

# CLIENT ALERT

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## **WHY PRESIDENT BIDEN'S PLAN TO VACCINATE THE UNVACCINATED IN PRIVATE EMPLOYMENT IS A LOT OF BUZZ, BUT LIKELY LITTLE STING**

by Sara H. Jodka

The entire country has been abuzz about President Biden's Plan for "[Vaccinating the Unvaccinated](#)." The Plan would require private employers with 100 or more employees ("Covered Employers") to ensure their workers are vaccinated from COVID-19 or tested weekly and to provide paid time off for employees to get vaccinated.<sup>1</sup>

To execute this Plan, the Department of Labor's Occupational Safety and Health Administration (OSHA) is developing a rule that will require Covered Employers to ensure their workforce is fully vaccinated or require any workers who remain unvaccinated to produce a negative test result on at least a weekly basis before coming to work. OSHA will issue an Emergency Temporary Standard (ETS) to implement this requirement, which will impact over 80 million private-sector employers.

The ETS will further require Covered Employers to provide paid time off for workers to get vaccinated or any side effects they experience post-vaccination.

**However, before businesses start responding, make policies, or allow employees to quit over this Plan, it is important to remember a few things – the most pertinent of which is that the vaccination/testing portion of this Plan may never take effect. Here's why:**

### **WHAT IS AN ETS, AND WHAT IS THE APPEAL PROCESS?**

First, OSHA rules take a long time to go into effect. An ETS, however, bypasses that long process letting OSHA implement a *limited* six-month standard to address a workplace safety emergency that is "[necessary to protect workers from grave danger due to exposure to toxic substances or agents determined to be toxic or physically harmful or to new hazards and that an emergency standard is needed to protect them](#)." Then, OSHA publishes the ETS in the Federal Register, where it also serves as a proposed permanent standard. It is then subject to the usual public rulemaking process for adopting a permanent standard, except that a final ruling should be made within six months.

An ETS may be challenged in the U.S. Court of Appeals. In response, any person who may be adversely affected by a final or emergency standard may file a petition (no later than the 59th day after the rule's promulgation) for judicial review of the standard with the U.S. Court of Appeals for the circuit in which the objector lives or has its principal place of business. However, filing an appeals petition will not delay the enforcement of a standard, which makes an ETS immediately upon publication in the Federal Register, unless the Court of Appeals

specifically orders it, and that is also likely. Further, there will probably be circuit court splits across the country on this issue, which will likely prompt certification before the United Supreme Court. Given the conservative majority of the Supreme Court and, what has turned out to be a political division on this issue, the current Supreme Court is likely to strike down the mandate.

Employers may also request temporary and permanent variances.

### **WHY HAVE I NEVER HEARD OF AN ETS BEFORE?**

Most people have probably never heard of an ETS before because they are rarely published. They are so rare that OSHA has issued fewer than ten of them before. The last ETS was issued was almost 40 years ago in 1983. Of those, six were challenged in court, and only one, which involved a cancer-causing chemical used in manufacturing, survived, and that was back in 1978. The ones that were challenged are as follows:

- 1973 Organiophosphorous Pesticides
- 1973 14 Carcinogens
- 1976 Diving Operations
- 1977 Benzene
- 1978 Acrylonitrile (the only one that was allowed to go into effect)
- 1973 Asbestos

### **WHAT IS THE LIKELIHOOD THAT THIS ETS WILL GO INTO EFFECT?**

While an ETS has not been challenged in almost forty years, given the immediate public backlash and sheer scope impacting 80 million workers, this one most certainly will as the legal standard for considering the validity of an ETS has not changed.

As demonstrated by the case examples discussed above that courts found insufficient to warrant an ETS (*i.e.*, asbestos, benzene, and carcinogens), it will be difficult for OSHA to demonstrate that COVID-19, while undoubtedly dangerous and harmful, presents the "grave danger" required to survive a challenge.

The ETS also will likely be challenged as insufficient and as being both over-inclusive and under-inclusive.

First, there will be arguments that the measures are not sufficient to remediate the danger posed by COVID-19. There are clear cases of breakthrough COVID-19 cases (*i.e.*, COVID-19 infections of vaccinated individuals). As for the weekly testing alternative to vaccination, its inclusion in the Plan is likely the true death knell as it only captures a small fraction of a 168-hour workweek. As such, it continues to allow

<sup>1</sup> This article will not discuss proposed mandatory vaccination requirements for federal employers, federal contractors, or Medicare/Medicaid participating employers.

infected individuals who contract COVID-19 outside the small testing window to spread COVID-19 throughout the workplace. As such, the ETS is arguably too broad to serve its purpose and guard against the “grave danger” it is supposed to protect.

Second, the ETS is arguably under inclusive as there is no apparent rhyme or reason as to why the ETS only triggers employers with 100 or more employees. There is no known correlation of infection rates being greater for employers with 100 employees. It is unclear why 100 employees was chosen as the magic number, just as it was unclear why 500 was chosen for covered employer status under the First Families Coronavirus Response Act.

Conversely, it is also overinclusive as it applies to “all employers,” regardless of any analysis of whether an employer’s workforce works remotely.

#### **WHAT SHOULD BUSINESSES DO NOW?**

Even if the mandate goes into effect before it can be overruled, OSHA is responsible for enforcement. It is unlikely that OSHA has the labor force to enforce such a requirement for 80 million workers.

An OSHA fine is \$14,000 per occurrence, and some workforces will likely skirt the requirement and risk the fine pending the appeal process that will likely overturn the mandate.

It is recommended that employers that are resistant or hesitant to mandate employee vaccinations inform their employees that, at this time, they do not intend to mandate vaccinations, but will comply with the law. Employers should wait on more specifics about the language, including open items such as exceptions for medical and religious accommodations, who is to pay for the vaccines and testing, what the variance allowances will look like, whether tax credits will be available for paid time off related to employer incurred costs, and many more.

As with many things, time will tell. At this point, you know as much as we do. Until we see the actual language of the ETS, and since fake vaccination cards may become even more of a trend, please read our related article about [how to spot and respond to fake vaccination cards](#).

#### **ABOUT THE AUTHOR**



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