

What employers need to know about federal infrastructure negotiations and vaccine mandates

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This content is not to be considered legal advice. We recommend Clients speak with legal counsel specializing in labor and employment law to ensure your organization meets requirements.

Agenda

- “Traditional” and “Human” infrastructure
- Likely legislative outcomes



Political dynamics

“Traditional” & “Human” infrastructure

- **Progressive House Democrats**
 - Bills are linked together - can't pass one without the other
 - Concerned about losing leverage with Moderate Democrats if traditional infrastructure passes without human infrastructure
- **Moderate Democrats**
 - Bills are not linked together - vote on traditional infrastructure bill should happen ASAP
 - Concerned that negotiations over human infrastructure could sink traditional infrastructure

Build Back Better Act

“Human” infrastructure

- **Items being discussed**
 - 12-week Paid Family & Medical Leave Program (at least \$600 billion)
 - Extend enhanced Child Tax Credit through 2026 (\$550 billion)
 - Add dental, vision, and hearing to Medicare (\$357 billion)
 - Maintain enhanced ACA subsidies (\$340 billion)
 - Green Energy initiatives (\$235 billion)
 - Universal pre-k (\$200 billion)
 - Maintain changes to Earned Income Tax Credit (\$135 billion)
 - Fix Medicaid Coverage Gap (???)

Federal PFML proposal

- **Employers will have 2 options:**
 1. Send employees to the government program (run through the Department of Treasury)
 2. Provide benefits equal to or greater than the federal requirements through a private plan
- **Private plan reimbursement:**
 - **If you buy insurance to fulfill the requirement,** you will be eligible for a premium reimbursement up to:
 - 90% of the average cost for the government to provide the benefits
 - **If you self-insure,** you are eligible for a reimbursement up to:
 - Claims paid, up to the 90% reimbursement

States with current PFML programs will have the option to become “legacy states”

- As a legacy state, you are required to modify your program to be at least equal to the federal requirements
 - Can provide more, but not less
- Employees in legacy states will file claims through the legacy state infrastructure
 - Employees in non-legacy states will file claims through the Department of Treasury
- Legacy states will be reimbursed by the federal government for the claims paid and administrative costs

Ways & Means PFML proposal

- **12-week Paid Family & Medical Leave program**
- **Own medical, bonding with new child, and caregiving for a family member**
 - Includes a “chosen family” definition
- **Progressive wage replacement**
 - 85 percent of the first \$290 of average weekly earnings,
 - plus 75 percent of average weekly earnings between \$290 and \$659,
 - plus 55 percent of average weekly earnings between \$659 and \$1,385,
 - plus 25 percent of average weekly earnings between \$1,385 and \$1,923,
 - plus 5 percent of average weekly earnings between \$1,923 and \$4,808
- **No employer or employee payroll tax**
 - Funded through general revenue

Alternative Ideas...

- 4 week program
- Means tested program
- “Ramp Up” program

Drug pricing proposal

Elijah Cummings Lower Drug Costs Now Act

- **Caps the prices of new drugs to market at 120% of the average cost in Australia, Canada, France, Germany, Japan, and the United Kingdom**
 - Pricing limit would end when a generic hits the market
 - **Major question – would the price caps apply to private payers?**
 - The Budget Reconciliation process likely means the price caps do not apply to private payer
- **Government savings estimated to be \$456 billion over 10 years**
 - Funds seemingly “earmarked” for adding dental, vision, and hearing coverage to Medicare
- **Potentially 30 fewer drugs come to market over a 10-year period**

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What items seem to be the most likely to stick?

Family

- Child tax credit (\$150 - \$550 billion)
- “Skinny” PFML program (\$150- \$300 billion)

Education

- Universal pre-k (\$200 billion)

Health

- Medicaid Coverage Gap (\$???) billion)
- Extend ACA subsidies (\$180 billion)

Green Energy

- “Basket” of initiatives (\$100 billion)

Keep your eye on...

- Drug pricing reforms
- Dental in Medicare

Sprint to the end of the year

End of October

- House scheduled to vote on bipartisan infrastructure bill
- Will need a “top-line” number to get enough Progressive votes

December 3rd

- Congress must pass a spending bill or else the government will shut down

December 10th

- Last day Congress is scheduled to be in session

Summary



 **Democrats will need to make tough choices**

 **Busy sprint to the end of the year**

 **National PFML program very possible**

Appendix

The “pay-fors...”

- **Individual increases**
 - Apply 3.8% ACA excise tax on S Corporation distributions (\$252 billion)
 - Top rate to 39.6% (\$170 billion)
 - Top capital gain rate to 25% (\$123 billion)
 - New 3% Excise Tax on those with AGI over \$5 million (\$127 billion)
- **Corporate changes**
 - For businesses with incomes under \$400,000, tax cut to 18%
 - For businesses with income between \$400,000 and \$5 million – no change
 - For businesses with income over \$5 million, tax increased to 26.5% (\$500 billion)

Appendix

Results from Presidents' first mid-term

Year	President	Approval rating	Senate	House
1982	Ronald Reagan	43%	+1	-26
1990	George Bush	58%	-1	-8
1994	William J. Clinton	46%	-8	-52
2002	George W. Bush	63%	+2	+8
2010	Barack Obama	45%	-6	-63
2018	Donald J. Trump	43.6%	+2	-41

Updates on the federal vaccine mandate initiative

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Agenda

- President Biden's action plan (what we know so far)
- Vaccine mandate considerations
- Disability accommodations for vaccine mandate
- Religious belief accommodations for vaccine mandates
- Challenges to COVID-19 Vaccine Mandates and other activity

President Biden's COVID-19 Action Plan

(what we know so far)

President Biden's COVID-19 action plan

- On 9/9/21, President Biden issued his path out of the pandemic: **COVID-19 Action Plan**
- It is a six-point plan:
 1. Vaccinating the unvaccinated
 2. Further protecting the unvaccinated
 3. Keeping schools safely open
 4. Increasing testing and requiring masking
 5. Protecting our economic recovery
 6. Improving care for those with COVID-19

Step 1: Vaccinating the unvaccinated

- This presentation will focus on vaccine issues
 - All **federal executive branch workers** and **EEs of certain federal contractors** must be vaccinated, *including those who work remotely*
 - **ERs with 100 or more EEs** must ensure their workers are either vaccinated or tested weekly before coming to work
 - **OSHA** has been directed to issue an Emergency Standard addressing the requirements for private ERs
 - **Health care and other workers** at certain facilities that receive Medicare or Medicaid reimbursement must be vaccinated

What are details of the federal requirements?

- Safer Federal Workforce Task Force has issued guidance
 - [9/24/2011 Guidance for Federal Contractors and Subcontractors](#)
 - [Contractors section](#) of Safer Federal Workforce website (regularly updated)
 - [Vaccine FAQs](#) (regularly) updated
- **Federal EEs** must be *fully vaccinated* by 11/22/21
- **Covered federal contractor EEs** must be *fully vaccinated* by 12/8/21
- **Fully vaccinated** is at least two weeks after last required dose
 - Pfizer and Moderna: 2 doses
 - Johnson & Johnson: 1 dose
- The vaccine mandate ***applies to remote workers***
- The following are ***not*** acceptable alternatives to vaccines:
 - Testing
 - Results of antibody test
 - Proof of prior COVID-19 infection

What are details of the federal requirements?

- Only **legally required exemptions** from the mandate are acceptable
- For federal EEs it appears that **only federally-recognized legal exceptions** are acceptable
 - Guidance specifically states that because it is federal law it supersedes state or local laws that prohibit vaccine mandates
 - The template for the medical exception form supplied for use by federal agencies only discusses disability accommodation under the Rehabilitation Act
 - The template for religious belief exception form supplied for use by federal agencies only discusses federal law
 - It appears that federal EEs are **not entitled** to the protections of any of the following:
 - State and local laws requiring accommodations for either disability or religious beliefs
 - State and local laws requiring accommodations for pregnancy and related conditions under state and local laws
 - ***It is not clear whether the exclusion of state and local laws requiring accommodations will also apply to federal contractors or to private ERs***

Proof of vaccination is required

- Attestation is **not** acceptable
- Proof of vaccination is required, and following **are** acceptable:
 - Copy of record of immunization from healthcare provider or pharmacy
 - Copy of COVID-19 Vaccination Record Card
 - Copy of medical records documenting vaccination
 - Copy of immunization records from public health or State immunizations information system
 - Copy of any other official documentation verifying vaccination with information on:
 - Vaccine name
 - Date(s) of administration, and
 - Name of healthcare professional or clinic site administering vaccine
- Digital copies **are** acceptable
 - PDF, digital photograph or scanned image

Masking and physical distancing requirements

- At a covered contractor worksite or at a federal workplace – including outdoor workspaces – all individuals (including EEs and visitors) must comply with published CDC guidance for masking and physical distancing
 - In areas of high or substantial community transmission, all individuals must wear mask indoors subject to limited exceptions (such as being alone in a room or eating or drinking)
 - In areas of low or moderate community transmission, fully vaccinated individuals are exempt from masking in most settings
 - Individuals who are not fully vaccinated must wear mask indoors and in certain crowded outdoor settings and must maintain physical distancing
- EEs who work remotely do not have to comply with physical distancing or masking in their residence

More on federal contractors

- Determining which federal contractors are covered is complicated, and you may need to consult a federal contractor attorney
- Covered Contracts are those that involve services to be performed in the U.S. and are any of the following:
 - Procurement contract for construction covered by Davis Bacon Act
 - Contract for services under Service Contract Act (SCA)
 - Concessions contract under SCA
 - Contract in connection with federal contracts or land offering services to federal EEs, their dependents or general public
- The requirements must be reflected in contracts as follows:
 - For contracts awarded before 10/15/21 and if performance is ongoing, requirements will be incorporated when there is an option exercised or extension to contract
 - For contracts made from 10/15/21 to 11/14/21, the solicitation will include the requirements
 - After 11/14/21, requirements must be included in all contracts

What rules apply to visitors to federal contractor worksites or to federal office buildings?

- Visitors must complete a [Certification of Vaccination](#) form but agencies should not otherwise ask for documentation
- Federal contractor EEs who are going onsite to a federal building should not be requested for documentation before they are subject to a contractual requirement

Disability accommodations for vaccine mandate

Accommodations for disabilities: Overview

- Under the ADA, ERs must provide accommodation for EE who has a disability in order to help EE perform the essential functions of the job
 - Accommodations do not have to be granted if it would:
 - Cause undue hardship for the employer
 - Create a direct threat to the safety of EE or others
 - Relieve EE from performing an essential job function
- A request for an accommodation triggers a duty to engage in a good faith interactive process
- ERs can propose alternative accommodations that effectively address the limitation and assist the EE
- ERs can also require medical documentation

Vaccine mandates: What is a disability?

- ADA (as amended by ADA Amendments Act of 2008 (ADAAA)) defines disability very broadly:
 - Mental or physical impairment that substantially limits one or more major life activities

Major life activity(ies)			
<input type="checkbox"/> Bending <input type="checkbox"/> Breathing <input type="checkbox"/> Caring For Self <input type="checkbox"/> Concentrating <input type="checkbox"/> Eating <input type="checkbox"/> Assistance with managing medications	<input type="checkbox"/> Hearing <input type="checkbox"/> Interacting With Others <input type="checkbox"/> Learning <input type="checkbox"/> Lifting <input type="checkbox"/> Performing Manual Tasks	<input type="checkbox"/> Reaching <input type="checkbox"/> Reading <input type="checkbox"/> Seeing <input type="checkbox"/> Sitting <input type="checkbox"/> Sleeping	<input type="checkbox"/> Speaking <input type="checkbox"/> Standing <input type="checkbox"/> Thinking <input type="checkbox"/> Walking <input type="checkbox"/> Working
Major bodily functions:			
<input type="checkbox"/> Bladder <input type="checkbox"/> Bowel <input type="checkbox"/> Brain <input type="checkbox"/> Cardiovascular <input type="checkbox"/> Circulatory <input type="checkbox"/> Reproductive	<input type="checkbox"/> Digestive <input type="checkbox"/> Endocrine <input type="checkbox"/> Genitourinary <input type="checkbox"/> Hemic <input type="checkbox"/> Immune <input type="checkbox"/> Respiratory	<input type="checkbox"/> Lymphatic <input type="checkbox"/> Musculoskeletal <input type="checkbox"/> Neurological <input type="checkbox"/> Normal Cell Growth <input type="checkbox"/> Operation of an Organ <input type="checkbox"/> Special Sense Organs & Skin	

What disabilities make a COVID-19 vaccine unsafe?

- In context of vaccine mandate, healthcare provider must be able to certify that imposing the mandate would create a serious risk of harm to EE because of the disability at issue
- CDC has made clear that very few conditions are “contraindications” for getting the COVID-19 vaccine. They include certain allergies:
 - Having had a severe allergic reaction or an immediate allergic reaction (even if not severe) to any ingredient in an mRNA COVID-19 vaccine or Johnson & Johnson’s Janssen COVID-19 (J&J/Janssen) vaccine
 - Having had an allergic reaction to the first shot of an mRNA vaccine
 - Being allergic to Polyethylene Glycol (ingredient in mRNA vaccines) or to Polysorbate (ingredient in J&J/Janssen vaccine)
 - If EE had an immediate allergic reaction (even if not severe) to another vaccine or injectable therapy for another disease, **only** if healthcare provider recommends against COVID-19 vaccine

CDC advice about medical conditions that are NOT contra-indicators for COVID-19 vaccine

- CDC has said that the following medical conditions *do not pose danger with regard to having a COVID-19 vaccine*:
 - History of severe allergic reactions not related to vaccines or injectable medications (such as food, pet, venom, environment, latex, or oral medicines)
 - Underlying medical conditions that put individuals at increased risk for a more severe course of COVID-19, including but not limited to:
 - Diabetes
 - Heart disease
 - Immunocompromised condition
 - Obesity

Mental impairments and COVID-19 vaccine mandates

- Under the ADA, EEs are entitled to accommodations for mental impairments, including but not limited to, many mental conditions
- An EE could obtain medical documentation from a treating mental health provider advising that their mental health impairment (e.g. Obsessive/Compulsive Disorder; Severe Anxiety; etc) could be exacerbated if EE is forced to get a vaccine
- ER may need to provide accommodation for such a mental impairment

Excerpt from the Federal Medical Accommodation form for Vaccine exception

- Please provide at least the following information, where applicable:
 1. The applicable contraindication or precaution for COVID-19 vaccination, and for each contraindication or precaution, indicate: (a) whether it is recognized by the CDC pursuant to its guidance; and (b) whether it is listed in the package insert or Emergency Use Authorization fact sheet for each of the COVID-19 vaccines authorized or approved for use in the United States;
 2. A statement that the individual's condition and medical circumstances relating to the individual are such that COVID-19 vaccination is not considered safe, indicating the specific nature of the medical condition or circumstances that contraindicate immunization with a COVID-19 vaccine or might increase the risk for a serious adverse reaction; and
 3. Any other medical condition that would limit the employee from receiving any COVID-19 vaccine.
- If this is a temporary condition or medical circumstance, when the condition expected to end or expire (allowing for COVID-19 vaccination to begin after the date you provided): [insert date]

Pregnancy-related accommodations

Special legal issues for pregnancy/breastfeeding accommodations from vaccine mandate

- A “routine” pregnancy is **not** a disability under the ADA and the condition of breastfeeding (without complications) is also **not** a disability
- Therefore, ERs are not required to grant an **ADA** vaccine exemption accommodation for women simply because of pregnancy or breastfeeding
- However, ***there are many state and local laws that require ERs to grant reasonable accommodations to EEs who are pregnant or breastfeeding or have other pregnancy-related conditions***
- As discussed earlier, the guidance for federal EEs suggest that it is only accommodations that are required under federal law that are relevant
- It is not clear whether that is also true for EEs of federal contractors
- For EEs of private employers, ERs have a choice of mandating vaccines or regular testing
Therefore, it is very probable that state and local laws requiring pregnancy-related accommodations apply

What does the CDC say about pregnancy and breastfeeding and the COVID-19 vaccine?

- CDC recommends COVID-19 vaccine even if individual is pregnant, trying to get pregnant or breastfeeding
- There have not been clinical studies with humans, but no safety concerns were identified in animal studies
- CDC has advised that COVID-19 vaccines do not cause infection, including in pregnant people or their babies
 - None of the vaccines contain a live virus
 - Women who are breastfeeding may pass along immunities from vaccine to infant

Religious belief accommodations for vaccine mandate

Religious belief accommodations: Overview

- Title VII of Civil Rights Act requires ERs to provide reasonable accommodation for EE's sincerely held religious beliefs unless the accommodation would impose undue hardship on ER
- There is legal authority that undue hardship threshold is low (more than a de minimis cost) – much lower than undue hardship under ADA
 - Be careful because State laws requiring accommodations for religious beliefs may have a higher standard for undue hardship
 - For example, NY, NJ and CA use same definition of undue hardship for religious accommodations as for disability accommodations
 - It may be difficult to justify allowing more vaccine exemptions for medical conditions than for religious beliefs under this theory
- EEOC and courts have been generally deferential to EE on whether their beliefs are religious in nature and/or sincerely held
 - Not everything is a religious belief
 - ERs can ask EEs to identify religious belief, practiced or observance and how it conflicts with workplace policy or requirement

More about religious belief accommodations

- It does not have to be an organized religion, and individual does not have to believe in a supreme being
- The individual's sincerely held religious belief does not have to be the official doctrine of that religion
- Courts have found that a belief will be religious if in the individual's own life view it takes on a religious context but it must be more than a philosophy or way of life
- Past contradictory behavior is not enough to undermine the sincerity of a current religious belief

Challenges to sincerely held religious beliefs

- Can ER ask for verification from a religious leader?
 - EEOC has said verification is not required and that even non-clergy who are aware of EE's religious belief or practice could verify
- How do you determine if belief is based on religion?
 - Does it address fundamental and ultimate questions about deep and imponderable matters?
 - Is it a comprehensive belief system, rather than an isolated teaching?
 - Is it recognized by certain formal and external signs?
- Helpful resource: **EEOC Compliance Manual on Religious Accommodation**

Examples of beliefs

- “My body is a temple”
- “I put my health in God’s hands”
- Blood is life force and human blood must be kept pure and free from contaminants
- Objections fetal cells were used in manufacturing, development or testing of COVID-19 vaccines

Language from the federal Religious Exemption Form for vaccine mandate

1. Please describe the nature of your objection to the COVID-19 vaccination requirement.
2. Would complying with the COVID-19 vaccination requirement substantially burden your religious exercise? If so, please explain how.
3. How long have you held the religious belief underlying your objection?
4. Please describe whether, as an adult, you have received any vaccines against any other diseases (such as a flu vaccine or a tetanus vaccine) and, if so, what vaccine did you most recently receive and when, to the best of your recollection.
5. If you do not have a religious objection to the use of all vaccines, please explain why your objection is limited to particular vaccines.
6. If there are any other medicines or products that you do not use because of the religious belief underlying your objection, please identify them.
7. Please provide any additional information that you think may be helpful in reviewing your request.

Vaccine mandate considerations for private employers

OSHA Emergency Temporary Standard

- We are awaiting OSHA Emergency Temporary Standard (ETS)
 - On Friday, OSHA sent ETS to White House for Review
 - We expect expedited review
- ETS is only effective for 6 months but could be extended or made permanent
- Mandate on private ERs with more than 100 EEs is either vaccine or regular testing
- We expect ETS to define how to count 100 EEs
- ETS will include requirement of paid time off to get the vaccine

Additional vaccine mandate considerations

- Private ERs will have more leeway – can require vaccines or regular testing
- How strictly do you want to apply your religious and medical exemptions?
- Do you want to allow those who do not meet the legal requirements for an exemption to have the option of testing instead of a vaccine?
 - Those who do not “believe” in vaccines or trust the COVID-19 vaccines
 - Those who fear that the vaccine could harm them or family members who have underlying medical conditions (notwithstanding the CDC)
- Who will have to pay for the testing?
 - If it is being granted as a legally required accommodation to a mandate, ER will probably have to pay
 - OSHA ETS will likely address issues related to responsibility for payment
 - Part of President Biden’s COVID-19 Action Plan was to make rapid testing more available at lower cost

Collecting proof of vaccines and/or tests

- ERs need to consider how they will collect proof of vaccination and proof test results
 - Federal ERs and Federal contractors are not allowed to rely on attestations
 - They must obtain proof
- There are third party providers who are developing “apps” for EEs to use to upload vaccine cards and/or test results
- There are privacy issues associated with the collection, storage and sharing of this medical information

What are reasonable accommodations to a vaccine mandate?

- Telework
- Mask wearing and physical distancing
- Testing
- Job transfers
- Office relocation
- Unpaid leave

Steps to prepare for OSHA's ETS

1. Get an accurate count of employees, including temporary, part-time, and leased employees
2. Survey your employees about their vaccination status
3. Research testing options, including convenience, reliability, and cost
4. Evaluate methods for collection of proof of vaccine and/or testing
5. Develop an accommodation process and/or consider outsourcing
6. Be prepared for paid time-off requirements
7. Evaluate remote working as an accommodation
8. Start working on employee communications and policies

Challenges to COVID-19 Vaccine Mandates and other activity

Court Challenges to private vaccine mandates have not been successful

Kentucky Hospital (E.D. KY 9/24/2021)

Cincinnati Hospital (S.D. Ohio 9/30/2021)

Houston Hospital (S.D. Texas 6/12/21)

State University (N.D. Ind. 7/18/21), appealed to 7th Circuit (8/2/21), and review by SCOTUS denied (Amy Coney Barrett) on 8/2/21

- Courts have emphasized that employers/universities were willing to grant exemptions.
- They have assumed plaintiffs may have a right in bodily integrity but have said that right is not absolute when it comes to the workplace (or university setting).
 - To work at hospital, EEs had to agree to wear a certain uniform, park their vehicle in a certain spot, sit at a certain desk and work on certain tasks. “Every employment includes limits on the worker’s behavior in exchange for his remuneration.”
 - EEs were not being coerced and could freely choose to accept or refuse a COVID-19 vaccine. However, if they refuse, they will need to work somewhere else.
- They have relied on ***Jacobson v. Massachusetts (1905)*** in which SCOTUS upheld criminal conviction for refusing to get the smallpox vaccine.

United Airlines case

- United Airlines announced a policy to place EEs who requested accommodation for medical or religious reasons on indefinite unpaid leave
- A class action has been filed to prevent United Airlines from requiring indefinite unpaid leave **rather than** other accommodations (e.g., testing, symptom checking, mask wearing, physical distancing, antibody tests)
- United Airlines opposed on several legal grounds, including that the alternative accommodations proposed by EEs would create an undue hardship
- Court has entered temporary restraining order and is considering whether to extend this order to more permanent relief

Other challenges to Vaccine Mandates

- 20 States prohibit proof-of-vaccination requirements.
 - 11 banned through Executive Order (most recent is Texas Governor Exec. Order)
 - 9 banned through legislation
- Some of these orders/laws apply to private ERs, while others are focused only on government action
- It is not clear that states can override the federal mandate

Some States and localities are adopting Vaccine Mandates

- As of 10/14/21, 22 states, and the District of Columbia and Puerto Rico, have some type of vaccine mandate
- Variations:
 - Some apply only to government employees
 - Some include government contractors
 - Some require either vaccination or testing while others mandate vaccines
 - Some apply to specific types of workplaces:
 - Schools
 - Correctional facilities
 - Health care
 - Nursing homes

Questions

Thank you!



Life's brighter under the sun



Thank you for your time.
A recording of this session will be posted to
our website, www.sunlife.com/insights.



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