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Vaccine Mandates Q&A

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On September 9, 2021, President Biden issued two executive orders in conjunction with the Path out of the Pandemic, President Biden's COVID-19 Action Plan (collectively, the "President's Action Plan"), providing new COVID-19 vaccination requirements, which may affect you and your business. Since the President's announcement, we have received numerous questions from employers across the spectrum. This article unpacks the White House's latest efforts as employers continue to navigate the ever-changing COVID and vaccination landscape.

Q. Who is covered by the President's Action Plan?

Private employers with 100 or more employees

Under the President's Action Plan, all employers with 100 or more employees must require vaccination or a weekly negative test result. The anticipated emergency temporary standard (ETS) from OSHA rule implementing this mandate will also require that all employers with 100 or more employees provide paid time off for its workers to get vaccinated, and recover if workers are under the weather post-vaccination.

Businesses that do not comply with the vaccine mandate or the paid-time-off requirements may face fines of up to \$14,000 per violation.

It is currently unclear who will bear the costs of the weekly COVID-19 tests—the employer or the employee.

Healthcare facilities receiving Medicare or Medicaid reimbursement

Employers in most healthcare settings that receive Medicare or Medicaid reimbursement must also require employees to be fully vaccinated. These employers include but are not limited to hospitals, dialysis facilities, ambulatory surgical settings, home health agencies. Those who must be vaccinated include nursing home staff, hospital staff, clinical staff, individuals providing services under arrangements with such facilities, volunteers, and staff who are not involved in direct patient, resident, or client care. This requirement was designed to provide a nationwide standard for healthcare vaccinations. Currently, there is no negative test exception for healthcare workers contemplated under the President's Action Plan.

Head Start and Early Head Start Programs, Department of Defense Schools, and Bureau of Indian Education-Operated Schools

All staff, teachers, and administrators of Head Start, Early Head Start, Department of Defense Schools, and Bureau of Indian Education-Operated Schools must be fully vaccinated. Currently, there is no negative



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test exception for these employees contemplated under the President's Action Plan.

Federal Employers and Contractors Who Do Business with the Federal Government

Under the Executive Order Requiring Coronavirus Disease 2019 Vaccination for Federal Employees, all federal employees are required to be vaccinated.

Similarly, under the Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors, all federal contractors who (i) enter new contracts on or after October 15, 2021, (ii) extend their current contracts or contract-like instruments, or (iii) exercise an option on any existing contract or contract-like instrument, are required to provide adequate COVID-19 safeguards to workers as outlined in the Safer Federal Workforce Task Force Guidance, including the requirement that contractors be fully vaccinated. This Executive Order applies to all companies performing work for or in connection with a Federal Government contract or Contract-like instrument.

Federal workers and contractors will have 75 days to become fully vaccinated. Currently, there is no negative test exception contemplated under the President's Action Plan.

Q. How will the President's Action Plan be Enforced?

The mandates governing private employers will be enforced under the above-mentioned ETS by OSHA

The mandate governing Medicaid and Medicare healthcare facilities will be enforced by the Centers for Medicare & Medicaid Services.

The vaccination requirements for Head Start programs will be initiated and implemented by the Department of Health and Human Services, the Department of Defense, and the Bureau of Indian Education.

The rules governing federal employees and contractors will be implemented by the Safer Federal Worker Task Force.

Q. What can we expect next?

That's the million-dollar question. While it is currently unclear what the exact scope of the new rules and orders will be, more information is expected to become available relatively quickly. The ETS and other rules will likely be issued within the next few weeks. We anticipate that the forthcoming rules will be similar to vaccine mandates in other states and will generally track the U.S. Equal Employment Opportunity Commission's (EEOC) requirements related to the Americans with Disabilities Act and Title VII of the Civil Rights Act of 1964 exemptions for disabilities and/or sincerely held religious belief, practice, or observance. The scope and standards of those exemptions are addressed below.

Similarly, we anticipate that companies may be required to provide

reasonable accommodations for those who are exempt, which may include masking, testing, and providing remote worksites.

As new rules and ETSs are contemplated and released, we will provide additional information.

Q. Are there exemptions from mandatory vaccination?

We anticipate that the vaccination requirements under the President's Action Plan will be subject to the ADA and Title VII exemptions for disabilities and/or sincerely held religious beliefs, practices, or observances.

Q. Can a disability create an exemption from the vaccination requirement?

When an employee cannot get vaccinated for COVID-19 because of a disability, the employee must let the employer know that he or she needs an accommodation. To request an accommodation, an individual does not need to mention the ADA or use the phrase "reasonable accommodation." As part of determining whether an employee has a disability that would prevent them from getting vaccinated, the employer may request supporting documentation from the employee's medical provider.

Q. What is considered a sincerely held religious belief?

What qualifies as a "religion?"

Sincerely held religious beliefs implicate Title VII of the Civil Rights Act of 1964. The EEOC's guidance broadly defines religion as beliefs which address fundamental questions about life, purpose, and death. Religious beliefs, practices, and observances include both theistic and non-theistic moral or ethical beliefs as to what is right and wrong, or which are sincerely held. The definition of religion protects beliefs and practices which the employer may be unfamiliar or beliefs that may have only one follower. However, certain beliefs do not fall under Title VII's definition of religion. Social, political, or economic philosophies, and well as mere personal preferences, even if strongly held, are not religious beliefs protected under Title VII. Similarly, ways of living, such as veganism, pacifism, or minimalism, are not protected religious beliefs.

Determining whether an employee's practice stems from a sincerely held religious belief turns not on the nature of the activity, but rather upon the motivation. Employers should review religious accommodation requests on a case-by-case basis as a certain practice by one employee may qualify as a sincerely held religious belief whereas an identical practice by another employee may not. For example, one employee might observe dietary restrictions for religious reasons while another employee adheres to the same dietary restrictions for health or environmental reasons. In this scenario, the employee whose practice is based upon sincerely held religious beliefs is subject to reasonable accommodation under Title VII whereas the employee who engages in the same practices but for secular

reasons might not be subject to reasonable accommodations.

Thus, employers should be mindful that vague statements from employees requesting a religious accommodation such as, “I refuse to get the COVID-19 vaccine due to my religion” are insufficient and will require additional inquiry by the employer to determine whether the accommodation request is indeed based upon the employee's sincerely held religious belief.

How does an employer determine whether a belief is sincerely held?

Religious beliefs must be “sincerely held” in order to qualify for Title VII accommodations. The EEOC requires that employers should ordinarily assume that an employee's request for religious accommodation is sincerely held. However, if there is an objective basis upon which the employer may question the sincerity of the employee's religious belief, the employer may request documentation from the employee to assist in the employer's assessment of the employee's sincerely held religious belief, practice, or observance. Types of documents which may be requested from the employee include the following:

- Statements and explanations from the employee that address (i) the religion upon which the employee is basing his or her religious accommodation request; (ii) the length of time the employee has practiced the religion; and (iii) the specific tenets of the religion which require the religious accommodation.
- Written statements or other documents from third parties such as the employee's religious leader, practitioners, or other with whom the employee has discussed his or her beliefs or who has observed the employee's past religious adherence.

The employer should be mindful that while prior inconsistent conduct is relevant to the question of sincerity, an individual's beliefs—or degree of adherence—may change over time, and therefore an employee's newly adopted or inconsistently observed religious practice may nevertheless be sincerely held.

Q. What accommodations must be made?

If the employer determines that employee has a disability that would prevent the employee from being vaccinated or that the employee's religious objection is, indeed, a sincerely held belief, then the employer must determine whether permitting a reasonable accommodation would create an undue hardship on the employer. The EEOC has identified the following as possible reasonable accommodations: an unvaccinated employee entering the workplace might wear a face mask, work at a social distance from coworkers or non-employees, work a modified shift, get periodic tests for COVID-19, be given the opportunity to telework, or finally, accept a reassignment.

To prove an undue hardship, the employer will need to demonstrate how much cost or disruption the employee's proposed accommodation would involve (such as implementing mask-wearing, social distancing, or alternative working conditions). However, undue hardship is something

greater than simple hardship. Relevant factors to be considered include the identifiable cost in relation to the size and operating costs of the employer, the number of individuals who will in fact need a particular accommodation, and workplace safety. Only if the employer believes implementing reasonable accommodations would create an undue hardship on the employer may it refuse to permit accommodations.

Q. How do I verify which of my employees are vaccinated?

EEOC guidance and HIPAA FAQs confirm that employers may ask employees about vaccination status, whether an employee has been tested for Covid-19, and whether an employee is experiencing any symptoms of Covid-19, but should not ask any follow-up questions.

Under the ADA, information obtained about vaccination status is considered protected health information and must be stored separately from the employee's personnel file. If an employer administered the vaccine or received the information related to the employee's vaccine status through its employee benefit plan, HIPAA applies, and the employer generally needs employee authorization or another HIPAA exception which allows use of that information prior to disclosure of the information.

Q. What can I do about an employee that refuses to be comply with the rules?

While the President's Action Plan does not clearly identify what actions an employer may take against a non-compliant employee, we anticipate that the employer will be able to terminate the employee, so long as the employee is not refusing to comply because of a disability, sincerely held religious belief, or other protected status or exemption.

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