



TO: Restaurant Allies
FROM: Shannon Meade, Vice President, Public Policy and Legal Advocacy
RE: **Biden Vaccination/ Testing Mandate – Background and Next Steps**
DATE: September 13, 2021

Background. On September 9, 2021, President Biden released a broad new COVID-19 action plan. For the private sector, the plan directs the U.S. Department of Labor’s (DOL) Occupational Safety and Health Administration (OSHA) to issue an Emergency Temporary Standard (ETS) that will require all private sector employers with 100 or more employees to ensure their employees are fully vaccinated for COVID-19 or tested weekly. The ETS will also require covered employers to provide employees a reasonable amount of paid time off (or use existing paid time off) to get vaccinated and recover from any side effects associated with the vaccine.

Association staff is in direct contact with DOL/OSHA officials and participating in all stakeholder calls hosted by the Department. Below is what we learned from last Friday’s call hosted by senior OSHA officials:

- **Timing.** ETS will be issued “expeditiously” in the coming weeks.
- **Public Input.** No opportunity for public input or listening sessions prior to ETS issuance.
- **Process.** When the ETS is published in the federal register, it will become effective immediately in states where OSHA has direct jurisdiction. (NOTE: There are 22 states with State OSHA plans and they will have 30 days to implement the federal ETS or something equal to it.) After publication, stakeholders will have an opportunity to comment (likely 60 days as was the case with the existing ETS on the healthcare industry) and shape the final rule/permanent standard that will replace the ETS. OSHA intends to issue the final rule 6 months after the issuance of the ETS.
- **Jurisdiction.** The ETS will not supersede any existing U.S. Department of Transportation rules, i.e., mandated masks on flights.
- **Applicability.** The 100+ employee threshold is to be counted per company, not per worksite.
- **Remote employees.** Will not apply to remote employees who are physically isolated from co-workers. Only applies to workers who work inside the office.
- **Accommodations.** Appropriate accommodations will be provided for those workers that are unable to get vaccinated due to underlying health issues and/or religious reasons.
- **Federal contractors.** All federal contractors doing business with the federal government must require their workforce to get vaccinated.
- **Procedures for handling employees who refuse to get vaccinated or tested, i.e., ability to fire the employee.** Officials said this was outside the scope of the ETS and it would not address employer disciplinary activities. Officials were silent on liability protections.
- **Collective Bargaining Agreements.** Will not change those obligations for employers.

Unanswered Questions. The DOL/OSHA officials did not address many important questions, including the following:

- **Who pays for testing?** Is the employer required to pay?
- **Testing capacity?** What are rules for employer procurement of test kits? Is there ample U.S. supply?
- **Verification process?** What are procedures for how employers will verify vaccinations and tests?
- **What level of vaccination is required under the ETS?** Is one shot, two shots, and/or booster required? Associated waiting periods? (OSHA officials advised employers to start implementing vaccine policies as soon as possible and get ahead of the rule.)
- **Accommodations/Exemptions?** What are the specific disability-based and religious exceptions? What documentation is required?
- **Compliance rules?** Will employers be required to report positive tests and vaccine data to the Federal Government?
- **Fraudulent Documents?** Are employers required verify documentation or will employee attestation be required?
- **Guidance for covered employers?** Will OSHA provide covered employers with detailed guidance? Will there be a living FAQ document frequently updated on OSHA's website?
- **Guidance specific to ongoing workforce shortage?** The vaccine/testing mandate could exacerbate the ongoing workforce shortage. How will employers facing recruitment and retention challenges navigate this new mandate? What is the plan if the unemployment numbers rise because of this new mandate?
- **Are there penalties?** Media reports indicate that employers could face “penalties of up to \$14,000 for each violation.
- **Duration of the permanent standard?** Once OSHA issues the permanent standard, how long will it remain effective? What are the criteria?

Potential Legal Challenges. OSHA has special statutory and rulemaking authority to issue an ETS when it determines that workers are in “grave danger” in the workplace such that the standard is needed to protect them. Once the ETS issues, the legality will be tested. Already, 19 Republican Governors are threatening to file a legal challenge against it. Some are speculating that they will forum shop to the appropriate federal court to seek a nationwide preliminary injunction to prevent OSHA from issuing the ETS. Questions remain regarding constitutionality and standing as much depends on the actual content of the ETS its directives.

Evolving Situation. More to come. The ETS raises a number of issues. Guidance and information is evolving daily. We will keep you updated on any significant developments.