Federal And State Governments Expand Vaccine And Testing Mandates For Employees

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In recent weeks, both the federal government and several state governments have announced some of the most far-reaching action to date designed to fight the spread of COVID-19 in the workplace. These actions are part of a larger trend shifting the strategy for containing COVID-19 away from the isolation and remote work that characterized the early days of the pandemic, and towards a widespread vaccination/testing approach designed to enhance the safety of social interaction as workers return to work and patrons return to businesses.

The Federal Response

On September 9, 2021, in one of the most far-reaching executive actions of the COVID-19 pandemic, the Biden administration announced that the Occupational Safety and Health Administration ("OSHA") will issue a rule that will require all employers with 100 or more employees to either ensure their workers are vaccinated or require unvaccinated employees to produce a weekly negative test result before attending work. Employers will also be required to provide paid time off to allow their employees to receive vaccinations and to recover from any vaccine side effects. OSHA has intimated that existing paid time off will likely be sufficient to meet this requirement.

These new requirements will be part of a forthcoming Emergency Temporary Standard ("ETS") promulgated by OSHA. The ETS allows OSHA to enact regulations it can enforce immediately if a "grave danger" to worker safety is present. Covered employers who ignore the standard could face OSHA citations and monetary penalties of up to $14,000 per violation. The ETS applies to all employers covered by the OSH Act, which includes most office-based employers such as financial institutions and various other professional work environments.

Labor Department officials have stated that the ETS will be issued within the next several weeks, but did not provide a definitive timeline. Once it is issued, OSHA will likely provide a grace period of 75 days before it begins enforcing the ETS. The ETS can remain in place for six months before it must be replaced with a more formal final rule from OSHA.

States Follow Suit

New Jersey has followed suit with the federal standard. Even before President Biden's vaccination and testing pronouncement on September 9, Governor Murphy issued Executive Orders 252 and 253, which require all preschool to Grade 12 school personnel, including those working in private schools; workers at state agencies, authorities, and colleges; and workers in certain covered facilities such as long-term care facilities and licensed community residences to be fully vaccinated against COVID-19 by October 18, 2021 or be subject to COVID-19 testing at a minimum of one to two times per week. The State will also enforce the ETS mandate from OSHA. Additionally, the State has stressed that "State and federal requirements do not impact an employer's ability to impose more stringent vaccination or testing requirements on workers,

including any requirement for more frequent testing, for testing of both vaccinated and unvaccinated staff, and for mandatory vaccinations without a testing alternative."

Both New York and Massachusetts have instituted similar requirements for healthcare workers. New York will require healthcare workers in hospitals, treatment centers, home health agencies, adult care centers, and other such facilities to receive their first vaccine dose no later than October 7, 2021. All employees at Massachusetts' rest homes, assisted living residences, and hospice programs, as well as workers who provide in-home direct care services, are required to be fully vaccinated by October 31, 2021.

Takeaways

Both the federal government and state governments are beginning to take a more proactive approach to vaccination and testing requirements, including by incentivizing vaccinations through onerous testing mandates. Employers covered by the OSHA ETS mandate will be required to abide by its terms or face stiff penalties. Beyond the requirements imposed by state and federal authorities, employers would do well to create their own vaccine and testing protocols to protect their workforce and protect themselves from potential liability. In doing so, employers should keep in mind that these protocols can be even more stringent than the federal and state mandates outlined above.