



Vaccine mandates under Biden's COVID-19 Action Plan

September 21, 2021

This content is not to be considered legal advice. We recommend that you speak with legal counsel specializing in labor and employment law about employment law issues related to COVID-19 vaccines.

We are issuing this vaccine whitepaper to discuss the impact of President Biden's September 9, 2021 Action Plan and Path out of the Pandemic ("Biden's COVID-19 Plan" or "the Plan") on employer considerations of whether to impose a COVID-19 vaccine mandate. Our [prior version of the whitepaper](#) discusses, among other things, issues related to mandatory vaccines potentially arising out of the Emergency Use Authorization (EUA) and about the need to provide accommodations for employees who request them because of disabilities or sincerely held religious beliefs. Here we will focus on the potential impact of President Biden's COVID-19 Action Plan, discuss additional developments that are expected, and examine options and trends for employers.

President Biden's COVID-19 Action Plan

On September 9th, President Biden established a six-point plan to address COVID-19 which includes:

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; and
6. Improving care for those with COVID-19.

Notable provisions of the Plan related to employment are discussed below.

Vaccine Mandates for all employers with 100 or more employees. Biden's COVID-19 Action Plan orders that all employers with 100 or more employees ensure their workers are vaccinated or tested weekly before coming to work. He has directed the Occupational Safety and Health Administration (OSHA) to issue an Emergency Temporary Standard ("OSHA Emergency Standard") to implement this requirement.

Vaccination for all federal workers and for many federal contractors. As part of Biden's COVID-19 Action Plan, he signed an [Executive Order](#) to require all federal executive branch workers to be vaccinated and he also signed a separate [Executive Order No. 14042](#) directing that this standard be extended to employees of certain contractors that do business with the federal government. President Biden ordered his Safer Federal Workforce Task Force ("Task Force") to issue guidance concerning agency implementation of this requirement, and on 9/19/21 the Taskforce issued a detailed





series of **FAQs**, which are discussed more fully below. Among other things, these FAQs indicate that agencies are strongly encouraged to incorporate vaccination requirements into government contracts that are not covered by Executive Order 14042. Since Executive Order No. 14042 contains some ambiguity regarding which federal contractors are covered, it is important to note that agencies are being encouraged to include contractual requirements concerning vaccination which will inevitably expand the scope of impacted contractors.

Vaccination for over 17 million Health Care Workers.

The Plan indicates that the Centers for Medicare & Medicaid Services (CMS) is taking action to require COVID-19 vaccinations for workers in most health care settings that receive Medicare or Medicaid reimbursement, including but not limited to hospitals, dialysis facilities, ambulatory surgical settings, and home health agencies.

Paid time off mandated to get vaccinated. The Plan advises that OSHA is developing a rule that will require employers with 100 or more employees to provide paid time off to workers for the period of time it takes for workers to get or to recover if they are recovering from the side effects of the vaccination.

Requesting states to adopt vaccine requirements for all school employees. The plan includes requirements that teachers and staff at Head Start and Early Head Start programs, teachers and youth program personnel at the Department of Defense (DOD), and teachers and staff at the Bureau of Indian Education-operated schools get vaccinated. The Plan asks more states to join those that have mandated that all school staff receive a COVID-19 vaccination.

Orders to expand accessibility and affordability of testing, including at home testing. The Plan supports action to make at-home tests available at cost and to encourage the availability of rapid COVID-19 tests generally, including expanding free pharmacy testing.

Continue to require masking for interstate travel and on federal property. The Plan advises that mask-wearing will be required in airports and on other modes of public transportation subject to federal regulation, as well as on federal property.

What are the requirements in Task Force FAQs regarding federal employees?

- Will vaccines be required for remote workers?** It is important to point out that the Plan mandates vaccines for federal employees even for employees who do not work on-site at a federal work location, including those who work remotely. The FAQs issued by the Task Force make clear that to protect the health and safety of the entire federal workforce and to promote the efficiency of the civil service all federal employees are required to be full vaccinated—unless they have a legal exception—regardless of where they are working. For clarity, the Task Force states, “employees who are on maximum telework or working remotely are not excused from this requirement, including because employees working offsite may interact with the public as part of their duties and agencies may need to recall employees who are on maximum telework and working remotely.” While private employers have been increasing their vaccine mandate requirements, most private employer mandates do not address employees who work exclusively from home. The OSHA Emergency Temporary Standard, when issued, may provide guidance.
- Will testing be permitted as an alternative to vaccines absent a legally recognized accommodation?** Under the Plan, federal workers will no longer be allowed to substitute rigorous COVID-19 testing for proof of vaccination. While legally recognized accommodations will still be allowed, federal employees will not be able to submit to testing in lieu of vaccination absent a legally recognized justification for an accommodation (i.e., disability or sincerely held religious belief). It is not clear whether OSHA will extend this restriction on testing as an alternative to vaccination to the requirements being imposed on employers with 100 or more employees. The FAQs continue to suggest that proof of a negative test will be required for employees or visitors who are not vaccinated, including, for example, those who have been approved for an exception from the vaccination requirement. The FAQs advise that such individuals will need to show proof of a negative COVID-19 test result from within the previous days before entry to a federal building or federally controlled indoor worksite.





- Is documentation of vaccination required?** The FAQs for federal employees advise that agencies must require documentation from employees to prove vaccination, even if an employee has previously attested to their vaccination status. Federal employees will be required to provide a copy of the record of immunization from a health care provider or pharmacy, a copy of the COVID-19 Vaccination Record Card, a copy of medical records documenting the vaccination, a copy of immunization records from a public health or state immunization information system, or a copy of any other official documentation containing required data points. That data on the documentation must include the type of vaccine administered, date(s) of administration, and the name of the health care professional(s) or clinic site(s) administering the vaccine(s). Employees are also required to certify under penalty of perjury that the documentation they are submitting is true and correct. The FAQs expressly state that employees may provide a digital copy of the records, including, for example, a digital photograph, scanned image, or PDF that clearly and legibly displays the information outlined above. In collecting this information, agencies are also required to comply with applicable Federal laws, including privacy requirements and protections related to disability-related inquiries.
- What vaccination requirements are imposed on visitors to federal buildings?** The Task Force FAQs advise that visitors to federal building should be asked to provide information about vaccination status. Visitors who are not fully vaccinated or who decline to provide information about their vaccination status must provide proof of a negative COVID-19 test from no later than the previous 3 days prior to entry to a federal building. Agencies need to provide visitors with a [Certification of Vaccination form](#) when they enter a federal building or federally controlled indoor worksite and should be directed to keep with them during their time on federal premises. The FAQs clearly state that the agencies will not maintain Certification of Vaccination forms from visitors. If visitors are not fully vaccinated, they must comply with all relevant CDC guidance and safety protocols, including mask-wearing and physical distancing requirements.
- How should the vaccine documentation be collected and maintained?** The Task Force FAQs recognizes that agencies have unique operational environments and may develop their own processes to both collect and maintain

the required information, in compliance with applicable laws and agency record management policies. The FAQs specifically state that agencies may develop and use new processes, systems tools, and applications to collect and maintain the required information or choose to leverage existing processes, systems, tools or applications. The processes used must allow an employee to update their vaccination status and related information. The FAQs make clear that the collection and use of the information is subject to strict federal private safeguards.

- What are legally recognized exceptions to a vaccination requirement?** The Task Force guidance discusses two legally recognized reasons for an accommodation to a mandatory vaccine requirement: (1) as an accommodation for a disability and (2) as an accommodation for a sincerely held religious, belief, practice or observance. The FAQs advise that determining whether an exception is legally required will require consideration of factors such as the basis for the requested exception, the nature of the employee's job responsibilities, and the reasonably foreseeable effects on the agency's operations, including protecting other agency employees and the public from COVID-19. The FAQs also advise that additional guidance on legally required exceptions will be forthcoming.
- What steps may a private employer take if an employee refuses to be vaccinated or provide proof of vaccination?** The Task Force FAQs advise that if an employee refuses to be vaccinated or provide proof of vaccination, the agencies should respond by providing employees with information about the benefits of vaccination and ways to obtain the vaccine. The FAQs further provide that if the employee continues to refuse to be vaccinated or provide proof of vaccination the agency should pursue disciplinary measures, up to and including removal from federal service in accordance with agency policies and collective bargaining agreement requirements. Interestingly, the FAQs specifically advise that employees should not be put on administrative leave while pursuing an adverse action but should be required to follow safety protocols for employees who are not fully vaccinated when reporting to agency worksites. The FAQs remind the agencies that they should follow a different process if the employee claims a legally required exception and should follow a reasonable accommodation process.

- When is an individual considered fully vaccinated?**
 The Task Force FAQs advise that people are considered fully vaccinated two or more weeks after they have received the second dose in a 2-dose series (Pfizer or Moderna) or a single dose vaccine (Johnson & Johnson). The FAQs state that there “is currently no post-vaccination time limit on fully-vaccinated status.” The FAQs also advise that there is one clinical trial that may be considered for full vaccination (Novavax).
- Will there continue to be different safety protocols for fully vaccinated individuals?** The Task Force FAQs advise that fully vaccinated individuals do not need to physically distance or have restrictions on official travel, although they must comply with local requirements and relevant CDC guidance for fully vaccinated individuals while travelling. The FAQs advise that fully vaccinated individuals in areas of substantial or high transmission as reported by the CDC need to wear a mask in public indoor settings but that fully vaccinated individuals in areas of low or moderate transmission do not need to wear a mask, unless required by state or local regulations or laws. The FAQs note that fully vaccinated individuals might choose to wear a mask regardless of the level of transmission for a variety of reasons.

What actions will private employers be required to take with regard to vaccination mandates under President Biden’s Plan?

As of this writing, OSHA has not yet issued the Emergency Temporary Standard ordered under Biden’s COVID-19 Action Plan for private employers. We understand that employers have many questions, including the following: (1) is the 100 employee threshold per enterprise or per worksite; (2) will the vaccine mandate apply to remote workers; and (3) does the employer have to pay for the cost of tests for those who are approved for a vaccination exception or for time spent testing. We expect that OSHA’s Standard will address these issues and we will provide an update as soon as the Standard is issued.



Sun Life will update this whitepaper as we learn more. Find the most current version on [sunlife.com/insights](https://www.sunlife.com/insights).

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