

CLIENT ALERT: Biden Administration Publishes Details of Vaccine Mandate Covering Most Large Employers and Health Care Employers

On November 4, 2021, the Biden Administration announced the details of two comprehensive rules that establish mandatory COVID-19 vaccination requirements for most employers with 100 or more employees and health care employers. The rules, issued by the Occupational Safety and Health Administration (OSHA) and the Centers for Medicare & Medicaid Services (CMS), were highly anticipated following President Biden's announcement of his mandatory vaccination plan for large employers, health care employers, federal contractors and federal employees on [September 9, 2021](#). The following is an overview of the newly published rules and the requirements for affected employers:

Large Employers with 100 or More Employees

OSHA has issued a COVID-19 Vaccination and Testing Emergency Temporary Standard (ETS), requiring employers with 100 or more employees to require that their employees are vaccinated or alternatively to produce a negative test on at least a weekly basis. Employees who have received either two doses of the Pfizer or Moderna vaccine, or one dose of the Johnson & Johnson vaccine, are considered "fully vaccinated" under the rule. All covered employers must comply with the rule no later than January 4, 2022.

After January 4, 2022, covered employers must require unvaccinated employees to produce a verified negative COVID-19 test on at least a weekly basis. Unvaccinated employees who fail to comply with the testing requirement are not permitted in the workplace. These requirements do not apply to employees who do not report to a workplace where other individuals such as coworkers or customers are present, for example, employees who work exclusively from home or outdoors. If an unvaccinated employee only comes into the workplace occasionally, the employer must ensure that the employee is tested within seven days prior to returning to the workplace and provides documentation of that test result. Significantly, the OSHA rule does not require employers to provide or pay for tests; however, the rule acknowledges that employer payment for testing may be required by other laws, regulations, or collective bargaining agreements.

Starting on December 5, 2021, covered employers must provide workers with paid time off to receive vaccinations (up to four hours, including travel), as well as sick leave to recover from vaccination side effects that preclude them from working. Additionally, covered employers must ensure that all unvaccinated employees wear face masks in the workplace, effective December 5, 2021.

The OSHA rule will apply to an estimated 84 million workers.

Health Care Employers

A second rule, issued by CMS, requires health care employers participating in Medicare or Medicaid programs to ensure their employees are fully vaccinated no later than January 4, 2022. The rule applies to all workers in covered health care facilities, including contractors, students and volunteers, regardless of their job responsibilities. Unlike the OSHA rule, health care employers are not permitted to provide their employees with a COVID-19 testing option in lieu of vaccination.

It is anticipated that the CMS rule will cover approximately 76,000 health care facilities and 17 million health care workers.

Enforcement and Next Steps

The federal government is largely relying on employers to enforce the new vaccination and testing requirements themselves. In the case of the OSHA rule, it is expected that OSHA investigators will initiate investigations into employer COVID-related practices mostly in response to employee complaints. CMS has indicated it will ensure health care employer compliance through established survey and enforcement processes. Employers who are determined to be in noncompliance with the vaccination and testing mandates may have to pay significant civil penalties, and in the case of health care employers, may be denied government funding.

It is likely that the new rules will receive significant criticism and a variety of legal challenges regarding the impact and enforceability of the mandates in the coming days and weeks. In the meantime, the regulation requires that covered employers establish written policies and implementation strategies consistent with the requirements outlined above.

MBJ will continue to monitor these issues for any forthcoming guidance. In the meantime, please contact your MBJ attorney with any questions you may have regarding these or any of the other legal changes addressed above.

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This alert was prepared on November 4, 2021.

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