

Labor & Employment Alert
September 10, 2021

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***A Toolkit of Federal Guidance for Developing a Workplace COVID-19
Vaccination Program***

In recent weeks, a growing conversation has unfolded about COVID-19 vaccine mandates in the workplace. This conversation was further thrust into the spotlight last night, on September 9, 2021, when President Biden outlined a far-reaching COVID-19 Action Plan, which particularly seeks vast vaccine mandates in the workplace.

For employers, implementing a vaccine policy can be intimidating given the variety of state and federal regulators who have issued guidance on the subject. Additionally, a COVID-19 vaccine mandate may carry an extra threat of workplace polarization of which many employers are understandably wary. The purpose of this Client Alert is to summarily outline a toolkit of federal guidance, including President Biden's COVID-19 Action Plan, that an employer may consult, in part, when considering whether to implement a COVID-19 vaccine program in their workplace. Please note, all numbered headings below are hyperlinked.

I. [President Biden's Path Out of the Pandemic COVID-19 Action Plan](#)

In its COVID-19 Action Plan (the "Plan"), the Biden Administration outlines a six-pronged strategy to combat COVID-19, which highly emphasizes the importance of vaccinations.

1) Vaccines

Regarding COVID-19 vaccinations, the Plan:

- Requires a vaccine mandate or weekly testing for private sector employers with 100+ employees.
 - An OSHA Emergency Temporary Standard (ETS) is being developed to implement this mandate.
 - Massachusetts is under federal OSHA jurisdiction which covers most private sector workers within the Commonwealth. State and local government workers are not covered by federal OSHA. Under Massachusetts law, Massachusetts public employees have at least the same level of protection provided under the federal OSH Act, including standards and provisions of the General Duty Clause, pursuant to MGL c. 149, §6 ½(b). However, at this point, it remains unclear how the Plan will impact Massachusetts enforcement of its workplace safety rules for public employees, including as they relate to a potential vaccine mandate and/or testing requirements.
- Requires a vaccine mandate for all federal workers and the employees of federal contractors with no stated option of a testing alternative.
- Requires a vaccine mandate for health care workers at Medicare and Medicaid participating hospitals and other health care settings.
 - The Centers for Medicare & Medicaid Services (CMS) will be carrying out this action.

Labor & Employment Alert

September 10, 2021

- “Calls” on large entertainment venues to require patrons to have proof of vaccination or show a negative test for entry.
- Requires paid time off to get vaccinated or recover from vaccine-related illness.

2) Additional Vaccine Protections

In the wake of COVID-19 breakthrough cases, for fully vaccinated individuals, “booster” COVID-19 vaccine shots will be made available starting as early as the week of September 20th subject to various federal authorizations. It is unclear at this time whether boosters will be a part of the Plan’s vaccine mandate requirements.

3) Keeping Schools Safely Open

A main priority of the Plan is to ensure the safe reopening of schools.

- The Plan requires vaccination for staff in Head Start Programs, Department of Defense Schools, and Bureau of Indian Education-Operated Schools.
- The Plan “calls” on states to adopt vaccine requirements for school employees.
 - Massachusetts is not one of the nine states that requires teachers and school staff to be vaccinated.
- The Plan provides additional funds to school districts:
 - \$130 billion ARPA funds are allocated to states, school districts and tribes for safe reopening of schools.
 - If a state cuts funding to a local school district implementing CDC-recommended prevention strategies, the school district can rely on ARPA funds to fill such gaps
 - School districts may begin spending their ARPA funds immediately.
 - School districts may use the funds to reimburse any allowable cost dating back to the national COVID-19 emergency declaration.
 - The U.S. Department of Education plans to make additional funding available to help local school districts fill gaps when the state has withheld their funding for implementing COVID-19 safety measures.
 - Local school districts will be able to apply to the Department of Education soon to restore funding withheld by the state, which can be used for school board members or superintendent salaries whose pay was cut.
- The U.S. Department of Education is in charge of ensuring that state and local officials are providing students with access to safe full-time, in-person learning. The Department launched investigations in five states that prohibited mask mandates in schools in part to examine whether the mask mandate prohibitions discriminate against students with disabilities who are at a higher risk of severe illness from COVID-19 by preventing them access to safe in-person learning
- The Plan encourages increased school testing:
 - HHS provided \$10 billion in funding for COVID-19 testing in K-12 schools.
 - The Biden Administration “calls” on all schools to arrange regular testing.

Labor & Employment Alert **September 10, 2021**

- CDC recommends that testing be offered to not yet fully vaccinated students when community transmission is at moderate, substantial or high levels, and to not yet fully vaccinated teachers and staff at any level of community transmission.
- The Plan provides the U.S. Food and Drug Administration with necessary resources to assist in the FDA's process regarding a vaccine for children under age 12.

The remaining three prongs of the Plan provide insight into expanding COVID-19 testing access and continuing masking in certain areas; outlining provisions for protecting the country's economic recovery to support borrowing and support for business (especially small businesses); and offering developments for improving care for those with COVID-19.

II. [U.S. FDA Approves Pfizer Vaccine](#)

On August 23, 2021, the FDA approved the Pfizer-BioNTech COVID-19 Vaccine (commonly known as the "Pfizer vaccine") as the first COVID-19 vaccine (now being marketed as Comirnaty), meaning it no longer carries the EUA status. Gaining "vaccine" status demonstrates that the Pfizer vaccine successfully passed the FDA's standard and thorough process in assessing its quality, safety, and effectiveness.¹

III. [OSHA's Latest Non-Binding COVID-19 Guidance](#)

On August 13, 2021, the U.S. Department of Labor's Occupational Safety and Health Administration ("OSHA") issued its most recent, non-binding guidance to mitigate COVID-19 exposure in the workplace.² In particular, this Guidance applies [the CDC's most recent public health recommendations for fully vaccinated people](#) (updated July 26, 2021), amidst the rise of the Delta variant of COVID-19, to workplaces. Relying on this report, OSHA reinforces that vaccines "are an effective and critical tool for bringing the pandemic under control" while also making additional recommendations for addressing the Delta variant in the workplace. Regarding vaccinations in the workplace, OSHA recommends that employers:

- *Facilitate COVID-19 Vaccinations*
 - Employers "should" provide their workers with paid time off to get vaccinated and recover from any side effects.
 - Employers should consider providing vaccines to their employees.

¹ The Pfizer vaccine is still subject to EUA status for individuals ages 12 through 15 years and for the administration of its third dose "booster" shots.

² As we have mentioned in past Client Alerts, while OSHA guidance is non-binding, all employers are subject to the General Duty clause from the OSH Act of 1970, which provides that employers shall furnish to each of its employees a place of employment that is free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees. As such, following OSHA's COVID-19 guidance to the greatest extent possible is advisable.

Labor & Employment Alert **September 10, 2021**

- Employers should consider implementing vaccine policies, that require their employees to either a) get vaccinated; or b) if they choose to not get vaccinated, to undergo regular testing and continue to wear masks and social distance.
- *Follow the CDC's Recommendations for Fully Vaccinated People*
 - Employees while working in public indoor settings in areas with substantial or high community transmission should wear masks, even if they are vaccinated, to protect unvaccinated workers.
 - Fully vaccinated employees with known exposure to a person who has COVID should wear masks up to 14 days following their contact unless they test negative for COVID-19 three to five days after their contact.

Along with its vaccination recommendations, these OSHA guidelines encourage employers to continue to take a multi-layered approach to prevent COVID-19 in the workplace, including:

- Implement physical distancing in all communal work areas;
- Provide face coverings or surgical masks (or other PPE as appropriate);
- Educate employees on COVID-19 procedures and policies;
- Consider mask requirements for guests/visitors of certain workplaces;
- Maintain ventilation systems based on prior CDC and OSHA guidance;
- Perform routine disinfecting of the workplace;
- Set up anti-retaliation programs and an anonymous process for workers to voice concerns about COVID-19-related hazards in the workplace; and
- Continue to follow all mandatory OSHA standards, including the Emergency Temporary Standard discussed in [our Alert from June](#).

IV. [U.S. Department of Justice's \(DOJ\) Memorandum Opinion on "Whether Section 564 of the Food, Drug, and Cosmetic Act Prohibits Entities from Requiring the Use of a Vaccine Subject to an Emergency Use Authorization"](#)

Pursuant to Section 564 of the Food, Drug, and Cosmetic Act ("FDCA"), the U.S. FDA granted emergency use authorization (EUAs) for three vaccines to prevent COVID-19. This memorandum by the Office of Legal Counsel of the DOJ from July 6, 2021 considers whether Section 564 limits the implementation of vaccination requirements as conditions of employment, education, and receipt of services, while the vaccines are still subject to EUA status. Without considering restrictions by laws like the ADA, the DOJ finds in this memorandum that the EUA status does not prohibit entities from imposing vaccination requirements.

It is important to note that this DOJ memorandum is non-binding on employers or the courts. However, it does provide further support for the contention that the EUA status of COVID-19 vaccines should not prohibit an employer from mandating its employees to be vaccinated.

Labor & Employment Alert September 10, 2021

V. [The EEOC's Technical Assistance Questions and Answers](#)

In late May and in June 2021, the EEOC updated its COVID-19 Technical Assistance to consider the impact of various equal employment opportunity (EEO) laws on implementing a COVID-19 vaccine mandate. There are two important takeaways from this updated Technical Assistance:

- Federal EEO laws do not prevent employers from implementing a COVID-19 vaccine mandate for all employees that physically enter the workplace, subject to reasonable accommodation requirements discussed below.
- Asking employees about their vaccine status or requesting proof of vaccination from a third party (i.e. a local pharmacy) is permissible as it does not constitute a “disability-related inquiry” under the Americans with Disabilities Act (ADA).³

That said, a workplace COVID-19 mandate is subject to the reasonable accommodation provisions of Title VII and the ADA and other EEO laws, regardless of whether the employee receives the vaccine directly from the employer or elsewhere. Broadly speaking, under Title VII and the ADA, an employer must provide a reasonable accommodation from a COVID-19 vaccine mandate to employees who because of disability or “sincerely held religious belief, practice, or observance” are unable to get vaccinated for COVID-19. However, an employer does not need to provide an accommodation if doing so poses an undue hardship for the employer’s business operations. The analysis for determining “undue hardship” differs slightly, depending on whether the basis for the accommodation is disability-related or related to a “sincerely held religious belief, practice, or observance.”

Beyond the reasonable accommodation consideration, employers requiring the COVID-19 vaccine may run the risk of claims of discrimination based on disparate impact and disparate treatment. Disparate impact allegations could potentially manifest as claims that a vaccine mandate disproportionately excludes or negatively impacts certain types of employees based on their race, color, religion, sex, national origin, disability, age, etc. The EEOC’s Technical Assistance highlights how certain demographics of employees may face greater barriers to receiving a COVID-19 vaccination than others, which could cause a disparate impact among an employer’s workforce.

Alternatively, an employer may face disparate treatment allegations if it creates a COVID-19 vaccine mandate that *treats* employees differently based on their race, color, religion, sex, national origin, disability, age, etc. An employer can defend against disparate treatment claims by having a legitimate non-discriminatory reason for requiring some, but not all, employees to get the vaccine. Given the potential for both disparate impact and disparate treatment claims, it is advisable to seek legal counsel before implementing a vaccine mandate, particularly if it does not apply uniformly across the board, to determine the risk of a discrimination claim, the strength of the business reason justifying different treatment among various classes of employees, and how Massachusetts laws might also apply.

³ Vaccine information from an employee is confidential medical information and must be separately maintained in a confidential medical file under the ADA and other relevant privacy laws.

Labor & Employment Alert September 10, 2021

VI. [Center for Disease Control's Workplace Vaccination Program Information Page](#)

In March 2021, the CDC published an information page on its website providing practical guidance for employers implementing a COVID-19 vaccination policy. This practical guidance includes, in part, vaccination mandate exemptions that are consistent with the EEOC's guidelines (*see above*); how to build workplace confidence in the vaccine; coordinating on-site and off-site vaccination services for employees; suggestions regarding staggering employee vaccinations to avoid worker shortages resulting from employee absences; and offering recommendations for reopening the workplace after employees have been vaccinated.

VII. [National Institute for Health's Key Elements of a Model Workplace Safety and Health COVID-19 Vaccination Program](#)

In February 2021, the National Institute for Health (NIH) outlined its "key elements" for creating a model COVID-19 vaccination program in the workplace. These elements include:

- Establishing a COVID-19 Vaccination Planning Committee to make plans for a specific workplace on implementing a COVID-19 vaccination program while also identifying obstacles and considering program logistics.
- Collaborating with and educating employees on the COVID-19 vaccination program, which includes addressing potential concerns of employees.
- Open communication and dissemination of information about the employer's vaccination program and choice of a vaccination site at or near the place of employment.
- Creating safety and transparency protocols for communicating and handling medical risks (e.g. severe allergic reactions) that may result from administering the vaccine on-site and allowing appropriate medical leave for workers experiencing side effects.

When it comes to whether an employer can mandate the COVID-19 vaccine, the NIH defers to the U.S. Equal Employment Opportunity Commission (EEOC) (*see above*).

Next Steps for Employers

As discussed above, there are many regulatory and statutory provisions to consider when implementing a vaccine policy, whether it be an outright mandate, or a policy that contains alternatives to vaccination, such as testing. The bottom line is that vaccine mandates are not only permissible as a condition of employment, subject of course to reasonable accommodation obligations and bargaining obligations in a union workplace, but heavily favored as indicated in the Biden Administration's Plan issued last evening. Whether your policy requires a vaccine mandate or testing, and even if you are not subject to the Biden Administration's Plan, in framing your policy, it is important to develop a communications strategy, so employees clearly understand any consequences for refusal to get a vaccine or otherwise comply with the policy. It is also critical to train managers regarding implementation of the policy, including reasonable accommodation obligations. Given the EEO laws which may be implicated as well as other potential



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Labor & Employment Alert
September 10, 2021

wage and hour obligations that may arise, employers are well-advised to consult with legal counsel as they roll out and implement vaccine policies.

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