PATH OUT OF THE PANDEMIC: EMPLOYER CONSIDERATIONS UNDER THE NATIONAL COVID-19 PREPAREDNESS PLAN

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U.S. Labor, Employment, and Workplace Safety Alert

By: Erinn L. Rigney

On 2 March 2022, President Biden released his administration's National COVID-19 Preparedness Plan (Plan) to "enable America to move forward safely" from the COVID-19 pandemic. The Plan focuses on four main areas—(1) protecting against and treating COVID-19, (2) preparing for new variants, (3) preventing economic and educational shutdowns, and (4) continuing global vaccination efforts. This alert addresses the Plan's directives that affect employers and the workplace.

Consistent with the Centers for Disease Control and Prevention's (CDC) updated COVID-19 guidance,[1] the Plan outlines how the country can move on from the COVID-19 pandemic, while also being prepared to respond to new variants and outbreaks. Among other things, the Plan focuses on implementing preventative tools like masking when the community's risk level is high and studying the impact on healthcare providers and hospitals when making decisions about whether restrictions should be imposed. In adopting this framework, the Plan moves away from generalized mask recommendations, espousing an approach that may permit all individuals to go maskless in most public indoor spaces in low to medium risk areas,[2] and focuses on the virus' impact on the healthcare system, rather than the mere number of cases in a given area. To further guide individuals, the administration plans to launch a single public health website that will identify risk levels and recommend preventative measures.

Additionally, the Plan also calls on Congress to reinstate a paid leave program for small and mid-size businesses to ensure that employees can adequately care for themselves or others due to COVID-19. Although minimal details were provided, the paid leave program will likely be similar to the Families First Coronavirus Response Act (FFCRA) paid leave entitlement,[3] which was passed in March 2020 and extended on a voluntary basis through 31 March 2021. Like the FFCRA, the Plan notes that such leave would include tax credits for employers. With many state and local COVID-19 leave laws expiring, passage of federal paid leave would provide protections for employees who may be impacted by COVID-19.

Recognizing that COVID-19 may have long-term impacts on many individuals' health, the Plan references directives on treatment and support for those suffering from "long-COVID" and pledges investments in efforts to support the mental health and well-being of healthcare workers. Employers should be aware that employees suffering from the long-term effects of or mental health conditions related to COVID-19 may be entitled to reasonable accommodations under the Americans with Disabilities Act and relevant state laws. Further, despite a relaxation of certain COVID-19 prevention recommendations, individuals who are immunocompromised may require additional protections or accommodations in the workplace.

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Finally, the President announced that, as part of the Plan, the Occupational Safety and Health Administration (OSHA) would be publishing additional guidance to assist employers with:

- Increasing vaccination/booster rates for employees;[4]
- Supporting employees choosing to wear high quality masks, with a specific reference to employees who are immunocompromised;
- Limiting COVID-19 infections in the workplace; and
- Enhancing ventilation in buildings(which was included several times in the guidance both for employers and more generally as well)

The president's announcement further indicates that OSHA is not done in the area of COVID-19 workplace safety and health guidelines and enforcement, despite the Supreme Court's decision blocking OSHA's subsequently withdrawn vaccination or testing emergency temporary standard (ETS). Indeed, OSHA is reporting over US$4 million in employer penalties from COVID-related violations of OSHA's General Duty Clause,[5] which requires employers to provide a safe work environment for employees.[6] Further, OSHA continues to indicate that it may be working on a permanent COVID-related safety standard, given that it did not withdraw the ETS as a proposed permanent rule. Additionally, for healthcare employers, although the Healthcare ETS expired in December 2021, OSHA continues to work on a permanent standard that will protect healthcare workers from COVID-19 hazards. Moreover, OSHA continues to post its ETS frequently asked questions and other subregulatory guidance.[7] Employers should prepare for additional OSHA subregulatory guidance on masking, decreasing workplace transmission, protecting immunocompromised employees, and improving workplace ventilation. OSHA would likely seek to implement and enforce this guidance through its General Duty Clause authority, until OSHA likely includes it in a permanent standard, which may apply to specific industries or more generally to private employers.

BEST PRACTICES FOR EMPLOYERS

As has been the case throughout the COVID-19 pandemic, employers can expect changing guidelines as conditions and federal and state agency directives evolve. In light of these factors, employers should consider the following:

- As regulatory requirements and guidance are updated, employers may need to reevaluate and modify workplace policies and protocols related to masking, social distancing, and vaccination, while simultaneously preparing to adapt to changing conditions.
- Employers should monitor developments and be prepared to implement a paid leave policy similar to the FFCRA for their workforces, subject to coverage.
- As OSHA has not affirmatively adopted the CDC's new framework, employers should remain cognizant of their obligations under the General Duty Clause, and adhere to current federal or state OSHA guidelines.[8]
- Employers should adhere to guidance from the Equal Employment Opportunity Commission when evaluating accommodation requests related to mental health or long-term effects of COVID-19.[9]

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Our lawyers regularly advise clients on COVID-19 matters and we are well prepared to assist businesses as they navigate operations or seek clarifying guidance regarding reopening. Visit the K&L Gates HUB for information about our available COVID-19 resources.

Our Labor, Employment, and Workplace Safety lawyers 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.

FOOTNOTES

[1] *See*https://www.cdc.gov/coronavirus/2019-ncov/your-health/covid-by-county.htmlCenters for Disease Control and Prevention, "COVID-19 By County" (last visited March 3, 2022).

[2] This does not include (i) face covering requirements for individuals across all transportation networks throughout the United States through 18 March 2022; healthcare settings, which should continue to use community transmission rates and continue to follow CDC's infection prevention and control recommendations for healthcare settings; and (iii) face coverings recommendations for individuals who have tested positive for, are experiencing, or have been exposed to someone with COVID-19.

[3] *See* K&L Gates Legal Alert, "COVID-19: Analysis of the COVID-19 Pandemic Congressional Response: Employer Requirements Under the Families First Coronavirus Response Act (FFCRA)", (discussed here).

[4] Employers may still mandate COVID-19 vaccination, subject to reasonable accommodations and state law exemptions (discussed here, here, and here).

[5] 29 U.S.C. § 654, 5(a)1 ("Each employer [] shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees…").

[6] *See* Inspections with COVID-19 related Violations | Occupational Safety and Health Administration (last visited March 4, 2022).

[7] *See* Occupational Safety and Health Administration,"COVID-19 Vaccination and Testing ETS" (last visited March 3, 2022).

[8] *See* Occupational Safety and Health Administration,"Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace" (last visited March 3, 2022).

[9] *See* Equal Employment Opportunity Commission,"COVID-19 and the Definition of "Disability" Under the ADA/Rehabilitation Act" (last visited March 3, 2022); Department of Justice and the Department of Health and Human Services,"Guidance on 'Long COVID' as a Disability Under the ADA, Section 504, and Section 1557" (last visited March 3, 2022).

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KEY CONTACTS



ERINN L. RIGNEY
PARTNER

CHICAGO
+1.312.807.4407
ERINN.RIGNEY@KLGATES.COM

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