COVID-19: PRESIDENT BIDEN TARGETS PRIVATE EMPLOYERS AND FEDERAL EMPLOYEES AND CONTRACTORS IN HIS "PATH OUT OF THE PANDEMIC"

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On 9 September 2021, President Biden announced his comprehensive national strategy for addressing the COVID-19 pandemic including multiple directives and actions targeted at federal, private-sector, and healthcare employers. The strategy includes regulatory action from the Occupational Safety and Health Administration (OSHA) and the Centers for Medicare & Medicaid Services (CMS) in addition to two Executive Orders, all of which include sweeping vaccination and COVID-19 safety mandates. Though the six-pronged action plan includes measures focused on vaccination efforts, protecting already vaccinated individuals, keeping schools safely open, increasing access to testing, safeguarding economic recovery, and improving care for those affected by COVID-19, this alert will address the specific directives affecting employers.

OSHA EMERGENCY TEMPORARY STANDARD FOR LARGE PRIVATE-SECTOR EMPLOYERS

As outlined in the President's six-pronged strategy, the White House has directed OSHA to issue an emergency temporary standard (ETS) that would require private employers with 100 or more employees to either mandate the COVID-19 vaccine for its workforce or require weekly COVID-19 testing before reporting to a worksite. Though limited details were provided, this ETS would apply to approximately 80 million private-sector workers in the United States. As part of the ETS, covered employers would also be required to provide paid time off for time spent obtaining a COVID-19 vaccine as well as for recovery from post-vaccination symptoms. The ETS is anticipated to be published in the coming weeks.

As background, OSHA is authorized to issue emergency temporary standards under limited conditions, specifically when it has determined that workers may be in grave danger and a new standard is necessary for their protection in the workplace. After initial publication in the Federal Register, the temporary standard follows the usual rulemaking procedure for a permanent standard, though the timeline for a final ruling is within six months of publication. Finally, an ETS may be challenged in the appropriate U.S. Court of Appeals.[1]

OSHA most recently issued an ETS on 10 June 2021 that was limited to the healthcare industry. Prior to that, OSHA had not issued an emergency temporary standard since November 1983, and that one (related to asbestos) was invalidated by the U.S. Court of Appeals for the Fifth Circuit about four months later. It is reasonable to expect that a new ETS may also face legal challenges, not only in the regular course, but also due

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to a potential clash with state legislation and executive actions prohibiting certain requirements related to COVID-19 vaccinations.

EXECUTIVE ORDERS DIRECTED AT FEDERAL EXECUTIVE EMPLOYEES AND FEDERAL CONTRACTORS

The President's plan also includes an Executive Order mandating the vaccine for federal executive branch employees, with exceptions only as permitted by law. Although few details have been provided, the Executive Order directs the Safer Federal Workforce Task Force (Task Force) to issue guidance within seven days as to the specific implementation protocols for affected agencies.

A separate Executive Order requires agencies to include a clause in certain federal contracts providing that contractors must comply with all workplace safety guidelines issued by the Task Force, with the specific protocols and any exceptions to be published by 24 September 2021. By 8 October 2021, the Federal Acquisition Regulatory Council, which is responsible for promulgating the Federal Acquisition Regulation (FAR), is required to (1) begin drafting the FAR clause required by the Executive Order and (2) recommend that agencies use their authority under FAR Subpart 1.4 to deviate from the FAR to include the Executive Order's requirements in specific types of contracts. Agencies also are required to take steps to ensure that the Executive Order's requirements are included in contracts and contract-like instruments that are not subject to the FAR, such as other transaction agreements, entered into on or after 15 October 2021. The clause will be included in contracts or contract-like instruments for services, construction, leases, and concessions. It also will be included in contracts and contract-like instruments subject to the Service Contract Act or entered into with the Federal Government in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public. The Executive Order specifically excludes certain types of federal agreements from compliance with the new requirement. Most notably, the Executive Order excludes federal grants, contracts below the simplified acquisition threshold (currently $250,000), and subcontracts solely for the provision of products.

EXPANDED CMS REGULATIONS FOR HEALTHCARE FACILITIES

The President's plan also expands on the 18 August 2021 CMS emergency regulation requiring vaccination for nursing facility staff, by requiring employees of all healthcare facilities that receive funds from Medicare and Medicaid to be fully vaccinated. The new CMS directive will expand the vaccination mandate to hospitals, home care facilities and dialysis centers in the United States 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 arrangements, volunteers, and staff who are not involved in direct patient, resident, or client care. Although some states have begun to adopt vaccination mandates for the healthcare industry, the CMS directive will develop a uniform standard across all covered entities. CMS is in the process of developing an Interim Final Rule with Comment Period that will be issued in October.

PRACTICAL CONSIDERATIONS FOR EMPLOYERS

Given the broad scope of the President's plan and the pending ETS, employers, including federal contractors, should evaluate coverage under any of the aforementioned mandates and work with counsel to develop and

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implement a compliance program that complies with federal, state, and local laws. Depending upon the scope of the ETS, there may be additional issues under the National Labor Relations Act and the Fair Labor Standards Act, as well as state wage and hour laws. Unionized employers should be cognizant of how these directives may impact obligations under collective bargaining agreements or whether a vaccine program would be a mandatory subject of bargaining. Finally, employers must address employee and applicant requests for a reasonable accommodation under both the Americans with Disabilities Act and Title VII of the Civil Rights Act if requiring vaccination as a condition of employment.

The K&L Gates Labor, Employment and Workplace Safety (LEWS) group can assist with all aspects of a mandatory vaccination program, including determining coverage under the various directives and proposed regulatory actions, addressing compliance with federal and state laws, developing COVID-19 safety policies and procedures, and crafting communications to employees and contractors.

Our Government Contracts and OFCCP practice can help federal government contractors understand the new obligations and risks that will emerge as a result of this latest action by the White House related to COVID-19.

FOOTNOTES

[1] 29 U.S. Code §655 (“Any person who may be adversely affected by a standard issued under this section may at any time prior to the sixtieth day after such standard is promulgated file a petition challenging the validity of such standard with the United States court of appeals for the circuit wherein such person resides or has his principal place of business, for a judicial review of such standard. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary.”).

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