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New Details Emerge Regarding OSHA's Impending Vaccine Mandate

As reported in our earlier [Client Alert](#), President Biden recently announced an Action Plan to address the COVID-19 pandemic, including directing the U.S. Department of Labor ("DOL") to issue an emergency rule that will require large employers to mandate COVID-19 vaccination or weekly testing for employees. Although the DOL's emergency rule has not yet been released, new details have emerged from White House announcements and a conference call featuring senior advisors from the Occupational Safety and Health Administration ("OSHA").

According to the President's Action Plan, the new emergency rule will apply to private companies with 100 or more employees. OSHA has advised that the 100-employee threshold will be evaluated on a company-wide basis, not per location. In addition, OSHA officials advised the rule will not apply to employees who are fully remote and have no in-person contact with others in the workplace. OSHA further informed that employers have the option of requiring all employees to be vaccinated and to forgo the weekly testing option, except potentially for employees who qualify for a medical or religious exemption.

Once published, the new rule should clarify what kind of information and evidence employers will be required to gather and maintain to confirm vaccination status, what qualifies as "vaccinated" for employees who have only received one dose of a two-dose vaccine, and whether employers must pay for weekly testing if they choose to offer a testing option.

Thus far there has been no indication of when the federal rule will be published or when it will take effect. The rule is expected to have several provisions that will be enacted in phases. Because OSHA will publish the rule as an Emergency Temporary Standard, it will be effective for only six months, unless OSHA chooses to replace it with a permanent standard under the full federal rulemaking process.

What should employers do while waiting for publication of the rule?

To start, employers should determine whether OSHA's new rule will apply to them. Until we know more details, full-time, part-time and even temporary employees could be counted toward the 100-employee

threshold. For integrated employers with more than one company under common ownership or control, the employees of all entities could be counted toward the threshold, similar to the DOL's approach with the Families First Coronavirus Response Act. In addition, President Biden's other vaccine mandates may apply if the employer is a federal contractor or a healthcare provider. Those employers may be required to comply with the vaccination mandate even if they have fewer than 100 employees.

Although legal challenges to OSHA's rule are almost inevitable, those challenges will take time to litigate, and businesses could face a \$14,000 fine per violation before any legal challenges might result in the rule being stricken or suspended. Therefore, we recommend employers that will be covered begin preparing for the rule to take effect. Among other things, covered employers should prepare a vaccination policy, evaluate and consider whether to allow a weekly testing option, and create a plan for receiving, evaluating and responding to accommodation requests.

Employers also should consider how they plan to collect and verify employee vaccination and testing records, as these records must be kept confidential and separate from the employee's personnel file. In addition, merely asking employees whether they have been vaccinated likely will not be sufficient to satisfy the mandate. Employers also should designate an individual or a team to verify employee vaccination and collect vaccination documentation, and should ensure those responsible for implementing the vaccination program are properly trained.

For employers that permit employees to undergo weekly COVID-19 testing as an alternative to being vaccinated, employers should consider how and where the testing will occur, and who will cover the testing costs and whether they will or may be required by law to compensate non-exempt employees for their time being tested. Employers that decide to mandate vaccination with no testing option should consider how that will affect the workplace, morale and employee retention.

Employers also should identify who will evaluate exemption requests and ensure the evaluators are trained on the applicable laws. Because accommodation requests need to be evaluated in a consistent manner for all employees, employers should consider designating one person to evaluate the requests. Finally, employers with a unionized workforce also should review any applicable collective bargaining agreements to determine whether implementation of a vaccine mandate must be negotiated with the union.

If you have questions about your company's management of COVID-19 in the workplace, including how to comply with President Biden's Action Plan or OSHA rules, please contact your Kutak Rock attorney, a member of the firm's [OSHA Compliance & Workplace Safety Group](#) or a member of the firm's [National Employment Group](#). You may also visit us at www.KutakRock.com.

