

Today's webinar will begin shortly. We are waiting for attendees to log on.

Presented by:

J. MICAH DICKIE

Phone: (404) 260-3419

Email: mdickie@fisherphillips.com

Please remember, employment and benefits law compliance depends on multiple factors – particularly those unique to each employer's circumstances. Numerous laws, regulations, interpretations, administrative rulings, court decisions, and other authorities must be specifically evaluated in applying the topics covered by this webinar. The webinar is intended for general-information purposes only. It is not a comprehensive or all-inclusive explanation of the topics or concepts covered by the webinar.



Considerations for Employers Handling COVID Vaccine Mandates

J. MICAH DICKIE

Attorney
Fisher Phillips

Phone: (404) 260-3419

Email: mdickie@fisherphillips.com

www.fisherphillips.com



Agenda



- Who is subject to the vaccine mandate and how employees will be counted
- Recommendations on creating policies and procedures
- Concerns surrounding testing requirements, such as cost and timing
- Reasonable accommodations and exemptions
- Considerations for surcharges as part of a wellness program, implementation of surcharges, and potential ACA affordability issues
- HIPAA considerations



President Biden's Path Out of the Pandemic



THE WHITE HOUSE



[Administration](#) [Priorities](#) [COVID Plan](#) [Briefing Room](#) [Español](#)

PATH OUT OF THE PANDEMIC

PRESIDENT BIDEN'S COVID-19 ACTION PLAN

President Biden is implementing a six-pronged, comprehensive national strategy that employs the same science-based approach that was used to successfully combat previous variants of COVID-19 earlier this year. This plan will ensure that we are using every available tool to combat COVID-19 and save even more lives in the months ahead, while also keeping schools open and safe, and protecting our economy from lockdowns and damage.



[Vaccinating the Unvaccinated](#)



[Further Protecting the Vaccinated](#)



[Keeping Schools Safely Open](#)



[Increasing Testing & Requiring Masking](#)



[Protecting Our Economic Recovery](#)




[Improving Care for those with COVID-19](#)



September 9, 2021 Executive Orders



- Two Executive Orders:
 - One Mandating Vaccines for Federal Employees
 - One Mandating Vaccines for Federal Contractors



Administration Priorities COVID Plan

BRIEFING ROOM

Executive Order on Requiring Coronavirus Disease 2019 Vaccination for Federal Employees

SEPTEMBER 09, 2021 • PRESIDENTIAL ACTIONS

By the authority vested in me as President by the Constitution and the laws of the United States of America, including sections 3301, 3302, and 7301 of title 5, United States Code, it is hereby ordered as follows:

Section 1. Policy. It is the policy of my Administration to halt the spread of coronavirus disease 2019 (COVID-19), including the B.1.617.2 (Delta) variant, by relying on the best available data and science-based public health measures. The Delta variant, currently the predominant variant of the virus in the United States, is highly contagious and has led to a rapid rise in cases and hospitalizations. The nationwide public health emergency, first declared by the Secretary of Health and Human Services on January 31, 2020, remains in effect, as does the National Emergency Concerning the Coronavirus Disease 2019 (COVID-19) declared pursuant to the National Emergencies Act in Proclamation 9994 of March 13, 2020 (Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak). The Centers for Disease Control and Prevention (CDC) within the Department of Health and Human Services has determined that the best way to slow the spread of COVID-19 and to prevent infection by the Delta variant or other



Administration Priorities COVID PI

BRIEFING ROOM

Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors

SEPTEMBER 09, 2021 • PRESIDENTIAL ACTIONS

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Property and Administrative Services Act, 40 U.S.C. 101 *et seq.*, and section 301 of title 3, United States Code, and in order to promote economy and efficiency in procurement by contracting with sources that provide adequate COVID-19 safeguards for their workforce, it is hereby ordered as follows:

Section 1. Policy. This order promotes economy and efficiency in Federal procurement by ensuring that the parties that contract 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 as described in section 5(a) of this order. These safeguards will decrease the spread of COVID-19, which will decrease worker absence, reduce labor costs, and improve the efficiency of contractors and subcontractors at sites where they are performing work for the Federal Government. Accordingly, ensuring that Federal contractors and subcontractors are adequately protected from COVID-19 will bolster economy and efficiency in Federal procurement.



September 9, 2021 Executive Orders



Federal Contracts Covered:

- A procurement contract for services, construction, or a leasehold in real property;
- A contract covered by the Service Contract Act (SCA);
- A contract for concessions, including concessions generally under the SCA; or
- A contract in connection with federal property or lands offering services for federal employees, dependents, or the general public.

Federal Contracts **NOT** Covered:

- Grants;
- Indian Tribes contracts or contract-like instruments;
- Those with a value equal to or less than the FAR simplified acquisition threshold;
- Agreements involving employees performing work outside US; and
- Subcontracts solely for the provision of products.



September 9, 2021 Executive Orders



What Are the Requirements?

- Federal contractors will be required to follow new vaccine mandate requirements [effective with contracts with pending solicitations or entered into on or after October 15, 2021](#).
- Safer Federal Workforce Taskforce issued Guidance on [September 24, 2021](#).
- Contracts must include a flow-down clause to incorporate the safety protocol requirements in lower-tier subcontracts.
- [Applies to remote employees](#).



September 9, 2021 Executive Orders



Other Requirements?

- A vaccine mandate requiring full vaccination for employees of covered federal contractors by December 8, with limited exceptions for those legally entitled to an accommodation (prior COVID-19 infection or antibody tests are not accepted as substitutes);
- Mask and physical distancing requirements at covered contractor worksites (including for employees, visitors and others); and
- A requirement that contractors designate a person or persons to coordinate COVID-19 workplace safety efforts at their workplaces.



September 9, 2021 Executive Orders



Other Requirements?

- Covered contractors must verify an employee's vaccination status by obtaining proof and cannot document an employee's vaccination status by way of self-attestation.
- At a covered contractor worksite - including outdoor workspaces – all individuals including covered contractor employees and visitors must comply with published CDC guidance for masking and physical distancing at a covered contractor workplace. However, those who work remotely do not have to comply with the physical distancing or masking requirements at their residence. Those who are fully vaccinated do not need to physically distance.

The Forthcoming Vaccine Mandate





Forthcoming Vaccine Mandate



- Biden's plan involves OSHA issuing a vaccine/testing rule that will apply to all private employers with more than 100 employees.
- Estimated to impact 80 million workers, or two-thirds of the country's workforce.

Which employers will be covered?



- ALL employers covered by the OSH Act must comply with the forthcoming ETS.
- Includes many office-based employers who do not regularly interact with OSHA.
 - Financial institutions;
 - Insurance companies;
 - Law firms;
 - Other professional and technical work environments.

State-Plan States

- In states where the federal government does not have jurisdiction over workplaces safety, the state agencies will have to adopt the ETS or “just-as-effective measures” within 15 to 30 days.
- Governors of some state-plan states have already come out against the ETS, which could set up a battle between state-plan agencies and federal OSHA.



Unanswered Questions



- **How will the 100-employee threshold be counted?**
 - While not clear in President Biden's announcement, on Friday, OSHA officials suggested the threshold will likely be *total* number of employees, rather than employees at each worksite.
 - Also unclear how the joint employer analysis will factor in.

Unanswered Questions

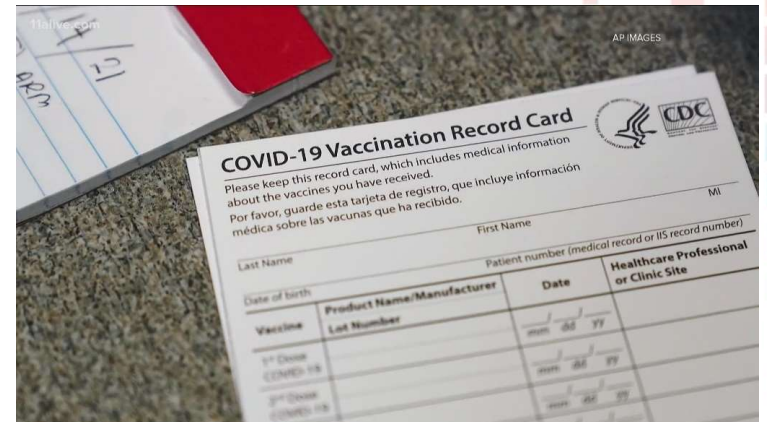


- **Will remote employees be covered?**
 - According to comments from OSHA: The ETS will not apply to employees who “never” come to work.
 - But, if the employee ever comes to work, or works outside of the office with others, they will be covered.



Unanswered Questions

- **Will employers be required to collect proof of vaccination?**
 - Unclear at this time.
 - Consider record retention requirements: OSHA requires record retention for length of employment + 30 years.
 - Could have huge recordkeeping implications if required.



Concerns surrounding testing requirements: Unanswered Questions

- **What type of testing will be required?**
 - Unclear at this time.
 - While the PCR test is more accurate, it takes longer to receive the results and is more expensive.



Concerns surrounding testing requirements: Unanswered Questions

- **Who pays for testing?**
 - Unclear at this time.
 - Insurance may cover the cost of tests, and several states have laws predating COVID-19 requiring employers to pay for mandatory medical tests or reimburse employees for any such testing.



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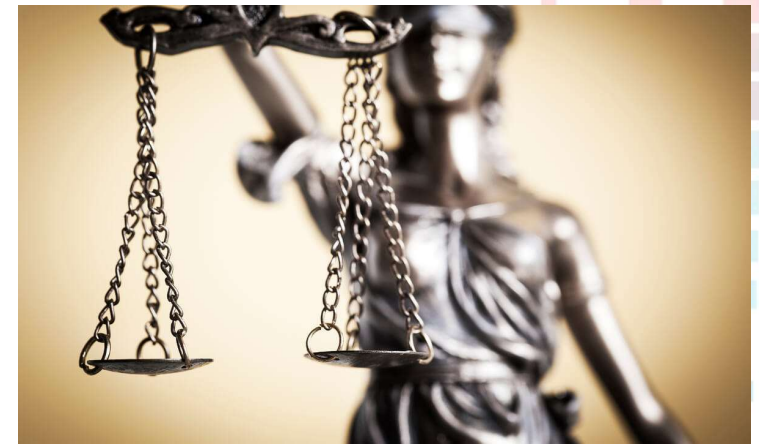
Unanswered Questions



- **Will unionized employers be required to bargain over the decision of how to comply with the ETS?**
 - Unclear to what extent unionized employers will be compelled to bargain over the decision on how to comply with the ETS (or at least the discretionary aspects with respect to vaccines vs. weekly testing).

Unanswered Questions

- **Will the ETS face legal challenges?**
 - Most likely.
 - Governors of many states have already indicated they intend to challenge the ETS.
 - Courts may block enforcement of the emergency rule, or parts of the rule, until legal challenges are resolved.
 - OSHA will have to prove that there is a “grave danger” to workers.
 - But employers should not count on being relieved of all obligations and should prepare now.



Policies and Procedures: What Should You Do?

- **Adopt Procedures for Determining Employees' Vaccination Status**
 - Maintain confidential records of employee vaccination status.
 - EEOC has indicated it is lawful to ask employees about COVID-19 vaccination status, but this should end your inquiry.
 - ETS may require that you collect proof of vaccination.
 - Otherwise, create a confidential list of vaccinated workers.
 - Review state laws regarding confidentiality and privacy of medical records.

Policies and Procedures: What Should You Do?

- **Determine if you will mandate the vaccine or allow unvaccinated employees to be tested weekly.**
 - For some employers, collecting and tracking weekly test results may burden them such that they decide to adopt a mandatory vaccination policy.
 - OSHA officials stated that employers may require vaccinations without providing the alternative for weekly testing (subject to accommodations)
 - If planning for weekly testing, think through the logistics:
 - Onsite or through designated vendors?
 - Payment for testing
 - Payment of time for testing



Policies and Procedures: What Should You Do?



- **Have a plan for tracking test results.**
 - You should have a plan in place for collecting and tracking test results.
 - Who is going to collect the results?
 - When will the test results need to be collected?
 - How will you track the results?



Policies and Procedures: What Should You Do?



- **Have a plan for addressing noncompliance by employees.**
 - What happens to an employee who does not get tested?
 - What happens to an employee who refuses to get vaccinated?

Policies and Procedures: What Should You Do?

- **Develop a plan for handling accommodation requests.**
 - Employees may request accommodations for disabilities or for religious reasons under federal or state laws.
 - Develop a robust and clear reasonable accommodation policy to address religious and disability issues.
 - Communicate and administer the accommodation process thoughtfully, emphasizing individualized, confidential consideration of each request.
 - Be prepared for employees to request an accommodation from the weekly testing requirement.

Policies and Procedures: What Should You Do?

- **Develop a plan for handling accommodation requests – Deep Dive.**
 - Religious accommodations: Step 1: Decide Whether the Objection is Based on a Personal Choice or a “Sincerely Held Religious” Belief.
 - You should generally assume that an employee’s stated religious belief is sincerely held unless you have a good faith and objective basis for questioning the religious nature or the sincerity of the stated belief. Some examples of when this question might be properly triggered is if the employee recently adopted this belief system in response to your vaccine mandate, or acquired a “religious certification” from a “church” they found online.
 - Your questions regarding the employee’s stated belief for the exemption should be answered through an interactive process with the employee in which you may be able to – in some circumstances – request additional information or documentation from the employee.

Policies and Procedures: What Should You Do?

- **Develop a plan for handling accommodation requests.**
 - Religious accommodations: Step 2: Engage in the Interactive Process
 - If you conclude that the employee's objection to the mandate is (or could be) grounded in an actual sincerely held religious belief, that doesn't mean the worker gets to automatically skip the vaccine and resume work as normal. The second step is to engage in what's known as "the interactive process." If an employee requests to be exempted from your mandatory vaccination policy due to religious beliefs, you are allowed to – and should – engage in an interactive dialogue with the employee to determine what reasonable accommodation, if any, may be suitable for them and your organization.



Policies and Procedures: What Should You Do?



- **Develop a plan for handling accommodation requests.**
 - Religious accommodations: Step 3: Make a Decision on the Accommodation Request
 - Once you have all the information in hand, your final step is making a decision on how to respond to the request.



Policies and Procedures: What Should You Do?



- **Develop a plan for handling accommodation requests.**
 - Religious accommodations: Step 3: Make a Decision on the Accommodation Request
 - If the employee refuses all options you offer to them, holding out for an accommodation of their choosing that you have decided is not reasonable, you may have no choice but to exclude them from the workplace. You might be in a situation where you would place them on an unpaid leave of absence until circumstances surrounding the pandemic change and permit the safe return of unvaccinated workers.



Policies and Procedures: What Should You Do?



- **Develop a plan for handling accommodation requests.**
 - You have one final consideration to make: in determining if a religious accommodation can be made, the last step is determining whether the specific accommodation request made by the employee or the only accommodation request you can identify causes an undue hardship.



Policies and Procedures: What Should You Do?



- **Develop a plan for handling accommodation requests.**
 - Medical Accommodation Requests:
 - For ADA accommodations, the employee should be asked to provide appropriate documentation from health care provider regarding the request/impairment(s), the duration of the need for accommodation and how the impairment(s) conflict with the employer's vaccination requirement.

Policies and Procedures: What Should You Do?

- **Prepare for OSHA Complaints and Inspections**
 - The vaccination ETS will not displace current compliance duties related to COVID-19 prevention and mitigation.
 - OSHA will likely ask for your COVID-19 response plan and training records.
 - Develop a COVID-19 policy and communicate its requirements to your employees.
 - Train managers and supervisors on what to do and say if OSHA arrives for an inspection.

Options for Increasing Vaccination Rates



Increasing Vaccination Rates

Relevant Options:

- Informational Campaign
- Incentives





Increasing Vaccination Rates



Informational Campaign

- *Lots of people are flooded with disinformation about vaccines from social media, disreputable (and sometimes reputable) news sources, and word of mouth*
- *Others simply do not have information*
 - EX: Many believe they have to pay for the vaccine, even though they are free of charge.
- *Address specific questions, concerns, or misconceptions among vaccination skeptics in your workforce*
 - EX: Emphasize that although not 100% effective, it is still the best defense against serious illness, hospitalization, and death



Increasing Vaccination Rates



Informational Campaign

- Have HR or other company leaders present informal question-and-answer sessions
- Invite respected representatives from the medical community or public health officials to provide in-person or virtual education with the opportunity for Q&A
- Share informational videos from the CDC or other trusted resources about the vaccines
 - Conduct town hall to discuss FAQs – obtain questions anonymously prior



Increasing Vaccination Rates



Informational Campaign TIPS

- Provide materials that can be considered outside of the workplace, discussed with family members
- Encourage employees to consult their medical provider
- Use language that is appropriate for your employees
- Pay employees for time spent at any of the information sessions

Increasing Vaccination Rates

Can We Incentivize?

Yes, but carefully:

- You will still have the same accommodation obligations for medical/religious reasons
- If incentive is too high, could be considered involuntary by EEOC, making it a wellness program
- *De minimis* incentive is always okay – water bottle or modest gift card (likely \$25 or less)



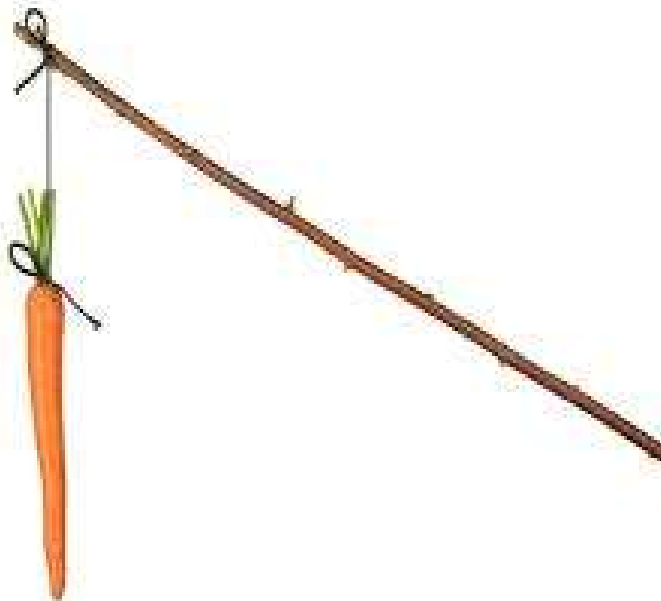
Increasing Vaccination Rates



Incentivizing

Options:

- *Cash*
- *Gift cards*
- *Paid time off*
- *Raffles*
- *Vacations*
- *Fitness Equipment*
- *More...*





Increasing Vaccination Rates



Incentivizing

- Employers must also consider offering alternative means for an employee to earn an incentive if unable to be vaccinated due to a medical/disability or religious objection.
- Some potential options to earn the incentive:
 - Watching a workplace COVID-19 safety video.
 - Reviewing CDC literature on how to mitigate the spread of COVID-19 in the workforce.
 - COVID-19 testing.



Increasing Vaccination Rates



Incentivizing

- All documents and information about an employee's vaccination status should be maintained confidentially.
- You may not offer incentives to your employees in return for their family members getting vaccinated.
- You can still offer an employee's family member the opportunity to be vaccinated by your organization or your agent if you take certain steps to ensure compliance with federal privacy laws.



HIPAA AND THE ACA



Surcharge Considerations





HIPAA and Mandatory Vaccines



HIPAA Violations Can Be Avoided

REMEMBER:

- You can develop a properly designed wellness program that takes vaccine status into account. Such a program must comply with all HIPAA wellness program rules and also reflect compliance with recent EEOC guidance related to vaccine accommodations.



HIPAA and Mandatory Vaccines



HIPAA Violations Can Be Avoided

6 Key Questions for surcharges:

1. Does the surcharge comply with wellness incentive limits, taking into account existing incentives (such as existing smoking cessation or biometric screen programs)?
2. Does the surcharge allow you to maintain compliance with the ACA Employer Mandate affordability rules?



HIPAA and Mandatory Vaccines



HIPAA Violations Can Be Avoided

6 Key Questions:

3. Can this be implemented mid-plan year, and if so, may employees opt out if they experience a significant cost increase?
4. Does the reasonable alternative standard offered comply with the activity-only or outcome-based rules?
5. Do state laws prevent, or otherwise limit, such a program?
6. Will booster shots be required to earn the incentive, and if so, at what point will you conclude that booster shots are necessary in order for workers to be considered “fully vaccinated”?

HIPAA Violations Can Be Avoided

Can employers limit group health plan coverage to those that are vaccinated, or perhaps limit health plan claims for COVID-19-related illnesses to only those that are vaccinated?

No. Such an action would clearly violate HIPAA non-discrimination rules and therefore should be avoided.



Final Questions



Email: ubamember@fisherphillips.com

HRCI –

SHRM –



J. MICAH DICKIE

Associate
Fisher Phillips

Email: mdickie@fisherphillips.com

Phone: (404) 260-3419

www.fisherphillips.com



Thank You

J. MICAH DICKIE

Attorney
Fisher Phillips

Email: mdickie@fisherphillips.com

Phone: (404) 260-3419

www.fisherphillips.com