



COVID-19 VACCINE POLICIES

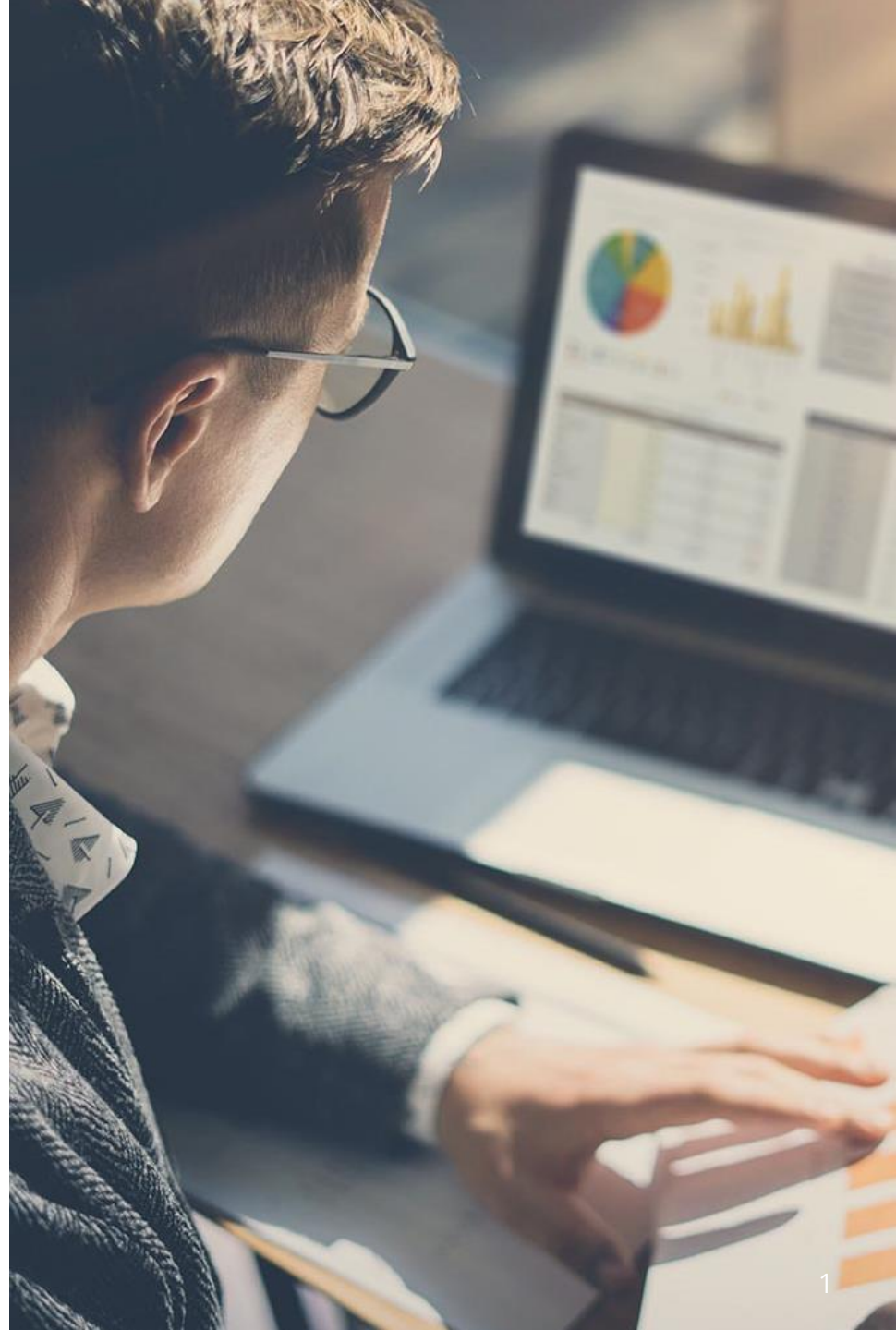
EMPLOYERS TAKING ACTION FOLLOWING BIDEN ACTION PLAN, DELTA SURGE, & FULL FDA APPROVAL

TUESDAY, SEPTEMBER 14, 2021



AGENDA

- 1 **Biden's Action Plan**
- 2 **Protecting the Workplace**
- 3 **Protecting the Health Plan**
- 4 **Plan Changes to Avoid**
- 5 **What Should You Do?**



BIDEN'S "PATH OUT OF THE PANDEMIC"

Newly announced **6-step action plan** [includes](#) several mandates affecting private employers

1. Virtually all healthcare settings accepting Medicare/Medicaid must mandate COVID vaccines for all staff, volunteers, etc. *(weekly testing will likely be limited to a subset of employees provided medical or religious accommodation)*
2. All federal contractors must mandate COVID vaccines for all employees within 75 days *(they're removing the option announced in July 2021 to alternatively allow weekly testing beyond the limited subset of employees provided medical or religious accommodation)*
3. All other employers with 100+ employees will soon have to follow an OSHA Emergency Temporary Standard (ETS) which will mandate COVID vaccines or weekly testing for all employees "before coming to work"
 - ✓ An ETS has only been attempted nine times, and courts have stayed or vacated four of those and partially vacated one of them
 - ✓ An ETS can only be issued if **employees are exposed to grave danger from a hazard and an ETS is necessary to protect employees from that danger**
 - ✓ An ETS can only last up to **six months**, after which a permanent standard must take effect
 - ✓ Once effective, OSHA can impose penalties up to **\$14,000 per violation** under the ETS

WEEKLY TESTING

For employers not mandating vaccines or for those providing accommodations to protected employees, weekly testing could impose some burdens and costs

- The FLSA and many state laws will require paying for time spent taking employer-required tests (*and possibly even some drive time*) as regular compensable time
- With a median test price of \$150, an employer might find that a very expensive solution (*e.g., for 50 employees, \$150 per test would total \$7,500 per week or \$390,000 per year*)
- More convenient affordable options like DIY test kits are getting harder to find
 - ✓ The President announced that retail giants Amazon, Walmart, and Kroger have agreed to reduce the price of at-home kits to sell at cost for three months, and he's indicated he might invoke the Defense Production Act to facilitate manufacturing enough testing kits/supplies to meet this national need
- We're hopeful that remote workers won't have to test weekly, so long as they're truly not interacting face-to-face with other employees, clients, suppliers, customers, etc.

REASONING BEHIND VACCINE MANDATES

We know many employers would like to relay the CDC's scientific explanations behind vaccine mandates, so here are some notes:

- **Direct Employee Protection from Serious Illness and Death:** The vaccines are proven to provide extremely effective protection against serious illness and death. “Even among the uncommon cases of COVID-19 among the fully or partially vaccinated, vaccines make people more likely to have a milder and shorter illness compared to those who are unvaccinated.” In states with presumptive work comp laws, this is a paramount concern for employers, but employers all over the country are doing what they can to ensure safe staffing levels in this challenging labor market.
- **Reduced Likelihood of Infection and Transmissibility (*enhanced by all efforts to decrease community transmission*):** “A growing body of [evidence](#) indicates that people fully vaccinated with an mRNA vaccine (Pfizer-BioNTech or Moderna) are **less likely** than unvaccinated persons **to acquire SARS-CoV-2 or to transmit it to others**. However, the risk for SARS-CoV-2 breakthrough infection in fully vaccinated people cannot be completely eliminated as long as there is continued community transmission of the virus.”
- **Natural Immunity Is Enhanced by the Vaccine:** “The [study](#) of hundreds of Kentucky residents with previous infections through June 2021 found that those who were unvaccinated had **2.34 times the odds of reinfection** compared with those who were fully vaccinated...The findings suggest that among people who have had COVID-19 previously, getting fully vaccinated provides **additional protection against reinfection.**”

VACCINES PROTECTING THE WORKPLACE

- The Delta variant of COVID-19 has caused all employers to give fresh consideration to how best to protect the workplace
 - ✓ In May, federal recommendations advised masks and quarantines (unless symptomatic) weren't necessary for fully vaccinated individuals
 - ✓ Now, masks regardless of vaccination status is gaining traction during high rates of hospitalizations
- Now with full approval of the Pfizer vaccine for ages 16+, is it time for employers to mandate vaccines?
 - ✓ EEOC says it's fine, with reasonable accommodations for protected individuals
 - ✓ DOJ says it was fine even when it was only approved via EUA
 - ✓ Courts have ruled in favor of a TX hospital and IN university
 - ✓ DOL said on August 9, 2021, it's looking into the legality of employers mandating this
 - ✓ State and local laws are implicated, too (*some mandate, some prohibit mandates*)
 - ✓ Polls are showing over half of employers are likely to mandate vaccines by end of year

IF MANDATING VACCINES, EEOC SAYS...

Must engage in an **interactive process** to provide **reasonable accommodations** when it doesn't create undue hardship on the employer for the following employees:

- ❑ Those with **disabilities (or pregnancy)** for whom it is medically inadvisable to be vaccinated
 - ✓ Can require a doctor's note
 - ✓ Typically a known allergic reaction to an ingredient in the vaccines
 - ✓ Might also be medically advisable to wait 90 days following recovery from COVID-19 to begin vaccination
- ❑ Those with a **sincerely held religious belief**
 - ✓ Can require an attestation, but note this doesn't require a formal ban from a formal religion, so consult counsel
 - ✓ Only the Congregation of Universal Wisdom outright bans vaccines
 - ✓ Only two other religions openly discourage (*but do not ban*) vaccines: the Dutch Reformed Church and the Church of Christ, Scientist
 - ✓ Jehovah's Witnesses are prohibited from receiving blood transfusions or donations, but COVID-19 vaccines do not involve blood contact
 - ✓ The Catholic church has expressed the Pfizer and Moderna vaccines "ethically sound" and the J&J vaccine "morally acceptable," and Pope Francis has stated it's a moral obligation to be vaccinated from COVID-19 to protect yourself and others
 - ✓ Islam has expressed general vaccine approval via Dakar Declaration on Vaccination (*while those from Southeast Asia might not conform to the Dakar Declaration, the COVID-19 vaccines do not contain any porcine or animal products*)

All personal information received to grant accommodations must be kept **strictly confidential** and separate from employment records

Interactive process does not require employees use specific words to request accommodation, and employer does not have to accept employee's proposed accommodation if another reasonable accommodation is better suited to the position

Employer claiming undue hardship must prove "substantial cost" to deny a medical accommodation, or "more than de minimis burden" to deny a religious accommodation

IF MANDATING VACCINES, THERE'S MORE

- ❑ Remember DOL has not weighed in, and some large employers such as the federal government and New York are allowing unvaccinated to get regularly tested instead (*but health care settings like the VA, the executive branch of the federal government, and federal contractors now have vaccine mandates*)
- ❑ Wage & hour issues
 - ✓ FLSA or state laws may require paying employees for time spent getting vaccinated
 - ✓ Employees recovering from side effects may also be eligible for paid leave
 - Employer <500 might be able to claim 100% FFCRA EPSL tax credit to be fully reimbursed for these wages, but only through September 30, 2021
- ❑ Contractual obligations may limit ability to enact new employment terms (or governmental contracts may require them)
- ❑ State and local law might prohibit or might require vaccine mandates, might target by industry
 - ✓ 11 states and counting have some sort of ban on vaccine mandates
 - Only MT so far prohibits vaccine mandates in employment
 - NH prohibits it in employment unless a “direct threat” exists that cannot be eliminated or reduced by reasonable accommodation
 - AR, GA, IN, TN, UT: Only prohibit it for employment with government agencies, and even those orders/laws tend to exempt those engaged in providing health care
 - ✓ Denver has provided an [employer toolkit](#) for industries which Denver mandates must have all employees vaccinated

IF MANDATING VACCINES, THERE'S MORE

- ❑ Administrative burden: How long will you give employees to get vaccinated? How will you deal with fraud? If boosters become official, will you require those to be “fully” vaccinated, and if so how will you track everyone getting vaccines at different times of year? How hard will it be to update employment materials and systems?
- ❑ Union / collective bargaining agreements may require negotiating employment terms
- ❑ DEI alignment: Some studies indicate vaccination rates are lower among low-income and minority populations, so you might data mine your demographics to see if you will inadvertently impact your DEI goals
- ❑ Employee retention: How does your workforce feel about vaccine mandates? What will you do if a significant portion of your workforce leaves overnight?
- ❑ Will employees who refuse to get vaccinated be eligible for unemployment benefits?
- ❑ Advised to **seek legal counsel** to clearly communicate your policy and prepare your justifications beforehand

IF NOT MANDATING BUT PAYING GENERAL INCENTIVES

EEOC has said general incentives to encourage vaccination are fine, subject to the following rules:

- ❑ Must provide reasonable accommodations to earn the same full incentive for the medical and religious reasons we previously discussed
- ❑ Must protect confidentiality and maintain proof of vaccination (or of need for accommodation) separate from employment records
- ❑ Most employers are just having employees get vaccinated anywhere they like in the community, in which case incentives for employees and family members are fine without limits
 - However, if the employer is providing vaccines via a worksite clinic or near-site employer arrangement, then the incentive cannot be so large as to be “coercive” and cannot be provided to family members

And of course, these incentives would be taxable income

IF NOT MANDATING BUT PROVIDING HEALTH PLAN INCENTIVES

With Delta Airlines announcing \$200/mo health plan surcharges, many employers are looking into whether they should protect their health plan from large, preventable claims under wellness rules allowed by federal law

- IRS says applicable large employers may only use the ***non***-discounted single rate charged to the employee to determine **affordability** on its lowest cost health plan providing minimum value
 - ✓ The only exception is employers may use a discounted rate tied *solely* to tobacco status, so a vaccine incentive won't qualify
 - ✓ This means some employers will want to opt for a discount for being vaccinated rather than adding a new surcharge for being unvaccinated
- EEOC says asking generally about COVID vaccination status does not invoke ADA or GINA
 - ✓ But providing the vaccines at work or arranging them for employees would invoke ADA and GINA, which greatly limits the size of the incentive and prohibits incentivizing family members
- HIPAA and ACA would treat this as an activity-only health-contingent wellness program
 - ✓ Must limit to 30% of the total single rate (combined with all other health-contingent incentives)
 - ✓ Would require reasonable accommodations for medical reasons (can require a doctor's note) or religious reasons (can require an attestation) to qualify for the same full incentive
- Confidentiality: Required to maintain records separate from employment records

IF NOT MANDATING BUT PROVIDING HEALTH PLAN INCENTIVES

There are many other considerations as well

- If implementing during the plan year and employer deems it to be a significant cost change, employees may have rights to elect cheaper coverage (or drop without COBRA if already on cheapest plan)
- Administrative burden: How long will you give employees to get vaccinated? How will you deal with fraud? If boosters become official, will you require those to be “fully” vaccinated, and if so how will you track everyone getting vaccines at different times of year? How hard will it be to update plan materials and systems? Since the focus is on protecting the plan from preventable high-cost claims, will the entire family eligible to be vaccinated have to earn the incentive?
 - If other family members can qualify, incentive can be up to 30% of the rate of the plan the employee is enrolled in rather than the single rate (still combined with all other health contingent incentives)
- Union / collective bargaining agreement may require negotiating benefit terms
- DEI alignment: Some studies indicate vaccination rates are lower among low-income and minority populations, so you might data mine your plan to see if you will inadvertently impact your DEI goals
- Employee retention: How does your workforce feel about vaccine incentives? What will you do if a significant portion of your workforce leaves overnight?

HEALTH PLAN CHANGES TO AVOID

- We would advise against tying health plan eligibility or coverage levels to vaccination status, as it violates HIPAA by discriminating based on health status
 - ✓ Cannot discriminate based on “receipt of health care,” and being vaccinated or not vaccinated would fit this description
- We would advise against removing claims coverage for COVID-19 hospitalization and treatment
 - ✓ Removing coverage of such claims for just the unvaccinated would violate HIPAA as discussed directly above
 - ✓ Removing for everyone will cause major hardships for vaccinated individuals with breakthrough infections, particularly employees who are immunocompromised which make up over 40% of breakthrough infection hospitalizations

WHICH APPROACH WILL YOU TAKE?

Need to evaluate a host of options, such as everything already discussed plus:

- Percentage of workforce already vaccinated or in-process
- Workplace safety needs
 - Can your workplace function safely with other measures like social distancing, masking, regular testing paid for by the employer, etc.?
 - Are your employees in regular close proximity with others for durations of more than 15 minutes?
- Customer expectations
- Industry standards
- Employee relations concerns (retention and recruitment)



More Than Just Insurance

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