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NEW COVID-19 REQUIREMENTS FOR EMPLOYERS

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NEW REQUIREMENTS FOR EMPLOYERS TO ADDRESS COVID-19 ANNOUNCED BY PRESIDENT BIDEN ON SEPTEMBER 9, 2021

President Biden announced multiple new federal requirements that will impose upon employers mandates that are intended to cause more Americans to be vaccinated. The new requirements announced on September 9, 2021 will be enforced in part through the Occupational Safety and Health Administration (OSHA) of the Department of Labor, and in part through Executive Orders signed by the President on September 9, 2021. These new initiatives are explained below.

I. VACCINATION OR WEEKLY TESTING, AND PAID TIME OFF FOR VACCINES TO BE REQUIRED FOR BUSINESSES WITH 100 OR MORE EMPLOYEES.

The Department of Labor will use its authority to issue Emergency Temporary Standards (ETS) to require all employers with 100 or more employees:

1. to require all workers to be fully vaccinated; or
2. to require all unvaccinated workers to produce a negative COVID test at least once a week before being allowed to work; and
3. to provide paid time off for workers to be vaccinated and to recover from health effects of a COVID vaccination.

In Arizona, Federal OSHA standards are enforced by the Arizona Division of Occupational Safety and Health, part of the Industrial Commission of Arizona. Federal law requires the Arizona OSHA standards to be at least as effective as the Federal OSHA standards.

A. OSHA's Legal Authority for Emergency Temporary Standards.

The regulation has not yet been issued. The President announced that OSHA will issue the standard using its legal authority to issue Emergency Temporary Standards. Normally, an OSHA standard may be issued only after notice of the proposed standard is published, the public has an opportunity to comment on it, and the final standard is issued. Under the Emergency Temporary Standard authority, OSHA may issue a standard that takes effect immediately if OSHA considers a hazard to expose workers

to a grave danger. The ETS may be in effect for up to six months, which allows time for public comment on the ETS and its replacement by a regular standard. The ETS may also be challenged in Court.

B. The Joint Employer Doctrine Will Undoubtedly Apply to Meet the 100-Employee Threshold.

This regulation will apply to 80 million workers of businesses with more than 100 employees. Under existing legal interpretations, the Department of Labor and Federal Courts often consider more than one business to be a joint employer of employees. This typically occurs when a staffing agency is used or when employees provide services for the benefit of affiliated businesses, such as a parent or subsidiary company. It can also apply when contractors furnish workers who are used and directed by customers of the contractor. The Joint Employer Doctrine will undoubtedly be used by OSHA to aggregate the number of workers to cross the 100-employee threshold for this new standard to apply.

The imposition of different OSHA standards for large employers than for smaller employers is different concept than what has traditionally been the approach for OSHA standards. Unlike the Civil Rights Act, the Family and Medical Leave Act, and other laws that apply only to employers with more than a specified number of employees, OSHA applies to all employers, regardless of size. There generally are not stricter standards based on the size of the employer, however, that is the approach for the new COVID vaccination requirements.

II. VACCINATION REQUIREMENTS FOR FEDERAL CONTRACTORS AND FEDERAL EMPLOYEES.

President Biden signed two Executive Orders on September 9, 2021, one applicable to Federal contractors, and their subcontractors, and their subcontractors' subcontractors, etc. and one for Federal employees. No later than September 24, 2021, the Federal Government will issue what will be referred to as "Guidance" that will be actually be a requirement. The Guidance has not yet been drafted, but will certainly state that for the promotion of worker safety, all businesses that have contracts with the federal government must require that their workers be vaccinated or be subjected to weekly testing, and they must require that their direct and lower tier subcontractors do the same.

When the Guidance and related documents are issued, there may be some exceptions and there may be a phasing-in of requirements for businesses performing under existing or new contracts.

All Federal agencies have until September 16, 2021 to issue requirements for vaccination of all of their employees, subject only to limited exceptions, as discussed below.

III. POTENTIAL EXCEPTIONS TO VACCINE REQUIREMENTS AND CAUTIONS IN COMMUNICATIONS AND MANAGING RISKS IN IMPLEMENTING MANDATORY VACCINATION POLICIES AND THE NEW LAW.

Under the Civil Rights Act of 1964 and the Americans with Disabilities Act, employers of 15 or more employees may be required to accommodate employees' mental and physical disabilities and their religious views and practices. The executive actions announced by President Biden therefore must be reconciled with those potential exceptions to a vaccination requirement.

Employers should therefore consider employee requests for accommodations based on their medical or psychological conditions, if those conditions could be considered to be a disability, which is generally considered to be a physical or mental impairment that substantially restricts a major life activity. A compromised immune system, for example, would often qualify as such an impairment. Because the OSHA standard can be satisfied by a weekly COVID test, it would be unlikely that an employee could have a medical reason not to be tested, even if there is a medical reason not to be vaccinated.

Employers will need to follow the ADA interactive dialogue requirements. Employers should be fair, respectful and document concerns and consider alternative accommodations to only a mandatory vaccine to avoid retaliation and lawsuits. Deadlines for vaccine mandates may need to be extended while dialogues occur with an employee and/or their healthcare provider or counselors. The EEOC may find the company discriminated against employees with medical conditions if the Company does not engage in an interactive dialogue and discuss and provide alternative accommodations.

Be cautious of drop dead deadlines to commit or to obtain a vaccine when communicating with employees about their medical issues. Limiting employees time frame and dialogue in this manner can be construed as discrimination if people are threatened with their employment or ability to work and earn a living and are precluded from an effective interactive dialogue occurs. Don't forget the basics of the ADA process. Manage risks to avoid complaints and lawsuits even if at the end of a trial a company may prevail on being able to mandate vaccines, at what financial cost and distraction of time and resources.

Remember that all medical related information, from copies of vaccination cards to notes and discussions about medical issues, must be kept under lock and key separate from a regular personnel file.

Another exception to mandatory vaccinations and testing that can arise is for religious objections. For example, Christian Scientists tend to focus on prayer for healing and not necessarily medicine or medical treatment and may seek an exception to a mandatory testing policy. The Civil Rights Act does enable employees to request accommodations for personal belief systems that fulfill a role in their lives that is similar to the role that religion fills in the lives of adherents to traditional religions. Again, this requires an interactive dialogue and discussion of alternative options to mandatory vaccinations. For example, the duty to accommodate religious practices or a belief system that opposes vaccinations would not appear to apply to excuse weekly Covid testing or other alternative work arrangements.

Company representatives and supervisors should not make fun of employees who have sincerely held beliefs or anxieties about medicine, vaccines, etc. Be careful of inappropriate comments by supervisors that are disrespectful or demonstrate a lack of compassion and understanding for employees and their religion, medical status anxieties, etc. We are already seeing claims raised about these type of behaviors so be cautious who your organization selects to meet with employees or discuss these topics with your employees.

An organization can cause irreparable harm in employee loyalty and morale depending on the manner and communications that are used to roll out mandatory vaccines. Remember just because it is a company policy or federal law to get a vaccine does not mean people will, similar to people choosing at times to disregard safety and do not wear mandatory seat belts or may text while driving.

This is a time for leadership in addressing these issues. Just because the laws says you can mandate vaccines does not mean your organization should ignore planning the method and process to achieve that goal. Many organizations are promoting vaccines through education and encouragement to help people

make the choice themselves to protect themselves and others. Regularly educate your workforce about the vaccine and risks of not having the vaccine. Bring in speakers. Also, consider bringing a nurse to the company to give vaccines, just like companies do with flu shots. Talking to employees about one's own successful experience with the vaccine can be reassuring to employees who have a very real fear of the vaccine.

And, if the company representatives are making inappropriate comments behind closed doors at your organization, they should probably not be involved in the Human Resources process to address these issues. It is a charge or lawsuit waiting to happen, as well as adversely impacting the morale at an organization in a time of intense labor shortage.

Also, companies need to be mindful to avoid concerted protected activity complaints filed with the NLRB. Companies do not need to be a union to be subject to the NLRB. Employees of private, non-union companies can file unfair labor practices charged with the NLRB if employees are communicating about terms and conditions of their employment and violations arise. For example, if a company is upset that employees will not get vaccinated and starts surveilling or monitoring the employees and their communications among one another, that can be an NLRB violation. If a company tells employees they cannot share with one another what the company provides for accommodations, that can be a violation. So tread lightly to manage risks and accomplish goals.

One of our national niches is in representing companies involving OSHA and safety at work. OSHA is in charge of enforcing the new Federal Government mandate and can issue fines of up to \$14,000 per violation. Please update your organization's pandemic plan to integrate these new rules.

Employees also can bring retaliation OSHA complaints against companies. For example, if employees raise a safety issue that is ignored or the company fails to comply or expresses disdain for the employees raising the safety issue, that can be retaliation and employees can file a charge with OSHA.

IV. ADDITIONAL PRACTICAL RECOMMENDATIONS.

Employers should implement COVID vaccination and testing policies applicable to their employees so that employees know what is required, when compliance must be accomplished, and the reasons for the requirements. Prepare and conduct educational and factual training to employees within the next thirty days regarding the vaccine.

Gammage & Burnham employment lawyers have experience in counseling employers and providing COVID policies, updated OSHA-compliant pandemic plans, safety toolbox talks to use with employees and working with companies to document and engage in the interactive dialogues required by the ADA and for religious considerations.

It is generally more effective for the policy to be explained by a supervisor who is closer and more likely to be trusted by the subordinate employees than for the policy to be rolled out in a large group setting or on paper or email, which makes it less likely that employees will be comfortable to ask questions or express themselves. Also, consider having a counselor's contact information available to employees to speak with in a private setting about their anxieties and stress related to the vaccine.

Do not forget to translate educational materials into Spanish or other languages to enhance education and awareness about the safety of the vaccine and the benefits of the vaccine against COVID.

If a workforce is afraid of the government or concerned about providing information to get a vaccine, consider bringing a nurse to the workers.

Depending on the number of unvaccinated employees, businesses may want to consider engaging a mobile vaccination or testing service to come to the workplace, as that would facilitate compliance and minimize the paid time off for vaccinations.

Employers should also preserve documentation that they have reviewed vaccination cards, negative COVID tests results for employees, or possess employee signed acknowledgment forms that a person has been vaccinated in order to demonstrate compliance with the new standard in the event there is an OSHA inspection, which can be triggered by an employee complaint or by a random process. Records to verify vaccinations or negative COVID tests should be preserved, either in paper or electronic form, in a confidential and secure manner and may not be maintained with regular personnel files. Counterfeit vaccination cards are already appearing so companies may need to address fraudulent documents.

Employee resistance to vaccinations may be deep seated and based on a variety of factors. Employers should also consider engaging the services of counselors or medical providers to speak with hesitant employees to answer questions and provide information. Such approaches will likely be more persuasive and effective with some vaccine resistant employees who may react negatively to perceived authoritarian edicts from employers just as they do to mandates from the government.

Caring and trusted individuals in organization will have more success in talking to employees and accomplishing the goal of increasing vaccinations at a worksite, as opposed to threats and bullying employees to obtain a vaccine. Plan your process to increase vaccinations and ensure compliance, while avoiding unnecessary distractions and disruptions at work and avoiding claims and charges. Safety, education, understanding and mental health support should be a primary element of a company's plan to implement the new law.

The Employment Practice Group at Gammage & Burnham is available to help companies address employment policies such as COVID compliance, interactive dialogue process, as well as to counsel employers in individual compliance or employee discipline issues. Gammage & Burnham lawyers have particularly extensive experience in OSHA compliance issues, and OSHA procedures are the centerpiece for the new COVID requirements for employers. For additional guidance, please contact Julie Pace, David Selden, or Heidi Nunn-Gilman.



Julie Pace's practice handles employment law, handbooks, drug and alcohol policies, I-9 and E-Verify compliance, OSHA, independent contractor and alleged misclassification issues with DES and other government agencies, and defends claims of sexual harassment, employment discrimination, retaliation, whistleblower, and wrongful discharge, and against charges by the EEOC or ACRD. She handles matters involving OSHA, ICE, OFCCP, DOL, NLRB, ADA, FMLA, ERISA, PPA, CARES Act, SIGPR Audits, COVID-19, ACA, Davis-Bacon, wage and hour laws, FAR, SCA, and government contracts. She regularly provides training to companies and assists with investigations. Julie can be reached at 602.256.4488 or jp pace@gb law.com



Dave Selden's practice focuses on defending employers in employment and commercial litigation relating to the full range of employment issues, including but not limited to wrongful termination, non-competes, independent contractor and alleged misclassification issues with DES and other government agencies, defending claims of sexual harassment, employment discrimination, retaliation, whistleblower, and EEOC OR ACRD charges. He drafted most of the Arizona employment laws enacted during the past 25 years. He handles matters involving OSHA, ICE, OFCCP, DOL, NLRB, ADA, FMLA, Davis-Bacon, FAR, SCA, PPA, CARES Act, SIGPR Audits, COVID-19, government contracts, and wage and hour laws. Dave can be reached at 602.256.4490 or dselden@gblaw.com.



Heidi Nunn-Gilman's practice focuses on employment litigation and human resource matters. She advises clients on matters relating to labor and employment law, including I-9 and immigration compliance strategies, E-Verify, ICE and worksite enforcement, EEOC, Title VII, FLSA, FMLA, ADA, drug and alcohol, NLRB, PPA, CARES Act, SIGPR Audits, COVID-19, wrongful discharge, non-competition and confidentiality agreements, wage and hour laws/DOL for both public and private employers, paid sick leave, employee handbooks, and executive agreements. Heidi can be reached at 602.256.4455 or hnunnGilman@gblaw.com.