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Client Alert: President Biden Announces Employers with 100 or More Employees Must Ensure Their Workforce Is Vaccinated or Tested Weekly for COVID-19

On September 9, 2021, President Biden announced a six-pronged national strategy to fight COVID-19. The President's plan includes a rule that is being developed by the Occupational Safety and Health Administration (OSHA) that would require *all* employers with 100 or more employees to ensure that their workforce is fully vaccinated or tested weekly for COVID-19.

In addition to this requirement, OSHA's rule will require that employers with 100 or more employees provide paid time off for the time it takes their employees to get vaccinated or to recover from any side effects associated with getting the vaccine. On the other hand, there is no current mandate that would require employers to pay employees for the time it takes to get tested each week. It remains to be seen whether OSHA's rule will impose a payment requirement relative to testing. Furthermore, there could be variations at state and local levels on this front.

In order to implement these requirements, OSHA will issue an Emergency Temporary Standard (ETS). While no draft regulations have been released, OSHA does not need to pursue notice-and-comment rulemaking to implement its ETS. Consequently, the actual language of

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the rule likely will become known upon publication and will take effect shortly after its release. An ETS may be in place for up to six months, after which OSHA will need to issue a permanent standard adopted through ordinary rulemaking.

In addition to announcing the OSHA ETS, President Biden also signed an Executive Order on September 9, requiring all federal executive branch workers to be vaccinated. The President issued a second Executive Order the same day, which requires that contractors and subcontractors doing business with the federal government “provide adequate COVID-19 safeguards to their workers performing on or in connection with a Federal Government contract or contract-like instrument.” The federal contractor Executive Order does not mention a vaccination requirement, but rather instructs these contractors to follow protocols that will be released by the Safer Federal Workforce Task Force (“Task Force”) by September 24. While the protocols developed by the Task Force have not been released, they will likely include some sort of vaccination requirement, as the President’s six-pronged action plan mentions extending the federal employee vaccination requirement to “employees of contractors that do business with the federal government.” As such, it will be important in the coming weeks for businesses that do business with the federal government to remain up to date on any guidance issued by the White House or the Task Force.

The President also announced that the Centers for Medicare & Medicaid Services (CMS) are taking action to require COVID-19 vaccinations for workers in most health care settings that receive Medicare or Medicaid reimbursements.

Given the rapid pace with which regulations are being implemented and changing, it will be important for employers to monitor any announcements from the



White House and OSHA to ensure they are in compliance. While the exact language of OSHA's ETS has not been released, employers should begin preparing to implement a policy that will comply with these requirements.

If you have any questions regarding employer obligations when it comes to implementing policies that comply with President Biden's new announcements and OSHA's ETS, please contact Bill Tarnow, Alissa Griffin, or your Neal Gerber Eisenberg attorney.

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