachers and school staff. The Path Out Plan will also require vaccination among federal employees, including those working in DOD and Bureau of Indian Education schools.

In addition, the Path Out Plan outlines how the Department of Education will make additional funding available to help school districts fill financial funding gaps when funding has been withheld by their state for implementing COVID-19 protocols. Local school districts will be able to apply to the Department of Education in the coming weeks. These funds are different from the funds already allocated through the American Rescue Plan.

Testing

The Path Out Plan also outlines multiple initiatives designed to increase COVID-19 testing and to make it more affordable. Several retailers will sell at-home, rapid COVID-19 tests at cost to consumers for the next three months. The Path Out Plan also calls for a federal government investment of nearly \$2 billion for the procurement of rapid point-of-care and over-the-counter at-home COVID tests. Medicaid must also cover the cost of testing for beneficiaries. Although this part of the Plan is geared to increase testing, the Plan does not address whether or not employers will bear the financial burden of testing for employees who opt for testing instead of compliance with a vaccination mandate or whether employers are required to pay employees for time spent testing each week. Some states have already mandated that employers pay for mandatory testing, however.

Economic Recovery

Another portion of the Plan is aimed at assisting more than 150,000 small businesses. More than \$150 billion in loanable funds are still available in the COVID Economic Injury Disaster Loan (EIDL) program. The Small

Business Administration (SBA) will increase the maximum amount of funding a small business can borrow through this program from \$500,000 to \$2 million, which can be used to hire and retain employees, purchase inventory and equipment, and pay off higher-interest debt. The SBA is also directed to make it easier for small businesses with multiple locations in hard-hit sectors like restaurants, hotels, and gyms to access these loans. The SBA will offer a 30-day exclusive window of access where only small businesses seeking loans of \$500,000 or less will receive awards after the new loan program is rolled out. The Plan also will direct changes to the Paycheck Protection Program (PPP) which forgives federal loans to employers with the goal of streamlining the process for forgiveness.

Additional Areas of Interest

The White House has stated that the Path Out Plan will provide additional support for hospitals facing capacity issues, including a commitment to double the number of DOD teams deployed to support hospitals who have a surge in COVID-19 cases. The Path Out Plan also calls to increase the average weekly pace of shipments of free monoclonal antibody treatment and deploying federal monoclonal antibody strike teams. The Plan also perpetuates federal property and interstate travel masking requirements.

Conclusion

Although OSHA's ETS regarding mandatory vaccinations for employers with more than 100+ employees is expected to be rolled out in the very near future, it is almost certain to be met by legal challenges from employers, trade organizations, and state governments. In general, OSHA is empowered to promulgate an ETS that would remain in effect for up to six months without going through the normal review and comment process of rulemaking. It is worth noting that there is precedent for the courts to strike down an OSHA ETS; in 1984, a court rejected an OSHA ETS regulating asbestos after concluding that OSHA did not provide sufficient support that workers were in grave danger and an emergency standard was necessary to protect them. All employers, regardless of size, are still required to comply with the general duty clause of the OSH Act. The details of this Path Out Plan and anticipated ETS are far from certain.

If you have any questions about the Path Out Plan and what it may mean for your business, please contact one of the authors or any member of Baker Donelson's [Labor & Employment Team](#).

Upcoming Webinars:

Baker Donelson will be holding webinars to answer all of your vaccine-related questions. Join shareholders [Jennifer L. Curry](#) and [Donna M. Glover](#) for their two-part webinar "COVID-19 Vaccination Mandates: What Employers Need to Know About Religious and Medical Exemptions" on September 21 and September 22. To learn more and to register, click [here](#).

Additionally, shareholder [Andrea Bailey Powers](#) will be presenting her webinar, "Vaccine Incentives: Your Questions Answered" on September 23. To learn more and to register, click [here](#).