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## **Biden's Vaccination Mandate Plan: A Scatter-shot of Legal Solutions**

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### **Biden's Vaccination Mandate Plan: A Scatter-shot of Legal Solutions**

#### **The Ongoing Destabilization of COVID-19 and Biden's Response**

The **Coronavirus** Disease 2019 (COVID-19) pandemic has not ended. Beginning around the **end of July**, the United States has seen another upward trend in COVID-19 deaths. By the end of the first week of August, hospitalization rates had increased in **nearly every state**, with 10 states seeing at least a 50% increase. Currently, some states **are contemplating** enacting "crisis standards of care," a phrase referenced by the American Medical

Association's **ethical guidelines** that govern how physicians ought to make triage decisions when critical care resources become limited.

The current COVID-19 pandemic is dominated by one trait. Data shows that **nearly all** COVID-19 related deaths in the United States are suffered by people who are not vaccinated. Hospitalizations are similarly unbalanced, with unvaccinated patients making up **between 95% to 99.9%** of the population of COVID-19 patients in hospitals.

In response, on September 9, 2021, President Joe Biden announced **an** action plan addressing the COVID-19 pandemic. The first part of the plan focused on increasing the population of domestically-vaccinated individuals. This first part of the plan can be divided into five policy goals. Four of those plan's policy goals reference employers and employees, and the fifth consists of a request for large entertainment venues to require their customers provide proof of vaccination. Of the remaining four parts of the plan, the first and fourth call for section Occupational Safety and Health (OSHA) **emergency temporary standards** (ETS): one for employers with more than a hundred workers, and one requiring employers to give workers paid time off in order to get vaccinated. The second policy consists of an **Executive Order** requiring COVID-19 vaccination for federal employees and another **Executive Order** aimed at increasing vaccinations for federal contractors. The third policy is made up of a set of Centers for Medicare & Medicaid Services (CMS) **emergency regulations** expanding earlier vaccination requirements to a greater number of health care settings.

## The Occupational Safety and Health Administration's Emergency Temporary Standard

The planned OSHA ETS regarding employers with more than one hundred employees is the most ambitious prong of Biden's action plan. While the exact text of the ETS has not been released, the action plan states the ETS will require these employers ensure **"their workforce is fully vaccinated or require any workers who remain unvaccinated to produce a negative test result on at least a weekly basis."** Estimations predict this ETS would effect 80 million workers. Put another way, according to the **U.S. Bureau of Labor Statistics**, firms with at least one hundred employees made up 65.15% of the United States' private labor market.

This ambitious standard faces both legal and practical challenges. According to **White House Press Secretary Jen Psaki**, the Biden administration is relying upon the **Occupational Safety and Health Act of 1970** as a source of authority for the ETS. Section 6(c)(1) of the act allows for an ETS when two elements are met. First, employees must be **"exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards."** Second, the ETS must be **"necessary to protect employees from such danger."**

Historically, courts have looked upon OSHA ETS orders with skepticism. ETS orders have **only been issued ten times, and courts have "invalidated or halted four of those rules and partially blocked one."** Prior to COVID-19, the **last successfully issued ETS** came into place in 1978. The most recent attempt before COVID-19, an ETS limiting



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exposure to asbestos, was **invalidated** by a U.S. Court of Appeals in 1984. In that case the court held that OSHA failed to provide sufficient evidence that the ETS was necessary in order to prevent serious danger to the employees relevant to the order, and that existing standards overlapped with regulations established by the ETS.

OSHA regulation also faces serious practical concerns. In 2019, Trump **reduced** the number of OSHA workplace safety inspectors to approximately 800 workers, bringing the agency's investigator force down to the smallest size it has been since it was founded in 1971. OSHA is already struggling to keep up with its current workload. Of the **\$4 million in citations** OSHA issued for COVID-19 related safety violations, only \$897,000 has been paid. **More than half** the companies that were issued citations appealed. In the five years prior to the pandemic, **only 8%** of companies appealed OSHA citations of this type. In short, OSHA's ability to police the **more than 100,000** private firms that would be effected by this rule would be dubious, even if the agency was legally allowed to do so.

## Executive Orders for Federal Employees and Federal Contractors

Biden issued two executive orders along with his COVID-19 action plan. **The Executive Order for Federal Employees** requires every federal agency to implement a plan to require COVID-19 vaccination for all their employees. The range of this order is broad; the federal government employs **more than 2.1 million** employees, and the only limiting factor on the order is that it would be "**subject to exceptions as required by law.**"

In contrast, the **Executive Order for Contractors** does **not directly regulate** federal contractors or subcontractors. Instead, the order calls for federal agencies to "**include a clause**" in "**contracts and contract-like instruments**" requiring contractors to comply with the guidance of Biden's Safer Federal Workforce Task Force. This new clause **is to be included** in new contracts, new offers for contracts, new extensions and renewals for contracts, and exercising options for ongoing contracts. While this executive order includes the same "**subject to exceptions as required by law**" language as the previous order, it also includes additional restrictions. The order **does not apply** to grants, agreements with Native American Tribes under the Indian Self-Determination and Education Assistance Act, contracts valued equal to or less than the simplified acquisition threshold, employees who perform work outside the United States, or subcontracts solely for the provision of products. Even with these exceptions, the number of federal contractors is **estimated** to exceed four million people.

## Centers for Medicare & Medicaid Services (CMS) Vaccination Mandate Expansion

On August 18, 2021, the CMS **released an emergency regulation** requiring staff at nursing homes affiliated with Medicare or Medicaid to become vaccinated. This **new emergency regulation** expands on requirement to include staff for any certified "facility," including "hospitals, dialysis facilities, ambulatory surgical settings, and home health agencies."

The rationale for this expansion is logically sound. Medical staff have a large number of opportunities to interact with sick patients. **Over 1,200** nurses have already died while suffering from COVID-19 in the United States. Hospitals are **short-staffed** and losing skilled medical professionals to an avoidable illness should be avoided.

## Those Unaddressed by the Mandates

Biden's attempt to encourage vaccinations is praiseworthy. Each vaccination has a real potential to save lives. The multi-faceted nature of Biden's attack plan demonstrates a great deal of adaptability, utilizing emergency temporary

standards, executive orders, and emergency regulations. However, the patchwork nature of this plan has a cost. If we can praise the ETS for regulating up to 65.15% of private firm employees, then we must also recognize that the standard has no effect for the remaining millions of workers who are categorically excluded if the standard only applies to firms with more than 100 workers. Even more crucially, there is a cost to organizing the vaccine mandate around where individuals work. Biden's vaccine mandate plan does not address vaccinations for unemployed individuals. The August 2021 unemployment rate was 5.2%. This figure includes long-term unemployed individuals, the 3.2 million people who have not been employed for more than twenty-seven months. In order to maximize the number of vaccinated individuals and reduce the spread of COVID-19, the Biden administration will need to develop solutions that include this group of people.



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