

# VACCINATION MANDATES FOR FEDERAL CONTRACTORS AND EMPLOYERS WITH 100+ EMPLOYEES

On Sept. 9, 2021, President Biden announced new efforts to address the ongoing COVID-19 pandemic, including an executive order and a directive to the Department of Labor's Occupational Safety and Health Administration (OSHA), which together will require the vaccination of millions of Americans who work for federal contractors and large employers with 100 or more employees. Many important details of these new mandates remain unknown; however, the president's statements regarding large employers and the text of his Executive Order covering federal contractors (Executive Order), both announced on Sept. 9, answer the following basic questions.

## ***Which Employers Do the Mandates Cover?***

- The Executive Order. The Executive Order generally covers all companies that do business with the federal government as contractors or subcontractors, subject to the following caveats:
  - The Executive Order does not apply to: (i) grants; (ii) contracts with Indian Tribes; (iii) contracts or subcontracts of \$250,000 or less in value; (iv) employees who perform work outside the United States; and (v) subcontracts solely for the provision of products.
  - The Safer Federal Workforce Task Force will publish guidance clarifying the scope of the federal contractor executive order on or before Sept. 24, 2021.
- Large Employers. Companies with "100 or more employees" will be subject to a forthcoming Emergency Temporary Standard (ETS) to be published by OSHA, according to President Biden.

## ***What Will Covered Employers Be Required to Do?***

- The Executive Order. The Executive Order suggests that covered employers must require—to the extent permitted by applicable law—full vaccination in "any workplace locations...in which an individual is working on or in connection with a Federal Government contract or contract-like instrument." Many questions, however, are left to be

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answered by forthcoming administrative guidance to be published on Sept. 24:

- ***Subject to “reasonable accommodations”?*** The Executive Order does not expressly reference accommodations for disabilities or religious beliefs, but it qualifies the vaccination requirement as being mandated to the extent permitted by applicable law, which suggests that it is not meant to override accommodation requirements under the Americans With Disabilities Act or Title VII of the Civil Rights Act.
- ***No testing exception?*** The Executive Order identifies no alternatives to vaccination, such as weekly testing. It is unclear whether administrative guidance will permit regular COVID-19 testing as a type of “reasonable accommodation” that may be offered to employees with disabilities or sincerely held religious beliefs that preclude vaccination.
- ***Applicable to remote workers?*** The Executive Order does not explicitly distinguish between workers who perform work in an office environment and those who work in a remote setting; however, it calls for administrative guidance to clarify what “workplace locations” are covered by the Executive Order.
- Large Employers. The Biden administration has described the ETS as requiring all employers with “100 or more employees” to require their “workforce” to become fully vaccinated or, alternatively, to require all of their “workers” to present a negative COVID-19 test on “at least a weekly basis before coming to work.” This leaves many questions unanswered, including (among others) the following:
  - ***Which “employees” will be counted?*** It is not clear whether the new ETS will cover business with 100 or more employees in a particular facility or across the entire U.S. workforce. It is also unclear whether the count would encompass all workers, including full-time, part-time, temporary and independent contractors. Given the public health focus of this initiative, however, and the Biden administration’s expressed frustration with vaccine hesitancy, it would not be surprising if OSHA defined “employee” in the broadest sense possible.
  - ***Who will pay for weekly testing?*** The Biden administration’s plan includes offering “free” COVID-19 testing at 10,000 pharmacies across the U.S. With respect to the time employees spend on testing, the U.S. Department of Labor has previously [advised](#) that “[f]or many employees, undergoing COVID-19 testing may be compensable because the testing is necessary



for them to perform their jobs safely and effectively during the pandemic.” It is unclear whether the ETS will address further who must bear costs associated with weekly testing.

- ***Applicable to remote workers?*** It is not clear whether the ETS will distinguish between workers who perform work in an office environment and those who work in a remote setting. The Biden administration has stated the ETS will require unvaccinated workers to present a negative COVID-19 test on at least a weekly basis “before coming to work,” which suggests the ETS may not be intended to apply to remote workers who never “come to work.”
- ***Applicable to non-employee workers?*** Although the ETS will apply to employers with 100 or more “employees,” the Biden administration has described the vaccination and testing mandates in the ETS as applying to “workers.” This leaves open the question of whether the ETS will apply to a covered business’s “workers” regardless of whether they are classified as “employees.”

#### ***When Will the Mandates Take Effect?***

- The Executive Order applies to new contracts and subcontracts (as well as any amendments or extensions of covered agreements) entered into on or after Oct. 15, 2021, with limited exception for covered agreements that are currently in process. The Biden administration has encouraged all federal contractors to begin taking steps to comply with the mandate immediately. This is based on the fact that achieving “fully vaccinated” status requires several weeks of time to complete.
- The ETS is expected to take effect upon its publication, which OSHA has announced will happen in “the coming weeks,” except in states that have in place OSHA-approved “State Plans.” Jurisdictions with State Plans will have 30 days to incorporate the ETS into their State Plans.

Armstrong Teasdale’s Employment and Labor team is actively monitoring and providing updates regarding new guidance from the federal government concerning COVID-19 vaccination requirements for employers. If you have any questions, please contact your regular Armstrong Teasdale lawyer or one of the authors listed below.